SELECTED ETHICS ISSUES FOR THE CPA-ATTORNEY OR THE ATTORNEY WHO PRACTICES WITH AN ACCOUNTING FIRM

ROBERT L. FREED, ESQUIRE
GEORGE B. SHEPHERD, JR., ESQUIRE
FREED & SHEPHERD, P.C.
RICHMOND, VIRGINIA

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I. *INTRODUCTION*

A. Sources of information:

1. The Virginia State Bar ("VSB") maintains a professional responsibility web page, http://www.vsb.org/profguides/index.html. A link on that page "Ethics Opinions and Information" will take you to http://www.vsb.org/profguides/opinions.html; that page in turn contains a link to "Tom's LEO Summaries" and to "Virginia CLE Home Page."

2. "Tom's LEO Summaries" located on the McGuire Woods LLP's website at http://www.mcguirewoods.com/services/leo/ contain summaries of Virginia's and the ABA's Legal Ethics Opinions, prepared by Thomas E. Spahn, McGuireWoods LLP, Richmond, Virginia. These summaries are arranged chronologically and by topic. Tom was a member of the VSB committee that was responsible for the promulgation of the Rules and is a member of the VSB committee that has recently promulgated the Consolidation of Part Six, Section IV, Paragraph 13, Rules of the Virginia Supreme Court, Disciplinary Board Rules of Procedure and Council Rules of Disciplinary Procedure, that were approved by the Virginia State Bar Council on February 23, 2002. Tom has graciously consented to the use of his hypotheticals contained below, and his web site provided most of the information concerning LEO's contained in this paper, for both of which this author is extremely grateful.

3. The "Virginia CLE Home Page" contains a link to http://www.vacle.org/opinions/leos.htm that as of the date of this paper contains LEOs 1360 through 1799. These opinions are available in electronic format as a result of the work of James M. McCauley, Virginia State Bar Ethics Counsel.

B. Key.

1. **Bold - except for titles that appear as small caps, all bold language indicates a Rule of Professional Conduct ("Rules"), Rules of the Supreme Court of Virginia Part 6, §II effective January 1, 2000.**

2. *Italics - all italics represent Comments, Virginia Code Comparison, and Committee Commentary to the Rules.*

3. "LEO" - Legal Ethics Opinions are written informal advisory opinions issued by the Standing Committee on Legal Ethics.

4. "Code" - Code of Professional Responsibility (Effective January 1, 2000, the Code of Professional Responsibility was replaced by the Rules of Professional Conduct).

5. "DR" - Disciplinary Rule under the Code.

C. Caution: Most LEOs cited in this paper were issued under the Code and must be carefully analyzed by application of the Rules.

D. ***DISCLAIMER*: *Nothing in this paper should be construed to express the opinions or views of the Virginia State Bar or its Disciplinary System and all opinions and views are personal to the author.***

II. *LEGAL ETHICS FOR THE LAWYER WHO IS A CERTIFIED PUBLIC ACCOUNTANT (OR THE CERTIFIED PUBLIC ACCOUNTANT WHO IS A LAWYER)*

A. Do the Virginia Rules of Professional Conduct apply to a CPA who is also a lawyer but is not engaged in the practice law? *Probably Yes, if the CPA-Attorney is a member of the Virginia State Bar.*

1. *An attorney "must comply at all times with applicable rules of the Code of Professional Responsibility, whether or not the attorney is acting in a professional capacity as a lawyer."* LEO 1185.

   a. Although this opinion was decided in the context of an attorney who engaged in an abortion protest, in which he was convicted of trespassing and disturbing the peace, it is often cited for the proposition that an attorney must at all times comply with the Rules of Professional Responsibility.

2. ABA Model Rule of Professional Conduct 5.7: Responsibilities Regarding Law-Related Services

   a. ABA Model Rule 5.7 provides that a lawyer is subject to the Rules of Professional Conduct in the provision of law-related services if:

      (1) the circumstances are not distinct from the lawyer's provision of legal services to clients; or

      (2) when an entity is controlled by the lawyer individually or with others and the lawyer fails to take reasonable measures to assure that the client receiving law-related services knows the services

are not legal and does not expect the protections of a client-lawyer relationship.

b. Virginia has not adopted ABA Model Rule 5.7 or any similar provision.

3. *Active Membership v. Associate Membership*.

a. Active Members of the Virginia State Bar are persons admitted to practice law in the state and who are engaged in the practice of law, either full-time or part-time, salaried or non-salaried. "Organization & Government of the VSB," Professional Guidelines 2003-2004, p. 93, *available at* http://www.vsb.org/profguides/org.pdf#page=1.

b. Associate Members of the Virginia State Bar are persons who "have heretofore or may hereafter be ***admitted to practice law*** in the courts of [Virginia], but who are not presently so engaged." Associate members are entitled to all the privileges of active members except that they may not practice law, vote or hold office (other than as members of committees) in the Virginia State Bar. *Id*. (emphasis added).

c. Under the VSB's Professional Guidelines 2003-2004, the section entitled "Promulgation of Legal Ethics, Lawyer Advertising, Solicitation and Unauthorized Practice of Law Opinions and Rules of Court," defines "member" as "any *active* member of the Virginia State Bar." *Id*. at 95-96 (emphasis added).

d. However, in the section entitled "Procedure for Disciplining, Suspending, and Disbarring Attorneys," the term "attorney" is defined simply as "a member of the Bar." *Id*. at 103.

4. Conclusion: If the CPA-Attorney is a member (active or associate) of the Virginia State Bar, the Rules apply to him or her, even if he or she is not engaged in the active practice of law.

B. *Can a lawyer practice law in Virginia with a non-lawyer entity? It is clear that the answer is No.*

1. LEO 1584 (1994) ruled on the District of Columbia Rule 5.4 and a ***multi-disciplinary*** law firm in D.C., which included a non-lawyer partner and a Virginia-admitted attorney. There was a conflict between DR 3-103 (A), which prohibited lawyers from practicing

law with non-lawyer partners, and D.C.'s Rule 5.4 which permitted such practice. Applying DR 1-102 (B)'s choice of law provisions, the Committee concluded that D.C.'s more permissive rule would enable the Virginia attorney to practice in that firm in D.C., despite DR 3-103 (A)'s prohibition. However, the law firm could not practice law in Virginia, even through the Virginia licensed attorney. The Ethics Committee cited ABA Formal Opinion 91-360 (1991) which had addressed this same issue, reaching the same conclusion.

2. RULE 5.4 Professional Independence Of A Lawyer provides ...

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

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

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

(1) a nonlawyer owns any interest therein . . .

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

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

C. *How the Rules apply to the CPA-Attorney who practices both professions:*

1. As stated above, the CPA-Attorney must practice law in a law entity and must practice accounting in a separate accounting entity. A lawyer who is also a CPA may perform both legal and accounting services as long as the client consents after full disclosure. Note that under Rule 1.8(a), a lawyer may not enter into a "business transaction" with a client unless the client is given an opportunity to seek independent advice, and there has been full disclosure and consent in writing. LEO 1163 (1988).

2. *Conflicts of Interest Rules*. Legal Ethics Opinion 1634 most directly addressed the situation of a lawyer-account's responsibilities under the Rules of Professional Conduct, and found that the Rules of Professional Conduct apply when an attorney is functioning in a dual capacity as an attorney and an accountant.

a. In the hypothetical, a tax return was prepared for a client by an accounting firm in which the attorney was also a principal in his capacity as a CPA. The accounting firm also prepared previous returns for the client and his spouse before they separated.

b. The client was represented by the attorney solely in his capacity as a CPA.

c. The IRS proposed an adjustment to the client's 1991 return, which did not involve his former spouse. However, the adjustments to the 1991 return could affect the 1988 return filed by the client and his former spouse.

d. The issue was whether the attorney could represent the client in the matter before the IRS regarding the 1991 return, when there could be a potential effect on the joint 1988 return.

e. Under Rule 1.9(a), a lawyer who has represented a client in a matter may not subsequently represent another person in the same or substantially related matter if the interest of the second person is adverse in any material respect to that of the former client, without the former client's consent after disclosure (former DR 5-105(D)).

f. The Committee found that an attorney is responsive to the Code of Professional Responsibility (now the Rules of Professional Conduct) when he is functioning in a dual capacity as an attorney and an accountant.

g. Applying Rule 1.9(a), the client's former spouse is a former client of the attorney with an interest adverse to the present client. Therefore, the attorney may not represent the client in the IRS matter without consent from the client's former spouse.

3. *Production of Documents*.

a. In *In the matter of Oliver Stuart Chalifoux*, the Disciplinary Board of the Virginia State Bar found that a lawyer-accountant could not refuse to produce documents under a subpoena *duces tecum*.

b. Facts: Chalifoux, the lawyer-accountant, refused to produce personal and business tax returns of the client

under a subpoena *duces tecum*. He asserted that the tax returns were prepared by him in his non-lawyer capacity as a tax accountant.

c. The Board found that Chalifoux blurred the capacity in which he represented the clients and their business entity and the fact that Chalifoux was also their accountant did not displace his role as their lawyer.

d. Chalifoux argued that compliance with the subpoena *duces tecum* would allow clients to obtain their tax returns even though they had not paid Chalifoux Tax Accounting, Inc. for their preparation.

e. The Board applied Rule 1.16, which does not permit a lawyer to withhold a client's files until the client's bill has been paid to the lawyer (or until the client's bill has been paid to another creditor).

f. The Board stated that if a lawyer, acting in a fiduciary capacity, violates his duty in a manner that would justify disciplinary action had the relationship been that of an attorney-client, the lawyer is subject to discipline under the Rules of Professional Conduct.

g. The Board found that even if Chalifoux could establish that he acted solely in his capacity as an accountant, he could not avoid the production of documents sought by the subpoena *duces tecum*, since he is a lawyer subject to the Rules of Professional Conduct, even though he acted only in his capacity as an accountant.

4. Firm Name, Letterhead, Business Cards

a. Under Rule 7.5(a), firm names on a professional card, office sign, letterhead, telephone directory listing, law list, legal directory listing, website, or other professional notice must not be "false, fraudulent, misleading or deceptive."

b. In the context of a non-legal consulting firm established by a law firm to provide services to the firm's clients, it is the attorney's responsibility to ensure that the public is not mislead by the use of public communication. LEO 1658. The attorney must ensure that the public understands that the two entities are separate and distinct.

c. However, in *Ibanez v. Florida Dept. of Business and Prof'l Regulation*, the Supreme Court of the United States found that a lawyer's designation as CPA next to her name in the yellow pages, on her business card, and on her law office stationary, was commercial speech protected by the First Amendment.

5. Under DR 2-102(E), a lawyer who is engaged in both the practice of law and another profession or business "shall not so indicate on his letterhead, office sign, or professional card, nor shall he identify himself as a lawyer in any publication in connection with his other profession of business." However, Virginia has not adopted a provision similar to DR 2-102(E). *See* Rule 7.5.

6. Office Space, Overhead Expenses, Support Staff

a. In LEO 1658, the Committee found that the law firm and consulting firm were allowed to share overhead expenses such as secretarial support, library resources, and lobby space.

(1) Under the hypothetical presented, the two entities shared lobby space, but not office space. The attorney was the president of the law firm and a shareholder of the consulting firm and would serve as chair of its board of directors. However, the attorney would have limited involvement in the day-to-day operations of the consulting firm. A non-lawyer shareholder would serve as CEO of the consulting firm and have direct operational control.

(2) The Committee found that where an attorney conducts a law practice on the same premises as the non-legal business, the attorney must maintain separate signage and telephone listings, separate and secure client files, and separated office space. *Id.*

(3) Where support staff are employed by both entities, great care must be exercised to avoid any inadvertent disclosures of confidences and secrets. *Id.*

b. LEO 1787 enforced that under Rule 5.3(a), when an attorney is associated with a nonlawyer, he must make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer,

including taking reasonable measures to ensure that certain information is kept confidential. *See* LEO 1787.

(1) When an attorney makes disclosures necessary to carry out the representation, the attorney should be mindful of the continuing duty of confidentiality and, therefore, take necessary steps to prevent disclosure of client information beyond what is needed for the representation.

(a) Rule 5.3(a) directs that when an attorney employs, retains or is associated with a nonlawyer, certain precautions must be taken.

(b) Comment One to that rule confirms that Rule 5.3(a) applies not only to the employees of the attorney but also to independent contractors. In LEO 1787, the Committee stated that the attorney should therefore consider Rule 5.3 applicable to his contracting with the expert witness for the client's matter. That rule directs the attorney to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer."

(2) The attorney in LEO 1787 provided confidential client information to the nonlawyer expert witness. In such a situation, the attorney then needs to make "reasonable efforts" to ensure that the expert witness understands the attorney's duty of confidentiality and to ensure that the expert witness protects the confidentiality of the information received.

(3) In determining what would be "reasonable measures" to ensure that the expert witness acts in a manner compatible with the attorney's duty of confidentiality, a parallel provision in the rules provides guidance. Rule 1.6's provisions regarding the general duty of confidentiality includes paragraph (b)(6), which allows for disclosure of:

(a) "[i]nformation to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes, provided the lawyer exercises due care in the selection of the agency, *advises the agency that the information must be kept confidential* and reasonably believes that the information will be kept confidential." Rule 1.6(b)(6) (emphasis added).

(b) While an expert witness is not hired for "office management purposes," the precautions outlined for such disclosures in Rule 1.6(b)(6), including advising the third party that the information must be kept confidential, would be appropriate "reasonable measures" for this attorney to take.

(4) The specific questions raised in LEO 1787 was whether the attorney could 1) request the witness to contact the attorney upon receipt of a request or subpoena for the client information and 2) obtain an agreement from the witness that he will keep the client information confidential, including not disclosing the information to opposing counsel. Each of those steps would be appropriate for this attorney to ensure, as required by Rule 5.3, that the expert witness does nothing to compromise the attorney's duty to protect the confidentiality of information.

(5) “This committee [the Legal Ethics Committee] has consistently declared that protection of client confidences is a ***'bedrock principle'*** of legal ethics." *See* LEOs 1643, 1702, 1749.

7. Referrals

a. In LEO 1658, discussed above, the committee noted that an attorney's referral of clients to a related business in which he or she has a pecuniary interest triggers the requirements of DR 5-101(A) (Rule 1.7) and DR 5-104(A) (Rule 1.8), relating to conflicts of interest and business transactions with clients.

(1) Since the attorney would profit from the client using the services of the consulting firm, there must be full and adequate disclosure to enable the client to make an informed decision. Rule 1.7.

(2) Since the referral also creates a business transaction between the attorney and the client, Rule 1.8 requires that it not be unconscionable, unfair or unreasonable.

8. Fee Sharing With Non-Lawyers

a. Rule 5.4 generally prohibits lawyers from sharing fees for legal services with nonlawyers.

b. Accounting firms can probably overcome violation of the bar's rules prohibiting fee-sharing with non-lawyers without much difficulty.

(1) First, services performed by their in-house lawyer is not "legal advice" and the services performed are not legal services. Therefore, the fees charged and collected for this work are not "legal fees."

(2) Second, the lawyers do not actually "split" the fees with the non-lawyer; rather, the Accounting firm bills the client directly and pays the lawyer a salary out of the general revenues of the firm. This is the way lawyers pay nonlawyer staff in a traditional law firm and is not improper fee sharing with such nonlawyers.

(3) Third, the division of a Accounting firm's profits with nonlawyer equity partners is arguably not fee-splitting in the traditional sense, since it is not client nor case specific, but merely the division of all profit in the aggregate. Existing rules authorize the sharing of profits with nonlawyer employees. DR 3-102 (A)(3); Model Rule 5.4 (a)(3).

III. *FIRM NAMES, LETTERHEADS, CARDS, AND ENTITIES*

A. **RULE 7.1 Communications Concerning A Lawyer's Services**

(a) A lawyer shall not, on behalf of the lawyer or any other lawyer affiliated with the lawyer or the firm, use or participate in the use of any form of public communication if such communication contains a

false, fraudulent, misleading, or deceptive statement or claim. For example, a communication violates this Rule if it:

(1) contains false or misleading information; or

(2) states or implies that the outcome of a particular legal matter was not or will not be related to its facts or merits; or

(3) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated; or

(4) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law.

(b) Public communication means all communication other than "in-person" communication as defined by Rule 7.3.

B. *COMMENT TO RULE 7.1*

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] The legal profession should assist laypersons to recognize legal problems because such problems may not be self revealing and often are not timely noticed. Therefore, lawyers should encourage and participate in educational and public relations programs concerning our legal system, with particular reference to legal problems that frequently arise. Preparation of communications and professional articles for lay publications, participation in seminars, lectures, and civic programs, and other forms of permitted communications by lawyers to the public should be motivated by a desire to increase the public's awareness of legal needs and its ability to select the most appropriate counsel, rather than for the sole purpose of obtaining publicity for particular lawyers.

[4] These Rules recognize the value of giving assistance in the lawyer selection process while avoiding falsity, deception, and misrepresentation.

All such communications should be evaluated with regard to their effect on the reasonably prudent layperson. The non lawyer is best served if communications about legal problems and lawyers contain no misleading information or emotional appeals, and emphasize the necessity of an individualized evaluation of the situation before conclusions as to legal needs and probable expenses can be made. The attorney client relationship should result from a free and informed choice by the layperson. Unwarranted promises of benefits, over persuasion, vexatious or harassing conduct are improper.

