VaCLE Ethics Update 2015: Hot Topics in Legal Ethics

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**1. Virginia State Bar Establishes Study Committee for the Future of Law Practice.** (see also attached article)

VSB President Kevin Martingale appointed a study committee to investigate rapidly changing developments in the practice of law, including developments in technology, increased competition from non-lawyer online legal service providers, the commoditization and globalization of the practice of law, alternate business structures for law firms including non-lawyer ownership of professional service firms, licensed limited legal technicians (LLLTs) and legal document preparers, "lawyer incubator" opportunities for newly graduated lawyers (a form of mentorship).

An area in which the Committee is currently focused is alternative business structures (ABS) in which lawyers and non-lawyers would work together in the same firm. For example, in the District of Columbia, non-lawyers are permitted to hold a non-controlling ownership interest in the firm, but the services provided by the non-lawyer members must be related to and in support of the firm's delivery of legal services. *See* D.C. Rule 5.4. In Virginia, this would require amendments to Rule 5.4 of the Rules of Professional Conduct prohibiting non-lawyer ownership of a law firm and fee-sharing with non-lawyers.[1] To preserve the core values of the legal profession (competence, confidentiality, conflict of interest avoidance and independence of

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1 Va. Rule 5.4(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

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

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

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

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

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

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

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

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

(2) a nonlawyer is a corporate director or officer thereof, except as permitted by law; or

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

professional judgment) a regulatory frame work for ABS has been developed in countries such as Australia and the U.K. in which lawyers are accountable for the conduct of non-lawyer members and the professional regulatory authorities are empowered to regulate not only the individual lawyers but also the professional services firm. Under Rule 5.3, lawyers have an obligation to take steps to ensure that the conduct of non-lawyers they use in practicing law conforms to the lawyer's own professional obligations. The Standing Committee on Legal Ethics addressed this issue at length in LEO 1850 (2010) which addresses "outsourcing" legal services to third parties including non-lawyer service providers. http://www.vsb.org/docs/LEO/1850.pdf

For more detailed information on what the FLP Committee is studying, see the attached article.

**2. Proposed Amendments to Rules 1.1 (Competence) and Rule 1.6 (Confidentiality) in light of Advances in Technology Relevant to the Practice of Law.**

The VSB has filed a petition with the Supreme Court of Virginia to amend Comment 6 to Rule 1.1 (competence) proposing that a nine-word phrase be added to that comment:

> To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

As of this writing, 11 states have adopted a rule that to be competent, lawyers must keep abreast of the benefits and risks associated with technology relevant to their practice. *See* Robert J. Ambrogi, *Law Sites* Blog, "11 States Have Adopted Ethical Duty of Technology Competence," posted March 16, 2015 at http://www.lawsitesblog.com/2015/03/11-states-have-adopted-ethical-duty-of-technology-competence.html

The VSB has also petitioned the Court to amend Rule 1.6 by adding a new paragraph (d):

> (d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information protected under this Rule.

To accompany this rule amendment, the VSB has also asked the Court to approve two new comments to Rule 1.6:

> [19] Paragraph (d) requires a lawyer to act reasonably to safeguard information protected under this Rule against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, confidential information does not constitute a violation of this Rule if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the

> reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the employment or engagement of persons competent with technology, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).
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> 19[a] Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other laws, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of this Rule.

These proposals have stirred criticism and debate about whether and to what extent lawyers should be required, under the Rules of Professional Conduct, to be informed about and use relevant technology in their law practices. Opposition to the proposed amendments is substantial as evidenced by the fact that they were approved by a narrow majority vote of 36 to 23 by the Council of the Virginia State Bar on February 28, 2015. Some critics perceive the proposed rule as too lacking in specificity to give guidance. Even so, the VSB's petition points to 16 states that have adopted language identical to ABA Model Rule 1.6(c) which is also the same language in the VSB's proposed paragraph (d). See also ABA Chart at: [http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chron_adoption_e_20_20_amendments.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chron_adoption_e_20_20_amendments.authcheckdam.pdf)

In today's law practice, requiring electronic security for the storage of a client's sensitive information or the security of an attorney-client communication is hardly a far-fetched or ill-conceived concept. Already, some state and federal laws mandate security measures when a person's personal identifying information, medical records or financial information is communicated over the Internet. A new body of law is emerging as states have begun to impose confidentiality obligations directly on all persons who maintain personal data on portable electronic devices. For example, as of January 1, 2009, all companies that own, license, store, or maintain personal information (name combined with Social Security number, driver's license number, and financial or credit card number) on any resident of Massachusetts must take measures to ensure that the information is not subject to unauthorized access, disclosure, or misuse.[2] Encryption will be required for any portable device, including laptops, flash drives, Blackberries, cell phones, and (to the extent feasible) information transmitted through wireless devices or over the Internet. Among the requirements imposed by the regulations are designating a security officer, identifying the portable devices subject to the rule, conducting risk assessments, documenting the security program, monitoring firewalls and passwords, and policing contracts with third-party service providers. Similarly, as of October 1, 2008, a statute requires encryption by those doing business in Nevada of all personal information leaving a company's computers to be transmitted over electronic networks.[3]

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2 201 C.M.R. § 17.00, promulgated under Massachusetts' Security Breaches Act, M.G.L. ch. 93H.

Granted, these are legal obligations not ethical mandates but to the extent that they begin to set a state or federal standard for the confidentiality of *third party* information, their impact on lawyers' duties with respect to *client* information should be obvious. Why should the legal ethics rules permit a lower level of protection for our client's confidential information than the protection accorded non-clients?

The lawyer's duty of confidentiality does more than prohibit intentional publication of confidential information, but it requires reasonable steps to prevent inadvertent disclosure. Former DR 4-101 of the Code of Professional Responsibility required that a lawyer shall not *knowingly* reveal a confidence or secret of a client. That rule was replaced when Virginia adopted Rule 1.6 which requires that a lawyer *not reveal information* that is protected by the attorney-client privilege 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. Rule 1.6(a). Thus, the scienter requirement under the old Code has been removed. As the comments to ABA Model Rule state:

> [16] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.
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> [17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Although these comments were adopted and have been part of the ABA Model Rules since 2002, after they were proposed by the Ethics 2000 Commission, Virginia's version of Rule 1.6 does not include them. In fact, Virginia's Rule 1.6 and the 18 comments which follow the rule *are completely silent on confidentiality and the use of technology*. This is remarkable given the pervasive use of electronic devices and communications in the practice of law. However, the ABA and most other state bars have either amended their rules of professional conduct or issued ethics advisory opinions to address confidentiality issues that arise out of lawyers' use of technology, including, to name but a few: (1) transmission and use of inadvertently disclosed privileged documents;[4] (2) the duty to "scrub" metadata when transmitting electronically created

3 Nev. R. Stat. § 597.970*; cf.* Canada's Personal Information Protection and Electronic Documents Act (2000 c.5) (requiring accountability for personal information and providing for damages for breaches).

