A SURVEY OF ETHICAL ISSUES IN THE ATTORNEY-CLIENT RELATIONSHIP

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I. INTRODUCTION.

A. Sources of information:

1. The Virginia State Bar ("VSB") maintains a web page for Professional Responsibility at 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 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 web page at http://www.mcguirewoods.com/services/leo/ contains summaries of Virginia's and the ABA's Legal Ethics Opinions prepared by Thomas E. Spahn, Esquire. These summaries are arranged chronologically and topically. 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 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 February 23, 2002, submitted to the Virginia Supreme Court March 21, 2002, revised per Court's Instructions of May 10, 2002, with additional rule changes approved by Council June 13, 2002, and re-submitted to the Virginia Supreme Court July, 2002. Tom has graciously consented to the use of the information on his web site, which has provided most of the information concerning LEO's contained in this outline, for which this author is extremely grateful.

3. The "Virginia CLE Home Page" contains a link to http://www.vacle.org/opinions/leos.htm, a site that as of the date of this paper contains LEOs 1360 through 1763. 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 large 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 Official Comments 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.

6. "ABA" - ABA Ethics Informal Opinion.

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

II. WHEN DOES THE ATTORNEY-CLIENT RELATIONSHIP BEGIN AND CONFIDENCES IF THE ATTORNEY IS NOT ENGAGED.

A. **RULE 1.6 Confidentiality of Information.**

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

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

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

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

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

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

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

(c) A lawyer shall promptly reveal:

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

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

(3) information concerning the misconduct of another attorney to the appropriate professional authority under Rule 8.3, but only if the

client consents after consultation. Consultation should include full disclosure of all reasonably foreseeable consequences of both disclosure and non-disclosure to the client. Under this paragraph, an attorney is required to request the consent of a client to disclose information necessary to report the misconduct of another attorney.

B. *Comments to Rule 1.6:*

[1] The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

[2] The common law recognizes that the client's confidences must be protected from disclosure. The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

[3] Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that clients usually follow the advice given, and the law is upheld.

[4] A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

[5] The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be

likely to be detrimental to the client, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

[5a] The rules governing confidentiality of information apply to a lawyer who represents an organization of which the lawyer is an employee.

[6] The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

Authorized Disclosure. [7] A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

[7a] Lawyers frequently need to consult with colleagues or other attorneys in order to competently represent their clients' interests. An overly strict reading of the duty to protect client information would render it difficult for lawyers to consult with each other, which is an important means of continuing professional education and development. A lawyer should exercise great care in discussing a client's case with another attorney from whom advice is sought. Among other things, the lawyer should consider whether the communication risks a waiver of the attorney-client privilege or other applicable protections. The lawyer should endeavor when possible to discuss a case in strictly hypothetical or abstract terms. In addition, prior to seeking advice from another attorney, the attorney should take reasonable steps to determine whether the attorney from whom advice is sought has a conflict. The attorney from whom advice is sought must be careful to protect the confidentiality of the information given by the attorney seeking advice and must not use such information for the advantage of the lawyer or a third party.

[7b] Compliance with Rule 1.6(b)(5) might require a written confidentiality agreement with the outside agency to which the lawyer discloses information.

[8] Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client. [9] The confidentiality rule is subject to limited exceptions. However, to the extent a lawyer is required or permitted to disclose a client's confidences, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited.

[10] Several situations must be distinguished.

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

[12] Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(c), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.

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

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

Withdrawal. [15] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).

[16] After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in Rule 1.6. Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer

from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

[17] Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

Dispute Concerning a Lawyer's Conduct. [18] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(2) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[19] If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by paragraph (b)(2) to prove the services rendered in an action to collect it. This aspect of the Rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it,

and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

Disclosures Otherwise Required or Authorized. [20] If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (a) requires the lawyer to invoke the attorney-client privilege when it is applicable. Except as permitted by Rule 3.4(d), the lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

[21] The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.

Attorney Misconduct [21a] Self-regulation of the legal profession occasionally places attorneys in awkward positions with respect to their obligations to clients and to the profession. Paragraph (c)(3) requires an attorney who has information indicating that another attorney has violated the Rules of Professional Conduct, learned during the course of representing a client, to request the permission of the client to disclose the information necessary to report the misconduct to disciplinary authorities. In requesting consent, the attorney must inform the client of all reasonably foreseeable consequences of both disclosure and non-disclosure.

[21b] Although paragraph (c)(3) requires that authorized disclosure be made promptly, a lawyer does not violate this Rule by delaying in reporting attorney misconduct for the minimum period of time necessary to protect a client's interests. For example, a lawyer might choose to postpone reporting attorney misconduct until the end of litigation when reporting during litigation might harm the client's interests.

Former Client. [22] The duty of confidentiality continues after the client-lawyer relationship has terminated.

C. Definition of Practice of Law Determine Whether Attorney-Client Relationship Exists. - "The existence of an attorney-client relationship is determined by the definition of the practice of law in the Rules of Court. This definition is found in

Part Six, Subsection A of Section 1 of the Virginia Rules of Court." LEO 1184. This rule provides:

1. Generally, the relation of attorney and client exists, and one is deemed to be practicing law whenever he furnishes to another advice or service under circumstances which imply his possession and use of legal knowledge or skill.