[5] An unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated.

VIRGINIA CODE COMPARISON

Rule 7.1 incorporates the provisions of DR 2-101 of the Virginia Code as they apply to all of a lawyer's communications.

COMMITTEE COMMENTARY

As originally adopted, Rule 7.1 addressed both lawyer communications and lawyer advertising without any distinction. As amended, Rule 7.1 applies to all lawyer communications, including lawyer advertising, whereas Rule 7.2 specifically applies to lawyer advertising. The amendment now clarifies, for example, that Rule 7.2(e) applies only to lawyer advertising.

Rule 7.2(d) was amended to include both written and e-mail communications. Subparagraph (a)(3) was added to Rule 7.2 to prohibit "advertising specific or cumulative case results," which incorporates the Committee's longstanding opinion found in LEO 1750.

C. **RULE 7.5 Firm Names And Letterheads**

(a) A lawyer or law firm may use or participate in the use of a professional card, professional announcement card, office sign, letterheads, telephone directory listing, law list, legal directory listing, or a similar professional notice or device unless it includes a statement or claim that is false, fraudulent, misleading, or deceptive. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1 and 7.2.

(b) A law firm shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations of those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

D. *COMMENTS TO RULE 7.5*

[1] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." Although the Supreme Court of the United States has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm.

[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact partners, may not denominate themselves as, for example, "Smith and Jones," for that title suggests partnership in the practice of law.

E. Key Factor: The key seems to be whether or not the information contained in the name or letterhead is misleading.

F. Names and Letterheads:

1. A law firm may:

a. not use the name of a lawyer who has stopped practicing law and is now engaged in a business. LEO 277 (1975).

b. not include on the lawyer's letterhead the chairmanship of a Virginia State Bar committee, since it could mislead the public as to the lawyer's status, ability or integrity. LEO 402 (1981).

c. not include the name of a lawyer/legislator who is not actively practicing in the firm. LEO 206 (1970).

d. not indicate on its letterhead that one of its lawyers is a Commonwealth's Attorney. LEO 230 (1973).

e. not continue to use a former partner's name on printed material once the former partner becomes a judge. LEO 851 (1986).

f. not use the name of a former partner after the partner has withdrawn from the firm and is no longer practicing law, LEO 1108 (1988); but, may use a retired former partner's name as long as the former partner is accurately characterized, LEO 1341 (1990); and may use the name of a retired partner as long as the retired partner practiced with the firm until retirement and is not practicing law elsewhere or taken a public office. LEO 1376 (1990).

2. A law firm may:

a. indicate that one of its lawyers is registered to practice before the U.S. Patent & Trademark Office. LEO 283 (1976).

b. place the name of a legal assistant on the law firm's outside door if the label properly identifies the person as a legal assistant. LEO 326 (1979). Same as to paralegal. LEO 767 (1986). Same as to non-lawyer *unless* misleading. LEO 1288 (1989).

c. include a non-lawyer's name on its stationery as long as the stationery explains the non-lawyer's status. LEO 970 (1987).

d. indicate the absence of a partnership by using the term "affiliated law offices." LEO 469 (1982).

e. list a retired lawyer as "of counsel" to a firm even though the retired lawyer is not actively practicing law, as long as the lawyer "remains associated with the firm and available for occasional consultations." The "of counsel" relationship "turns on the actual practice of law and is not satisfied by a mere business or financial relationship with the firm, a sporadic affiliation over time, or the status of a forwarder or receiver of legal business." LEO 1554 (1993). See II(K), below.

f. continue to use a deceased or retired partner's name in its title. LEO 1704 (1997). Although sole practitioners may not use words like "group" or "associates" in their firm's names, using a deceased lawyer's name is acceptable as long as the firm's letterhead indicates that the other lawyer is deceased. LEO 1706 (1997).

G. Fictitious names: It is misleading and deceptive under Rule 7.1(a)(1) and 7.5(d) for an attorney or attorneys to advertise using a corporate, trade or fictitious name unless the attorney or attorneys actually practice under such name.

1. Use of a name which is not the name used in the practice is misleading and deceptive as to the identity, responsibility, and status of those using such name.

2. The usage of a corporate, trade, or fictitious name should include, among other things, displaying such name on letterhead, business cards, and office sign.

3. Furthermore, the usage of such name shall be in compliance with Rule 7.5 and shall comply with applicable laws, including Sections 13.l-542 et seq. or Sections 59.l-69 et seq. of the Code of Virginia. LEO 1750 (2001).

H. Business cards:

1. A lawyer may:

a. designate the lawyer's status as a professional engineer and president of a construction consultant firm. LEO 399 (1981).

b. use the designation "LLM (Taxation)" LEO 395 (1980); and, indicate employment of the lawyer by an accounting firm and may use a business card bearing the notation "Tax Specialist." LEO 504 (1983).

(1) Note: this LEO 504 may have been overruled by Rule 7.4(d), that allows lawyers to hold themselves out as limiting their practice in a particular area or field of law so long as the communication of such limitation of practice is in accordance with the standards of Rule 7.4, Rule 7.1 (Communications And Advertising Concerning A Lawyer's Services), and Rule 7.3 (Direct Contact With Prospective Clients And Recommendation Of Professional Employment).

(2) Rule 7.4(d) provides that "A lawyer shall not state or imply that the lawyer has been recognized or certified as a specialist in a particular field of law except as follows: . . . (d) A lawyer may communicate the fact that the lawyer has been certified as a specialist in a field of law by a named organization, provided that the communication clearly states that there is no procedure in the Commonwealth of Virginia for approving certifying organizations."

2. The business card for a non-lawyer working for a lawyer, such as a law firm's business manager or legal assistant may indicate the firm, but the card must clearly reveal their positions. LEO 338 (1979).

I. Entity Issues:

1. It would be improper for a solo practitioner to:

a. use the term "attorneys at law" in describing the lawyer's practice. LEO 1492 (1992).

b. use the term "and associates" if the lawyer only has an office-sharing arrangement or use the term "associates" if the lawyer employs less than two lawyers. LEO 1532 (1993).

2. It would be improper for a law firm to indicate that it is a partnership of professional corporations without revealing that they engage in the practice of law. LEO 1242 (1989).

3. It would be improper for a professional corporation not to reveal the form of association in communications to the public or clients. LEO 1369 (1990).

4. Note that the Rules govern practice in an entity:

a. A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law. Rule 5.4(b).

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

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

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

5. A nonlawyer has the right to direct or control the professional judgment of a lawyer. Rule 5.4(d).

J. Multi-jurisdictional firms. A multi-state law firm's letterhead:

1. which lists the firm's lawyers must state the lawyers' jurisdictional limits, LEO 1026 (1988); and,

2. may not include a statement indicating that the law firm "serves" multiple jurisdictions since that statement might give the erroneous impression that each lawyer listed on the firm's letterhead is licensed in those jurisdictions. LEO 1026 (1988).

K. Office Sharing.

1. With other lawyers:

   a. Lawyers sharing office space with one another should not represent adversaries in the same matter, because of the possibility of the appearance of impropriety and the sharing of confidential information. LEO 413 (1981).

   b. It is not per se unethical for lawyers sharing office space and secretaries to represent adverse clients, but they must be careful. LEO 799 (1986).

   c. A solo practitioner who shares offices with a firm and whose office may be entered only by going through the firm should place a sign in the lobby indicating the lawyer's solo practitioner status. LEO 874 (1987).

   d. Three lawyers share an office, phone system and secretarial help. It is not improper per se for the lawyers to represent adverse clients as long as the clients consent. It would be best for the lawyers not to represent adverse interests, given their close relationship. LEO 943 (1987).

2. With non-lawyers: A lawyer may conduct a legal practice out of a non-legal business office if there is a proper separation of the two functions and the public is not misled. The lawyer may provide non-legal services to clients with consent after full disclosure. LEO 1317 (1990).

L. "Of Counsel"

1. To be "of counsel" to a firm, a lawyer must have a "continuing close association" with the firm. A lawyer may have such a relationship with more than one firm. LEO 1293 (1989).

2. A law firm may designate a non-Virginia lawyer as "of counsel" on the firm's letterhead, but the characterization must be accurate. Providing business advice and financial assistance to the firm does not create an "of counsel" relationship. LEO 1342 (1990).

3. A law firm may act as "of counsel" to another law firm if there is "a requisite close, regular, personal relationship" between the firms. LEO 1467 (1992).

IV. *PRO BONO SERVICE*

A. RULE 6.1 Voluntary Pro Bono Publico Service

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

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

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

B. *COMMENT TO RULE 6.1*

[1] Every lawyer, regardless of professional prominence or professional work load, has a personal responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. The Council for the Virginia State Bar urges all Virginia lawyers to contribute a minimum of two percent of their professional time annually to pro bono services. Pro bono legal services consist of any professional services for which the lawyer would ordinarily be compensated, including dispute resolution as a mediator or third party neutral.

[2] Pro bono services in poverty law consist of free or nominal fee professional services for people who do not have the financial resources to compensate a lawyer. Private attorneys participating in legal aid referral programs are typical examples of "poverty law." Legal services for persons whose incomes exceed legal aid guidelines, but who nevertheless have insufficient resources to compensate counsel, would also qualify as "poverty law," provided the free or nominal fee nature of any such legal work is established in advance.

[3] Pro bono publico legal services in civil rights law consists of free or nominal fee professional services to assert or protect rights of individuals in which society has an interest. Professional services to assert or protect for victims of discrimination based on race, sex, age or handicap would be typical examples of "civil rights law," provided the free or nominal nature of any such legal work is established in advance.

[4] Free or nominal fee provision of legal services to religious, charitable or civic groups in efforts such as setting up a shelter for the homeless, operating a hotline for battered spouses or providing public service information would be examples of "public interest law."

[5] Training and mentoring lawyers who have volunteered to take legal aid referrals or helping recruit lawyers for pro bono referral programs would be examples of "volunteer activities designed to increase availability of pro bono legal services."

[6] Service in any of the categories described is not pro bono publico if provided on a contingent fee basis. Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free or nominal fee legal services is essential. Accordingly, services for which fees go uncollected would not qualify.

Collective Fulfillment of Pro Bono Publico Service

[7] Although every lawyer has an individual responsibility to provide pro bono publico services, some legal matters require the application of considerably greater effort and resources than a lawyer, acting alone, could reasonably provide on a pro bono basis. In fulfilling their obligation under this Rule, a group of two or more lawyers may pool their resources to ensure that individuals in need of such assistance, who would otherwise be unable to afford to compensate counsel, receive needed legal services. The designation of one or more lawyers to work on pro bono publico matters may be attributed to other lawyers within the firm or group who support the representation.

Financial Support in Lieu of Direct Pro Bono Publico Services

[8] The provision of free or nominally priced legal services to those unable to pay continues to be the obligation of each lawyer as well as the profession generally, but the efforts of individual lawyers are often not enough to meet the need Not only do these needs far exceed the capacity of the collective bar, the nature of legal practice for many lawyers places constraints on their ability to render pro bono publico legal services. For example, some lawyers (e.g., some government lawyers) are prohibited by the terms of their employment from engaging in any outside practice. Other lawyers lack the experience and access to resources necessary to provide competent legal assistance.

[9] To provide legal services beyond those available through the pro bono efforts of individual lawyers, the legal profession and government have established additional programs to provide such services. Lawyers who are unable to fulfill their pro bono publico obligation through direct, legal representation should support programs that provide legal services for the

purposes described in (a) through financial contributions in proportion to their professional income.

VIRGINIA CODE COMPARISON

There was no direct counterpart to this Rule in the Disciplinary Rules of the Virginia Code. EC 2-27 stated that the "basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer. . . . Every lawyer, regardless of professional prominence or professional work load, should find time to participate in serving the disadvantaged." EC 8-9 stated that "[t]he advancement of our legal system is of vital importance in maintaining the rule of law . . . [and] lawyers should encourage, and should aid in making, needed changes and improvements." EC 8-3 stated that "[t]hose persons unable to pay for legal services should be provided needed services."

COMMITTEE COMMENTARY

The subject matter of this Rule was not specifically addressed in the Disciplinary Rules of the Virginia Code. The Committee drafted language different from that of the ABA Model Rule to bring the Rule in line with Ethical Considerations approved by the Supreme Court of Virginia on June 17, 1994 (specifically EC 2-28 and 2-29). The Committee then adopted the new versions of EC 2-27 and EC 2-30, EC 2-31, and EC 2-32 as the Rule's Comment for section (a). Sections (b) and (c) permit greater flexibility in the manner in which lawyers fulfill their pro bono obligations.

V. *ADVERTISING*

A. **RULE 7.2 Advertising**

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded, or electronic communications, including public media. In the determination of whether an advertisement violates this Rule, the advertisement shall be considered in its entirety, including any qualifying statements or disclaimers contained therein. Notwithstanding the requirements of Rule 7.1, an advertisement violates this Rule if it:

(1) contains an endorsement by a celebrity or public figure who is not a client of the firm without disclosure (i) of the fact that the speaker is not a client of the lawyer or the firm, and (ii) whether the speaker is being paid for the appearance or endorsement; or

(2) contains a portrayal of a client by a non-client without disclosure that the depiction is a dramatization; or

(3) advertises specific or cumulative case results, without a disclaimer that (i) puts the case results in a context that is not misleading; (ii) states that case results depend upon a variety of factors unique to each case; and (iii) further states that case results do not guarantee or predict a similar result in any future case undertaken by the lawyer. The disclaimer shall precede the communication of the case results. When the communication is in writing, the disclaimer shall be in bold type face and uppercase letters in a font size that is at least as large as the largest text used to advertise the specific or cumulative case results and in the same color and against the same colored background as the text used to advertise the specific or cumulative case results.

(b) A recording of the actual electronic media advertisement shall be approved by the lawyer prior to its broadcast and retained by the lawyer for a period of one year following the last broadcast date, along with a record of when and where it was used, which recording and date shall be provided to the Standing Committee on Lawyer Advertising and Solicitation upon its request.

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

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

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

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

(d) A written or e-mail communication that bears the lawyer's or firm's name and the purpose of which in whole or in part is an initial contact to promote employment for a fee, sent to a prospective non-lawyer client who is not:

(1) a close friend, relative, current client, former client; or

(2) one who has initiated contact with the attorney; or

(3) one who is similarly situated with a current client of the attorney with respect to a specific matter being handled by the

attorney, to the extent that the prospective client's rights may be reasonably expected to be materially affected by the outcome of the matter; shall be identified by conspicuous display of the statement in upper case letters "ADVERTISING MATERIAL." The required statement shall be displayed in the lower left hand corner of the address portion of the communication in type size at least equal to the largest type used on the communication and also on the front of the first page of the communication in type size at least equal to the largest type used on the page. Further, in the case of e-mail advertising or solicitation, the header shall also display the statement, in uppercase letters, "ADVERTISING MATERIAL."

Further, any such written communication shall not be sent by registered mail or other forms of restricted delivery, nor shall such written communication be sent to any person who has made known to the lawyer a desire not to receive communications from the lawyer. Lawyers who advertise or solicit by e-mail shall include instructions of how the recipient of such communications may notify the sender that they wish not to receive such communications in the future.

This paragraph does not apply to any communication which is directed to be sent by a court or tribunal, or otherwise required by law.

(e) Advertising made pursuant to this Rule shall include the full name and office address of an attorney licensed to practice in Virginia who is responsible for its content.

B. *COMMENT TO RULE 7.2*

[1] The proper motivation for commercial publicity by lawyers lies in the need to inform the public of the availability of competent, independent legal counsel. The public benefit derived from advertising depends upon the usefulness of the information provided to the community or to the segment of the community to which it is directed. To achieve these objectives, advertising must not be false, fraudulent, misleading or deceptive. Advertising marked by excesses of content, volume, scope or frequency, or which unduly emphasizes unrepresentative biographical information, does not provide that public benefit.

[2] Advertisements and personal communications which are not misleading or deceptive will make it apparent that the necessity and advisability of legal action depends on variant factors that must be evaluated individually. Due to fee information that may frequently be

incomplete and misleading to a layperson, a lawyer should exercise great care that fee information is complete and accurate. Due to the individuality of each legal problem, statements regarding average, minimum or estimated fees may be deceiving, as will commercial publicity conveying information as to results previously achieved, general or average solutions, or expected outcomes. It would be misleading to advertise a set fee for a specific type of case without adhering to the stated fee in charging clients. Advertisements or other claims that convey an impression that the ingenuity of the lawyer rather than the justice of the claim is determinative are similarly likely to be deceptive. An advertisement that truthfully reports a lawyer's achievement on behalf of clients or former clients may be misleading nonetheless, if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client' case. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client. Whether a particular disclaimer is sufficient will depend on its content and the manner in which it is displayed in the context of the advertisement. Only factual assertions, and not opinions, should be made in such communications. Commercial publicity and personal communications addressed to undertaking any legal action should always indicate the provisions of such undertaking and should disclose the impossibility of assuring any particular result. Not only must communication be truthful but its meaning must be capable of being understood by the reasonably prudent layperson.