documents;[5] and (3) communications between lawyer and client when the latter is using his or her employer's computer.[6]

Obviously, the general public, including lawyers, do not possess skills and expertise in technology and Internet security. Although the proposed rule amendments do not contemplate that attorneys must develop a mastery of the security features and deficiencies of each technology available, the duties of confidentiality and competence that attorneys owe to their clients do require a basic understanding of the electronic protections afforded by the technology they use in their practice.[7] If the attorney lacks the necessary competence to assess the security of the technology, he or she can and should seek additional information or consult with someone who possesses the necessary knowledge, such as an information technology consultant. Requiring lawyers to use reasonable care to safeguard information protected by Virginia Rule 1.6, is not overreaching nor would it impose a financial burden on solo or small firm lawyers as an operating cost vis-à-vis other existing overhead expenses that lawyers incur in their practices, such as physical security, law office management software, banking and recordkeeping functions, photocopying, etc. Many of the security measures are built into the operating systems and software lawyers use and need only be enabled. Other security precautions do not cost any money but should obviously be implemented. No lawyer's or law firm's laptop computer should be able to be opened or used without a strong password, which should never be written down on the computer or in the computer case. A strong password system has several characteristics, generally twelve or 16 characters, mixing capital letters, lower case letters, and numbers, changed every 60 or 90 days. Automatic logons should never be activated, and should be disabled if they have been activated. Automatic logoffs, which require reinsertion of a password after a period of inactivity, should be used.

Increasingly, lawyers are turning to portable devices for communication and storage and security measures for flash drives and portable external hard drives cannot be ignored. The risk that these devices may be stolen, lost or misplaced is considerably high. A 320 gigabyte drive can store over 20 million pages of Word documents, so one of these devices can literally contain an entire law firm's files. Many of these products can be purchased with encryption systems already built

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4 ABA Formal Op. 05-437; D.C. Bar Ass'n Op. 256.

5 ABA Formal Op. 06-442 and Md. Bar Ass'n Op. 2007-09, discussing sending lawyer's duty to "scrub" metadata to avoid inadvertent disclosure of confidential information.

6 ABA Formal Op. 11-459 (discussing duty to warn client regarding risk of interception and loss of confidentiality if using employer's computer).

7 *See* State Bar of Arizona, Formal Op. 05-04, which addressed what lawyers must do to ensure that computers, through which Internet connections are available and to which connection can be made over the Internet, are secure from attack or from inadvertent disclosure of confidences, concluding that an attorney must take reasonable precautions with regard to electronically stored communications among a "panoply" of available measures, including firewalls, security software against destructive intrusions (viruses and "worms") and against "spyware" (the more malicious intrusions allowing outsiders access to computer files), password systems, and encryption systems. *See* New Jersey Supreme Court Advisory Committee on Professional Ethics, *Electronic Storage and Access of Client Files*, NJ Eth. Op. 701, April 10, 2006 (storing client information to be accessed by the lawyer from "any location in the world" requires reasonable care to ensure that unauthorized persons do not have similar access).

in. It is hard to argue that encrypting such a device is not mandatory, much less prudent, in discharging a lawyer's duty to ensure that confidential client documents do not fall into the wrong hands.

One of the principal objections to the proposed rule amendments, and a source of frustration for some, is the perceived lack of specificity as to what actions are or are not considered "reasonable" efforts to safeguard clients' confidential information. Guidance to lawyers by professional regulatory authorities regarding the risks and benefits associated with technology that lawyers use or should use in their practice has been outpaced by the rapid changes in those technologies. Attempting to write rules of conduct in regard to specific technologies would be pointless as the rule could be obsolete by the time such a new rule were adopted or shortly thereafter. The best approach, in the bar's view, is to apply a more general duty to use reasonable care that is flexible, recognizing that a "technology-by-technology" approach to lawyer regulation is neither practical nor helpful.

Nevertheless, a lawyer can be expected and must use reasonable care to protect a client's confidential information and consequently breaches his ethical duty to a client if he fails to employ generally accepted or recognized security measures to protect confidential communications with a client or to protect a client's confidential information.
For example, suppose an attorney takes his laptop computer to a local coffee shop and uses a public wireless Internet connection to conduct legal research on a matter and emails a client regarding sensitive matters. He also takes the laptop computer home to conduct the research and emails a client from his wireless unsecured network at home. The Committee's own research—including consulting with experts in the field of Internet security—leads to its conclusion that without appropriate safeguards such as firewalls, secure username/password combinations, and encryption, data transmitted wirelessly can be intercepted and read with increasing ease. Some security risks for public wireless networks become obvious and are common knowledge. For example, when a user accesses an open public wireless network, the user is typically alerted that the communications are not secure. A lawyer who uses an open unsecured public network for confidential communications with a client in the face of such a warning may not be acting reasonably.

**3. Rule 5.8 and the Duty of Notification When a Lawyer Leaves A Law Firm**

The Supreme Court of Virginia has adopted a new rule requiring a departing lawyer and/or his or her firm to notify clients of the lawyer's departure and the client's options for continuation of the representation. Because of the fact that lawyers are ethically required to keep clients reasonably informed in regard to the handling of their legal matters, the frequency with which lawyer departure issues are raised on the Ethics Hotline, and the acrimony and disagreement that often accompanies a lawyer departure or firm dissolution, the Ethics Committee recommended, and the Supreme Court of Virginia has adopted, a new Rule of Professional Conduct that explicitly dictates how and under what circumstances clients must be notified. The Supreme Court adopted Rule 5.8 (Procedures for Notification to Client When a Lawyer Leaves a Law Firm or When a Law Firm Dissolves) on February 27, 2015, but the new rule does not go into effect until May 1, 2015.

Notice must be given only to those clients on whose matters the departing lawyer has been primarily responsible. No communications about the lawyer's departure may be made until the departing lawyer and the firm have first conferred, or attempted to confer, in order to reach an agreement about client notification. If an agreement cannot be reached, either the departing lawyer or the firm may communicate unilaterally with the affected clients about the lawyer's departure and offer the client the choice of: (1) migrating with the departing lawyer; (2) choosing another lawyer in the firm to continue the representation; or (3) choosing another lawyer other than the departing lawyer or the firm.

Virginia's new Rule 5.8 is based on Florida RPC 4-5.8 and is not derived from an ABA Model Rule of Professional Conduct. To date, Virginia and Florida are the only states that have adopted a rule of professional conduct on lawyer departure notification to clients. Other state bars, including Virginia, have addressed the issue through advisory legal ethics opinions.[8] Rule 5.8 adopts guidance from Virginia legal ethics opinions 1332,[9] 1506 and 1822[10] on the departing lawyer's and firm's obligations, but expresses more concrete steps to follow. The new rule does not change the Committee's interpretation of a lawyer's obligations in these circumstances, but it does make clear that these are now requirements, not suggestions, and establishes default rules for situations where the lawyer and firm cannot agree on how to proceed, or where the client does not respond to the required notification. LEO 1506 concluded that Rule 1.4 of the Virginia Rules of Professional Conduct *required* the departing lawyer and her firm to communicate with the affected clients. If the departing lawyer had primary responsibility for a client's matter, that client should be given timely notice of the lawyer's departure and advised of the options from which the client may choose.