2. Specifically, the relation of attorney and client exists, and one is deemed to be practicing law whenever:

   a. One undertakes for compensation, direct or indirect, to advise another, not his regular employer, in any matter involving the application of legal principles to facts or purposes or desires.

   b. One, other than as a regular employee acting for his employer, undertakes, with or without compensation, to prepare for another legal instruments of any character, other than notices or contracts incident to the regular course of conducting a licensed business.

   c. One undertakes, with or without compensation, to represent the interest of another before any tribunal -- judicial, administrative, or executive -- otherwise than in the presentation of facts, figures, or factual conclusions, as distinguished from legal conclusions, by an employee regularly and bona fide employed on a salary basis, or by one specially employed as an expert in respect to such facts and figures when such representation by such employee or expert does not involve the examination of witnesses or preparation of pleadings.

   d. One holds himself or herself out to another as qualified or authorized to practice law in the Commonwealth of Virginia.

3. Because lawyers generally hold themselves out as qualified or authorized to practice law, under the Virginia Rules of Court it is difficult for the attorney-client relationship not to begin upon a client's initial contact with an attorney.

D. Client's and Potential Client's Expectations Key. The rules concerning the preservation of confidentiality of information assume the existence of an attorney-client relationship. A key factor in determining whether such a

relationship exists is whether the person speaking with the attorney has an expectation of confidentiality in their consultations, even if the attorney does not ultimately represent the client. While the fact that an attorney is compensated for an initial consultation would be very strong evidence that the attorney-client relationship had begun, the fact that an attorney is not compensated for such a consultation is only a factor to consider when evaluating the potential client's expectation.

E. Social Engagements. Even when a lawyer learns information at a time when he does not believe he is acting in his professional capacity, the attorney-client relationship may arise and the lawyer will be bound by the duties of confidentiality.

a. A lawyer who learns confidences during a professional discussion at a social engagement may not reveal the contents without the client's consent. The client's expectations determine whether the relationship begins. LEO 629.

b. A lawyer partner was acquainted with a victim's family for many years and acquired confidences about the victim's family through social contacts. Because the family never sought or received legal advice from the partner and none of the discussions occurred in the lawyer's "professional capacity as a lawyer, to which an expectation of confidentiality might attach, as opposed to conversations between friends" the lawyer's partner could represent the defendant LEO 1697.

F. Interviewing Potential Clients and Confidentiality Even If No Attorney Client Relationship Arises. - When a person discusses with a lawyer the possibility of employing the lawyer, but no attorney-client relationship ensues, the information revealed to the attorney is nevertheless protected under Rule 1.6(a). An initial consultation with an attorney creates an expectation of confidentiality even where no attorney-client relationship arises in other respects.

1. A lawyer interviewing potential co-defendants in a criminal matter might learn confidential information from one that would preclude the representation of another. Even if the first potential client consented, the lawyer could not represent the other criminal defendant because of the possible use of the first prospective client's confidences against the prospective client. LEO 1363

2. Legal aid society lawyers who are involved in client intake and advice must maintain the confidentiality of what they have learned. “It is

irrelevant whether or not an attorney-client relationship ensued" as a result of any client intake interviews, and it is also "irrelevant whether or not the attorneys actually remember" the confidential information imparted to them. LEO 1757

3. A non-lawyer legal aid employee obtains general financial information from applicants to determine if they meet the pro bono standards. The "intake interview by non-lawyer staff personnel to determine a person's eligibility for legal aid services" (without the furnishing of any legal advice) does not create an attorney-client relationship with the legal aid office. However, identifying data about a potential legal aid office client is a secret which cannot be disclosed without the potential client's consent. However, to prevent denying access to legal aid services to other potential clients, the Bar recommended that the intake specialist obtain a written informed consent at the intake interview in which the prospective client acknowledges "that the limited information given will not be treated as confidential for purposes of enabling the legal aid office to screen for conflicts or to make referrals." LEO1633

4. A university pre-paid student legal service office represents students in criminal matters. While the mere initial consultation with a student-defendant does not create an attorney-client relationship, the meeting "created an expectation of confidentiality" that the lawyer must respect. LEO 1453.

G. Lawyer In Non-Lawyer Context Must Disclose If Confidences Will Not Be Maintained. A lawyer working at a state institution of higher learning may enter into an employment contract under which the lawyer must disclose to the administration information that the lawyer has obtained from those seeking legal advice. Although an "expectation of confidentiality" may arise in situations in which no attorney-client relationship exists, the lawyer may resolve any problems by issuing "a disclaimer to colleagues or students indicating that no attorney/client relationship will be formed and any information received will not be treated as secret or confidential." LEO 1601.

III. **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.

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. 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. 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 in the following decisions did not impose such a requirement:

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 Bar 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 limited his liability to a client for malpractice, except 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.

IV. LIMITATIONS ON SCOPE OF REPRESENTATION.

A. RULE 1.2 Scope of Representation.

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

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

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

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

B. *Comments to Rule 1.2.*

Scope of Representation. [1] Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by the law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. In that context, a lawyer shall advise the client about the

advantages, disadvantages, and availability of dispute resolution processes that might be appropriate in pursuing these objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. These Rules do not define the lawyer's scope of authority in litigation.

[2] In a case in which the client appears to be suffering mental disability, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities. [3] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, a lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

Services Limited in Objectives or Means. [4] The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The terms upon which representation is undertaken may exclude specific objectives or means. Such limitations may exclude objectives or means that the lawyer regards as repugnant or imprudent.