[3] The regulation of advertising and personal communications by lawyers is rooted in the public interest. Advertising through which a lawyer seeks business by use of extravagant, self laudatory statements, or appeals to fears and emotions could mislead laypersons. Furthermore, public and personal communications that produce unrealistic expectations in particular cases may bring about distrust of the law and lawyers. Thus, public confidence in our legal system would be impaired by such statements regarding professional services. The attorney client relationship, being personal and unique, should not be established as the result of pressures and deceptions. All lawyers should remain vigilant to prevent deceptive publicity that would mislead laypersons, cause distrust of the law and lawyers, and undermine public confidence in the legal system. Only unambiguous information relevant to a layperson's decision regarding legal rights or selection of counsel is appropriate in communications.

[4] Advertisements and public communications should be formulated to convey information that is useful to a layperson in making an appropriate selection. Self laudation should be avoided. Information that may be

helpful in some situations would include: (1) office information, such as: name, including name of law firm, and names of professional associates; addresses; telephone numbers; credit card acceptability; languages spoken and written; and office hours; (2) biographical information; (3) description of the practice but only by using designations and definitions authorized by Rule 7.4; and (4) fee information.

VIRGINIA CODE COMPARISON.

Rule 7.2 is similar to DR 2-101 of the Virginia Code except for those provisions included in Rule 7.1. In addition, Rule 7.2(a)(3) includes the specific prohibition against advertising specific and cumulative case results. Paragraph (d) also now includes the provisions that all written or e-mail communication must display the words "advertising materials."

Paragraph(e), which is contained in ABA Model Rule 7.2, is intended to provide accountability if any issue regarding a particular communication should arise.

COMMITTEE COMMENTARY.

The Committee decided to split the originally adopted Rule 7.1 into two rules and create Rule 7.2. Rule 7.1 applies to all communications from a lawyer including advertising that is covered under Rule 7.2. Rule 7.2 was specifically segregated due to the unique issues created by the inclusion of paragraph (e) and the fact that the committee determined these specifics were meant to apply to advertising but not generically to all communications. The committee expanded paragraph (c) to include all written and e-mail communication.

Paragraph (a)(3) is a new provision that specifically prohibits "advertising specific or cumulative case results without an appropriate disclaimer," which has no direct counterpart in Virginia Code, but incorporates the longstanding opinion of the committee, as previously outlined in its written opinions.

C. LEO 1750 (2001) provides guidelines about lawyer advertising:

1. advertisements using actors to portray lawyers or employees must disclose "that the actor is not a member or employee of the firm or that the depiction is a dramatization;"

2. advertisements may not use terms such as "no recovery, no fee"; "we guarantee to win, or you don't pay"; "we are paid only if you collect"; or "no charge unless we win" and must explain that litigation expenses and court costs would be payable regardless of

outcome (because the public “may not distinguish the difference between the terms ‘fee’ and ‘costs’”);

3. advertisements may not indicate that automobile accident victims “will have to consult an attorney;”

4. lawyers participating in lawyer referral services may not falsely imply that the lawyer’s inclusion on a referral list is based on quality, that the referral list includes all lawyers or law firms eligible for the list on some objective criteria, or that there are many lawyers participating in the service in a certain geographic area;

5. advertisements may not “advertise specific case results, whether individually or cumulatively” (because past results do not predict future results, and because such claims might provide a false impression -- as when a lawyer advertises a $1 million verdict without disclosing that defendant had made a pre-trial offer of $2 million to settle);

6. advertisements may not use statements such as “the best lawyers” or “the biggest earnings”; and, clients’ testimonials may not make claims that lawyers could not themselves make, but may include such “soft endorsements” as “the lawyer always returns phone calls and the attorney always appeared concerned.”

D. A lawyer or law firm may:

1. list former and present clients, if the clients consent and may also refer to the lawyer's aviation law experience in the advertisements. LEO 397 (1980).

2. state that the lawyer has lectured in a CLE program as long as the advertisement is accurate and does not imply that the lawyer is a certified specialist. LEO 1292 (1989).

3. not make statements such as the lawyer is "the best lawyer" as this is misleading. LEO 1297 (1989).

4. not "guarantee you get justice with the insurance company." LEO 1443 (1992).

5. not advertise that it has been in operation since 1882 when there was a gap in its operation from 1917 until 1925. LEO 917 (1987).

6. may join the list of firms to be recommended to members of a prepaid legal services plan as long as all advertisements are accurate. LEO (1989) LEO 1750 (2001).

7. may allow his or he name to appear on a list of lawyers in the Virginia Association of Home Builders directory. LEO 339 (1979).

8. may post general office information in local police or sheriff's offices to help those who might need a lawyer. LEO 380 (1980).

9. may permit an organization to use the lawyer's name in making an endorsement of the organization. LEO 434 (1981).

10. may circulate wallet-sized cards for automobile accident victims to use in protecting their rights, but the card may not state "public service" since the card is intended to solicit business. LEO 1098 (1988).

11. may not properly advertise that the lawyer will answer all legal questions on a telephone for a period for a specific sum, since not all legal questions can be answered without thorough research; the lawyer might not have the expertise to answer all questions; and, the lawyer might have a conflict. LEO 1328 (1990).

12. may not list its lawyers as available to work on matters in certain legal areas when the lawyers do not possess the requisite legal knowledge to practice in those areas. LEO 1406 (1991).

13. may agree with a trade association to provide a free initial consultation to association members and to offer discounted fees to members, but the association may not direct the lawyer's representation of individual members. LEO 1497 (1992).

14. may not join a for-profit lawyer referral service that exclusively refers individuals to that lawyer. LEO 1543 (1993).

VI. *SOLICITATION*

A. **RULE 7.1 Communications Concerning A Lawyer's Services**

(a) A lawyer shall not, on behalf of the lawyer or any other lawyer affiliated with the lawyer or the firm, use or participate in the use of any form of public communication if such communication contains a false, fraudulent, misleading, or deceptive statement or claim. . . . .

B. **RULE 7.3 Direct Contact With Prospective Clients And Recommendation Of Professional Employment**

(a) A lawyer shall not, by in-person communication, solicit employment as a private practitioner for the lawyer, a partner, or associate or any other lawyer affiliated with the lawyer or the firm from a non-lawyer who has not sought advice regarding employment of a lawyer if:

(1) such communication contains a false, fraudulent, misleading, or deceptive statement or claim; or

(2) such communication has a substantial potential for or involves the use of coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, overpersuasion, overreaching, or vexatious or harassing conduct, taking into account the sophistication regarding legal matters, the physical, emotional or mental state of the person to whom the communication is directed and the circumstances in which the communication is made.

In-person communication means face-to-face communication and telephonic communication.

(b) A lawyer shall not assist in, cooperate with, or offer any qualified legal services plan or assist in or cooperate with any insurer providing legal services insurance as authorized by law to promote the use of services or those of the lawyer's partner or associate or any other lawyer affiliated with the lawyer or the firm if that assistance, cooperation or offer, and the communications of the organization, are not in accordance with the standards of this Rule or Rule 7.1 and 7.2, as appropriate.

(c) A lawyer shall not assist a nonprofit organization which provides without charge legal services to others as a form of political or associational expression to promote the use of services or those of the lawyer's partner or associate or any other lawyer affiliated with the lawyer or the firm if:

(1) the assistance or the communications of the organization on the lawyer's behalf are false, fraudulent, misleading, or deceptive; or

(2) the assistance or the communications of the organization on the lawyer's behalf involve the use of coercion, duress, compulsion, intimidation, threats, unwarranted promises of

benefits, overpersuasion, overreaching, or vexatious or harassing conduct, taking into account the physical, emotional or mental state of the person to whom the communication is directed and the circumstances in which the communication is made.

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

(e) A lawyer shall not accept employment when the lawyer knows or it is obvious that the person who seeks the lawyer's services does so as a result of any person's conduct which is prohibited under this Rule.

(f) Notwithstanding any other provisions of this Rule, a lawyer shall not initiate in-person solicitation of professional employment for compensation in a personal injury or wrongful death claim of a prospective client with whom the lawyer has no family or prior professional relationship. In-person solicitation means face-to-face communication and telephone communication.

C. *COMMENT TO RULE 7.3*

Direct Contact between Lawyers and Laypersons

[1] Whether a lawyer acts properly in volunteering advice to a layperson to seek legal services depends upon the circumstances. The giving of advice that one should take legal action could well be in fulfillment of the duty of the legal profession to assist laypersons in recognizing legal problems. The advice is proper whenever it is motivated by a desire to protect one who does not recognize that the person may have legal problems or who is ignorant of legal rights or obligations. It is improper if the advice is false, fraudulent, deceptive, or misleading. It is also improper, if given in person, when the advice is offered under circumstances which present a substantial potential for coercion, duress, or overreaching, which hold out unwarranted promises of benefits, taking into account the mental, physical, or emotional condition of the layperson and the circumstances surrounding the advice; or when the advice is given to a layperson who does not have a prior relationship to the lawyer,

or who is relatively unsophisticated or inexperienced regarding legal services.

[2] In-person communications between a lawyer and a layperson regarding legal problems and the selection of a lawyer should likewise be motivated by a desire to inform the layperson of the availability of competent, independent legal counsel. Since in-person communication provides the opportunity for a two-way exchange of information regarding legal problems and lawyers, the lawyer should encourage questions and respond willingly, candidly, and truthfully. Only personal communications which are not false, fraudulent, deceptive or misleading can provide useful information. However, the in-person character of such communications-in face-to-face settings and by telephone-can give rise to overreaching on the part of the lawyer or a feeling of being pressured for a response on the part of the layperson. Such communication is improper if it has the potential of involving coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, overpersuasion, overreaching, or vexatious or harassing conduct. In determining whether such a potential exists, a lawyer should be aware of whether the layperson's physical, mental or emotional state makes it possible for the person to make a reasoned judgment regarding the selection of a lawyer. The lawyer should also take into account such other factors as the age, education, and experience of the layperson and any preexisting relationships (family, friendship, business or other) between the lawyer and the layperson.

[3] In-person communications regarding legal problems and the selection of a lawyer are also improper if the recipient, by virtue of inexperience or lack of sophistication about legal services, is not capable of making an informed decision during the course of the conversation. The experience and sophistication of the layperson regarding legal services and the employment of a lawyer has an important bearing on whether a lawyer should volunteer through personal contact advice that the person should obtain the service of a lawyer. There is a greater danger of the lawyer's overreaching or the layperson's feeling pressured to employ the lawyer in cases of relatively inexperienced or unsophisticated persons than in other cases. For example, a young couple considering the purchase of their first home may not have the experience or sophistication to evaluate in a personal conversation the reasons they need a lawyer. On the other hand, a business executive may be quite familiar with and capable of evaluating in the same context the need and choice of a lawyer.

[4] Also, close friends, relatives, clients and former clients, and other persons who have established personal business or professional relationships with a lawyer or the lawyer's firm are deemed to be informed about the need and services of the lawyer. It is therefore proper for the lawyer to volunteer advice to such persons concerning the

engagement of a lawyer and then accept employment. Of course, the advice should not be false or misleading, and should be given in circumstances which do not have the potential for overreaching.

[5] The in-person solicitation of personal injury and wrongful death claims is fraught with special perils, as noted by the Supreme Court of the United States in Ohralik v. Ohio State Bar Assn., *436 U.S. 447 (1978). The potential for overreaching is very great when a lawyer, a professional trained in the art of persuasion, personally solicits an injured or distressed layperson. The injured person's plight not only makes that person more vulnerable to influence, but is also more likely to make the overtures of an uninvited lawyer more obtrusive and distressing as an invasion of the individual's privacy. Accordingly, a different rule prevails. Lawyers may not solicit these types of claims by face-to-face or telephone communication, in the absence of a family or prior professional relationship, unless the contact is completely free of any motivation for financial gain.*

Lawyer Recommendations

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

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

VIRGINIA CODE COMPARISON. Rule 7.3 is substantially similar to DR 2-103 of the Virginia Code.

COMMITTEE COMMENTARY. As with Rule 7.1, and for similar reasons, the Committee believed it prudent simply to adopt, verbatim, DR 2-103 as Rule 7.3 and to incorporate select Ethical Considerations from Canon 2 as the Comments.

D. A lawyer or law firm may:

1. not solicit business from an accident victim by telephone or by face-to-face communication as Rule 7.3(f) prohibits any "in-person" in these circumstances. Rule 7.3 (f) overrules LEOs such as LEO 625.

2. not delegate in-person solicitation to a non-lawyer, even acting under the lawyer's supervision. LEO 1290 (1989).

3. send a letter to an automobile accident victim to solicit employment as long as the letter is truthful. [Rule 7.1(c) requires, among other things, that the term "ADVERTISING MATERIAL" appear on the envelope.] LEO 508 (1983).

4. may solicit designation as a fiduciary as long as there is no overreaching or fraud. (approved by the Supreme Court 11/12/93) LEO 1515 (1994).

5. may offer free estate planning seminars to church members (with no intent to solicit other business) and may accept other business if a church member wants to retain the lawyer. LEO 856 (1986).

6. So long as in compliance with the advertising rules contained in Rule 7.3):

    a. may write a solicitation letter to someone charged with driving while intoxicated. LEO 579 (1984).

    b. send clients letters encouraging them to have the lawyer review their wills. LEO 312 (1979).

    c. mail a simple office announcement to residences and businesses within a designated zip code. LEO 362 (1980).

    d. engage in direct mail advertising. LEO 447 (1982).

    e. send clients a periodic newsletter addressing general legal matters and may also send former clients letters about legal developments relating to the previous work for those clients. LEO 448 (1980).

f. mail advertising brochures to travel agencies, tour operators and airlines as long as they are truthful. LEO 470 (1982).

g. publish and circulate a newsletter about recent legal developments, although it must comply with advertising rules. LEO 671 (1985).

h. send letters to criminal defendants indicating the primary areas of the lawyer's practice, but may not indicate in the letter that "I am sure you will find that my fees are substantially lower than the normal rates of this community" because it would not be a verifiable statement. LEO 862 (1986).

i. send solicitation letters to people whose homes are subject to foreclosure. LEO 904 (1987).

E. In accordance with Rule 7.3(d), a lawyer or law firm may:

1. not refund to a developer a portion of the lawyer's fee from clients referred to the lawyer by that developer. LEO 207 (1970).

2. may not discount fees for preparing a will contingent on the client's contributing money to a charity which advertises the lawyer's services. LEO 387 (1980).

3. may not pay a referral fee to a mediation and counseling service that refers clients to a law firm. LEO 512 (1983).

4. may represent a party in a real estate settlement upon recommendation of a real estate firm, as long as the client consents to the arrangement and is free to hire any lawyer; but under Rule 7.3(d), the lawyer may not give the real estate firm anything of value in return for its recommendation. LEO 539 (1984).

5. may pay an auto body shop or tow truck operator for a list of their clients so the lawyer may send solicitation letters to them, because the body shop and tow truck operator would not be recommending the lawyer in return for payment. LEO 984 (1987).

6. may accept clients who contacted the lawyer based on the recommendation of prison inmates, as long as the lawyer has not compensated the inmates or engaged in false advertising. LEO 1295 (1989).

7. may accept referrals from a therapist as long as the lawyer maintains loyalty to the client and does not reveal any client confidences without consent. LEO 1374 (1990).

8. not engage in an arrangement with a non-lawyer under which the non-lawyer refers cases to the lawyer, assists in helping the lawyer for a fee and in personal injury cases receives a percentage of the client's recovery. The arrangement impermissibly involves a lawyer: (a) paying the non-lawyer a referral fee for soliciting clients, and (b) splitting fees with a non-lawyer. LEO 1572 (1994).

9. may not pay a service fee to a so-called "lender service bureau" in return for obtaining legal work from the bureau. LEO 1632 (1995).

10. may not pay a percentage of the collection lawyer's fee to a company that offers an electronic communications system to facilitate the collections, because it would amount to impermissible fee-splitting with a non-lawyer. This rule would also apply if the company referred collections clients to the lawyer. LEO 1676 (1996).

VII. *FEES IN GENERAL*

A. **RULE 4.1 Truthfulness In Statements To Others**

In the course of representing a client a lawyer shall not knowingly: (a) Make a false statement of fact or law . . . .

B. **RULE 1.5 Fees**

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

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

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

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

(4) the amount involved and the results obtained;

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

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

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

(8) whether the fee is fixed or contingent.

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

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

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

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

(2) 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.

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

C. *COMMENT TO RULE 1.5*

Basis or Rate of Fee

[1] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. In a new client-lawyer relationship, however, an understanding as to the amount, basis, or rate of the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. A written statement concerning the fee reduces the possibility of misunderstanding.

Furnishing the client with a simple letter, memorandum, receipt or a copy of the lawyer's customary fee schedule may be sufficient if the basis or rate of the fee is set forth.

Terms of Payment

[2] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(j). However, a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.

[3] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will

be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures. When considering whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications.

Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage. In any event, a fee should not be imposed upon a client, but should be the result of an informed decision concerning reasonable alternatives.