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8 Ky. Bar Ass'n Op. 424 (2005)(discussing the duty to notify and that joint notification is preferable but not always practical); Philadelphia Bar Ass'n Prof, Guidance Comm. and Pa. Bar Ass'n Comm. on Legal Ethics and Prof. Resp., Joint Formal Op. 2007-300(reaffirming earlier conclusion that the departing lawyer and the firm each bear an obligation to notify clients of departure and "if one fails or refuses to do so, the other one must."). *See also* ABA Formal Op. 99-414 (1999) (taking the position that a lawyer leaving a law firm for another is under an ethical obligation, along with responsible members of the firm who remain, to notify clients in whose matters the departing lawyer has played a principal role, that he or she is leaving the firm.)

9 LEO 1332 recommends that the lawyer and firm send a joint letter that:

(1) identifies the withdrawing attorneys;
(2) identifies the field in which the withdrawing attorneys will be practicing law, gives their addresses and telephone numbers;
(3) provides information as to whether the former firm will continue to handle similar legal matters, and;
(4) explains who will be handling ongoing legal work during the transition.

10 LEO 1822 reiterated LEO 1322's advice and adds that:
1) the notice should be limited to clients whose active matters the lawyer has direct professional responsibility at the time of the notice (*i.e*., the current clients);
2) the departing lawyer should not urge the client to sever its relationship with the firm, but may indicate the lawyer's willingness and ability to continue her responsibility for the matters upon which she currently is working;
3) the departing attorney must make clear that the client has the ultimate right to decide who will complete or continue the matters; and
4) the departing lawyer must not disparage the lawyer's former firm.

In short, Rule 5.8 is intended to protect the affected clients by prohibiting unilateral contacts with clients prior to the announcement of a departure or dissolution, providing an opportunity for the lawyers to "meet and confer," and requiring notice to the affected clients of their right to choose who continues the representation.

The new rule also adopts a default rule in the event a client fails to respond to a notification letter:

> In the event that a client of a departing lawyer fails to advise the lawyer and law firm of the client's intention with regard to who is to provide future legal services, the client shall be deemed a client of the law firm until the client advises otherwise or until the law firm terminates the engagement in writing.[11]
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> In the event that a client of a dissolving law firm fails to advise the lawyers of the client's intention with regard to who is to provide future legal services, the client shall be deemed to remain a client of the lawyer who is primarily responsible for the legal services to the client on behalf of the firm until the client advises otherwise.[12]

There are, of course, numerous business and legal issues that arise when a lawyer announces his or her intent to leave a firm. Rule 5.8 does not resolve those issues, but rather focuses solely upon the lawyers' duty of communication with the affected clients when a lawyer announces his or her departure from the firm. For example, the rule does not address disputes between the departing lawyer and the firm over the division of fees and expenses on matters that the departing lawyer will be taking with her.

Comment [1] to Rule 5.8 explains:

> Upon the departure of a lawyer or the dissolution of the law firm, the client is entitled to notice that clearly provides the contact information for the departing lawyer and information about the ability and willingness of the lawyer and/or firm to continue the representation, subject to Rule 1.16.

Comment [2] provides:

> If continued representation by the departing lawyer and/or by the law firm is not possible, the communication shall clearly state that fact and advise the client of the remaining options for continued representation, including the client's right to choose other lawyers or law firms.

For example, if the departing lawyer is court-appointed in a criminal case, he or she will continue the representation of that client unless permitted to withdraw or replaced by the court; so in those

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11 Rule 5.8 (d).

12 Rule 5.8 (e).

situations, the notification letter should inform the client of that fact. There may be other situations as well where the client's options or right to select counsel may be restricted; for example, in cases where an insured has contractually agreed to allow an insurer to appoint counsel.

Depending on the client's election, the departing lawyer or another lawyer in the law firm may have a duty to notify the court if they have a client in litigation and, if counsel of record before a court, may be required to file a motion to withdraw or a motion for substitution of counsel if their representation of that client has been terminated. *See* Comment 5 to Rule 5.8 *citing* Rule 1.16(c). While Rule 5.8 reinforces the client's right to choose counsel, such choice may implicate obligations, including a requirement to pay fees for services previously rendered and costs expended in connection with the representation as well as a reasonable fee for delivering a copy of the client's file. *See* Comment [4] to Rule 5.8 *citing* Rule 1.16(e).

**4. Rule 1.10—Imputing Conflicts of Interest**

Va. Rule 1.10 (a) states: While lawyers are associated in a firm, none of them shall *knowingly* represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.6, 1.7, 1.9, or 2.10(e). (emphasis added). I have always read this rule to mean that if one lawyer in a law firm would have a conflict of interest in undertaking representation of a new client, no other lawyer in the law may do so. Further, I always thought that lawyers had an ethical duty to check for conflicts before undertaking representation of a new client. Certainly the ABA Model Rules support the view that checking for conflicts before undertaking representation is an ethical duty. The ABA's Standing Committee on Ethics and Professional Responsibility stated in ABA Formal Op. 09-455 that:

> When a lawyer moves between law firms, the moving lawyer and the new firm each have an obligation to protect their respective clients and former clients against harm from conflicts of interest. A moving lawyer whose current clients may wish to become clients of the new firm must determine whether the new firm would have disqualifying conflicts of interest in representing those clients. The prospective new firm has a corresponding duty to determine the conflicts in its current representations that could arise if the moving lawyer actually joins the firm. Comment [3] to Rule 1.7 advises lawyers to adopt reasonable procedures, appropriate for the size and type of firm and practice, "to determine in both litigation and non-litigation matters the persons and issues involved" to ascertain whether proposed new matters are permitted under the conflicts rules. Comment [2] to Rule 5.1(a) includes policies and procedures designed to "detect and resolve" conflicts of interest among those measures that law firm managers must establish to give reasonable assurance that all lawyers in the firm conform to the Rules.

The *Restatement (3d) of the Law Governing Lawyers,* §121, cmt. g states: "[f]or purposes of identifying conflicts of interest, a lawyer should have reasonable procedures, appropriate for the size and type of firm and practice, to detect conflicts of interest, including procedures to

determine in both litigation and nonlitigation matters the parties and interests involved in each representation."

Indeed, Comment [3] to Va. Rule 1.7 states: "[t]he lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the parties and issues involved and to determine whether there are actual or potential conflicts of interest."