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

Criminal, Fraudulent and Prohibited Transactions. [6] A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

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

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

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

C. Limitation of Scope Is Ethically Permissible. Rule 1.2(b) permits the limitation of the scope of a lawyer's representation of a client, if the client consents after consultation.

1. May limit scope of representation and limit other actions which client may pursue during representation, provided there is full and adequate disclosure and the client consents. In the Legal Aid context, there is some question as to whether the client may make a truly free and volitional consent if the client has little or no other opportunity of securing counsel. LEO 1193

2. The limitation on scope of representation may not impair the client's rights. Excluding services related to a spousal support claim until child support issues resolved is permissible, provided that the legal rights to collect the spousal support are preserved by the lawyer attempting to limit the scope of the representation to the child support issues. In such LEO 1193

D. May Limit Scope Generally and May Limit Types of Services To Be Utilized To Achieve Objective. The limitation may be on the scope of the representation in general, or it may be on the scope of the services to be provided in connection with the representation .

E. Limitations May Not Infringe On The Lawyer's Duty of Competence. The scope of representation may not be so limited as to infringe on the lawyer's duty of competence under Rule 1.1. Nor may the scope of the client's participation be limited so that he or she could not terminate the lawyer's services or could not make final decisions regarding settlement of litigation.

F. Third Party Limitations on Scope of Representation. It is unethical for an attorney to agree to an insurance carrier's restrictions on the attorney's representation of an insured absent full disclosure and consent of the client at the outset of the representation and absent a determination that the client's rights will not be materially impaired by the restrictions. LEO 1723.

G. Limitation of Scope Prohibited In Some Court Appointed Cases. 1005 A court-appointed lawyer has an ethical duty to file post-conviction motions requested by the client (unless they are ill-founded or the lawyer withdraws) because the Virginia statute governing court-appointed lawyers indicates that the duty of representation includes appeals. LEO 1005.

V. DECLINING OR TERMINATING REPRESENTATION.

A. RULE 1.16 Declining Or Terminating Representation

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

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

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

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is illegal or unjust;

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

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

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

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

(6) other good cause for withdrawal exists.

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

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

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

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

B. *Comments to Rule 1.16.*

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

Mandatory Withdrawal [2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may wish an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The

lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.

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

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring the client to proceed pro se.

[6] If the client is mentally incompetent, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and, in an extreme case, may initiate proceedings for a conservatorship or similar protection of the client. See Rule 1.14.

Optional Withdrawal [7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is illegal or unjust, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer also may withdraw where the client insists on a repugnant or imprudent objective.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

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

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.

C. Situations Where A Lawyer Is Prohibited From Representing Potential Client. A lawyer may not represent a client if the representation would result in a violation of the Rules or other law, or if his physical or mental condition materially impairs his ability to represent the client. A lawyer should not accept representation unless it may be performed competently, diligently, without conflict of interest, and to completion.

D. A Lawyer May Withdraw At Any Time, Provided No Material Effect On Client. Unless a lawyer is serving as counsel of record, a lawyer may withdraw from representing a client if the withdrawal may be accomplished without material adverse effect on the interests of the client.

1. A lawyer representing a prisoner pro bono who determines that the case is meritless and who seeks court permission to withdraw may not advise the court of the lawyer's conclusions about the case even if it means the court will not allow the lawyer to withdraw. LEO 435.

2. A lawyer who suspects that a client has committed fraud before the representation may "accept at face value" that the client's story is "bona fide" unless the lawyer "knows or, in the exercise of due diligence upon reasonable inquiry during the attorney/client relationship, the attorney should know of information to the contrary." Thus, the lawyer must maintain the client's confidences and secrets and has no duty to "confront the client and inquire directly about the client's prior conduct." However, nothing prohibits the lawyer from "investigating the matter further." If the lawyer "believes that the fraud is obvious" even though the lawyer never receives a confession from the client, the lawyer should "move to voluntarily withdraw" at a time "that does not materially prejudice the client." LEO 1687.

3. A court-appointed lawyer is not obligated to appeal a criminal conviction beyond the Supreme Court of Virginia, but must advise the client of deadlines and offer to make information available if the client wishes to appeal. LEO 525.

E. In Certain Situations, A Lawyer May Withdraw Even If Material Adverse Effect On Client. Withdrawal is permitted, even if there may be a materially adverse effect on the client when the client persists in a course of action which

the lawyer reasonably believes to be illegal or unjust, or if the lawyer's services were misused in the past, or where the client insists on a repugnant or imprudent objective. If a client breaches the terms of an agreement related to the representation, such as an engagement agreement, the lawyer may withdraw after giving a reasonable warning that the lawyer will withdraw unless the obligation is fulfilled. A lawyer may also withdraw if the representation will result in an unreasonable financial burden on the lawyer, if the representation has been rendered unreasonably difficult by the client, or if there is other good cause for withdrawal. .

1. A legal aid lawyer may withdraw from representing a legal aid client if from the beginning the representation did not meet legal aid guidelines, this would be a breach of the agreement with Legal Aid. LEO 203.

2. If a client liable for an indebtedness does not follow the lawyer's advise to accept service of process but rather continues to avoid such process, a lawyer should withdraw from representing a client. LEO 305.