Contingent Fees in Domestic Relations Cases

[3a] An arrangement for a contingent fee in a domestic relations matter has been previously considered appropriate only in those rare instances where:

> *(a) the contingent fee is for the collection of, and is to be paid out of (i) accumulated arrearages in child or spousal support; (ii) an asset not previously viewed or contemplated as a marital asset by the parties or the court; (iii) a monetary award pursuant to equitable distribution or under a property settlement agreement;*
>
> *(b) the parties are divorced and reconciliation is not a realistic prospect;*
>
> *(c) the children of the marriage are or will soon achieve the age of maturity and the legal services rendered pursuant to the contingent fee arrangement are not likely to affect their relationship with the non-custodial parent;*
>
> *(d) the client is indigent or could not otherwise obtain adequate counsel on an hourly fee basis; and*
>
> *(e) the fee arrangement is fair and reasonable under the circumstances.*

Division of Fee

[4] A division of fee refers to a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when

the fee is contingent and the division is between a referring lawyer and a trial specialist.

Disputes over Fees

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

VIRGINIA CODE COMPARISON

With regard to paragraph (a), DR 2-105(A) required that a "lawyer's fees . . . be reasonable and adequately explained to the client." The factors involved in assessing the reasonableness of a fee listed in Rule 1.5(a) are substantially similar to those listed in EC 2-20.

Paragraph (b) emphasizes the lawyer's duty to adequately explain fees (which appears in DR 2-105(A)) but stresses the lawyer's duty to disclose fee information to the client rather than merely responding to a client's request for information (as in DR 2-105(B)).

Paragraph (c) is substantially the same as DR 2-105(C). EC 2-22 provided that "[c]ontingent fee arrangements in civil cases have long been commonly accepted in the United States," but that "a lawyer generally should decline to accept employment on a contingent fee basis by one who is able to pay a reasonable fixed fee...."

With regard to paragraph (d), DR 2-105(C) prohibited a contingent fee in a criminal case. EC 2-22 provided that "contingent fee arrangements in domestic relation cases are rarely justified."

With regard to paragraph (e), DR 2-105(D) permitted division of fees only if: "(1) The client consents to employment of additional counsel; (2) Both attorneys expressly assume responsibility to the client; and (3) The terms of the division of the fee are disclosed to the client and the client consents thereto."

There was no counterpart to paragraph (f) in the Virginia Code.

COMMITTEE COMMENTARY

The Committee believes that DR 2-105 placed greater emphasis than the ABA Model Rule on the Full Disclosure of Fees and Fee Arrangements to Clients and therefore added language from DR 2-105(A) to paragraph (a) and from DR 2-105(D)(3) to paragraph (e).

The Comment to paragraph (d)(1) reflects the Committee's conclusion that the public policy concerns which preclude contingent fee arrangements in certain domestic relations cases do not apply when property division, support matters or attorney's fee awards have been previously determined.

Paragraph (e) eliminates the requirement in the Virginia Code that each lawyer involved in a fee-splitting arrangement assume full responsibility to the client, regardless of the degree of the lawyer's continuing participation. The requirement in the Virginia Code was deleted to encourage referrals under appropriate circumstances by not requiring the lawyer making the referral to automatically assume ethical responsibility for all of the activities of the other lawyers involved in the arrangement. However, such an arrangement is acceptable only if the client consents after full disclosure, which must include a delineation of each lawyer's responsibilities to the client.

D. LEO 1606 provides the principles governing attorney fees as follows:

1. Fee contracts "are not construed as are other commercial contracts."

2. "all fees must be reasonable."

3. Because the client "retains the absolute right to discharge the lawyer at any time for any reason or without reason," a discharged lawyer may only recover in quantum meruit for services rendered - valued by looking at the "reasonable value of the services rendered, not to the benefit received by the client."

4. A lawyer must return all unearned fees if the representation ends. A "retainer" is not a pre-payment for legal services, but rather a payment made to insure a lawyer's availability for future legal services.

    a. There may be no non-refundable advance legal fee.

    b. Even if a lawyer and client agree to a fixed fee, the lawyer must return any unused portion if the representation ends (using a quantum meruit approach).

5. Contingent fees can be used in family law matters only in "extremely rare situations." [Rule 1.5(d)(1) and Comment [3a]

codify the circumstances in which lawyers may handle family law matters on a contingent fee basis.] (1994)

E. Fees in general. A lawyer or law firm:

1. may charge a noteholder an amount in excess of the 5% trustee's fees to handle a foreclosure as long as the debtor's payment is limited to the amount specified in the deed of trust. LEO 912 (1987).

2. may include court-awarded attorneys' fees in considering the plaintiff's award from which the lawyer calculates the contingent fees. The court-awarded attorneys' fees are not considered "fees" for purposes of the fee-splitting rules. LEO 1563 (1993).

3. may charge a fixed percentage overhead fee for miscellaneous expenses in most representations, although such an arrangement would be improper in contingent fee matters (in which the client must be responsible for the actual costs incurred). LEO 1056 (1988).

F. Fees in domestic cases: Because Rule 1.5(d)(1) and Comment [3a] codify the circumstances in which lawyers may handle family law matters on a contingent fee basis, the following LEOs are listed by number only for your reference: 189 (1984); 363 (1980); 405 (1981); 423 (1981); 568 (1984); 588 (1984); 667 (1985); 778 (1986); 1062 (1988); 1081 (1988); 1174 (1988); 1229 (1989); 1298 (1989); 1653 (1995); 1229 (1989); and 1229..

VIII. ***FEE SHARING***

A. **RULE 1.5 Fees**

(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.

B. *COMMENT TO RULE 1.5*

Division of Fee

[4] A division of fee refers to a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist.

VIRGINIA CODE COMPARISON

With regard to paragraph (e), DR 2-105(D) permitted division of fees only if: "(1) The client consents to employment of additional counsel; (2) Both attorneys expressly assume responsibility to the client; and (3) The terms of the division of the fee are disclosed to the client and the client consents thereto."

COMMITTEE COMMENTARY

Paragraph (e) eliminates the requirement in the Virginia Code that each lawyer involved in a fee-splitting arrangement assume full responsibility to the client, regardless of the degree of the lawyer's continuing participation. The requirement in the Virginia Code was deleted to encourage referrals under appropriate circumstances by not requiring the lawyer making the referral to automatically assume ethical responsibility for all of the activities of the other lawyers involved in the arrangement. However, such an arrangement is acceptable only if the client consents after full disclosure, which must include a delineation of each lawyer's responsibilities to the client.

C. **RULE 5.4 Professional Independence Of A Lawyer**

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

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

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

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

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

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

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

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

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

(2) a nonlawyer is a corporate director or officer thereof; or (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

D. <u>*RULE 5.6*</u> *Paragraph (a)(1) is identical to DR 3-102(A)(1). Paragraph (a)(2) is substantially similar to DR 3-102(A)(2) which stated: "A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation that fairly represents the services rendered by the deceased lawyer." Paragraph (a)(3) is substantially the same as DR 3-102(A)(3). Paragraph (b) is identical to DR 3-103(A). Paragraph (c) is identical to DR 5-106(B). Paragraph (d) is identical to DR 5-106(C).*

E. <u>LEO on Fee Sharing</u>. A lawyer or law firm:

1. may participate in a local bar association's lawyer referral service, since any forwarding fee paid to the referral service is not impermissible fee-splitting. LEO 407 (1981).

2. may engage in a "barter" arrangement in which the lawyer renders services in return for other goods, as long as: the lawyer does not share legal fees (in cash or in kind) with any non-lawyers; the client consents; the legal fees are reasonable; and the lawyer keeps the legal fees in a trust account (or segregated in the case of goods) until the fees are earned. LEO 558 (1984). But note that under Rule 1.8(a), a lawyer may not enter into a "business transaction" with a client unless the client is given an opportunity to seek independent advice, and there has been full disclosure and consent in writing.

3. may engage a medical consulting firm that receives compensation on a contingent fee basis as long as the lawyer does not share any portion of a fee with a consulting firm and as long as no payments to any expert witness the consulting firm might provide are contingent on the outcome of the case in which the expert testifies. LEO 1047 (1988).

4. may not assist a title agency in preparing documents (with a single fee for both services submitted to the client) because it would involve sharing of legal fees with a non-lawyer and may also involve the lawyer helping a non-lawyer in the unauthorized practice of law. LEO 1329 (1990).

5. Rule 1.5(e) does not require that a lawyer sharing in fees also share responsibility, thus allowing "referral fees" if the client consents after full disclosure. LEOs such as LEO 1488 that required both lawyers take "responsibility" for the case are now outdated.

6. employed by a non-profit organization and a private practitioner who sometimes handles cases pro bono for the non-profit organization, may share court-awarded attorneys' fees with the organization (although it would be unethical for a lawyer who accepts a pro bono case to charge or collect a contingent fee for the representation). The court's review of the fees and the fact that the client is not paying the fees eliminate any worry about fee-sharing or overreaching by the lawyers. LEO 1744 (2000).

F. Hypothetical - Sharing Fees with Other Lawyers**.** You are a sole practitioner in a small town, and occasionally you need help in handling complicated real estate matters -- especially commercial real estate projects. Depending on where a case is pending, you work with a number

of large firms which can supply the manpower for the drafting, due diligence and negotiation that you sometimes require.

May you split your fee with the law firm you arranged to help you on a large real estate project? YES

May you arrange for a split of the fee that is not in proportion to the work you perform (in other words, may you keep 50% of the fee even though you do only 20% of the work)? YES

May you arrange for a split of the fee (in cases you refer to the other firm) in which you receive a percentage of the fee without performing any of the work? YES

Analysis - Unlike the old Code, the new Virginia Rules allow pure referral fees if the client consents after full disclosure Paragraph (e) eliminates the requirement in the Virginia Code that each lawyer involved in a fee-splitting arrangement assume full responsibility to the client, regardless of the degree of the lawyer's continuing participation. The requirement in the Virginia Code was deleted to encourage referrals under appropriate circumstances by not requiring the lawyer making the referral to automatically assume ethical responsibility for all of the activities of the other lawyers involved in the arrangement. However, such an arrangement is acceptable only if the client consents after full disclosure, which disclosure must include a delineation of each lawyer's responsibilities to the client. Rule 1.5 Committee Commentary.

G. Hypothetical - Lawyers Sharing Their Fees with Non-lawyers Outside the Firm. You have been successful in developing a practice of representing landlords in large suburban office parks. For several years, you have worked with an real estate agency that has been remarkably successful in finding tenants for your client's projects. Last week, the head of the agency told you that she has assessed the value her agency has brought to your practice and intends to dramatically increase her rates. As an alternative, she has proposed that you agree to pay the agency a relatively small percentage of the fees you generate in the real estate legal work that your perform. She explains that this arrangement will help your clients by making sure that her services are available for clients who are pursuing relatively small projects, while rewarding her for what she correctly perceives to be valuable assistance in the larger matters that you handle.

May you enter into the arrangement the head of the real estate agency has proposed? NO

If you cannot enter into the arrangement, what alternatives do you have? PROPOSE A DIFFERENT RATE STRUCTURE FOR DIFFERENT SIZE MATTERS.

Analysis.

The new Rules explicitly indicate that except for certain situations (not applicable here), [a] lawyer or law firm shall not share legal fees with a nonlawyer. Rule 5.4(a). Therefore, the real estate agency head's proposed arrangement would violate the Rules. The analysis would become more difficult if the real estate agency head proposed that you pay the agency a yearly "bonus." A general bonus might be acceptable, but any extra amount tied to the results in particular matters would be questionable.

One alternative to sharing fees with the agency is to propose a different rate structure for different size matters.

Best Answer

The best answer to question (a) is NO and the best answer to question (b) is PROPOSE A DIFFERENT RATE STRUCTURE FOR DIFFERENT SIZE MATTERS.

H. Hypothetical - Lawyers Sharing Their Fees with Non-lawyer Employees of Their Law Firm. Two years ago, a legal assistant at your firm suggested that his neighbor hire your firm to handle the sale of a large parcel of farmland that the neighbor owned. The resulting negotiation and transaction was enormously successful for the client, and your firm generated over $500,000 in fees.

May your firm pay a bonus to the legal assistant for recommending that your firm handle the real estate matter? NO

Analysis

Although legal assistants are treated like lawyers for purposes of most ethics rules, they are traditionally treated as non-lawyers for purposes of other rules, such as Virginia Rule 5.4(a)(3): (a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that: . . . (3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit sharing arrangement. Virginia Rule 5.4(a)(3).

A law firm's non-lawyer employees are probably also covered by the prohibition on rewarding someone for recommending a lawyer. 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 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, as appropriate. Virginia Rule 7.3(d).

These Rules would prevent a law firm from paying a bonus to a law firm staff member for recommending the law firm. On the other hand, the Bar has approved a law firm's payment of bonuses to secretaries based on the firm's overall profitability.

Best Answer. For both of these reasons, the best answer to this hypothetical is NO.

I. Hypothetical - Non-lawyers Sharing Their Fees with Lawyers. For several years, you have referred clients to a leasing consultant whose office is just one floor above yours. All of your clients have been very pleased with her work. This morning the leasing consultant suggested entering into a more formal arrangement. Under her proposal, she would pay you ten percent of any fee that she generates from her work for a client you refer to her. Of course, both of you recognize that you would have to make full disclosure to the clients and obtain their consent to your sharing in the leasing consultant's fees.

If your clients consent, may you share in the fees earned by the consultant for work she performs for the clients that you send to her? YES (PROBABLY).

Analysis. The issue here is whether lawyers may share fees earned by a non-lawyer. At first blush, it might seem that the prohibition against lawyers sharing their fees with non-lawyers should apply with equal force to non-lawyers sharing their fees with lawyers. However, there is no specific ethics rule that prohibits this practice, as long as the client consents after full disclosure, and the lawyer complies with all of the ethics requirements of doing business with a client. Virginia Rule 1.8(a). Some state bars have indicated that such an arrangement can pass ethical muster if the client consents after full disclosure. Other bars have rejected such arrangements as per se unethical.

Best Answer. The best answer to this hypothetical is PROBABLY YES.

J. Hypothetical - Sharing Fees with Finance Company. LEO 1764 (2002). If an attorney accepts a case for a fixed fee that is full at the start of the case, the attorney may not discount the fee with a finance company. The finance company was to sign an installment contract with the client for $5,000 plus interest and was then to pay the attorney a discounted lump sum of $4,000.

1. Except in three narrow exceptions not applicable in this instance, Rule 5.4(a) prohibits a lawyer from sharing his fee with a non-lawyer.
2. This committee has found arrangements similar to that proposed in this hypothetical to be violative of that concept. See, LEO 1047 (attorney's fee may not be shared with a group of medical experts), 1438 (attorney's fee may not be shared with an advertising firm), & 1676 (attorney's fee may not be shared with an electronic tracking firm).

3. In line with those opinions, while the attorney may arrange for the client to pay interest to the finance company, the attorney may not agree to provide the finance company with a portion of his fee.

K. Hypothetical - Departing Attorney and Fees Owed to Ex-firm. Under Rule 1.5(e), As long as a court orders it, a law firm and a departed lawyer can share in personal injury case fees *without* the clients' consent. LEO 1760 (2002). Note that this opinion is advisory only. Rule 1.5 was controlling. Rule1.5(e) requires client consent for any attorney to arrange a fee to be shared by more than one law firm; however, Rule 1.5(e)'s consent requirement must be considered together with the common law concept of quantum meruit. LEO 1606 explains that when an attorney is discharged prior to the completion of the employment contract, he is entitled to compensation for the value of the services actually rendered. This concept of quantum meruit was deemed the appropriate measure for determining a lawyer's compensation when the lawyer and the client had never specified the amount of compensation to be paid. *County of Campbell v. Howard*, 133 Va. 19 (1922). The court in *Heinzman v. Fine, Fine, Legum, and Fine*, 217 v. 958 (1977), deemed quantum meruit to be the appropriate measure for determining a lawyer's compensation where a lawyer has been discharged prior to completion of the employment contract. As part of the Rules for Professional Conduct, Rule 1.5(e) governs the permissible conduct of individual members of the Virginia Bar. Those rules do not dictate or limit the activities of a court. Therefore, even without client consent, it is permissible for an attorney to share a fee with an attorney in another firm so long as the fee share is part of a court order. The former firm may share in the fee from a former client who has now become the client of a departed attorney's new firm only if either the client consents to the arrangement pursuant to Rule 1.5(e), or, absent that consent, a court orders the fee share as proper compensation for the attorneys. Committee Opinion. October 11, 2001.

IX. *ENGAGEMENT LETTERS.*

A. **RULE 1.5 Fees**

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

> **(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;**
>
> **(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;**
>
> **(3) the fee customarily charged in the locality for similar legal services;**
>
> **(4) the amount involved and the results obtained;**
>
> **(5) the time limitations imposed by the client or by the circumstances;**
>
> **(6) the nature and length of the professional relationship with the client;**
>
> **(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and**
>
> **(8) whether the fee is fixed or contingent.**

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

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

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

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

(2) 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.

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

B. *Comments to Rule* 1.5.

Basis or Rate of Fee

[1] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. In a new client-lawyer relationship, however, an understanding as to the amount, basis, or rate of the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple letter, memorandum, receipt or a copy of the lawyer's customary fee schedule may be sufficient if the basis or rate of the fee is set forth.

Terms of Payment

[2] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(j). However, a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.

[3] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures. When considering whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage. In any event, a fee should not be imposed upon a client, but should be the result of an informed decision concerning reasonable alternatives.