Thus, while a conflicts check is so fundamentally important to avoid conflicts of interest, the Virginia rules only recommend but do not require lawyers to screen for conflicts before undertaking new representation. Further, unless Lawyer B in a law firm has *actual knowledge that another lawyer in the firm has a conflict*, it is not improper for Lawyer B to undertake representation of a new client adverse to another firm client. This is not acceptable. This did not seem even possible until the Supreme Court of Virginia decided *Northam v. Virginia State Bar*, 285 Va. 429, 737 S.E.2d 905 (2013). In that case, a wife seeking a divorce visited a law firm for the purpose of hiring a specific attorney in the firm, Mr. Lewis. An appointment was made by the receptionist for the wife to meet with Mr. Lewis for an initial interview. Two days later, the husband contacted another lawyer in the firm, Mr. Northam, seeking representation for a "domestic situation." The wife met with Mr. Lewis a week following her initial visit to the firm and provided Lewis with confidential information regarding her situation and Lewis took notes during the interview. At some point Lewis asked the wife if she knew whether her husband had retained a lawyer. The wife said "yes," indicating that he had retained a lawyer named "Northam something." At that point Lewis stopped taking notes and terminated the interview. The following day, Lewis met with his partner, Northam, advising Northam that he had met with the wife, saying "we have a problem." Following this meeting, the wife was notified that Mr. Lewis would not be representing her and the wife engaged another lawyer. Northam continued his representation of the husband in spite of the fact that Northam knew that his partner had met with the wife. Northam claimed that Lewis did not share, and Northam did not know. what information the wife imparted to Lewis in the interview.

The wife filed a complaint with the Virginia State Bar. Northam appealed a public admonition imposed by a district committee to the Disciplinary Board, which affirmed the public admonition on a finding that Northam had violated Rule 1.10 of the Virginia Rules of Professional Conduct. On appeal to the Supreme Court of Virginia, the judgment of the Disciplinary Board was reversed and final judgment was entered in favor of Northam, because there was no finding made by the Disciplinary Board that Northam had *actual knowledge* that Lewis had a conflict.

Northam did not dispute that his partner, Lewis, could not undertake representation of the husband having already met and interviewed the wife. But Northam argued that the Board erred in imputing Lewis's conflict without evidence to support the conclusion that Northam *knew* that Lewis had a conflict.

The Court agreed with Northam, stating that Rule 1.10 was not a "strict liability" rule but by the rule's own language it required that Northam act "knowingly."

The holding in *Northam v. Virginia State Bar* teaches that Rule 1.10 does not operate to impute a conflict unless the lawyers in a firm *knowingly* undertake representation of a client any other lawyer in the firm could not represent because of a conflict under 1.6, 1.7, 1.9, or 2.10(e). But then the question becomes "how does a lawyer know that another lawyer in the firm has conflict? Stated differently, shouldn't Northam have known that he had a conflict if the receptionist or firm had recorded that fact that the wife was scheduled to meet with Lewis about getting a divorce? When a lawyer agrees to meet with a prospective client shouldn't the lawyer or the firm be required to make a record or note of that event, indicating at the very least the name of the prospective client and their purpose for making an appointment? Otherwise, how would other lawyers in the firm know if they may have a conflict when contacted by the adverse party? If Northam had agreed to represent the husband doesn't he have an obligation to see that a record is made of that new representation, so that other partners in the firm are on notice and do not undertake representation of the opposing party as Mr. Lewis did?

The Ethics Committee proposed and released for public comment a proposed amendment to Rule 1.10 which addresses imputation of conflicts. After receiving comments, the EC voted to submit the proposed amendments to VSB Council in June 2014 for approval. This proposed rule was approved by VSB Council in June 2014 and is pending review by the Supreme Court of Virginia. Here is the proposed amendment:

Rule 1.10 Imputed Disqualification: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when *the lawyer knows or reasonably should know that* any one of them practicing alone would be prohibited from doing so by Rules 1.6, 1.7, 1.9, or 2.10(e).

The Committee proposed the addition of this new comment to help explain the proposed rule change:

[2a] A lawyer or firm should maintain and use an appropriate system for detecting conflicts of interest. The failure to maintain a system for identifying conflicts or to use that system when making a decision to undertake employment in a particular matter may be deemed a violation of Rule 1.10(a) if proper use of a system would have identified the conflict.

Note that the proposed amendment does not require a lawyer to maintain or use a system for detecting conflicts. It only states that the failure to do so may be a violation of Rule 1.10 if the conflict could have been avoided if proper use of the system would have identified the conflict.

Imagine how a large firm with offices in multiple jurisdictions or countries would operate if they did not maintain and use a centralized system for checking conflicts? Under the current rule, it would be too easy for a lawyer to bypass a conflicts check when undertaking representation of a new client, and then disavow actual knowledge that another lawyer in the firm is representing another client whose interests are directly adverse. Conducting a conflicts check before undertaking an interview of a prospective client is a fundamental well-accepted standard of practice, ministerial in nature, and can be done quickly and effectively with modern technology.

Requiring a conflicts check before undertaking representation of a new client is not a burdensome professional regulation.

As one commentator notes: "No lawyer should be able to escape the requirement of avoiding conflicts by saying "well, I just didn't track the clients/potential clients that I met with." Not only can clients be damaged by such a haphazard practice, but the public's confidence in the legal profession is undermined if lawyers and law firms are permitted to practice with no means for checking conflicts.

**5. LEO 1879 –Application of Rule 3.8 to prosecutors in administrative hearings.**

In this final opinion issued January 15, 2015, an administrative agency lawyer prosecuting a agency regulation violation questions whether there is probable cause to prosecute the case, even though the agency's board has found probable cause. The question is whether the administrative lawyer prosecuting the case is barred from proceeding further by Rule 3.8(a) which states:

> A lawyer engaged in a prosecutorial function shall:
> (a) not file or maintain a charge that the prosecutor knows is not supported by probable cause

The committee concludes that "a lawyer engaged in a prosecutorial function" is restricted to lawyers that prosecute a criminal case, and not a lawyer prosecuting a matter in a civil or administrative proceeding. As a result, all of the paragraphs in Rule 3.8 are limited in application to *criminal prosecutions*.

The Committee clarifies that Rule 3.1 may still apply, even if Rule 3.8 does not, and makes it improper for the prosecutor in the administrative proceeding to pursue the matter further if doing so would be frivolous, as there is no restriction on the type of proceeding to which Rule 3.1 applies.

This opinion should be of some interest to bar counsel and attorneys representing Respondent attorneys in disciplinary proceedings which are administrative in nature. Although Rule 3.8 (d)'s requirement to turn over exculpatory evidence would not apply to bar counsel prosecuting a complaint of misconduct, bar counsel is subject to another standing rule that requires disclosure of exculpatory evidence:

Rule 13-11(B)(3) states:

> Bar Counsel shall make a timely disclosure to the Respondent of all known evidence that tends to negate the Misconduct of the Respondent or mitigate its severity or which, upon a finding of Misconduct, would tend to support imposition of a lesser sanction than might be otherwise imposed.