3. A lawyer may withdraw from representing a client who reneges on a settlement offer that the lawyer had communicated to the opposing party. LEO 721.

4. If the statute of limitations is about to run on a claim for a client whom the lawyer cannot find, the lawyer may file the action and simultaneously move to withdraw. LEO's 841 872, 897, 1088, 1173.

5. A lawyer may withdraw from representing a client who does not pay the lawyer's bills. LEO 842.

6. A lawyer may withdraw from representing a client found mentally incompetent, even if the client wants to appeal the commitment order, as long as the lawyer believes that existing law supports the court's order, but the lawyer must prosecute the appeal if the court denies the withdrawal motion. LEO 908.

7. A lawyer may (but does not necessarily have to) withdraw -- without a "noisy withdrawal" -- if the lawyer's services have been used without the lawyer's knowledge to commit a fraud that is now completed. ABA-366.

F. Withdrawal Not Permitted If Withdrawal Not Required and Would Prejudice Client. Absent one of the enumerated grounds for withdrawal in Rule 1.16(a), a lawyer may not withdraw if such withdrawal would materially prejudice the

interests of the client. A lawyer representing a client (in a criminal matter in which sentencing is pending) who admits that she gave police a false identification (using another's driver's license) while being arrested for driving while intoxicated: may not reveal the client's fraud on the third party (because it does not involve the subject matter of the representation); must abide by the client's decision if she is determined to remain silent about the incident on the court date for the driving arrest; may continue to represent the client in the sentencing phase of the original criminal matter but "must be careful not to mislead the court in any statements"; may not invite the court in the sentencing hearing to ask questions that would elicit information about the driving arrest incident; may not withdraw from representing the client in the underlying criminal matter because it would prejudice the client (by prompting the court to ask about the withdrawal); must advise the client of the risk that the lawyer might be obligated to reveal the driving arrest incident if asked direct questions by the court at the sentencing hearing. LEO 1731.

G. Mandatory Withdrawal. A lawyer must withdraw from representation if the continued representation would result in a violation of the Rules or other law, if his physical or mental condition materially impairs his ability to represent the client, or if the lawyer is discharged by client (accept in cases where court approval of withdrawal is required). A lawyer need not withdraw merely because a client suggests a course of conduct, but the lawyer must withdraw if the client insists on pursing such conduct.

1. A lawyer named as trustee for the benefit of a non-represented seller must resign if the seller later requests the lawyer to do so. LEO 336.

2. A lawyer must withdraw from a divorce matter when the lawyer was a party to a telephone conversation (involving both clients and both lawyers) about a settlement agreement over which the parties now disagree, since the lawyer is likely to be a witness in the dispute. LEO 901. Rule 3.7(b) requires that when a lawyer learns or it becomes obvious that the lawyer may become a witness other than on behalf of the client and the testimony may be prejudicial to the client he must withdraw from representation.

3. The duty not to file unwarranted or frivolous motions supercedes the obligation of a court appointed lawyer to file an appeal motion which the lawyer considered frivolous. Accordingly, the court appointed lawyer had an obligation to withdraw. LEO 1530.

4. When a criminal defendant's lawyer learned that his client claims that the lawyer pressured the client into a plea of guilty against the client's

wishes the lawyer has a conflict with the client that cannot be cured, even with consent. The lawyer should move to withdraw, but "would be bound to continue the representation" if the court denies the motion. Until the lawyer withdraws, the lawyer must fully protect the client and therefore (presumably) may have to advise the client about the possibility of withdrawing the guilty plea. LEO 1558.

5. A lawyer who knows or believes that the lawyer's services are being used to perpetrate a fraud must withdraw and may disaffirm documents the lawyer has prepared, even if such a "noisy withdrawal" might reveal client confidences. A lawyer would be obligated to take these steps even if the lawyer is fired before having the chance to withdraw. ABA-366.

H. Withdrawal Prohibited By Third Party.

1. Where a lawyer is counsel of record, the lawyer must obtain court approval to withdraw. If the court refuses permission to withdraw, a criminal lawyer may not withdraw from representing a client even if the client "specifically and unequivocally requested" that the lawyer withdraw. LEO 514.

2. When a lawyer is appointed to represent a client by a third party, withdrawal ordinarily requires the approval of the appointing authority.

I. Duties Upon Termination. Upon any termination of representation, whether by the lawyer or the client, for any reason whatsoever, a lawyer is obligated to take all reasonable steps to mitigate the consequences of such termination to the client. For example a lawyer, may withdraw from representing a personal injury client before filing a lawsuit as long as the lawyer advises the client of: the withdrawal; the applicable statute of limitations; the necessity of the client hiring another lawyer; and the client's entitlement to the return of papers and property. LEO 559.