Contingent Fees in Domestic Relations Cases

[3a] An arrangement for a contingent fee in a domestic relations matter has been previously considered appropriate only in those rare instances where:

> *(a) the contingent fee is for the collection of, and is to be paid out of (i) accumulated arrearages in child or spousal support; (ii) an asset not previously viewed or contemplated as a marital asset by the parties or the court; (iii) a monetary award pursuant to equitable distribution or under a property settlement agreement;*
>
> *(b) the parties are divorced and reconciliation is not a realistic prospect;*
>
> *(c) the children of the marriage are or will soon achieve the age of maturity and the legal services rendered pursuant to the contingent fee arrangement are not likely to affect their relationship with the non-custodial parent;*

(d) the client is indigent or could not otherwise obtain adequate counsel on an hourly fee basis; and

(e) the fee arrangement is fair and reasonable under the circumstances.

Division of Fee

[4] A division of fee refers to a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist.

Disputes over Fees

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

C. Fees. Engagement letters should always address fees. Rule 1.5(b) requires that fees be adequately explained, preferable in writing, either before or within a reasonable time of commencing representation. This information should include amount, basis, or rate of the fee and how it shall be computed.

D. Expenses. Engagement letters should address expenses, describing the nature of expenses which may be incurred on the client's behalf and the client's obligation to pay those expenses.

E. Billing. Engagement letters should also address the timing of billing and expected payments. It is permissible to charge interest on outstanding balances, provided such fees are agreed to by a client after full disclosure.

F. Retainer Funds. If a retainer is to be obtained from the client, the engagement letter should address the amount to be held, how the funds will be held (commingled with other escrowed funds or in a separate account for the client), and how and when disbursements will be made from those funds. Additionally, the letter should address the replenishment of the retainer funds, and any suspension of services which

will result upon the failure to maintain an appropriate escrow balance. *But see* Rule 1.16(b) regarding the obligation not to cause a material adverse effect on the interests of the client.

G. Limitation of Client's Right to Terminate Representation. An engagement letter may not limit a client's ability to terminate lawyer's services (Rule 1.16(a)(3)). Except where court permission is necessary, a lawyer is obligated to withdraw whenever discharged by a client.

H. Termination of Representation By Lawyer. An engagement letter should explicitly address how and when the lawyer may terminate representation. *But see* Rule 1.16(b) regarding the obligation not to cause a material adverse effect on the interests of the client.

I. Arbitration Provisions. Provisions requiring arbitration are permissible so long as there is proper disclosure and the client consents. Note that in LEO 638 the Bar seemed to require that a client must actually seek independent counsel regarding an arbitration provision, but did not impose such a requirement in the following decisions:

1. Fee Disputes. A retainer letter requiring arbitration of fee disputes does not amount to a per se violation of the Code as long as: there is "full and adequate disclosure as to all possible consequences" of the agreement; the client consents; and the arrangement is not "unconscionable, unfair, or inequitable when made." LEO 1586.

2. Malpractice Claims. The Committee held that it is not per se improper for a client engagement agreement to provide for binding arbitration of legal malpractice claims as long as there is adequate disclosure and consent. They noted, however, that an initially-acceptable engagement agreement might become improper given the "occurrence of unusual and extraordinary facts and circumstances not contemplated at the outset of the representation." Appropriate disclosures might include "waiver of trial by jury or by the court, discovery, evidentiary rules, arbitrator selection, scope of award, expense, appellate rights, finality of award, enforcement of award." LEO 1707.

J. Limitation of Liability For Malpractice Claims - May Not Attempt To Limit Liability. Rule 1.8(h) generally prohibits a lawyer from prospectively limiting his liability to a client for malpractice, except that a lawyer may make such an agreement with a client of which the lawyer is an employee as long as the client is independently represented in making the agreement. A lawyer may not contractually define services which constitute the practice of law as not amounting to legal services and thereby limit his professional liability. LEO 1412.

K. Scope of Representation. Engagement letters should always address the scope of the anticipated engagement.

X. ***LAWYER PAID BY THIRD PARTY***

A. **RULE 1.7 Conflict of Interest: General Rule**

(a) . . . .

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

B. **RULE 1.8 Conflict of Interest: Prohibited Transactions**

(a) . . . .

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

(1) the client consents after consultation;

(2) there is no interference with the lawyer's independence of professional judgment or with the client lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

C. *COMMENT TO RULE 1.8*

Transactions Between Client and Lawyer

[1] As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. . . .

Person Paying for a Lawyer's Services

[4] Paragraph (f) requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 1.6 concerning confidentiality, Rule

1.7 concerning conflict of interest, and Rule 5.4(c) concerning the professional independence of a lawyer. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure.

VIRGINIA CODE COMPARISON

Paragraph (f) is substantially similar to DR 5-106(A)(1) and DR 5-106(B). DR 5-106(A)(1) stated: "Except with the consent of his client after full and adequate disclosure under the circumstances, a lawyer shall not . . . [a]ccept compensation for his legal services from one other than his client." DR 5-106(B) stated that "[a] lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services."

D. **RULE 5.4 Professional Independence Of A Lawyer**

(a) . . . .

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

E. *COMMENT TO RULE 5.4*

[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment. See also Rule 1.8(f).

VIRGINIA CODE COMPARISON.

Paragraph (c) is identical to DR 5-106(B).

F. So long as the requirements of Rule 7.6 are met, a lawyer of law firm:

1. must disclose the double payment if the lawyer receives double payment from a client and a third party . LEO 248 (1974).

2. may accept a fee from an unincorporated association to represent an association member. LEO 335 (1979).

3. acting as a financial adviser may receive a fee from the third party who markets the investments, ***if the client consents.*** LEO 563 (1984).

4. may be paid by an inmate's wife to act as the inmate's guardian ad litem, if the client consents. LEO 607 (1984).

5. In a real estate transaction, the seller's lawyer must advise the buyer that the lawyer represents only seller, even if the seller pays the buyer's closing costs. LEO 747 (1985).

6. A real estate purchaser's lawyer may arrange in advance for the seller to pay part of the lawyer's fee, but may not impose such a fee without the seller's prior consent. The lawyer must be careful not to use the communication to steer clients to the lawyer's firm. LEO 1177 (1988).

7. A mother who had an automobile accident in which her infant child was injured may not hire the same lawyer who represented her in a tort action against the other driver to also represent the child in the tort action, if there is a "non-frivolous claim" that could be filed against the mother in connection with the accident. Consent could cure this conflict, but the minor child cannot grant the consent, and the ability of the mother to grant the consent is a legal question beyond the Bar's purview. If there is no possible claim against the mother, then the mother can hire her lawyer to also represent the child, but must not direct or regulate the lawyer's professional judgment. LEO 1762 (2002). In applying those requirements to a mother serving as next friend for her child who is paying the attorney's legal fee, this committee noted in a prior opinion that the lawyer needs to pursue the objectives and interests of the child, not those of the mother. LEO 1557 (1993). The lawyer should not allow the mother to "direct or regulate the lawyer's professional judgment in rendering such legal services." Rule 5.4(c).

XI. ***FEE DISPUTES***

A. **RULE 1.5 Fees**

COMMENT TO RULE 1.5

Disputes over Fees

[5] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer should conscientiously consider submitting to it. Law may

prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

B. **RULE 1.8 Conflict of Interest: Prohibited Transactions**

(a) . . . .

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

VIRGINIA CODE COMPARISON.

"The first portion of Paragraph (h) is essentially the same as DR 6-102(A) . . . .

C. Limiting liability to clients.

1. If clients request it, lawyers may purchase at their own expense a fidelity bond covering their activities. LEO 195 (1968).

2. A retainer agreement may contain an arbitration provision covering malpractice claims as long as the client is fully informed of the provision's effect and is advised to seek independent legal advice. LEO 638 (1984).

3. An in-house lawyer may not obtain an indemnification agreement. LEO 877. Rule 1.8(h) now permits an in-house lawyer to obtain an indemnification agreement, if the corporation is separately represented. LEOs such as LEO 877 are overruled.

4. A lawyer may not prospectively limit liability to a client, but may secure a release from the client for "specific completed acts" in exchange for consideration if the client consents after full disclosure, is "first advised to seek independent counsel as to whether to sign such an agreement" and if the transaction was not "unconscionable, unfair or inequitable when made." LEO 1550 (1993).

D. Arbitration - an agreement requiring arbitration of:

1. Fee disputes is permissible as long as: there is "full and adequate disclosure as to all possible consequences" of the agreement; the client consents; and the arrangement is not "unconscionable, unfair, or inequitable when made." LEO 1586 (1994).

2. Legal malpractice claims as long as there is adequate disclosure and consent.

a. Like fee agreements, such initially-acceptable engagement agreement provisions might become improper given the "occurrence of unusual and extraordinary facts and circumstances not contemplated at the outset of the representation."

b. Note that there were no specific disclosures required. Appropriate disclosures might include "waiver of trial by jury or by the court, discovery, evidentiary rules, arbitrator selection, scope of award, expense, appellate rights, finality of award, enforcement of award." August 3, 2002

c. Note that there was no requirement that the client actually consult another lawyer before entering into such an agreement. LEO 638 arguable required that the client must be advised to seek independent counsel regarding an arbitration provision. LEO 1707 (1998).

d. *See also* LEO 1586 and LEO 1550.

XII. *RETAINING CLIENT'S FILES UNTIL ALL FEES ARE PAID*

A. **RULE 1.16 Declining Or Terminating Representation**

(a) . . . .

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

(e) All original, client-furnished documents and any originals of legal instruments or official documents which are in the lawyer's possession (wills, corporate minutes, etc.) are the property of the client and,

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

B. *COMMENT TO RULE 1.16*

Retention of Client Papers or File When Client Fails or Refuses to Pay Fees/Expenses Owed to Lawyer

[10] Paragraph (e) eschews a "prejudice" standard in favor of a more objective and easily-applied rule governing specific kinds of documents in the lawyer's files.

VIRGINIA CODE COMPARISON

Paragraph (d) is based on DR 2-108(D), but does not address documents in the lawyer's files (which are handled under paragraph (e). Paragraph (e) is new.

COMMITTEE COMMENTARY

The Committee recommended paragraph (e) instead of a "prejudice" standard as being more easily understood and applied by lawyers.

C. Hypothetical - Must you give your former client the files relating to the expert? YES (PROBABLY)

May you bill the former client for copying the expert materials? YES

(a) (b) The old Virginia Code at least theoretically recognized the traditional lawyer's lien on documents (allowing the lawyer to retain certain documents until the clients fully paid the lawyer), but a series of Virginia Legal Ethics Opinions explained that lawyers must give their clients any files that the client would be "prejudiced" by not possessing them. LEO 1690 (1997).

The new ethics Rules eschew this "prejudice" approach in favor of a unique formula that provides explicit guidance on how they should be handled. Rule 1.16(e).

Whether the client has fully paid them or not, lawyers must provide the following documents to their former clients upon request:

> "[O]riginal client-furnished documents and any originals of legal instruments or official documents." Lawyers must pay for any copies of these documents they wish to retain.
>
> "Lawyer/client and lawyer/third-party communications; the lawyers' copies of client-furnished documents . . .; pleadings and discovery responses; working and final drafts of legal instruments, official documents, investigative reports, legal memoranda, and other attorney work product . . .; research materials; and bills previously submitted to the client." Lawyers may charge the client for a copy of these documents, but may not withhold the documents until the client pays for the copies.
>
> Lawyers are not required to give former clients: copies of billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts of interest, staffing considerations, or difficulties arising from the lawyer/ client relationship.

Rule 1.16(e). Because the materials relating to the expert probably fall within the general "work product" category, you almost surely must provide them to your former client. You will be able to charge for copying under the new Rules, but you will not be able to insist on payment of the copy bill before sending the materials. Other state bars take

differing approaches. Some parallel Virginia's strict pro-client approach. Others allow lawyers to retain a client's files unless it prejudices the client.

Best Answer The best answer to question (a) is PROBABLY YES and the best answer to question (b) is YES.

D. Ownership of files and attorney lien issues. Many, if not most, older rulings will be modified or overruled by Rule 1.16(e).

E. Historical Perspective. For a good historical perspective see LEO 1690 for a Compendium Opinion.

F. RULE 3.7 Lawyer As Witness. 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: . . . (2) the testimony relates to the nature and value of legal services rendered in the case; or . . . .

XIII. *COSTS OF DOING BUSINESS*

A. **RULE 8.4 Misconduct**

It is professional misconduct for a lawyer to . . .

(b) commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer; (c) engage in professional conduct involving dishonesty, fraud, deceit or misrepresentation . . . .

VIRGINIA CODE COMPARISON

With regard to paragraphs (a) through (c), DR 1-102(A) provided that a lawyer shall not . . . (3) Commit a crime or other deliberately wrongful act that reflects adversely on the lawyer's fitness to practice law. (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on a lawyer's fitness to practice law."

B. **RULE 1.5 Fees**

(a) A lawyer's fee shall be reasonable. . . .

(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.

VIRGINIA CODE COMPARISON

With regard to paragraph (a), DR 2-105(A) required that a "lawyer's fees . . . be reasonable and adequately explained to the client." The factors involved in assessing the reasonableness of a fee listed in Rule 1.5(a) are substantially similar to those listed in EC 2-20. Paragraph (b) emphasizes the lawyer's duty to adequately explain fees (which appears in DR 2-105(A)) but stresses the lawyer's duty to disclose fee information to the client rather than merely responding to a client's request for information (as in DR 2-105(B)).

C. **RULE 1.15 Safekeeping Property**

(a) . . . .

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

VIRGINIA CODE COMPARISON - Paragraph (c) is identical to DR 9-102(B).

D. Setting Fees. May a law firm "mark up" it costs advanced? In LEO 1712, a law firm hired temporary attorneys ("Lawyer Temp") from an agency. The staffing agency hires temporary lawyers and pays them an hourly rate. The staffing agency bills the law firm with a mark-up. May the law firm charge the client a fee that exceeds the amount paid to the staffing agency? LEO 1712 provides, in part, as follows:

1. The appropriate and controlling Disciplinary Rules are DR 1-102(A)(4) [now Rule 8.4] which prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation that reflects adversely on the lawyer's fitness to practice law; DR 2-105(A) [now Rule 1.5] which provides that a lawyer's fee shall be reasonable and adequately explained to the client; and DR 9-102(B)(3) [now Rule 1.15] which requires a lawyer to render an appropriate accounting to the client.

2. DR 2-105(A) and (B) obligate the hiring firm to give the client an adequate explanation of the legal fees, and at the client's request, to furnish the basis of the legal fees.

   a. A law firm's mark-up of or surcharge on actual cost paid the staffing agency is a fee.

   b. In LEO 1648 (1995), the committee opined that it would be improper and dishonest for a law firm to charge, without disclosure to the client, additional "administrative fees," "processing fees" or "value billing" allocated to the originating attorney (a fixed percentage "add-on" from 20% to 200%) when the originating attorney did not actually work on the matter. The committee further stated that "any lawyer's bill which charges fees or costs for work not actually performed is fraudulent, unreasonable, not adequately explained to the client and breaches the lawyer's duty to properly account to the client."

3. Instead of billing the staffing agency's compensation as a disbursement to the client with a disclosed mark-up, the hiring law firm may simply bill the client for services rendered in an amount reflecting its charge for the Lawyer Temp's time and services. See California Formal Opinion 1994-138. Since the charge is not represented to be the hiring law firm's actual disbursement of funds for client-reimbursement, the hiring firm does not thereby misrepresent as an out-of-pocket disbursement what is actually its out-of-pocket disbursement plus a mark-up.

4. By analogy, law firms bill their clients at a certain rate for services rendered by salaried associates of the law firm without a disclosure of the salary of the associates. A law firm may, for example, charge $75 per hour for an associate's time when the associate is paid a salary of $60,000 per year and is expected to produce 1,800 billable hours per year, which is compensation paid the associate at the rate of $33 per hour. That the associate is an employee and the Lawyer Temp is an independent contractor seem to be a distinction without a difference in terms of non-disclosure of the spread between compensation paid and rates charged. In each instance the spread, or the mark-up, is a function of the cost of doing business including fixed and variable overhead expenses, as well as a component for profit. In each instance, too, DR 2-105(A)(1) mandates that a lawyer's fees shall be reasonable. The law firm is not required to disclose to and get consent from the client to whose representation the Legal Temp is assigned that a Lawyer Temp will participate in the representation as long as the Legal Temp

reports to and is under the direct supervision of a lawyer associated with the law firm.

5. If the law firm's payment to the staffing agency is billed to the client as a disbursement, or as a cost advanced by the law firm on behalf of the client, the disbursement shown must be the amount actually paid to the staffing agency. Upon disclosure to and consent from the client, the disbursement shown may be marked-up above the actual payment to the staffing agency. The law firm is not obligated, however, to bill the payment to the client as a disbursement. The law firm, in its statement for services rendered, may bill for the services of a Lawyer Temp at a rate or in the manner that it bills the time of salaried associates for services rendered, without disclosure of the amount paid the staffing agency.

XIV. *ADVANCING FEES AND COSTS*

A. **RULE 1.8 Conflict of Interest: Prohibited Transactions**

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless: (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client; (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and (3) the client consents in writing thereto. . . . .

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

(1) a lawyer may advance court costs and expenses of litigation, provided the client remains ultimately liable for such costs and expenses; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client. . . .

(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may: (1) acquire a lien granted by law to secure the lawyer's fee or expenses; and (2) contract with a client for a reasonable contingent fee in a civil case, unless prohibited by Rule 1.5.