A recent issue that bar counsel faces is how bar counsel can comply with the above rule if the exculpatory information is confidential under Rule 13-30. For example, what if the exculpatory information is a private disciplinary record of an attorney bar counsel plans to call as a witness to

testify against the respondent? That attorney witness is entitled to the confidentiality protection under Rule 13-30. If bar counsel discloses that confidential information to Respondent, bar counsel has breached the confidentiality rule under Rule 13-30. If bar counsel withholds the confidential information in compliance with Rule 13-30, bar counsel may be breaching Rule 13-11(B)(3) by failing to turn over exculpatory evidence to the Respondent.

This places bar counsel on the horns of an ethical dilemma. A lawyer may not knowingly disregard a standing rule of a tribunal. Rule 3.4(d). Bar counsel faced with this dilemma, of course, would have to commit knowingly to a course of action that would violate one rule or the other.

An attempt to address this problem is underway. If a proposed amendment to Part 6, §IV, ¶13 is adopted, bar counsel would be required to disclose exculpatory information to the Respondent notwithstanding the confidentiality rule. At its meeting on February 28, 2015 Council of the VSB considered an amendment to Rule 13-30 of the rules of procedure governing the conduct of attorney disciplinary actions requiring bar counsel to turn over exculpatory evidence:

> M. Disclosure of Exculpatory Evidence. Bar Counsel shall comply with the duty to disclose exculpatory evidence under these rules regardless of whether the information is considered confidential under Rule 13-30. The Attorney or Complainant that is the subject of the disclosure shall be notified whenever this information is transmitted pursuant to this subparagraph unless Bar Counsel decides that giving this notice will prejudice an investigation.

At the past Council meeting, there was discussion and debate over the second sentence of the proposed rule. Council voted to send the proposal back to the Standing Committee on Lawyer Discipline, which had proposed the rule, for further study and consideration.

**6. LEO 1880—Duty to file an *Anders* Petition Following a Conviction on an Indigent Defendant's Guilty Plea.**

In this opinion, the committee addresses whether court-appointed counsel are required to file an *Anders* petition on behalf of their client following a conviction on a guilty plea, if requested to do so by their client, but counsel believes the appeal has no merit. The opinion has been published for comment but is not final.

The committee concludes that a court-appointed attorney in state court must file petitions for appeal to the Court of Appeals of Virginia and to the Supreme Court of Virginia when directed to do so by an indigent client, even when such an appeal is to a conviction entered following a guilty plea, and is deemed frivolous by the attorney. A court-appointed attorney must advise his indigent client that he has a right to appeal, even under those circumstances. A court-appointed attorney who follows the procedure set forth in the Rules of Court which embody the constitutional requirements of *Anders* and *Akbar* does not violate the ethical prohibition regarding non-meritorious claims and contentions. The committee's conclusion is based on a thorough analysis of decisional, statutory and constitutional law. Although questions of law are

beyond the Committee's purview, the Committee has to review the legal requirements under these circumstances in order opine on the lawyer's ethical obligations.

In federal court, the law is different and therefore the answer is different—defense counsel is *not* obligated to file an appeal under these circumstances. Under federal rules and case law, a defendant can waive the right to appeal, and federal appellate courts will dismiss appeals filed when the grounds for appeal fall inside the scope of such waiver. An indigent federal criminal defendant who directs his court-appointed attorney to appeal a conviction following a plea wherein the right to appeal has been waived exposes himself to potentially grave consequences: The government may attempt to treat the appeal as a breach of the defendant's promise contained in the plea agreement, seek to reopen the case and to pursue the original charges, and use facts contained in the plea agreement in a subsequent trial. See, e.g., the discussion contained in *U.S. v. Poindexter*, 492 F.3d 263 (4th Cir. 2007).

Thus, counsel in federal cases must advise clients who have done so that they have waived their right to appeal, and counsel must ensure that clients understand the consequences of directing their court-appointed counsel to file an appeal notwithstanding their waiver of the right to appeal.

**7. ABA Formal Opinion 467: Managerial and Supervisory Obligations of Prosecutors Under Rules 5.1 and 5.3 (September 8, 2014)**

Prosecutors have special duties under Model Rule 3.8 of the ABA Model Rules of Professional Conduct. They must, for example: (a) not prosecute a charge they know is not supported by probable cause; (b) make reasonable efforts to assure that the accused has been advised of his or her procedural and constitutional safeguards; and (c) make timely disclosure to the defense of exculpatory and mitigating evidence. Citing the U.S. Supreme Court's 1935 opinion in *Berger v. United States*, the ABA Standing Committee on Ethics and Professional Responsibility emphasizes that the prosecution's primary interest "is not that it shall win a case, but that justice shall be done." Prosecutors in Virginia have nearly identical obligations under Va. Rule 3.8.

ABA Formal Op. 467 acknowledges that most prosecutors follow the rules and more often exceed the requirements of the Rules of Professional Conduct. However, recent publicity in the media has drawn attention to prosecutor misconduct in criminal cases,[13] suggesting that managing lawyers in a prosecutor's office have duties under ABA MR 5.1 to better train and supervise subordinate prosecutors under their direct supervision or supervisory control. Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Under the Virginia rules, prosecutors working in a Commonwealth's Attorney's office are regarded as working in a firm or law office. According to the definitions in the Virginia Rules of Professional Conduct, "firm" or "law firm" denotes a professional entity, public or private, organized to deliver legal services, or a legal department of a corporation or other organization. http://www.vsb.org/pro-guidelines/index.php/rules/preamble/

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13 *See,e.g.*, Peter Veith, "Ex-prosecutor Facing VSB Ethics Charges," VA. LAWYERS WEEKLY (March 16, 2015) summarizing recent disciplinary actions against Commonwealth's Attorneys.

Thus senior lawyers in a Commonwealth's Attorney's office fit within that definition; and, therefore, if they have supervisory authority over subordinate lawyers and non-lawyers they must meet the requirements of Rules 5.1 and 5.3. Accordingly, managing attorneys must adopt reasonable policies and procedures to ensure that all lawyers and nonlawyers in their offices comply with the rules.

The opinion identifies some specific areas in which training and supervision are needed: extrajudicial public statements about pending criminal investigations (See Rule 3.6) and complying with *Brady* material requests (See Rule 3.8(d)).

Prosecutors with managerial authority and supervisory lawyers must make "reasonable efforts to ensure" that all lawyers and nonlawyers in their offices conform to the Rules of Professional Conduct. Prosecutors with managerial authority must adopt reasonable policies and procedures to achieve these goals. Prosecutors with direct supervisory authority must make reasonable efforts to insure that the lawyers and nonlawyers they supervise comply with the Rules. Where prosecutors have both managerial and direct supervisory authority, they may, depending on the circumstances, be required to fulfill both sets of obligations.