1. Treatment of Files Upon Termination. Client files and copies of the same may not be withheld from the client due to non-payment of the lawyer's fees for services or of permissible copying charges.

a. Original Documents and Legal Instruments. Rule 1.16(e) makes it clear that all original, client-furnished documents and all originals of any legal instruments in a lawyer’s possession are the property of the client. Upon request, these items must be returned to the client, irrespective of whether or not the

lawyer's fees have been paid. If the lawyer wants copies of these documents, he may make them as his expense.

b. Other Documents Prepared In the Course of Representation Other Than Those For Internal Office Use. A lawyer must provide the client with copies of lawyer/client and lawyer/third-party communications, copies of client-furnished documents (other than originals required returned as described above), pleadings and discover responses, working and final drafts of legal documents, official documents, investigative reports, legal memoranda and other attorney work product documents prepared for the client in the course of the representation, research materials, and bills previously submitted to the client. The lawyer may bill the client for the costs associated with copying these materials; however, the lawyer must still provide the copies even if the client refusal to pay such costs.

c. Internal Office Use Documents. A lawyer is not required to provide a client with copies of billing records and documents intended for internal office use only, such as memoranda prepared discussing conflicts of interest, staffing, or difficulties arising from the lawyer/client relationship.

2. Escrowed Funds. A lawyer who withdraws from representing a client may exert a common law possessory lien on funds being held in trust for the client. LEO 1591.

VI. **COMPETENCY**.

A. **RULE 1.1 Competence. A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.**

B. *Comments to Rule 1.1*.

Legal Knowledge and Skill. [1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.

In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

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

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-consideration under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

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

Maintaining Competence. [6] To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education. The Mandatory Continuing Legal Education requirements of the Rules of the Supreme Court of Virginia set the minimum standard for continuing study and education which a lawyer licensed and practicing in Virginia must satisfy. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.

VII. DILIGENCE.

A. RULE 1.3 Diligence

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

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

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

B. *Comments to Rule 1.3.*

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

[1a] Additionally, lawyers have long recognized that a more collaborative, problem-solving approach is often preferable to an adversarial strategy in pursuing the client's needs and interests. Consequently, diligence includes not only an adversarial strategy but also the vigorous pursuit of the client's interest in reaching a solution that satisfies the interests of all parties. The client can be represented zealously in either setting.

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

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

C. Procrastination. The Comments to Rule 1.3 state that "no professional shortcoming is more widely resented than procrastination." For this reason it is usually desirable to establish a timetable for completion of various tasks as early as possible in the representation.

D. Need to Adhere To Timetable. Creating a timetable is the starting point, but adhering to the timetable and advising the client of any material delays is equally important. Always advise clients of delays, they may not be liked but nothing is worse than thinking your so unimportant that you don't deserve a call.

E. Checklists and Follow-up. In today's busy environment, where multiple clients and matters are juggled, it is imperative that checklists and tickler systems be used in all matters to ensure that deadlines are not missed and that pending matters are simply overlooked. Additionally, it is most important that a closing checklist be used to ensure that all the loose ends are tied up such as filing beneficiary forms for estate planning clients or filing financing statements in commercial transactions.

F. Special Guidance For Sole Practitioners. The obligation of diligence requires that a lawyer prepare for the eventuality of his or her own death or disability. For sole practitioners this means that they should arrange with another lawyer to be prepared to review their files and to make determinations regarding what items might need immediate attention upon the lawyer's death or disability.

VIII. COMMUNICATIONS WITH CLIENT.

A. RULE 1.4 Communication.

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

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

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

B. *Comments to Rule 1.4.*

[*1] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps that permit the client to make a decision regarding an offer from another party. A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea agreement in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable. See Rule 1.2(a). Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter.*

[1a] This continuing duty to keep the client informed includes a duty to advise the client about the availability of dispute resolution processes that might be more appropriate to the client's goals than the initial process chosen. For example, information obtained during a lawyer-to-lawyer negotiation may give rise to consideration of a process, such as mediation,

where the parties themselves could be more directly involved in resolving the dispute.

[2] Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others. On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.

[3] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from mental disability. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client. Practical exigency may also require a lawyer to act for a client without prior consultation.

Withholding Information [4] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(d) directs compliance with such rules or orders.

C. Communication Integral Part of Other Duties. The duty of competence is actually an integral part of the duties of competence and diligence. As with any principal/agent relationship, the lawyer must keep her client adequately informed to the extent necessary to enable the client to make informed decisions regarding the representation. For example, this does not mean that an estate planning client needs to be made into an estate planning attorney, but it

does mean that the lawyer must adequately explain to the client what his or her documents provide and the implications of those provisions.

D. Need To Advise Client of Availability of Dispute Resolutions Processes. The Comments to Rule1.4 states that a lawyer has an obligation to advise her clients of alternative dispute resolution processes such as mediation or arbitration.

E. Termination of Duty To Communicate. The duty to communicate normally terminates when the attorney-client relationship ends. For this reason a closing or termination letter should be sent to every client at the completion of the representation to make the cessation of the representation clear. Absent an agreement with the client to the contrary, the use of such a letter should relieve the lawyer of a continued obligation to further advise the client as to changes in the law or circumstances that might effect the client's legal affairs.

F. Use of E-mail Communications Permitted. Lawyers may ethically communicate client confidences using unencrypted e-mail sent over the Internet. However, lawyers should discuss with their clients alternative methods of communicating confidences that are "so highly sensitive that extraordinary measures to protect the transmission are warranted." ABA-413

IX. THE INCAPACITATED CLIENT.

A. RULE 1.14 Client Under A Disability.

(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

B. *Comments to Rule 1.14*.

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a mental disorder or disability, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular,

an incapacitated person may have no power to make legally binding decisions. Nevertheless, a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. Also, increasingly the law recognizes intermediate degrees of competence. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. If the person has no guardian or legal representative, the lawyer often must act as de facto guardian. Even if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] If the client has a legal representative, the lawyer should ordinarily look to the representative for decisions on behalf of the client. If there is no legal representative, the lawyer should seek such an appointment where it would serve the client's best interests. Thus, if a disabled client has substantial property that should be sold for the client's benefit, effective completion of the transaction ordinarily requires appointment of a legal representative. In many circumstances, however, appointment of a legal representative may be expensive or traumatic for the client. Evaluation of these considerations is a matter of professional judgment on the lawyer's part.