B. *COMMENT TO RULE 1.8*

Transactions Between Client and Lawyer

[1] As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. . . .

Acquisition of Interest in Litigation

[7] Paragraph (j) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. This general rule, which has its basis in common law champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these Rules, such as the exception for reasonable contingent fees set forth in Rule 1.5 and the exception for certain advances or payment of the costs of litigation set forth in paragraph (e).

VIRGINIA CODE COMPARISON

Paragraph (e)(1) incorporates the provisions of DR 5-103(B), including the requirement that the client remain "ultimately liable" for such advanced expenses.

Paragraph (e)(2) has no direct counterpart in the Virginia Code, although DR 5- 103(B) allowed a lawyer to advance or guarantee expenses of litigation as long as the client remained ultimately liable.

Paragraph (j) is substantially the same as DR 5-103(A).

COMMITTEE COMMENTARY

In Rule 1.8(e)(1), the Committee retained the requirement in DR 5-103(B) that a client must "remain ultimately liable for [litigation] expenses." However, the Committee adopted the limited exception for indigent clients that appears in Rule 1.8(e)(2).

C. Advancing of Costs and Fees. Except to the extent that Rule 1.8(e)(2) exempts indigent clients, a lawyer or law firm:

1. may advance a fee charged for release of medical records as long as the client remains ultimately liable. LEO 297 (1978) and LEO 820 (1986).

2. may advance costs only if the client agrees to reimburse the lawyer regardless of the litigation's success. LEO 317 (1978).

3. guarantee payment of a doctor's bill for litigation-related activity as long as the client remains ultimately liable. LEO 582 (1984).

4. may pay witnesses for the reasonable value of time they have expended, as long as the payment is not an inducement to testify, is not contingent on the outcome of the case, and as long as the lawyer's client remains ultimately responsible for the bill. LEO 587 (1984).

5. may pay a court reporter's bill as long as the client remains ultimately responsible. LEO 892 (1987).

6. may advance the expert fees for a death row inmate client, even there is "no probability" that the client can ultimately reimburse the lawyer for these costs. LEO 997 (1987).

7. may persuade a finance company to loan money to a personal injury client (against possible future recovery), as long as the lawyer is not responsible for the loan or a guarantor or co-signer. LEO 1155 (1988).

8. may pursue a collection case against a former client to pay for copying charges which the lawyer advanced, but is not required to undertake such efforts if they would be fruitless or involve so little money as to be not worthwhile. Although the Code does not require the lawyer to pursue such collection efforts, the Bar held that "a consistent policy of not proceeding against clients for the collection of expenses advanced would be improper." LEO 1237 (1989).

9. may not arrange for a line of credit (under which the firm might ultimately become responsible for the loan) that would enable the firm to immediately disburse funds from a trust account upon personal injury settlements, because: the firm would be acquiring an interest in the outcome of the litigation; the lawyer would be advancing money other than appropriate litigation expenses; and it would commingle the lawyer's funds and the client's funds. LEO 1256 (1989).

10. may not loan a personal injury client money for living expenses (consent would not cure the conflict). LEO 1269 (1989).

11. may not loan money to a corporation that extends credit to the lawyer's personal injury clients. LEO 1441 (1992).

12. may guarantee a de minimis appeal bond as long as the client remains ultimately liable for the expense. A criminal defense

lawyer may not represent a defendant for whom the lawyer's bail bond business posted a bond. LEO 1740 (2000).

XV. *TRUST ACCOUNTS AND CLIENT'S PROPERTY*

A. **RULE 1.15 Safekeeping Property**

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

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

(2) funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, and the portion belonging to the lawyer or law firm must be withdrawn promptly after it is due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

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

(c) A lawyer shall:

(1) promptly notify a client of the receipt of the client's funds, securities, or other properties;

(2) identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable;

(3) maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to the client regarding them; and

(4) promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer which such person is entitled to receive.

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

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

(i) funds that will likely be disbursed or distributed within thirty (30) days of deposit or receipt;

(ii) funds of $5,000.00 or less with respect to each trust or other fiduciary relationship;

(iii) funds held temporarily for the purposes of paying insurance premiums or held for appropriate administration of trusts otherwise funded solely by life insurance policies; or

(iv) trusts established pursuant to deeds of trust to which the provisions of Code of Virginia Section 55-58 through 55-67 are applicable;

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

(i) where a common account is authorized by a will or trust instrument;

(ii) where authorized by applicable state or federal laws or regulations or by order of a supervising court of competent jurisdiction; or

(iii) where (a) a computerized or manual accounting system is established with record-keeping, accounting, clerical and administrative procedures to compute and credit or charge to each fiduciary interest its pro-rata share of common account income, expenses, receipts and disbursements and investment activities (requiring

monthly balancing and reconciliation of such common accounts), (b) the fiduciary at all times shows upon its records the interests of each separate fiduciary interest in each fund, security or other property held in the common account, the totals of which assets reconcile with the totals of the common account, (c) all the assets comprising the common account are titled or held in the name of the common account, and (d) no funds or property of the lawyer or law firm or funds or property held by the lawyer or the law firm other than as a fiduciary are held in the common account. For purposes of this Rule, the term "fiduciary" includes only personal representative, trustee, receiver, guardian, committee, custodian and attorney-in-fact.

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

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

(i) a cash receipts journal or journals listing all funds received, the sources of the receipts and the date of receipts. Checkbook entries of receipts and deposits, if adequately detailed and bound, may constitute a journal for this purpose. If separate cash receipts journals are not maintained for escrow and non-escrow funds, then the consolidated cash receipts journal shall contain separate columns for escrow and non-escrow receipts;

(ii) a cash disbursements journal listing and identifying all disbursements from the escrow account. Checkbook entries of disbursements, if adequately detailed and bound, may constitute a journal for this purpose. If separate disbursements journals are not maintained for escrow and nonescrow disbursements then the consolidated disbursements journal shall contain separate columns for escrow and non-escrow disbursements;

(iii) subsidiary ledger. A subsidiary ledger containing a separate account for each client and for every other person or entity from whom money has been received in escrow shall be maintained.The ledger account shall by separate columns or otherwise clearly identify escrow funds disbursed, and escrow funds balance on hand. The ledger account for a client or a separate subsidiary ledger account for a client shall clearly indicate all fees paid from trust accounts;

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

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

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

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

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

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

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

(1) Insufficient fund check reporting.

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

(ii) Overdraft notification agreement required. A financial institution shall be approved as a depository for lawyer escrow accounts if it shall file with the Virginia State Bar an agreement, in a form provided by the Bar, to report to the Virginia State Bar in the event any instrument which would be properly payable if sufficient funds were available, is presented against a lawyer escrow account containing insufficient funds, irrespective of whether or not the instrument is honored. The Virginia State Bar shall establish rules governing approval and termination of approved status for financial institutions. The Virginia State Bar shall maintain and publish from time to time a list of approved financial institutions. No escrow account shall be maintained in any financial institution which does not agree to make such reports. Any such agreement shall apply to all branches of the financial institution and shall not be canceled by the financial institution except upon thirty (30) days notice writing to the Virginia State Bar, or as otherwise agreed to by the Virginia State Bar. Any such agreement may be canceled without prior notice by the Virginia State Bar if the financial institution fails to abide by the terms of the agreement;

(iii) Overdraft reports. The overdraft notification agreement shall provide that all reports made by the financial institution shall be in the following format:

> **(a) in the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors;**
>
> **(b) in the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the**

lawyer or law firm, the account name, the account number, the date of presentation for payment, and the date paid, as well as the amount of the overdraft created thereby;

(c) such reports shall be made simultaneously with and within the time provided by law for notice of dishonor to the depositor, if any. If an instrument presented against insufficient funds is honored, then the report shall be made within five (5) banking days of the date of presentation for payment against insufficient funds;

(iv) Financial institution cooperation. In addition to making the reports specified above, approved financial institutions shall agree to cooperate fully with the Virginia State Bar and to produce any lawyer escrow account or other account records upon receipt of a subpoena therefor. A financial institution may charge for the reasonable costs of producing the records required by this Rule.

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

(vi) Definitions.

"Lawyer" means a member of the Virginia State Bar, any other lawyer admitted to regular or limited practice in this State, and any member of the bar of any other jurisdiction while engaged, pro hac vice or otherwise, in the practice of law in Virginia;

"Lawyer escrow account" or "escrow account" means an account maintained in a financial institution for the deposit of funds received or held by a lawyer or law firm on behalf of a client;

"Client" includes any individual, firm, or entity for which a lawyer performs any legal service, including acting as an escrow agent or as legal representative of a fiduciary, but not as a fiduciary. The term does not include a public or private entity of which a lawyer is a full-time employee;

"Dishonored" shall refer to instruments which have been dishonored because of insufficient funds as defined above;

"Financial institution" and "bank" include regulated state or federally chartered banks, savings institutions and credit unions which have signed the approved Notification Agreement, which are licensed and authorized to do business and in which the deposits are insured by an agency of the Federal Government;

"Insufficient Funds" refers to an overdraft in the commonly accepted sense of there being an insufficient balance as shown on the bank's accounting records; and does not include funds which at the moment may be on deposit, but uncollected;

"Law firm" includes a partnership of lawyers, a professional or nonprofit corporation of lawyers, and a combination thereof engaged in the practice of law. In the case of a law firm with offices in this State and in other jurisdictions, these Rules apply to the offices in this State, to escrow accounts in other jurisdictions holding funds of clients who are located in this State, and to escrow accounts in other jurisdictions holding client funds from a transaction arising in this State;

"Notice of Dishonor" refers to the notice which, pursuant to Uniform Commercial Code Section 3-508(2), must be given by a bank before its midnight deadline and by any other person or institution before midnight of the third business day after dishonor or receipt of notice of dishonor. As generally used hereunder, the term notice of dishonor shall refer only to dishonor for the purpose of insufficient funds, or because the drawer of the bank has no account with the depository institution;

"Properly payable" refers to an instrument which, if presented in the normal course of business, is in a form requiring payment under Uniform Commercial Code Section 4-104, if sufficient funds were available.

(2) Deposits. All receipts of escrow money shall be deposited intact and a retained duplicate deposit slip or other such

record shall be sufficiently detailed to show the identity of each item;

(3) Deposit of mixed escrow and non-escrow funds other than fees and retainers. Mixed escrow and nonescrow funds shall be deposited intact to the escrow account. The non-escrow portion shall be withdrawn upon the clearing of the mixed fund deposit instrument;

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

> **(i) The total of the trial balance must agree with the control figure computed by taking the beginning balance, adding the total of monies received in escrow for the period and deducting the total of escrow monies disbursed for the period; and**
>
> **(ii) The trial balance shall identify the preparer and be approved by the lawyer or one of the lawyers in the law firm.**

(5) Reconciliations.

> **(i) A monthly reconciliation shall be made at month end of the cash balance derived from the cash receipts journal and cash disbursements journal total, the escrow account checkbook balance, and the escrow account bank statement balance;**
>
> **(ii) A periodic reconciliation shall be made at least quarter annually, within 30 days after the close of the period, reconciling cash balances to the subsidiary ledger trial balance;**
>
> **(iii) Reconciliations shall identify the preparer and be approved by the lawyer or one of the lawyers in the law firm.**

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

B. *COMMENT TO RULE 1.15*

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property which is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

[1a] Separation of the funds of a client from those of the lawyer not only serves to protect the client but also avoids even the appearance of impropriety, and therefore commingling of such funds should be avoided.

[2] Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[3] Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.

[4] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.

[5] For purposes of paragraph (e)(2)(ii) of this Rule, where a bank provides electronic confirmation of checks written on the trust account, the lawyer need not obtain or maintain the original canceled checks. Nothing in this Rule is intended to prohibit an attorney from using electronic checking for his trust account so long as all requirements in this Rule are fulfilled.

VIRGINIA CODE COMPARISON

Paragraph (a) is substantially the same as DR 9-102(A).

Paragraph (b) adopts the language of ABA Model Rule 1.15(c).

Paragraph (c) is identical to DR 9-102(B).

Paragraph (d) is new and has no counterpart in the Virginia Code or ABA Model Rules.

Paragraph (e)(1) is substantially the same as DR 9-103(A). Paragraph (e)(2) is new, adding requirements for lawyers handling funds as fiduciaries.

Paragraph (f) is nearly identical to DR 9-103(B).

C. Bank Rules. A lawyer or law firm:

1. may not maintain an account in any bank unwilling to notify the Virginia State Bar of returned checks. LEO 565 (1984).

2. may invest funds in a bank that does not comply with the trust account requirements, but may not use such a bank if the lawyer has the right to withdraw funds from the trust account. LEO 573 (1984).

D. Lost checks. A lawyer or law firm may withdraw funds from the trust account and place them in a separate interest-bearing account pending resolution of a lost check LEO 415 (1981).

E. Unclaimed funds and Escheat. A lawyer or law firm:

1. A lawyer who cannot determine to whom leftover trust account money should be paid may transfer the money to the lawyer's own account after diligently trying to determine to whom the money is owed and waiting until it is reasonable to conclude that no one will claim the money. [The lawyer should also check any escheat laws.] LEO 548 (1984).

2. A lawyer may identify clients with unclaimed trust funds because disclosure is required by law. LEO 818 (1986).

3. A deceased lawyer's trust account may be paid to the lawyer's estate if a diligent effort has not uncovered the clients to whom the money is owed and the money is kept in an interest-bearing

account until it is unlikely that any client would claim it. [The lawyer should also check any escheat laws.] LEO 697 (1985).

4. A lawyer holding minimal funds for clients with whom the lawyer has had no recent contact and who cannot now be located may dispose of the funds pursuant to Va. Code § 55-210.1. LEO 994 (1986).

5. The rule that allows a lawyer to take possession of trust account assets if a reasonable time has passed without any claims being made against the trust account is pre-empted by the statutory provision that would govern such a trust account that becomes part of a deceased lawyer's estate. LEO 1644 (1987).

6. LEO 1644 provides guidance to a real estate lawyer whose checks are not cashed: (1) the lawyer should follow the Uniform Disposition of Unclaimed Property Act (Va. Code § 55-210.1 et seq.); (2) a lawyer must "use whatever means are reasonable" to find people entitled to receive trust funds (this would "in almost all instances" include first class mail and -- "if the amount of money involved justified the cost" -- include checking with telephone information or postal records); (3) a lawyer may deduct from the funds held in trust reasonable costs incurred in attempting to locate the party, but may not deduct an attorney's fee; (4) the lawyer may not agree with the client in advance that the lawyer may keep unclaimed funds. LEO 1644 (1995)

7. A lawyer attempting to locate former clients to whom trust money is owed may use some of the trust money to compensate an investigator aiding in the search, as long as the compensation is reasonable and explained to the located clients (hiring an investigator is not a necessary step, because "due diligence is all that is required of an attorney trying to locate a client"). LEO 1673 (1996)

F. Real Estate. A lawyer or law firm:

1. may deliver the proceeds of a settlement to the seller before the deed is recorded, as long as the buyer's real estate lawyer has taken appropriate steps to protect the client and the client consents. LEO 383 (1980).

2. may conduct a "dry closing" as long as all clients consent. LEO 464 (1982). *But,* a real estate closing lawyer may not disburse trust funds before the vesting of title and perfection of liens. LEO 663 (1985)

3. A lawyer and client must run a settlement check through the lawyer's trust account. LEO 704 (1985).

4. Except as authorized by statute, may not disburse funds from a trust account until the funds have cleared. A lawyer may not deposit a check endorsed by the client and the lawyer in the firm's general account and write the client a check for the amount the client is due (intending to reimburse the general account from the trust account once the check clears). LEO 614 (1984). *And,* a lawyer may make disbursements from a trust account in accordance with the Wet Settlement Act. LEO 753 (1986). LEO 900 (1987) provides guidance under the Wet Settlement Act.

5. A lawyer may not disburse a real estate builder's proceeds and a construction loan payoff before recording of the lender's deed of trust. LEO 1116 (1988)

6. A lawyer may not disburse funds from a trust account until they are irrevocably credited to the account. A law firm may agree to waive the right to certified funds in all closings occurring between the lender and the law firm's clients as long as all the transactions comply with the Wet Settlement Act (Va. Code § 6.1-2.10). LEO 1255 (1989).

G. Interest and Fees. A lawyer or law firm:

1. may not ethically establish a trust account at a particular bank under an arrangement in which the lawyer receives payment for placing the account there. LEO 367 (1980).

2. may not place funds in an interest-bearing account that will generate an automatic administrative fee, even if the interest earned by the funds will be credited against the administrative fee. LEO 831 (1986).

3. A lawyer need not obtain written consent to deposit a client's funds in an IOLTA account, but must obtain the client's consent to deposit money in an IOLTA account if the funds might draw appreciable interest elsewhere and will not be needed for a long time. LEO 919 (1987).

4. A law firm may not earn interest or receive dividends on a client's funds held in a trust account, and may not obtain credit based on the funds being held in a trust account. LEO 1440 (1991).

H. Retainers.

1. The labels of payments as "retainers" or "guaranteed minimum fees" are not dispositive, and any payment for fees not yet rendered must be placed in a trust account and not removed until the services are rendered. LEO 510 (1983).