**8. ABA Formal Opinion 468: Selling Attorney's Role in Facilitating the Sale of a Law Practice Under Model Rule 1.17 (October 8, 2014)**

Prior to 1990, under the ABA Model Rules, a lawyer was forbidden to sell his or her law practice. The concept was that the "goodwill" of the lawyer's practice could not be sold and the clients were not "chattels" who could be transferred to the purchasing lawyer.[14] When Model Rule 1.17 was adopted, however, the ban on the sale of a law practice was lifted, provided the affected clients were given notice of the pending sale and afforded an opportunity to opt out as well as other requirements stated in the rule.[15] A second reason given for the traditional ban was that when a lawyer died, his estate could not sell the decedent's law practice as the purchasing attorney would be impermissibly sharing legal fees with a non-lawyer. Rule 5.4(a).[16] A third reason for the traditional ban was that a lawyer could not pay someone for recommending the referral of employment to a lawyer. Rule 7.2. Finally, a fourth reason was that the clients' confidential information could not be shared with another lawyer outside the firm without the clients' consent. All of the necessary rule amendments to Model Rules 5.4, 5.6 and 7.2 have been made to address these concerns, and the "opt out" provisions in Rule 1.17 address the client consent to allow confidential information to be shared with the purchasing attorney.

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14 ABA Formal Opinion 266 (June 2, 1945), stating that the "good will," or intangible going-concern value, of a lawyer's practice was not an asset that either the lawyer or the lawyer's estate could sell because "… clients are not merchandise. Lawyers are not tradesmen. They have nothing to sell but personal service. An attempt, therefore, to barter in clients, would appear to be inconsistent with the best concepts of our professional status."

15 Rule 1.17 requires that the entire practice or an entire area of practice must be sold; that the seller give written notice of the proposed sale to each client; and that the fees charged to the client shall not be increased by reason of the sale.

16 *See* n.1, *supra*.

When Virginia adopted its version of the Rules of Professional Conduct, the traditional ban on the sale of a law practice was lifted as well. Another key requirement is that the selling attorney shall "cease engaging in the private practice of law."[17] The lingering question is whether and to what extent may the seller engage in post-sale activity, i.e., continue to work on active matters for the orderly transition of the practice from seller to purchaser, if the selling attorney must "cease engaging in the private practice of law?"

In ABA Formal Op. 468 the ABA Committee concludes that:

> Lawyers retiring or withdrawing from law firms are not precluded from assisting their former colleagues in the transition of responsibility for pending matters from the retiring or withdrawing lawyer to another firm lawyer. Where appropriate, a selling lawyer or firm should be given a similar opportunity, for a reasonable period of time after the closing of the sale, to assist in the transition of active client matters.

In this opinion, the Committee looks to Comment [12] to ABA MR 1.17 as permitting the selling lawyer to engage in activity necessary to substitute the purchasing lawyer as counsel in a litigation matter. The Committee also points to Rule 1.16(d) which states that upon termination of the representation, the terminated lawyer shall take reasonable steps for the continued protection of the former client.

Neither the selling lawyer or law firm nor the purchasing lawyer or law firm may bill clients for time spent on transition activity that does not advance the representation or directly benefit the client. As the ABA Committee explains:

> The need to spend time on transition activity arises only because of the sale of a practice or area of practice. Charging clients for time spent implementing the sale, activity that would not have been undertaken but for the sale, constitutes an "increase" in the original fee arrangement between the seller and the client "by reason of the sale." Even if the hourly rate is unchanged, billing for the additional time spent on transitioning matters will necessarily increase the fee otherwise due for the representation. Thus, time spent implementing the sale may not be billed to clients.

Basically, ABA Formal Op. 468 says that a selling lawyer can assist the buyer in the transition period for a reasonable time after the official date of the sale, so long as there is no additional cost to the clients. Another option the parties might consider is having the selling attorney stay on for an additional period after the sale as a consultant to the purchasing attorney. As a consultant, the selling attorney is not "practicing law" and therefore is not violating the "cease the practice of law" requirement of Rule 1.17.[18]

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17 A lawyer selling his private practice could accept employment as a lawyer for a governmental entity.

18 Nor would the selling attorney, acting solely as a consultant, need to maintain his license in active status. LEO 1574 (1994).

Consequently, the cost or expense for time spent transitioning the practice from seller to buyer is a matter that must be negotiated between the two in the sale of the law practice, since the clients cannot be billed for such activity.

**9. Formal Opinion 466: Lawyer's Use of Social Media and Internet to Research Juror's Presence on the Internet (April 24, 2014)**

ABA Model Rule 3.5(a) prohibits a lawyer from having ex parte communications with a juror before and during trial and places restrictions on contacts after the juror is discharged. Model Rule 3.5(b) places a similar prohibition against ex parte communications with a potential juror and prohibits communications with or investigations of that juror or the juror's immediate family.

In this opinion, the ABA Ethics committee is asked whether a lawyer who represents a client in a matter that will be tried to a jury may review the jurors' or potential jurors' presence on the Internet leading up to and during trial, and, if so, what ethical obligations the lawyer might have regarding information discovered during the review? Examples of electronic social media used in the opinion include Facebook, Twitter, MySpace and LinkedIn. Depending on the privacy settings chosen by the juror, some information may be part of that person's public profile or information generally available to the public. To the extent that a lawyer investigates a juror's presence on the Internet and finds such public information, no violation of Rule 3.5 has occurred merely by the lawyer having accessed it. Passive review of a juror's website or ESM, that is available without making an access request, and of which the juror is unaware, does not violate Rule 3.5(b).

However, a lawyer may not personally, or through another, send an access request to a juror. Such an action would be viewed as an ex parte contact prohibited by Rule 3.5.

ESM platforms may have another feature in which the account holder or subscriber is notified that someone has viewed their public profile or home page. To the extent that this notification is automatically generated by a lawyer's investigation of the juror's public presence, the question is does this notification place the lawyer in violation of Rule 3.5? The ABA opinion cites a New York City Bar Association Ethics Opinion stating that the network generated notification to the juror or potential juror is an ex parte contact, albeit indirect.[19] The opinion further states the lawyer will have violated Rule 3.5 if he is aware that his visit to the juror's site or page will automatically trigger the notification. However the ABA Committee in this opinion concludes that the network generated notice to the juror is not a communication from lawyer to juror. While reaching this conclusion, the ABA Ethics Committee identifies some other important considerations. First, when the lawyer or lawyer's investigator uses an ESM platform they are required to "check off" that they agree to the terms of use and understand them. The terms of use may explain that a visit to a person's profile will result in a notice being sent. Thus, in defending a charge of violating Rule 3.5, the lawyer may face difficulty claiming that the notice sent was "inadvertent" since they had agreed and understood that this would be done. Second,

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19 Ass'n of the Bar of the City of N. Y. Comm. on Prof'l Ethics, Formal Op. 2012-2 .

Rule 4.4(a) prohibits lawyers from actions “that have no substantial purpose other than to embarrass, delay, or burden a third person . . . .” Lawyers who review juror social media should ensure that their review is purposeful and not crafted to embarrass, delay, or burden the juror or the proceeding.

Courts are increasingly warning jurors about the use of ESM during a trial. Violation of the court’s orders and instructions prohibiting jurors from communicating about the pending case using their portable electronic devices and ESM have been reported, cause delay in the proceedings and possible mistrials.