[4] If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Disclosure of the Client's Condition [5] Court rules generally provide that minors or persons suffering mental disability shall be represented by a guardian or next friend if they do not have a guardian. However, disclosure of the client's disability can adversely affect the client's interests. For example, raising the question of disability could, in some circumstances, lead to proceedings for involuntary commitment. The lawyer's position in such cases is an unavoidably difficult one. The lawyer may seek guidance from an appropriate diagnostician.

C. Objective Is To Preserve Normal Attorney-Client Relationship. In the case of the client with diminished or diminishing capacity, Rule 1.14(a) requires and attorney to attempt to maintain a normal attorney-client relationship. This preservation of "normalcy" should be maintained for as long as possible, in light of the client's abilities and capacity.

1. Whether a client is under a disability is determined on a case by case basis. Medical assistance may be necessary to make this determination.

2. Comment [5] to Rule 1.14 recognizes that the disclosure of a client's disability can adversely affect the client's interests. Disclosure is permissible to seek guidance from an "appropriate diagnostician." Care must be taken to ensure that the person consulted will protect the confidentiality of the client's condition until disclosure is unavoidable.

3. The Comments to Rule 1.14 place a particularly heavy burden on the attorney to determine and direct the ethical course of action based upon his assessment of the client's abilities and circumstances. If a person has a legal representative, the attorney must now determine which matters require communication with the client with limited incapacity and which only need be shared with the legal representative.

D. Need to Address Client's Disability Trumps Confidentiality. In ABA Ethics, Informal Op. 89-1530 it was held that an attorney may disclose information regarding his client's behavior to a physician in order to obtain expert advice regarding his capacity, thereby clarifying that an attorney's obligations under Rule 1.6 (Confidentiality) must yield to the provisions of Rule 1.14 which are designed to protect the incapacitated client.

X. FAIRNESS TO OPPOSING PARTY AND COUNSEL.

A. **RULE 3.4 Fairness To Opposing Party And Counsel. A lawyer shall not:**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. *Comments to Rule 3.4.*

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

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Paragraph (a) applies to evidentiary material generally, including computerized information.

[3] With regard to paragraph (c), it is not improper to pay a witness's reasonable expenses or to pay a reasonable fee for the services of an expert witness. The common law rule is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

[3a] The legal system depends upon voluntary compliance with court rules and rulings in order to function effectively. Thus, a lawyer generally is not justified in consciously violating such rules or rulings. However, paragraph (d) allows a lawyer to take measures necessary to test the validity of a rule or ruling, including open disobedience. See also Rule 1.2(c).

[4] Paragraph (g) prohibits lawyers from requesting persons other than clients to refrain from voluntarily giving relevant information. The Rule contains an exception permitting lawyers to advise current or former employees or other agents of a client to refrain from giving information to

another party, because such persons may identify their interests with those of the client. The exception is limited to civil matters because of concerns with allegations of obstruction of justice (including perceived intimidation of witnesses) that could be made in a criminal investigation and prosecution. See also Rule 4.2.

[5] Although a lawyer is prohibited by paragraph (h) from presenting or threatening to present criminal or disciplinary charges solely to obtain an advantage in a civil matter, a lawyer may offer advice about the possibility of criminal prosecution and the client's rights and responsibilities in connection with such prosecution.

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

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

[8] In adversary proceedings, clients are litigants and though ill feeling may exist between the clients, such ill feeling should not influence a lawyer's conduct, attitude or demeanor towards opposing counsel. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system. A lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of the client. A lawyer should

follow the local customs of courtesy or practice, unless the lawyer gives timely notice to opposing counsel of the intention not to do so. A lawyer should be punctual in fulfilling all professional commitments.

C. Threats of Criminal Prosecution Generally Not Permissible If Solely To Obtain Advantage In a Civil Matter. The key to the prohibition on threatening or presenting criminal or disciplinary charges is whether such action is taken solely to obtain benefit in a civil matter.

1. When a lawyer believed opposing counsel had wrongfully communicated with his client, he wrote a letter to the opposing counsel warning against ex parte contacts with the lawyer's client and threatening to "take the matter up with Judge and the Commonwealth's Attorney" if the ex parte calls continue. This letter violated the first prong of the prohibition on threatening criminal charges because reference to the Commonwealth's Attorney "presents a definite threat of criminal prosecution"; but, it did not violate the second prong (that the threat be made "solely to obtain an advantage in a civil matter"), because "the letter does not make the usual demand for payment/settlement by threatening prosecution," but instead was "meant to stop a certain action" (the ex parte contacts) that was itself improper. LEO 1755

2. A lawyer may send a letter to a "stalker" demanding that the stalking cease or else criminal and civil actions would be pursued. This is permissible event though civil actions were threatened, since the threat was not solely made to obtain an advantage in a civil matter, but was at least in part sent to stop the actions. LEO 1063.