2. A lawyer or law firm may not enter into an agreement in which advanced fees will be placed in an interest-bearing account, with both interest and principal being paid to the lawyer. LEO 650 (1985), *but,* As long as the client consents, a lawyer may place the client's funds in an interest-bearing account and apply the interest to pay the lawyer's fees. LEO 748 (1985).

3. A retainer must be placed in a trust account and may be transferred to the lawyer's account only as the fees are earned, and money should remain in the trust account until any dispute is resolved by appropriate legal means. LEO 1246 (1989).

I. Pay Legal Fees. A lawyer or law firm:

1. may not use funds paid to the lawyer as agent for the client to satisfy an unpaid legal bill, unless the client consents. LEO 262 (1975).

2. may not use the funds received from a non-client to pay an amount owed to the lawyer, unless the non-client consents. LEO 331 (1979).

J. Other. A lawyer or law firm:

1. may demand a written assurance from opposing counsel that money will be placed in escrow. LEO 249 (1974).

2. may take a promissory note from a client as evidence of a fee as long as the amount and terms are reasonable; the lawyer may assign or discount the note if the client consents; the lawyer must place in the trust account any amounts paid before the fee is earned. LEO 498 (1983).

3. A law firm may allow clients to pay with a credit card, as long as all payments are deposited in a trust account and the lawyer does not withdraw any fees until deposit checks have cleared. LEO 999 (1987)

4. Even if the bank handling a trust account has agreed to immediately credit deposited funds without waiting for clearance and honor all trust account check, a personal injury lawyer may not disburse funds from a trust account before the funds have cleared. LEO 1021 (1988).

5. A multi-state law firm must segregate funds received from Virginia clients in a separate account in a bank authorized to do business in Virginia (even if the bank is not physically located in Virginia). LEO 1238 (1989).

6. Lawyers may not leave their proceeds in a trust account because it would involve commingling the lawyers' money and clients' money. LEO 1262 and 1263 (1989).

7. A lawyer need not open a trust account if the lawyer does not receive any money belonging to clients or any advanced legal fees that have not yet been earned. [Rule 1.15 now applies whenever a lawyer holds money as a fiduciary.] LEO 1372 (1990).

8. A real estate lawyer has no duty to place trust money in a bank that will insure the entire amount, and may deposit money in a bank for which the lawyer acts as a director, shareholder and counsel if the client consents after full disclosure. [Under Rule 1.8(a), a lawyer may not enter into a "business transaction" with a client unless the client is given an opportunity to seek independent advice, and there has been full disclosure and consent in writing.] LEO 1417 (1991).

9. A lawyer representing the ex-wife of another lawyer in a divorce case found irregularities in the other lawyer's trust accounts. The ex-wife asked the lawyer to keep the irregularities secret, because revealing them could jeopardize the ex-wife's support payments. Although generally trust account violations must be reported, in this case the lawyer would violate the duty of confidentiality if he disclosed the husband's trust account irregularities to the Bar (the court had already been advised of the irregularities, and had placed all the information under seal). [The Bar did not discuss the circumstances under which the court had been advised of the trust irregularities.] [If information about the ethics violation is a client confidence, under Rule 1.6(c)(3) a lawyer may report the other lawyer's misconduct only if the client consents; the lawyer considering whether to report must consult with the client under that Rule.] LEO 1468 (1992).

10. A lawyer may deposit personal funds in a trust account "reasonably sufficient" to pay bank charges, although banks' differing procedures make it impossible to establish a "specific maximum amount that may be deposited." LEO 1510 (1993).

K. Lawyers acting as fiduciary:

1. Lawyers drafting a will or trust agreement must be very careful in naming themselves as executors or trustees. It is likely to be improper if the lawyer has not previously represented the client. At a minimum, the lawyer has a duty to advise the client of fees that would be charged by other executors or trustees. If the instrument requires that the estate or trust hire the lawyer's firm for legal services, the client must consent after full disclosure. If a lawyer acting as a fiduciary commits an act that could be disciplined had the relationship been that of an attorney and client, the lawyer-fiduciary may be disciplined by the Bar. LEO 1358 (1990).

2. A lawyer acting as executor or trustee could hire the lawyer's own law firm to represent an estate as long as the co-fiduciaries consented. However, the firm would have to withdraw if the executor/trustee had to be a witness in any later proceedings (unless the testimony involved a matter of formality or an uncontested matter, and would not be rebutted by another party). [Under Rule 3.7(c), this disqualification is not imputed to the lawyer's firm unless there is an actual conflict of interest.] LEO 1387 (1990).

3. LEO 1515 outlines the principle governing a lawyer acting as executor or trustee: a pre-existing attorney-client relationship is not necessary, but is one factor showing the propriety of the lawyer's selection; the lawyer must fully disclose the fees that will be charged (preferably in writing) and "has a duty to suggest that the client investigate potential fees of others who might otherwise provide such services." A lawyer acting as executor or trustee may hire the lawyer's own law firm to represent him or her as long as there is full disclosure (including "the general compensation to be paid to the law firm") and consent (if the client is already dead, the beneficiaries can consent). A lawyer acting as a fiduciary is governed by the Code (now Rules); and, a lawyer may solicit designation as a fiduciary as long as there is no overreaching or fraud. (approved by the Supreme Court 11/12/93). LEO 1515 (1994).

4. A lawyer acting as an executor, trustee, guardian, attorney-in-fact or other fiduciary is bound by the Rules. In discussing a lawyer's duty to render accountings, the Bar concludes that the duty varies with the type of fiduciary relationship. However, the duty of accounting may not be waived. LEO 1617 (1995).

5. Because a lawyer acting in a fiduciary capacity is governed by the Rules, a lawyer acting as trustee may not undertake activity the lawyer knows is unjustified. LEO 1335 (1990).

6. A lawyer representing an estate may purchase an estate asset if all interested parties consent. [Under Rule 1.8(a), a lawyer may not enter into a "business transaction" with a client unless the client is given an opportunity to seek independent advice, and there has been full disclosure and consent in writing.] LEO 340 (1979).

7. A law firm's policy of routinely omitting self-proving clauses from wills it prepares is inconsistent with the requirement to vigorously represent clients. LEO 1283 (1989).

8. A lawyer representing a fiduciary owes a duty to the fiduciary and not to the beneficiaries. ABA-380 (1994)

XVI. *BUSINESS WITH CLIENTS*

A. **RULE 1.8 Conflict of Interest: Prohibited Transactions**

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

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto. . . .

B. *COMMENTS TO RULE 1.8*

Transactions Between Client and Lawyer

[1] As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical

services, products manufactured or distributed by the client, and utilities services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

VIRGINIA CODE COMPARISON

With regard to paragraph (a), DR 5-104(A) provided that a lawyer "shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full and adequate disclosure . . . ." EC 5-3 stated that a lawyer "should not seek to persuade his client to permit him to invest in an undertaking of his client nor make improper use of his professional relationship to influence his client to invest in an enterprise in which the lawyer is interested."

C. Lawyer-owned businesses. Note that Rule 1.8(a) now provides that a lawyer may not enter into a "business transaction" with a client unless the client is given an opportunity to seek independent advice, and there has been full disclosure and consent in writing.

1. Title companies. LEO 1138, that permitted a lawyer who owned stock in a title insurance company to receive consulting fees varying with the number of policies the lawyer's clients obtained through the company was rescinded by LEO 1402 (1991).

a. A lawyer may offer the services of a title insurance agency in which the lawyer is a shareholder as long as there is full disclosure. LEO 591 (1984); LEO 603 (1985); LEO 712 (1985); LEO 886 (1987); LEO 939 (1987); LEO 1072 (1988); LEO 1097 (1988); LEO 1152 (1988); LEO 1170 (1989). LEO 1564 (1995) provides that a lawyer's ownership interest in a title insurance agency is not per se improper, but the lawyer must:

(1) follow all conflicts rules;

(2) completely separate the lawyer's law practice from any title insurance agency; and avoid any revelation of client confidences.

(3) The lawyer may not: be compensated by the title insurance agency based on the referrals of clients to the agency; receive a fixed salary unless it is related to the work performed for the agency; receive any interest earned on funds deposited in the agency's

trust account; or arrange for the agency to pay for any law firm salaries, services or advertisements.

(4) It is per se improper for the lawyer to represent a party in a transaction if the lawyer "directly or indirectly performs the function of a Title Insurance Agent" for the transaction, or holds a license as a Title Insurance Agent.

(5) A lawyer may arrange for title insurance through the agency to one of the lawyer's clients only: with consent after full disclosure; and if the transaction is not "unconscionable, unfair or inequitable when made." "[A]ll doubts regarding the sufficiency of the disclosure must be resolved in favor of the client, and against the attorney." The disclosure should be in writing and accepted by the client in writing, and should include an explanation of the cost and the availability of alternatives.

b. As long as it does not violate some federal or state law, lawyers may own a title insurance agency with share ownership percentages based upon past premiums paid by each lawyer's client. LEO 1647 (1995). But LEO 1138, that permitted a lawyer who owned stock in a title insurance company to receive consulting fees varying with the number of policies the lawyer's clients obtained through the company was rescinded by LEO 1402 (1991).

c. A lawyer may represent a developer in litigation in which an employee of a title company (of which the lawyer is part-owner) may have to testify, because the witness-advocate rule applies only when a lawyer must testify. LEO 1521 (1993).

d. A title insurance company owned by a lawyer and sharing office space with the lawyer's firm may not pay for the firm's salaries or advertisements. LEO 1405 (1991).

e. A lawyer who is operating a title company to conduct residential settlements: is subject to the UPL rules if the title company prepares legal documents such as notes and deeds; must comply with the trust account rules if an attorney-client relationship exists by reason of preparation of such documents (including the prohibition on the lawyer or law firm earning interest on client funds held in trust); must obtain clients' consent before retaining any interest

earned by client money held by the title company. LEO 1469 (1992).

2. Other businesses.

a. There is no per se rule against a lawyer representing a company in which the lawyer owns stock. LEO 772 (1986).

b. It is not improper per se for a law firm to own and represent a non-legal corporate entity. LEO 825 (1986).

c. A lawyer employed by a law firm may also be employed as a part-time life insurance agent. LEO 869 (1986).

d. A law firm may sell a computer software package under an agreement in which the law firm maintains the exclusive right to use the software for a certain period of time. LEO 914 (1987).

e. It is not per se unethical for a lawyer and bookkeeper to set up a company that handles law firms' billings, but they must be careful not to violate the ethics rules. LEO 1016 (1987).

f. A lawyer may represent a business in which the lawyer has a personal or financial interest as long as the lawyer's judgment will not be affected and the client consents after full disclosure. LEO 1027 (1988).

g. A law firm may form and invest in a non-legal services subsidiary (which the firm would also represent). There is nothing per se improper about this action, but the law firm must be cautious. LEO 1083 (1988).

h. A law firm may invest in a realty corporation and continue to represent clients of the corporation if the clients consent after full disclosure. LEO 1131 (1988).

i. A law firm may use a court reporting service in which it has an ownership interest as long as the client consents after full disclosure. LEO 1198 (1989).

j. A lawyer may refer clients to a bail bond business the lawyer partially owns if there is full disclosure. LEO 1254 (1989). [LEO 1343 indicates that the lawyer may not represent the criminal in the matter on which the bonding company has supplied the bond.] [Under Rule 1.8(a), a

lawyer may not enter into a "business transaction" with a client unless the client is given an opportunity to seek independent advice, and there has been full disclosure and consent in writing.]

k. A lawyer wishes to sell insurance to other law firms representing a client's adversaries. The clients must consent to this arrangement. LEO 1311 (1989).

l. A lawyer may practice law and operate a consulting firm out of the same office as long as the activities are kept separate and clients consent after full disclosure. The lawyer may send out one bill for both services as long as the bill fully discloses the separate services. LEO 1318 (1990).

m. A criminal lawyer may not represent a criminal defendant for whom the lawyer's bail bond business has written a bond. Such a representation is per se unethical regardless of disclosure and consent. LEO 1343 (1990).

n. A lawyer may use the lawyer's spouse as a court reporter if there is disclosure and consent. The disclosure must include a description of the fees received by the spouse. Another lawyer in the firm could use the spouse as a court reporter without disclosure and consent. Any lawyer in the firm could use another reporter at the spouse's reporting company without disclosure and consent unless the spouse is an owner of the reporting company. LEO 1343 (1990).

o. A professional corporation may establish a subsidiary for collections practice, as long as there is disclosure to prospective clients, and nothing in the law firm's or new professional corporation's name was misleading. LEO 1356 (1990).

p. Lawyers may be shareholders of a corporation providing mediation and arbitration services, but the lawyers must comply with the ethics code. LEO 1368 (1990).

q. A lawyer may represent a home builder in an action brought by a home buyer even though the buyer had paid a settlement or closing fee to the title corporation of which the lawyer was president. [The Bar indicated that the lawyer did not have an attorney-client relationship with the home buyer, although both the Opinion itself and the

summary indicate that the lawyer "represented" the home buyer.] LEO 1535 (1993).

r. A lawyer who also sells insurance may represent plaintiffs against insurance companies or their insureds for which the lawyer has written insurance policies, as long as the client consents. In fact, the lawyer may pursue such cases even if the lawyer wrote the policy for the defendant insured. [The Bar did not discuss the possibility that as an insurance agent the lawyer might have acquired confidential information about the defendant.] LEO 1612 (1994).

s. A law firm may not pay a service fee to a so-called "lender service bureau" in return for obtaining legal work from the bureau. Because the bureau apparently is not engaging in fraud against a tribunal, however, the law firm is not obligated to disclose the bureau's operations to the proper authorities. If the law firm determines that the possible misconduct of lawyers holding an "ownership or management interest" in the bureau meets the proper standards, the misconduct would have to be reported. LEO 1632 (1995).

t. A law firm may establish a non-legal consulting firm (to provide human resource advice) and share common directors, use similar logos and letterheads, share overhead expenses (such as secretarial support, library resources and lobby space), engage in joint marketing and refer clients to each other, as long as: the public would not be confused by any advertising; the joint marketing does not result in any misperceptions; the firms avoid sharing any confidential client information; the firms do not split fees or pay one another a referral fee; the firms advise their clients of other available referral options; the firms adopt "adequate conflicts screening procedures"; any lawyers involved in the consulting firm "comply at all times with applicable rules of the Code of Professional Responsibility, whether or not the attorney is acting in a professional capacity as a lawyer." LEO 1658 (1995).

u. Lawyers may guarantee a de minimis appeal bond as long as the client remains ultimately liable for the expense. A criminal defense lawyer may not represent a defendant for whom the lawyer's bail bond business posted a bond. LEO 1740 (2000).

v. As indicated in earlier Opinions, a lawyer representing a real estate purchaser cannot impose fees on the seller absent an agreement or some forewarning. A lawyer designated in a real estate contract as settlement agent may not comply with a title company's instructions that would involve the title company preparing documents and undertaking other activities that would constitute the unauthorized practice of law (a lawyer who owns a title company may perform legal work for a client, but may not undertake the same activities if working on behalf of the title company -- because "only an attorney engaged in private practice specifically retained by the seller may undertake legal representation of the seller)." LEO 1742 (2000).

w. A lawyer who owns a mediation company is "of counsel" to a law firm in which his/her spouse is a partner. After mediation of a domestic dispute, one of the parties asks an associate in the law firm to file for divorce on behalf of that party. The Bar holds that lawyers/mediators may not represent either party after they handle a mediation, even with the clients' consent (overruling earlier LEOs 1684, 590, 544 and 511). Because this specific disqualification applies only to the lawyer/mediator, an associate in the firm would not be disqualified based on the mediator's disqualification. However, the lawyer/mediator's duty of confidentiality arising from the mediation also disqualifies that lawyer, and is imputed to the firm to which the lawyer/mediator is "of counsel" (although client consent can cure this conflict). If there were no connection between the lawyer/mediator and the law firm, lawyers practicing in the firm would not be disqualified from representing the party in the divorce as a result of the spousal relationship to the mediator. LEO 1759 (2002).

D. Hypothetical - Accepting Equity in a Corporate Client Instead of Fees. You have always enjoyed being a real estate lawyer, but recently you found that your career choice may have given you the chance for great financial rewards as well. A new land development company just approached you to represent it. The President told you that the company cannot afford to pay your hourly rate, but would be willing to give you an equity share in the company in return for your services.

May you enter into an arrangement like this with your client? YES

Must your client be separately represented in making such an arrangement? NO

Must your client consent in writing before entering into such an arrangement? YES

Analysis

The ethics rules have never totally prohibited business transactions between a lawyer and the lawyer's client.

However, it is always dangerous for a lawyer to engage in a business transaction with a client. In LEO 1041 (1988), for instance, a lawyer and his non-lawyer friend entered into a partnership to purchase property. The friend raised some questions, and the lawyer assured him that things could be worked out later. A dispute later arose between them. The Bar held that the lawyer should have made a more complete disclosure of the potential adversity and advised his friend to retain his own lawyer in the transaction.

A West Virginia case went even further. In Committee on Legal Ethics of the *West Virginia State Bar v. Cometti*, 189 W. Va. 262, 430 S.E.2d 320 (W. Va. 1993), the Court suspended a West Virginia lawyer's license because, among other things, the lawyer had entered into a business transaction with a client without advising the client to seek independent counsel.

