

10TH ANNUAL ETHICS PRESENTATION
OCTOBER 14, 2009
9:00 – 11:00 a.m.

Disciplinary Rules in Hard Times

Lawyers, like other licensed professionals, enjoy a certain level of protection. Only members of the bar may practice law, and the self regulating bar sets the standards for admittance. Even lawyers, though, are not immune to the realities of a nationwide economic downturn. Therefore, we will examine how to cope with some of the economic realities of today without losing your valuable license in an ethical quagmire.

1. Marketing

When work dries up, marketing is the first step most businesses take to turn things around. The legal profession, in efforts to maintain its stature, has long regulated marketing and advertising efforts. Even after the landmark case of *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), ethical rules covering lawyer marketing and advertising have placed significant restraints on marketing to protect consumers and the profession.

a. Virginia Legal Ethics Opinion (LEO) 1846, February 2, 2009¹

In local business, the Rotary Club, Chamber of Commerce and other venues play a significant role in networking. Several national and local organizations have made a business of providing networking opportunities, such as BNI International² which has local chapters around the world.

In the BNI model, professionals join a local chapter, which permits one of each "type" of professional to be a member – e.g. one lawyer, one accountant, one real estate agent, one banker, etc. If your profession is already represented, you'll have to find another chapter to join. Members pay an annual maintenance fee for the privilege of membership and are required to attend weekly meetings, enforced by economic penalties or threat of dismissal from the program for not attending.

Members are expected to refer all business to the professional in their chapter that provides that service, and are expected to produce a certain number of referrals each week.

LEO 1846's facts summarize almost exactly the BNI model. In the LEO, the ethics committee was asked whether it was permissible for lawyers to participate in such an organization, and they answered the question in the

¹ <http://www.vacle.org/opinions/1846.htm>

² <http://www.bni.com/>

negative.

Citing Va. RPC 7.3(d) and 7.2(c), which preclude lawyers from giving anything of value to another for securing employment by a client, Va. RPC 5.4(a) relating to professional independence, Va. RPC 1.7(a) regarding conflicts of interest and Va. RPC 1.6 regarding confidentiality, the committee opted that any situation in which there is a quid pro quo or fee for referral is not allowed, except with approved lawyer referral services or pre-paid legal plans.

As such, BNI and other paid networking organizations are no longer available to attorneys in Virginia.

b. Advertising the Firm: Va. RPC 7, CAN-SPAM Act and Virginia Computer Crimes Act.

In general, Virginia's rules on lawyer marketing are some of the most restrictive in the nation, and run the gambit from general prohibitions in Va. RPC 7.1 that advertising may not be false or misleading, to specific rules in Va. RPC 7.3(f) for personal injury and wrongful death cases.

- i. Advertising must not be false or misleading. Va. RPC 7.1.
- ii. Public communications must include the full name and office address of a responsible attorney. Va. RPC 7.2(e).
- iii. Electronic communications to a group must be reviewed prior to dissemination and kept for one year after the last transmittal. Va. RPC 7.2(b).
- iv. Direct mail must say "ADVERTISING MATERIAL" conspicuously and in upper case letters on the envelope. Va. RPC 7.2(d).
- v. In-Person Solicitation, by telephone or face-to-face, always prohibited in personal injury and wrongful death cases in the absence of a prior family or professional relationship with the prospective client. Va. RPC 7.3(f).
- vi. Email solicitations to **prospective clients** (not current or former clients) must say "ADVERTISING MATERIAL" in the header, and must contain opt-out instructions. VA RPC 7.2(d).

The email body must contain the attorney's full name and office address to comply with VA RPC 7.2(e) and the CAN-SPAM Act (15 U.S.C. 7701 et seq.).

All headers must be legitimate and not "forged or falsified" to comply with Virginia's Computer Crimes Act. Va. Code § 18.2-152.1 et seq.

2. Fees

Unlike most professions in which the fees charged are only constrained by what the market will bear (think investment banking), lawyers have specific rules related to the reasonableness of fees and types of fees that may be charged in different cases.

- a. In general Va. RPC 1.5(a) states that "[a] lawyer's fee shall be reasonable." The rule goes on to specify several factors that can be used to determine the reasonableness of the fee including time involved, novelty of the issues, skill level required, opportunity costs, market rates for similar services, amount in controversy and the "results obtained," the relationship with the client and the experience and reputation of the lawyers.