D. Prosecutors May Advise Witnesses of Their Rights. Prosecutors may inform witnesses that they may be contacted by private investigators hired by the defense and explain "that they have the right to speak or not to speak with an investigator working for the defense" but they should not make any additional comments or criticize the opponent's tactics. LEO 1741 .

XI. COMMUNICATIONS WITH PERSON REPRESENTED BY COUNSEL

A. RULE 4.2 Communication With Persons Represented By Counsel

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

B. *Comments to Rule 4.2.*

[1] This Rule does not prohibit communication with a represented person, or an employee or agent of a represented person, concerning matters outside the representation. For example, the existence of a controversy between an organization and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification or legal authorization for communicating with the other party is permitted to do so.

[2] In circumstances where applicable judicial precedent has approved investigative contacts in pre-indictment, non-custodial circumstances, and they are not prohibited by any provision of the United States Constitution or the Virginia Constitution, they should be considered to be authorized by law within the meaning of the Rule. Similarly, communications in civil matters may be considered authorized by law if they have been approved by judicial precedent.

[3] ABA Model Rule Comment not adopted.

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

[5] This Rule covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question. Neither the need to protect uncounselled persons against being

taken advantage of by opposing counsel nor the importance of preserving the client-attorney relationship is limited to those circumstances where the represented person is a party to an adjudicative or other formal proceeding. The interests sought to be protected by the Rule may equally well be involved when litigation is merely under consideration, even though it has not actually been instituted, and the persons who are potentially parties to the litigation have retained counsel with respect to the matter in dispute.

[5a] Concerns regarding the need to protect uncounselled persons against the wiles of opposing counsel and preserving the attorney-client relationship may also be involved where a person is a target of a criminal investigation, knows this, and has retained counsel to receive advice with respect to the investigation. The same concerns may be involved where a "third-party" witness furnishes testimony in an investigation or proceeding, and although not a formal party, has decided to retain counsel to receive advice with respect thereto. Such concerns are equally applicable in a nonadjudicatory context, such as a commercial transaction involving a sale, a lease or some other form of contract.

C. A Lawyer May Generally Not Communicate With A Represented Party.

1. A lawyer may not directly contact an adverse party who is represented by a lawyer without that lawyer's consent (the adverse party's consent is insufficient) LEO 1326. This means that the fact that an adverse party who is represented by counsel calls opposing counsel is irrelevant to whether a lawyer has breached his fiduciary duties in such communication.

2. Even when a lawyer believes opposing counsel has acted improperly, the lawyer may not communicate directly with the other party. A lawyer may not send the adversary's client a copy of a letter the lawyer sent to the clerk alleging that the adversary lied to the court. LEO 501.

3. If a prosecutor believes that a lawyer has not communicated a plea agreement offer to the defendant, the prosecutor nevertheless may still not contact the defendant without the lawyer’s consent. The prosecutor should consider advising the disciplinary authorities that the lawyer may not be fulfilling the ethical obligation to pass along all pertinent information to the lawyer's client. LEO 1323.

4. A lawyer who is unsuccessful in having opposing counsel return telephone calls may not leave a message on the opposing party's voice mail. LEO 1525

5. A lawyer may communicate directly with a former employee of an adverse party unless the lawyer knows that the former employee is represented by counsel. A corporation's lawyer may not simply advise a former employee that the lawyer is representing the former employee individually and direct the former employee not to speak with opposing counsel. Former employees have the right to choose their own counsel, and until they have done so the corporation's lawyer must treat them as unrepresented parties with potentially adverse interests (and thus may only advise them to secure counsel). [Rule 3.4(g) allows a lawyer to request that former employees of a corporate client "refrain from voluntarily giving relevant information to another party" under certain circumstances.] LEO 1589

D. Contractually Required Notices. Contractually-required notices between a landlord and a tenant are permissible even if the parties are represented by lawyers, although courtesy would demand that a copy of the notice be sent to the recipient's lawyer. LEO 1375

E. Lawyer May Not Instruct Client To Speak To Opposing Party. A lawyer may not instruct a client to communicate with an adverse party without obtaining the consent of the adverse party's lawyer. LEO 233 and LEO 1755

F. Pro Se Lawyers Bound By Same Prohibitions But Not Lawyers Represented By Counsel. Even lawyers representing themselves may not contact an opponent who is represented by another lawyer. LEO 521 However, a lawyer who is a litigant (but not proceeding pro se) may directly contact the adversary as he is not acting in his capacity as a lawyer. LEO 771

G. A Lawyer May Contact an Opposing Party Unless a Lawyer Has Knowledge the Party is Represented by Counsel. A personal injury plaintiff's lawyer may deal directly with the adversary's insurance company and the lawyer's investigator may directly contact the adversary and witnesses unless the lawyer knows that the adversary is represented by counsel. LEO 550

H. Contacts When Matter Complete. A lawyer may contact an opposing party when a matter is complete; however, it is important that the lawyer be certain the matter is in fact complete.

1. After trial and before the time for appeal has expired, a lawyer may not send an adversary a letter, if the adversary was represented during the trial, even though no appeal has been filed and the adversary's lawyer has not indicated that an appeal will be filed. LEO 963

2. In a child custody matter, even after the entry of a final decree, a lawyer for one parent may not directly communicate with the other parent absent that parent's lawyer's consent, because final decrees in child custody cases do not normally end the matter. In this situation a lawyer may write the other party for the sole purpose of determining if the party is represented by a lawyer. LEO 1389 While the LEO dealt with a litigation context, its holding should apply in non-litigation contexts as well.