Whenever they gain some advantage at their clients' expense, lawyers are judged under the harsh "fiduciary duty" standard under which any such transaction is presumptively fraudulent. As if this were not bad enough, lawyers must overcome this presumption with "clear and convincing" evidence.

The Virginia Rules of Professional Conduct reflect this hostility to business transactions between lawyers and their clients.

The Rules require that any transactions between a lawyer and client be "fair and reasonable to the client." In addition, the Rules contain a number of new provisions.

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

the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

the client consents in writing thereto. Virginia Rule 1.8(a).

In ABA LEO 418 (2000), the ABA addressed the issue of lawyers taking on equity interest in their clients. The ABA indicated that lawyers may accept stock in lieu of or in addition to a client's cash payment for services, but the following rules apply to such arrangements:

the arrangements must satisfy the ethics standards for "business transactions" with clients;

determining if the fee is "reasonable" focuses "only [on] the circumstances reasonably ascertainable at the time of the transaction";

the lawyer must fully explain the possible conflicts that might arise (such as diminution in client control of the corporation and ways in which the lawyer's personal interests in the stock value might affect the lawyer's professional judgment);

the lawyer should describe the services to be rendered, and whether the stock acquisition is in the nature of an investment, a direct payment for services or a true "retainer" paid for the lawyer's availability;

even though it is not required by the Model Rules, the lawyer should recommend that the client seek independent advice;

if a corporation's main asset consists of a claim in litigation, the stock might be a prohibited "proprietary interest" in litigation;

a lawyer's ownership of a client's stock does not create an inherent conflict of interests because both share an interest in the corporation's success;

in the case of conflicts (as when a lawyer's ethical duty requires disclosure of adverse facts that will affect the stock price), the lawyer must subordinate any economic self-interest in favor of the ethics duty, and obtain the client's consent to be involved in rendering advice if there might be a material conflict;

in the case of a severe conflict (as when the stock is the lawyer's major asset), the lawyer might be incapable of rendering legal advice;

a lawyer-shareholder cannot challenge the client's termination of the lawyer.

The ABA also noted that some law firms have adopted policies about stock ownership in firm clients, such as:

assuring that the percentage of stock ownership in a client is a non-material amount;

requiring that a firm lawyer other than the main client contact decide any issues involving conflicts;

transferring billing and supervisory responsibility to a lawyer with no stock ownership in the client.

Best Answer. The best answer to question (a) is YES; the best answer to question (b) is NO; and the best answer to question (c) is YES.

XVII. *GIFTS AND BEQUESTS*

A. **RULE 1.8 Conflict of Interest: Prohibited Transactions**

(a) . . . .

(c) A lawyer shall not solicit, for himself or a person related to the lawyer, any substantial gift from a client including a testamentary gift. A lawyer shall not accept any such gift if solicited at his request by a third party. A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer any substantial gift from a client, including a testamentary gift, unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, a person related to a lawyer includes a spouse, child, grandchild, parent, or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

B. *COMMENT TO RULE 1.8*

Transactions Between Client and Lawyer

[2] A lawyer may accept ordinary gifts from a client. For example, an ordinary gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the

client should have the detached advice that another lawyer can provide. Paragraph (c) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

VIRGINIA CODE COMPARISON

Paragraph (c) is substantially similar to DR 5-104(B) which stated that a lawyer "shall not prepare an instrument giving the lawyer or a member of the lawyer's family any gift from a client, including a testamentary gift, except where the client is a relative of the donee." EC 5-5 stated that a lawyer "should not suggest to his client that a gift be made to himself or for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or overreached the client. If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he should urge that the client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. Except in those instances in which the client is related to the donee, a lawyer may not prepare an instrument by which the client gives a gift to the lawyer or to a member of his family."

C. A lawyer may not prepare a trust for a godparent (not a blood relative) under which the lawyer is an ultimate beneficiary, even if the lawyer and the godmother "maintained a mother/daughter-like relationship for nearly thirty years." However, it is not per se improper for the lawyer to serve as executor or trustee. LEO 1534 (1993).

XVIII. *SUPERVISING OTHER LAWYERS*

A. **RULE 5.1 Responsibilities of Partners and Supervisory Lawyers**

(a) A partner in a law firm, or a lawyer who individually or together with other lawyers possesses managerial authority, 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 or has managerial authority 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.

B. *COMMENT TO RULE 5.1*

[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. This includes members of a partnership and the shareholders in a law firm organized as a professional corporation; lawyers having managerial authority in the law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. See the "partner" definition in the Terminology section at the beginning of these Rules. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers.

[2] Paragraph (a) requires lawyers with a managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm, informal supervision and periodic review ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners or those lawyers with managerial authority may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a).

[5] Paragraph (c)(2) defines the duty of a lawyer having direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has such supervisory authority in particular circumstances is a question of fact. Partners of a private firm have at least indirect responsibility for all work being done by the firm, while a partner in charge of a particular matter ordinarily has responsibility for the work

of other firm lawyers engaged in the matter. Appropriate remedial action by a partner would depend on the immediacy of the partner's involvement and the seriousness of the misconduct. The supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

[7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

VIRGINIA CODE COMPARISON

There was no direct counterpart to this Rule in the Virginia Code. DR 1-103(A) provided that "[a] lawyer having information indicating that another lawyer has committed a violation of the Disciplinary Rules that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness to practice law in other respects, shall report such information to the appropriate professional authority . . . ."

COMMITTEE COMMENTARY.

The Committee adopted the language of ABA Model Rule 5.1 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.

XIX. *SUPERVISING NON-LAWYERS*

A. **RULE 5.3 Responsibilities Regarding Nonlawyer Assistants**

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

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

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

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

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

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

B. *COMMENT*

[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessional. 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".

VIRGINIA CODE COMPARISON

Rule 5.3(a) and (b) are similar to DR 3-104(C). The Virginia Code also addressed a supervising lawyer's responsibilities in DR 4-101(E) and DR 7-106(B). The Virginia Code did not contain any explanation of a lawyer's responsibility for a nonlawyer assistant's wrongdoing, which is addressed in Rule 5.3(c).

COMMITTEE COMMENTARY

The Committee adopted this Rule as a parallel companion to Rule 5.1 which applies similar provisions to lawyers with supervisory authority over other lawyers. The Committee inserted the phrase "or should have known" in Rule 5.3(c)(2) to reflect a negligence standard. The Committee also deemed it appropriate to add the language in the last sentence of the Comment to cover such recognized and accepted activities as those described.

C. A lawyer or law firm:

1. may hire a police officer as an investigator. LEO 366 (1980).

2. may hire an opponent's secretary but must assure that the secretary complies with the Code. A lawyer may not induce a non-lawyer to undertake activities that would violate the Code if undertaken by a lawyer. LEO 745 (1985).

3. may arrange for a non-lawyer accountant to perform work for the lawyer's clients, as long as the accountant does not perform legal work and the client consents after full disclosure. LEO 1077 (1988).

4. A lawyer and a legal assistant may contact representatives of a potential adversary in a patent or trademark case because the lawyer has a duty to investigate any possible claim and it is not yet known whether any actual adversity exists. Legal assistants are bound by the Code when assisting lawyers with client matters. LEO 1190 (1989).

5. A lawyer had a legal assistant interview a witness. When the witness told a different story at trial, the lawyer wanted to call the legal assistant to impeach the witness. The lawyer may call the legal assistant as a witness without withdrawing. LEO 1500 (1992).

6. A lawyer should not open up a branch office to be staffed entirely by non-lawyers (with the lawyer expecting to visit the branch

office two days each month), because a lawyer's supervision over non-lawyer staff "should be significant, rigorous and efficient." LEO 1600 (1994).

XX. *SALE OF PRACTICE*

A. **RULE 5.6 Restrictions On Right To Practice.**

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.

B. *COMMENT TO RULE 5.6*

[1] An agreement restricting the right of partners or associates to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

[2] Paragraph (b) prohibits lawyers from agreeing to a broad restriction on their right to practice, unless approved by a tribunal (in such situations as the settlement of mass tort cases) or a governmental entity. However, the lawyer must fully disclose the extent of any restriction to any future client and refer the client to another lawyer if requested to do so.

VIRGINIA CODE COMPARISON

This Rule is similar to DR 2-106, although it specifically permits a broad restriction if it is approved by a tribunal or a governmental entity.

COMMITTEE COMMENTARY

After a lengthy debate about the merits of settlements and the public policy favoring clients' unrestricted choice of legal representation, the Committee decided to generally prohibit provisions in settlement agreements that broadly restricted a lawyer's right to practice, but added an exception if a tribunal or a governmental entity approves the restriction. The Comment emphasizes that lawyers whose right to practice has been restricted by a court-approved settlement should advise all

future clients of the restriction and refer them to other counsel, if necessary.

C. **RULE 1.17 Sale Of Law Practice.**

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

(a) The seller ceases to engage in the private practice of law in the geographic area in which the practice has been conducted, except the lawyer may practice law while on staff of a public agency or legal services entity which provides legal services to the poor, or as in-house counsel to a business.

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

(1) the proposed sale and the identity of the purchaser;

(2) any proposed change in the terms of the future representation including the fee arrangement;

(3) the client's right to consent or to refuse to consent to the transfer of the client's matter, and that said right must be exercised within ninety (90) days of receipt of the notice;

(4) the client's right to retain other counsel and/or take possession of the file; and

(5) the fact that the client's refusal to consent to the transfer of the client's matter will be presumed if the client does not take any action or does not otherwise consent within ninety (90) days of receipt of the notice.

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

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

D. *COMMENT TO RULE 1.17*

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice and another lawyer or firm takes over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6.

Termination of Practice by Seller

[2] The fact that a number of the seller's clients decide not to be represented by the purchaser but take their matters elsewhere does not result in a violation. Neither does the seller's return to private practice after the sale as a result of an unanticipated change in circumstances result in a violation. For example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon leaving the office.

[3] Comment [3] to ABA Model Rule 1.17 substantially appears in paragraph (a) of this Rule. . . .

[6] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Rule 1.6 than do preliminary discussions concerning the possible association of any lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific information relating to the representation and to the file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser and any proposed change in the terms of future representation, and must be told that the decision to consent or to make other arrangements must be made within 90 days. If nothing is heard from the client within that time, the client's refusal to consent to the sale is presumed.

[7] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the Rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The Court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interest will be served by authorizing the transfer of the

file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered in camera.

[8] All the elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice.

Fee Arrangements Between Client and Purchaser

[9] The sale may not be financed by increases in fees charged the clients of the practice. Existing agreements between the seller and the client as to fees and the scope of work must be honored by the purchaser, unless the client consents after consultation. . . .

Other Applicable Ethical Standards

[11] Lawyers participating in the sale of a law practice are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to assure that the purchaser is qualified to assume the practice and the purchaser's obligation to undertake the representation competently (see Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure client consent after consultation for those conflicts which can be agreed to (see Rule 1.7); and the obligation to protect information relating to the representation (see Rules 1.6 and 1.9).

[12] If approval of the substitution of the purchasing attorney for the selling attorney is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be concluded in the sale (see Rule 1.16).

Applicability of the Rule

[13] This Rule applies to the sale of a law practice by representatives of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a nonlawyer representative not subject to these Rules. Since, however, no lawyer may participate in a sale of a law practice which does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing lawyer shall see to it that they are met.

[14] Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this Rule.

[15] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice.

VIRGINIA CODE COMPARISON

Ethical Consideration 4-6 states that a lawyer should not attempt to sell a law practice as a going business because, among other things, to do so would involve the disclosure of confidences and secrets.

COMMITTEE COMMENTARY

The Committee was persuaded to eliminate the prohibition of the sale of a law practice currently set forth in Ethical Consideration 4-6 by several arguments, the first being that sole practitioners and their clients are often unreasonably discriminated against when the attorney's practice is terminated. When lawyers who are members of firms retire, the transition for the client is usually smooth because another attorney of the firm normally takes over the matter. Such a transition is usually more difficult for the clients of a sole practitioner, who must employ another attorney or firm.

Another persuasive argument is that some attorneys leaving practice, firm members and sole practitioners alike, indirectly "sell" their practices, including its good will, by utilizing various arrangements. For example, firm members sometimes receive payments from their firm pursuant to retirement agreements that have the effect of rewarding the lawyer for the value of his/her practice. Sole practitioners contemplating leaving the practice of law may sell their tangible assets at an inflated price or bring in a partner prior to retirement, then allow the partner to take over the practice pursuant to a compensation agreement. Such arrangements do not always involve significant client participation or consent.

*In addition, an attorney's practice has value that is recognized in the law. Under Virginia divorce law, for example, a professional's practice, including its good will, may be subject to equitable distribution. (*Russell v. Russell*, 11 Va. App. 411, 399 S.E.2d 166 (1990)). Therefore, under the Virginia Code, an attorney in a divorce proceeding may be required to compensate his/her spouse for the value of the practice, yet be forbidden to sell it.*

The Committee recommended, after considering all of these factors, that adopting a carefully crafted rule allowing such sales without resort to these alternate methods would be preferable and would assure maximum protection of clients. This recommended

Rule is based on the ABA Model Rule 1.17 with several significant changes, the chief ones relating to consent and fees.

E. Withdrawing lawyers (including non-compete issue).

1. Note that Rule 5.6(a) now prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm:

a. A partnership agreement may not contain a non-compete clause. LEO 246 (1974) and LEO 428 (1981).

b. A partnership agreement may not restrict payment of "deferred compensation" if a withdrawing partner practices within a certain area; such a restriction would be acceptable if funding for the deferred compensation comes from an employer corporation, partnership or a third party. LEO 880 (1987).

c. A professional corporation's agreement may not contain a covenant not to compete after withdrawal. The corporation may not demand part of withdrawing lawyer's future fees because it would be impermissible fee-splitting. LEO 1232 (1989).

d. A firm may not require a withdrawing partner to divide fees earned from representing clients the withdrawing partner took when the partner withdrew. A professional corporation may not ethically enforce a provision under which a withdrawing lawyer who competed with the firm (within a fifty mile radius) and took clients originally brought to the firm by retired lawyers must reimburse the firm for payments it made to the retired lawyers. LEO 1556 (1994).

e. A lawyer hired as a company's inside general counsel may not enter into a non-competition agreement with the company (under which the lawyer could not serve as any competitor's in-house counsel for a period of one year). The Bar notes that the lawyer must protect the former client's confidences and secrets if the lawyer begins to represent a competitor. LEO 1615 (1995).

f. A limited liability law partnership may vary the time period over which the firm will repay a withdrawing partner's capital depending on whether the withdrawing partner retires from the practice of law (withdrawing lawyers who

stopped practicing received their capital over sixty months, while others received their capital over one hundred twenty months). Such an agreement affects "only the termination of the relationship itself" and is "not a restriction on the attorney's right to continue to practice law at the termination of the relationship." This determination moots the question of whether payment of the capital account "constitutes a retirement benefit" which could be directly tied to a non-compete provision. LEO 1711 (1997).

2. Procedures upon withdrawal:

a. A lawyer retiring from a law firm may advise clients that they may continue using the firm or hire another lawyer. LEO 298 (1978).

b. It is improper for a law firm to require a withdrawing partner to continue working for the former firm's clients and have all bills submitted to the former firm (which would pass payments along to the former partner after deducting one-third of the payment for "continuing overhead burden within predecessor law firm"). LEO 794 (1986).

c. LEO 1332 (1990) provides that upon a lawyer's withdrawal from a firm:

(1) the remaining lawyers may not contact the withdrawing lawyer's clients without advising them of their right to select the lawyer of their choice, or even arranging to meet the clients as they pick up their files from the firm, if the purpose of the telephone call or meeting is to attempt to dissuade a client from hiring the withdrawing lawyer if the client has expressed an intent to do so;

(2) the remaining lawyers may not contact opposing counsel and advise them of the firm's continuing representation of a client when the client has already indicated an intent to retain the withdrawing lawyer;

(3) a law firm may not condition release of a client's files upon the client's signing of a release;

(4) retention of a client's papers may be unethical even if the client has not paid its bills (if retaining the

files would be prejudicial to the client) (*see* Rule 1.6, above);

(5) law firm may not deny the withdrawing lawyer access to files it if would harm the clients. Note that Rule 1.16(e) governs a lawyer's duty to provide files to a former client.

d. A law firm may not prohibit a withdrawing associate from contacting any of the firm's clients until they decide on counsel, because such a rule would restrict the withdrawing lawyer's right to practice. Likewise, the law firm may not declare that all client files belong to the firm and that the withdrawing associate must share fees with the law firm. LEO 1403 (1991).

F. Sale of Practice:

1. A lawyer selling a law practice may advise clients that they may retain the new lawyer or some other lawyer. The lawyer purchasing the law practice may not purchase clients' files or an interest in pending litigation, and may not use the selling lawyer's name in the letterhead. [Rule 1.17 permits the purchase or sale of a law firm's practice, including good will, under certain circumstances.] LEO 321 (1979).

2. A law firm may not sell its name or goodwill, but may sell physical assets. A lawyer taking over a practice should notify clients of their right to select another lawyer and give direction about the disposition of their files (which should not be transferred without disclosure to the clients). LEO 956 (1987). Note that Rule 1.17 permits the purchase or sale of a law firm's practice, including good will, under certain circumstances.

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Created: July 28, 2002 Updated: August 29, 2005 (11:31am)