Va. RPC 1.5(b) doesn't require that the engagement be memorialized in writing, but only that the fee be explained to the client. However most malpractice carriers will require that the attorney provides written engagement letters or face a higher insurance premium.

Va. RPC 1.5(c) and 1.5(d) lay out the situations in which contingency fees may and may not be charged, and 1.5(e) and (f) deal with fee splitting.

- b. When the economy slows and inflation is not a major issue, some lawyers have considered reducing their rate or moving to flat rate billing. While flat rate billing in some situations is quickly becoming a trend amongst even the largest law firms, many commentators warn against cutting rates as a knee-jerk reaction to the present economy.
 - i. "Cutting to the Chase: Is it time to start chopping your rate?" ABA Journal, April 2009³
 - ii. "Citigroup GC Has No Sympathy for Law Firms Seeking Premium Fees" ABA Journal, September 28, 2009⁴.

3. Collections

Billing clients is only part of the problem when the client may be unable or unwilling to pay the lawyer her fee.

- a. Suits, Mediation and Arbitration

³ http://www.abajournal.com/magazine/cutting_to_the_chase

⁴

http://www.abajournal.com/weekly/citigroup_gc_has_no_sympathy_for_law_firms_seeking_premium_fees

Suing a client for a fee is often not worth the time, hassle, and potential damage to an attorney's reputation.

In the event of a fee dispute, Va. RPC 1.15(a)(2) states that "funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, and the portion belonging to the lawyer or law firm must be withdrawn promptly after it is due *unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.*" (emphasis added)

Rather than proceeding to litigation, at least directly, mediation and arbitration are useful approaches to settling the question of fees amicably. The Virginia State Bar offers a Fee Dispute Resolution Program (FDRP)⁵ where for a whopping fee of \$20.00 the bar will appoint a mediator or arbitrator to assist the parties. The program is only for voluntary participants, so both the attorney and client must agree to participate, and each party bears their own costs of representation.

Va. RPC 2.11 covers the duties of a lawyer acting as a mediator or arbitrator.

b. Property in lieu of fees.

Va. RPC 1.5 Official Comment 4. "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."

A lawyer receiving an interest in a venture or transaction with client needs to have the fee agreement that provides for the property interest reviewed by a third party attorney.

Va. RPC 1.8(j). "A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may: (1) acquire a lien granted by law to secure the lawyer's fee or expenses; and (2) contract with a client for a reasonable contingent fee in a civil case, unless prohibited by rule 1.5."

c. Virginia LEO 1848, April 14, 2009⁶

⁵ <http://www.vsb.org/site/public/fee-dispute-resolution-program/>

⁶ <http://www.vacle.org/opinions/1848.htm>

The best option for attorneys to avoid a collection action is to receive their fee up front and deposit it in their trust account. Some clients will balk at paying the entire fee up front, or will not have the funds available in their checking account, or their checkbook on their person at the time of the initial consultation.

Since the early 1980's, Virginia has allowed the use of credit cards as a payment method for fees and escrow account deposits for fees. *See* Virginia LEO 186-A (June 18, 1981), Virginia LEO 999 (November 13, 1987).

In LEO 1848, the question posed was whether attorneys may pass on the credit card processing fee to the client and if "chargebacks" could be made from the lawyer's escrow account. The ethics committee opined that "lawyer may pass along merchant fees associated with credit card use to the client *with disclosure and consent*" (emphasis added), but cautioned against having any sums debited by the credit card company directly from the escrow account and encouraged attorneys to have all debits made from the operating account so as to not run afoul of Va. RPC 1.15.

4. Disaster Planning

A "disaster" does not always take the form of a hurricane or earthquake. As lawyers become increasingly dependant upon technology to practice their trade, having a computer get hacked, a laptop go missing or a hard drive crash can quickly constitute a "disaster." Keeping data safe, secure and available is in many ways as important as planning for death, disability, fires and floods.

Likewise, in uncertain times, the public often turns to the trustworthy attorney for the safe keeping of their contract or Will or property, and lawyers must be aware of their duties and pitfalls of accepting items from a client.

- a. Business continuity plans, computer backups and security.
 - i. New York State Bar Association: Disaster Planning and Recovery⁷

The New York State Bar Association has a useful web site with checklists and other documents to help you prepare your law practice for all types of disasters.