Model Rule 3.3(b) reads:

> (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures including, if necessary, disclosure to the tribunal.

Comment [12] to Rule 3.3 provides:

> Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer’s client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Therefore, if a lawyer’s investigation of a juror’s internet presence reveals criminal or fraudulent conduct by a juror related to the proceeding, the lawyer must take reasonable remedial measures including, if necessary, disclosure to the tribunal. Virginia has adopted a provision similar to MR 3.3(b). See Virginia Rule 3.3(d). However, Comment [12] to Rule 3.3 was not adopted.

## 10. Ethical and Competency Requirements for Lawyers Appointed as GALs to Protect the Litigation rights of Armed Forces Personnel under the Servicemembers Civil Relief Act.[20]

A bill was quietly introduced recently in the last 2015 session of the General Assembly that attracted little attention. Senate Bill 1357 would have amended and reenacted Va. Code §8.01-52.1 and set out specific standards necessary for counsel, serving as guardian ad litem, to

20 This topic raises issues that have yet to be considered by the VSB’s Standing Committee on Legal Ethics (“Committee”). The views expressed under this topic are solely the author’s and do not represent any position of the Committee.

exercise due diligence in representation of a service member.[21] The bill did not pass and by a vote of 5 to 8, was not reported out of the Senate Courts of Justice Committee. One of the concerns raised was whether a lawyer's competence and performance as a court-appointed GAL for a service member under the SCRA is matter that should be for the Virginia State Bar to consider instead of enacting legislative standards.

What is the Service Members Civil Relief Act?[22] The broad purpose of the SCRA is to provide for and strengthen our armed forces by protecting its members from economic and legal disadvantages while they are on active duty. In part the national defense is dependent upon our armed forces being able to perform their military duties and devote their full time and attention

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21 SB 1357 would have added a new section to Va. Code §8.01-52.1 to require:

> C. Any counsel appointed to represent a defendant pursuant to the Servicemembers Civil Relief Act shall exercise due diligence to faithfully represent the interest of the servicemember, to locate and communicate with the servicemember, to conduct an investigation of the reasonably discoverable facts in the case, to determine whether or not the servicemember has a defense to any of the allegations in the suit, and to present that information to the court.
> 1. Due diligence in locating the servicemember includes:
> a. Requesting that the plaintiff provide documents and records from its collection activities;
> b. Identifying the last known command of the servicemember, including the name and address of the commanding officer, and contacting such officer;
> c. Identifying the names and address of relatives of the servicemember if any are listed in the plaintiff's files, and contacting such persons;
> d. Determining whether the servicemember has died or has been hospitalized;
> e. Identifying the servicemember's last known residences and contacting such residences by telephone;
> f. Conducting Internet searches to locate the servicemember;
> g. Contacting the local military legal assistance office for the servicemember's service branch, providing the office with a copy of the appointment order, and requesting assistance in locating the
> servicemember; and
> h. Sending letters to the servicemember's branch of the armed services.
> 2. Due diligence in investigating reasonably available facts includes,
> a. Reviewing the court's files; and
> b. Requesting and reviewing all of the plaintiff's materials related to the transaction or interaction with the servicemember, including electronic and paper contracts, applications, correspondence, memoranda, and other documents.
> 3. Due diligence in determining whether the servicemember has a defense to the allegations includes analysis of the relevant facts and applicable law, including jurisdiction, the Virginia Consumer Protection Act (§59.1-196 et seq.), landlord and tenant law pursuant to Chapter 13 (§55-217 et seq.) of Title 55, the Virginia Residential Landlord and Tenant Act (§55-248.2 et seq.), the Uniform Commercial Code, and the Servicemembers Civil Relief Act (50 U.S.C. §501 et seq.). Counsel should also determine whether the plaintiff would be unduly prejudiced by delaying the case until the servicemember returns.
> D. Upon request by counsel appointed pursuant to the Servicemembers Civil Relief Act, the plaintiff in a civil action shall promptly deliver all discoverable electronic and print files, records, documents, and memoranda regarding the transactional basis for the suit. The plaintiff shall also deliver all documents or information concerning the location of the servicemember.
> E. Counsel appointed pursuant to the Servicemembers Civil Relief Act shall not be selected by the plaintiff or counsel for the plaintiff or have any affiliation with the plaintiff.

22 50 U.S.C. App. §§501-597b.

to defending our country, undistracted by personal legal and financial matters that may interfere with the performance of their duties. The Act suspends or provides relief to active service personnel from matters such as evictions, distress, foreclosures, lease terminations, repossessions and requires or authorizes stays/or continuances of legal proceedings. An important feature of the Act is that it provides relief from default judgments taken or sought against a service member on active duty that is unable to appear in court.[23]

Section 521 of the SCRA applies to any case where the defendant is a service member and does not enter an appearance. To obtain default judgment in a civil action, a plaintiff must file an affidavit stating, whether or not the defendant is in the military and to support that conclusion with facts or in the alternative that the plaintiff is unable to determine the military status of the defendant. The SCRA also requires court-appointed counsel to serve as GAL for the defendant-service member. The court may require that the plaintiff post a bond to protect the defendant-service member from loss or damage if the judgment is later set aside. If the court determines that there may be a defense to the action that cannot be presented without the defendant-service member; or, if after due diligence, counsel has been unable to contact the defendant-service member or determine if there is a meritorious defense, Section 521 allows for a 90-day stay.

Pursuant to Section 522, the court may enter a stay in civil cases where the service member has actual notice of the proceeding. The court must grant a stay of not less than 90 days upon proper application by the service member. The court may enter an order granting an additional stay upon the service member's request. If the court denies this request the court must appoint counsel to represent the service member in the action or proceeding.[24]

Virginia implements the SCRA via Virginia Code Section 8.01-15.2 which provides:

> § 8.01-15.2. Servicemembers Civil Relief Act; default judgment. —
>
> A. Notwithstanding the provisions of § 8.01-428, in any civil action or proceeding in which the defendant does not make an appearance, the court shall not enter a judgment by default until the plaintiff files with the court an affidavit (i) stating whether or not the defendant is in military service and showing necessary facts to support the affidavit; or (ii) if the plaintiff is unable to determine whether or not the defendant is in military service, stating that the plaintiff is unable to determine whether or not the defendant is in military service. Subject to the provisions of § 8.01-3, the Supreme Court shall prescribe the form of such affidavit, or the requirement for an affidavit may be satisfied by a written statement, declaration, verification or certificate, subscribed and certified or declared to be true under penalty of perjury. Any judgment by default entered by any court in any civil action or proceeding in violation of Article 2 of the Servicemembers Civil Relief Act (50 U.S.C. App. § 527 et seq.) may be set aside as provided by the Act. Failure to file an affidavit shall not constitute grounds to set aside an otherwise valid default judgment against a defendant who was not, at the time of service of

23 *See* §§ 521 and 522, *supra*.