3. Even if a lawyer representing the company owner and a driver in a personal injury case (with limited insurance coverage) refuses to acknowledge that the lawyer has advised the clients of their right to separate counsel, the plaintiff's lawyer may not give such advice to the defendants -- either by mail or in a defendant's deposition in the presence of the defendant's lawyer (absent advance consent of the defendants' lawyer). LEO 1752.

4. There is a presumption that the non-suiting of a case does not serve to terminate the representation, because suits are often re-filed. LEO 1709.

XII. DEALING WITH UNREPRESENTED PARTIES

A. RULE 4.3 Dealing With Unrepresented Persons.

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

(b) A lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such

person are or have a reasonable possibility of being in conflict with the interest of the client.

B. *Comments to Rule 4.3*.

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel.

C. A Must Make Third Parties Aware that Third Parties Understand that Lawyer's Role.

1. A lawyer may communicate with an adverse witness as long as the lawyer discloses the lawyer's adversarial role. LEO 1281

2. A plaintiff's lawyer may not advise a potential tort defendant that he will be responsible for costs and that his credit could be impaired if he does not pay the tort claim. LEO 494

3. A lawyer may engage in settlement negotiations with lay adjusters. LEO 396

4. 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

5. A lawyer for a buyer in a real estate transaction asked that the seller execute a power of attorney authorizing the lawyer to sign necessary documents. Such a request would be proper only if the seller was unrepresented only if there was full disclosure of the lawyer's adversarial role and the seller's right to hire separate counsel. LEO 1401

6. A lawyer may obtain an endorsement on a consent order from an unrepresented party in a divorce matter as long as the lawyer advises the party to secure counsel and that the lawyer represents a party with adverse interests. LEO 890

D. No Advice To Unrepresented Parties Other Than To Secure Counsel.

1. A lawyer representing an executor-beneficiary need not advise another beneficiary whose interests "potentially" conflict with those of the executor-beneficiary to hire another lawyer, but the executor has a fiduciary duty to advise the other beneficiary to hire another lawyer. LEO 260

2. A lawyer representing a lender who sends documents to the borrower for signature should advise the borrower that the lawyer is representing the lender. Because the lawyer should not give any legal advice to non-clients, the lawyer is not required to advise the borrower of the opportunity to purchase title insurance. LEO 1436

3. In a wrongful death action, a lawyer representing a defendant may contact the decedent's purported relatives ex parte if they are not represented by counsel. The defendant's lawyer may not give any advice "other than the advice to secure counsel," and "may not state or imply that he is disinterested in the matter." LEO 1547

4. However, a defense lawyer may advise an unrepresented deposition witness that the witness is not required to answer a particular question. LEO 1192

E. Preparation of Documents and Assistance To Unrepresented Parties.

1. A state highway department lawyer may prepare documents a private landowner may sign to sell land to the state as long as the lawyer identifies the lawyer's role and invites the landowner to hire a separate lawyer to review the documents. LEO 228

2. A real estate lawyer representing a seller may prepare a deed and deed of trust as long as the lawyer explains the lawyer's role to the buyer. LEO 238

3. Under the Rules, a lawyer may assist a pro se litigant in preparing pleadings; however, such assistance establishes an attorney-client relationship. The lawyer's help may be required to be revealed under the rules of some courts, and the failure to make such disclosure would be impermissible and violate the 3.4(d). LEO 1127

4. An insurance carrier's lawyer may prepare settlement documents to be executed by a decedent's personal representative, but must include with

the papers a description of the nature of the lawyer's work and the fact that the lawyer had advised the unrepresented personal representative to seek independent counsel. LEO 1344

5. A lawyer may prepare the acceptance of service of process notice for an adverse party as long as the document is limited to a simple administrative matter. LEO 644.

XIII. **RESPECT FOR THE RIGHTS OF THIRD PERSONS**.

A. **RULE 4.4 Respect For Rights Of Third Persons**

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

B. *Comments to Rule 4.4*.

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons.

C. Lawyer's Generally Prohibited From Contacting Jury Members. Lawyers are prohibited from contacting jury members after a verdict is rendered if the purpose is merely to harass or embarrass the juror or to influence his action in future jury service. Such prohibited contacts would include a lawyer writing letters to members of a jury expressing his or her thanks for the manner in which they completed their service since such communications would create at least the appearance of an effort to influence a juror's actions in future jury service. However, if there is an allegation that a jury rendered a verdict contrary to the vast preponderance of the evidence. an attorney may contact and question individual jurors to determine if extraneous factors were considered in reaching their verdict. LEO 1549.

D. Even When Contacting Permissible Subject Matter May Be Limited. It is permissible for a plaintiff's attorney to contact a former employee of a defendant corporation provided the former employee is not represented, even if the corporate matter is still pending. However, since Rule 4.4 prohibits an attorney from obtaining evidence in a manner that violates the rights of a third party, it would be impermissible for the lawyer to inquire about advice given by

corporate counsel since the corporation has a right to confidentiality for the constituent/attorney communications involving the former employee. LEO 1749.