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http://www.nysba.org/Content/NavigationMenu/LawPracticeManagementResources/DisasterPlanningandRecovery/Business_Continuity_.htm

- ii. "Hackers Threaten Company With Data Blackmail," National Notary Now Issue #118, March 2009⁸.

Keeping data secure is as important as keeping it available. This article speaks to the duties of notaries, which are very similar to the lawyer's duty. See "Safekeeping of Property" below.

- iii. "Zombie computers 'on the rise'", BBC News, May 6, 2009⁹.

A current virus checker, a good firewall, and other common sense measures can help protect your office computers from a data breach.

- iv. "US urges 'cyber hygiene' effort", BBC News, October 1, 2009¹⁰

October is National Cyber Security Awareness Month.

- v. Microsoft now offers free virus checking and security software for all Windows® users¹¹.

b. Safekeeping of Property

During the Civil War, many individuals, especially in states like Virginia in which battles were regularly fought, did not trust banks to keep their property and money safe. Some individuals turned to lawyers for safe keeping of their property.

While Va. RPC 1.15 largely speaks to the safekeeping of a client's money while in a trust or escrow account, the rule is titled "Safekeeping Property" and applies when, "in the course of representation a lawyer is in possession of [the client's] property." This could extend to any documents such as birth certificates, Wills, original contracts, as well as coins, jewelry, stocks and bonds, and other valuables, or even to the gun that the client used in the crime for which they seek defense counsel.

When clients ask an attorney to keep their property, the attorney may wish to decline that request, and even may go as far as declining representation. Va. RPC 1.16 covers the rules for "Declining or Terminating Representation," and makes clear that declining representation is easier than terminating, especially when the attorney has already made an appearance on behalf of the client.

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<http://www.nationalnotary.com/news/index.cfm?text=newsnotary&newsid=1844&newsdate=25>

⁹ <http://news.bbc.co.uk/2/hi/technology/8032886.stm>

¹⁰ <http://news.bbc.co.uk/2/hi/technology/8279867.stm>

¹¹ <http://news.bbc.co.uk/2/hi/technology/8279109.stm>

Other options exist to shift safe-keeping responsibilities away from the attorney. Clients may be counseled to acquire a safe deposit box at a bank. A client who brings in their original Will or who executes it after their attorney has prepared it may be sent to the local probate court where, for a fee of two dollars, the probate clerk will keep the will in a safe place. *See* Va. Code §64.1-56 "Wills of living persons lodged for safekeeping with clerks of certain courts."

5. Partners, Employees & Overhead

Matching the supply of attorney time to the demand for it is always a challenge, especially for small firms. When the economy slows, many firms look at the supply side of their staffing situation just as hard as they do at the demand side, addressed in the Marketing section above.

a. Don't sacrifice communications and diligence when downsizing support staff.

Some firms have begun by trimming support staff before cutting back on attorneys who are harder to find, train, replace, and who carry much of the firm's reputation. Cutting back on support staff should be done with caution to avoid overburdening attorneys to the point where their duties of diligence and communications to client fall below the ethical standards.

i. Va. RPC 1.3(a)-(b): Diligence

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

ii. Va. RPC 1.4: Communications

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

b. Avoid over-delegating.

Just as there are pitfalls from reducing support staff levels, relying too heavily upon support staff can have an equally detrimental effect upon the client relationship and work product. Attorneys are required to oversee their

i. "Louisiana Disbars Lawyers for Delegating Too Much Authority to Nonlawyer Employees," ABA/BNA Lawyers' Manual on Professional Conduct, 25 Law. Man. Prof. Conduct 272.

"In a pair of unrelated decisions issued May 5 [, 2009], the Louisiana Supreme Court disbarred three personal injury lawyers who facilitated unauthorized practice [of law] by giving their nonlawyer employees

too much authority to manage cases, including allowing them to negotiate settlements, and who shared legal fees with those employees (*In re Garrett*, La., No. 08-B-2513, 5/5/09; *In re Guirard*, La. 09-B-2621, 5/5/09)."

- ii. Va. RPC 1.7: Conflict of Interest: General Rule
- iii. Va. RPC 5.1: Responsibilities of Partners and Supervisory Lawyers.
- iv. Va. RPC 5.3: Responsibilities Regarding Nonlawyer Assistants

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

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

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

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

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

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

- v. Va. RPC 5.4: Professional Independence Of A Lawyer.

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

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

"(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."

Other profit-sharing or fee-sharing compensation of nonlawyer employees or assistants is prohibited.