24 Section 522, *supra*.

> process or entry of default judgment, a servicemember for the purposes of 50 U.S.C. App. § 502.
>
> B. Where appointment of counsel is required pursuant to 50 U.S.C. App. § 521 or 522, the court may assess attorneys' fees and costs against any party as the court deems appropriate, and shall direct in its order which of the parties to the case shall pay such fees and costs. Such fees and costs shall not be assessed against the Commonwealth unless it is the party that obtains the judgment.

In Virginia, a service member who is unable to appear in court due to military duty should qualify as a person under disability[25] and entitled to appointment of a guardian ad litem (GAL).[26]

The legal standards for a lawyer appointed to serve as GAL for a person under a disability are set out in *Ruffin v. Commonwealth*, 10 Va. App. 488, 393 S.E.2d 425 (1990). In that case, a prisoner was convicted of operating a motor vehicle after having been declared a habitual offender. He argued that the order was void because it was filed directly against him, rather than against his committee. He also argued that the order was void because his guardian ad litem did not render effective assistance, because he was not notified of the proceedings, and because the guardian did not notify the court that the defendant was dissatisfied with his representation. The Court of Appeals reversed, holding that the defendant was denied fundamental fairness by not being informed by his guardian ad litem of the date of the hearing.

The Court in *Ruffin* relied on language from Va. Code §8.01-9(A):

> A suit wherein a person under a disability is a party defendant shall not be stayed because of such disability, but the court in which the suit is pending, or the clerk thereof, shall appoint some discreet and competent attorney-at-law as guardian ad litem to such defendant, whether such defendant shall have been served with process or not; or, if no such attorney be found willing to act, the court shall appoint some other discreet and proper person as guardian ad litem. Any guardian ad litem so appointed shall not be liable for costs. *Every guardian ad litem shall faithfully represent the estate or other interest of the person under a disability for whom he is appointed, and it shall be the duty of the court to see that the interest of such defendant is so represented and protected. . . .*

(Emphasis supplied by Court). The *Ruffin* Court added:

> The duties of a guardian *ad litem* cannot be specifically spelled out as a general rule, but it is clear that the guardian has a duty to make a bona fide examination of the facts in order to properly represent the person under a disability. *See Division of Social Services v. Unknown Father*, 2 Va. App. 420, 425 n.5, 345 S.E.2d 533, 536 n.5 (1986) (guardian may be removed if he fails to faithfully represent his ward).

25 Va. Code §8.01-2(6)(e).

26 Va. Code §§8.01-9; -15.2(B).

**What are the ethical standards for a lawyer appointed as GAL for a service member under the SCRA?**

It appears that the role of the lawyer serving as a GAL under the SCRA is a limited one: to protect the interests of the defendant service member from entry of a default judgment and/or to seek a stay of a civil proceeding until the defendant service member can appear in court to protect his or her interests. But even that limited role requires certain tasks to be done in order to properly and competently protect the defendant's interests. For example, at a minimum, it would appear from cited authority that the defendant is entitled to notice of a civil action in which he or she is named as a defendant. This would require the GAL to exercise reasonable diligence to locate the service member that has been sued.

A hypothetical[27] serves to flesh out what might reasonably be expected of the court-appointed GAL, the failure of which could lead to disastrous consequences for the defendant service member:

A young service member purchased a vehicle. On the purchase and finance documents he used his soon to be ex-wife's address. Approximately three weeks later, he was shot in the head. The service member was gravely wounded and not expected to live. He survived, but was incapacitated and in hospitals for over a year. While he was in the hospital, the divorce was finalized. The service member's command and ex-wife decided to return the vehicle to the lien holder who accepted it as a voluntary repossession. No one was authorized to act on the service member's behalf. The vehicle was later sold at auction pursuant to the security interest and lien. During the collection process the lien holder was aware of the service member's injury and status. The lien holder was in contact with the service member's command and ex-wife during the period between the shooting incident, the sale, and collection actions. The lien holder mailed the notice of sale to the service member's post-divorce address. The sale resulted in a deficiency, and the lien holder proceeded to collect the deficiency filing a warrant in debt against the service member. The lien holder served the service member at the address listed on the contract. The lien holder complied with the SCRA and filed the affidavit of service with the court indicating that the defendant was a service member. This invoked the service member's rights under section 521 of the SCRA. Pursuant to the SCRA and Virginia law, a GAL was appointed for the service member. There was a 90 day stay and a new trial date was set. During the stay, the GAL sent the notice of the suit and his representation to the same address used for service of process by the lien holder. The service member did not respond. Sometime prior to trial, the ex-wife sent correspondence to the court indicating that the service member had been gravely injured, that the lien holder was aware of the injury, that the service member was in a local hospital, and that he would not be available for trial. The GAL sent a preprinted letter to the address on the warrant in debt. At trial, the GAL asserted that the defendant had not responded to his inquiry, that the commanding officer had not replied pursuant to the SCRA, and that he did not find a legal basis for a defense or a stay. The default judgment was entered and the service member's bank account

27 This hypothetical is an actual true story and was taken from a Virginia State Bar Military Law Section Newsletter article entitled DUTIES OF THE GUARDIAN AD LITEM WHEN REPRESENTING A SERVICEMEMBER written by Dwain Alexander, II, Esq., a former Chair of the VSB Military Law Section. The article can be found at http://www.vsb.org/docs/sections/military/guardianadlitems.pdf

and pay were garnished.  In this case, the service member had defenses discoverable in the court's record -from the plaintiff, from the family members and ex-wife, and in the law - that were not presented.

The hypothetical raises at least two concerns:  (1) the lawyer serving as GAL did not exercise reasonable diligence in locating or communicating with the defendant service member/defendant; and (2) the lawyer serving as GAL did not conduct a reasonable investigation sufficient to determine whether the defendant had defenses to the claim or cause of action.

In short, the lawyer appointed to serve as GAL failed to protect the interests of his ward.

Although the appointment to serve as a GAL under the SCRA may not be the "full-service" model of advocacy expected of a GAL appointed to represent a child in custody or termination proceeding, the GAL under the SCRA must still fulfill some duties imposed by statute and common law necessary to properly represent the defendant even on a limited scope basis. Critical to that proper representation is that the GAL exercise reasonable diligence to locate the service member wherever they may be stationed; communicate with and provide necessary information to the service member in regard to the pending civil proceeding; and inform the court and necessary parties regarding the service member's status, including any defenses that may reasonably be asserted, based on the GAL's investigation; and, when necessary, move to stay the proceeding.

Rule 1.2 indicates that even if the representation of a client is limited in scope, it must be done diligently and competently.  Rule 1.1 requires that a lawyer act competently when representing a client.  Rule 1.3 requires the lawyer to act with reasonable diligence in representing a client. Finally, Rule 1.4 requires the lawyer to communicate with the client and keep the client reasonably informed about matters related to the representation.

The VSB Standing Committee on Legal Ethics has made clear that lawyers must act competently and diligently when providing services to another, even if the lawyer is not carrying out a traditional legal representation of a client.