- vi. Va. RPC 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law.
- vii. Va. RPC 8.4: Misconduct.

c. Telecommuting & Seconding

To reduce costs and keep attorneys on staff, many firms are allowing attorneys to work from home, sometimes on a reduced or flexible schedule. Firms are also "seconding" their attorneys to client's locations, whereby the firm's attorney works from the client's office.

When attorneys are working from outside the office in any capacity, several rules of professional conduct obtain added significance:

- i. "Have Law, Will Travel," ABA Journal, December 2007¹².

Firms that provide outsourced general counsel services to businesses can place an attorney at the client's location permanently or for an extended project, saving on overhead costs and in many cases improving the client relationship.

- ii. Va. RPC 1.4: Communications

When the attorney is at the client's site, many communications become easier, but keeping a written record of communications is still important so that the attorney could document her adherence to the rule.

For attorneys working from home, using electronic communication to stay in touch with clients may be useful in addition to paper correspondence. Telecommuting attorneys may still need to rely upon in-office support staff to ensure that paper communications both to and

¹² http://www.abajournal.com/magazine/have_law_will_travel/

from clients are handled in an efficient manner and that nothing falls through the cracks.

iii. Va. RPC 1.6: Confidentiality of Information

Whenever attorneys are out of the office, keeping information confidential requires additional care. With the shift to using computers, PDAs and other electronic devices to facilitate the practice of law, the opportunities for data loss or breach increase.

1. Virtual Private Networks (VPN)

Attorneys who are working at client's sites or from home can use Virtual Private Network (VPN) software to get an encrypted connection back to their office network, allowing them to share information with other attorneys in their office in a secure manner.

2. Encrypted hard drives and media storage devices,

By encrypting data on your laptop hard drive, your PDA or other digital media storage devices such as thumb drives, attorneys can provide an added layer of protection in the event that their electronic device goes missing. While there are limitations to the security that encryption of data storage can provide, using encryption provides a significant advantage over not encrypting at minimal cost.

3. Encrypted off-site backups.

In addition to keeping data secure from theft, keeping data available can be essential to the effective provision of legal services. By using an encrypted off-site backup service, lawyers can keep their data secure and can ensure that their data is accessible even if their electronic equipment is lost or damaged.

Several services exist that will do regular backups (every few hours) over the Internet¹³.

iv. Va. RPC 1.15: Safekeeping Property

¹³ See, e.g.: Mozy online backup (<http://www.b16c.com/refer/mozy.html>), which allows you to specify your own encryption key for added security, or Carbonite online backup (<http://www.carbonite.com/>).

- v. Va. RPC 5.1: Responsibilities of Partners and Supervisory Lawyers
- vi. Va. RPC 5.3: Responsibilities Regarding Nonlawyer Assistants

d. Hiring & Firing

In any employment situation, hiring and firing employees requires a high level of care and caution. While the reports of large firms laying off attorneys, support staff and rescinding new hire offers have proliferated the last year, there are also many opportunities at small and medium sized firms for displaced attorneys, opportunities for lateral moves for senior associates and partners, and opportunities for attorneys to strike out on their own.

- i. "Good Times or Bad, Firms Must Anticipate Problems Caused by Arrivals and Departures," ABA/BNA Lawyers' Manual on Professional Conduct, 25 Law. Man. Prof. Conduct 150.

Law firms and attorneys alike need to be aware of their duties to clients and conflicts when lawyers move from one firm to another. Firms are also using restrictive covenants to try and keep their book of business from evaporating when attorneys leave, while attorneys who move laterally or strike out on their own often need to bring clients with them to make themselves marketable and profitable.

While the "client's interest[] is paramount," firms are using both restrictive covenants and financial penalties – such as requiring a lump sum or full repayment of a loan to the practice taken out by a new partner to purchase their partnership share – to make it painful for profitable attorneys to leave.

- ii. Hunton & Williams downsizing lower ranks¹⁴, but hiring partners with a book of business.¹⁵
- iii. When laying off any employee, take steps to prevent any damage to practice, client relationships, infrastructure, etc.
 - 1. "Protect your organization from disgruntled workers," Selena Frye, TechRepublic.com, March 2, 2009¹⁶.

¹⁴ "Hunton & Williams lays off 23 lawyers, 64 staff members in U.S.", Richmond Times-Dispatch, May 15, 2009. http://www2.timesdispatch.com/rtd/business/legal/article/B-HUNT15_20090514-220007/267785/.

¹⁵ "Hunton Is Hiring (Really): Firm won't let recession retard its growth," ABA Journal, May 2009. http://www.abajournal.com/magazine/hunton_is_hiring_really/

¹⁶ <http://blogs.techrepublic.com.com/security/?p=986>

e. Proposed changes to Va. RPC 1.17: Sale of Law Practice.

Currently when a practice is sold, the rules of professional conduct create a restrictive covenant against the selling attorney practicing in any of the areas in which her former firm practiced within the former firm's geographic area. Under the proposed changes, the sale of part of a practice would only create a non-compete for the portions of the practice that was sold.

6. Malpractice Insurance

Some practice areas never seem to be effected by economic cycles: estate planning will always be needed as the population ages, criminal defense may even increase when the economy sours and crime rises, and litigation will always arise in good times and in bad. When purse strings are tight, clients may be more likely to sue their attorney over a fee (*See: Collections, supra*), or a bad outcome. Malpractice insurance may not be required, but many would argue that it is a necessity, or at least a wise decision.

a. Malpractice Insurance Still Not Required In Virginia

A proposed amendment to the Virginia Supreme Court Rules to make malpractice insurance mandatory was voted down, 60-11, by the Virginia State Bar Council on October 17, 2008.

b. Number of malpractice claims go up in a down economy.

- i. "Experts Say 'Perfect Storm' Is Brewing in Marketplace for Malpractice Insurance," ABA/BNA Lawyers' Manual on Professional Conduct, 25 Law. Man. Prof. Conduct 148.

"At this point, rates for malpractice insurance are steady or even declining, and insurers are competing for business ... [however] the current pricing [is] not sustainable [and] the rising cost of capital and reinsurance will make it necessary for insurers to raise rates soon. ...

"When the economy goes sour, there are more claims against lawyers."

c. Mediation and arbitration options for malpractice disputes.

See: Collections, supra, for information on mediation and arbitration options for attorney-client disputes.

7. Dealing with Stress

The practice of law can be stressful even when clients are plentiful. When lawyers, a risk-averse group to begin with, have to worry more about the bottom line, finding

clients, reducing staff, etc. the stress level increases further.

There are many great resources for attorneys to help in dealing with stress – from you local bar association up to state and national programs.

a. Lawyer Support Groups

i. ABA GP/Solo¹⁷

Solo practitioners and general counsels can often feel isolated from their legal peers. The ABA's GP/Solo group is a good way for these attorneys to be involved in a community of peers, providing discussion groups, meetings, continuing legal education opportunities and other networking and support opportunities.

ii. ABA Commission on Lawyer Assistance Programs¹⁸

The ABA Commission on Lawyer Assistance Programs provides support to attorneys in all practice settings on issues ranging from economic to depression and substance abuse.

iii. "Pressure Points: bar programs help lawyers cope with the emotional strains of the recession," ABA Journal, June 2009¹⁹.

"Nearly 24,000 jobs in the legal field, including both lawyers and support staff, were lost between March 2008 and March 2009, according to the Bureau of Labor Statistics at the U.S. Department of Labor."

b. Attorney substance abuse assistance programs

While a substance abuse or mental health problem could lead to a lawyer's incompetence to practice, in violation of Va. RPC 1.1: Competence, the professional code of ethics provides exceptions for bar sponsored programs that help attorneys in a confidential manner to deal with their problems.

i. Lawyers Helping Lawyers: Confidential, nondisciplinary help for lawyers, judges, law students and their members with substance abuse or mental health problems.²⁰

ii. When to report a fellow attorney with a problem?

¹⁷ <http://www.abanet.org/genpractice/>

¹⁸ <http://www.abanet.org/legalservices/colap/>

¹⁹ http://www.abajournal.com/magazine/pressure_points/

²⁰ <http://www.valhl.org/>

Va. RPC 8.3: Reporting Misconduct provides exceptions for lawyers representing lawyers, Va. RPC 1.6, and lawyers who are "trained intervenor or volunteer" for an "approved lawyer's assistance program."

c. ABA Recession Recovery Teleconference Series²¹

This summer the ABA sponsored a free teleconference series for attorneys to discuss strategies to deal with the economic downturn. The programs are recorded and are available on the ABA web site, or can be downloaded and played on any device that supports MP3 audio files.

²¹ MP3's available: <http://www.abanet.org/cle/recoveryseries/>