**Antonin Scalia Law School - George Mason University**
**19TH ANNUAL COSTELLO ETHICS UPDATE**
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## Part I – The Confluence of Attorney Well-Being and Legal Ethics (60 Minutes)

The issue I would like to speak with you about today, lawyer well-being, is one that affects almost all lawyers in the profession. In 2017, the National Task Force on Lawyer Well-being (the "Task Force"), a group of state supreme court justices and lawyers from around the country, published the "The Path to Lawyer Well-Being," a proposed set of guidelines for promoting well-being in the legal field. In response to this report's findings that depression and addiction in the profession on the rise, bar associations across the United States have implemented some type of educational well-being requirement or substance abuse and mental health counseling services to promote well-being. The connection between a lawyer's ability to maintain a healthy well-being and remaining ethical is clear. Studies show when lawyers do not take care of themselves, they can be less ethical and productive and are more likely to struggle with substance abuse or mental illness, which can directly impact their legal ethics.

**There is an undeniable correlation between substance abuse disorder, mental illness, or both and ethics violations in the legal community**.

### I. What is "Lawyer Well-being?"

a. **Task Force Definition:** The ABA defines lawyer Well-being as "A continuous process whereby lawyers seek to thrive in each of the following areas: emotional health, occupational pursuits, creative or intellectual endeavors, sense of spirituality or greater purpose in life, physical health and social connections with others. *Lawyer well-being is part of a lawyers ethical duty of competence. It includes lawyers' ability to make healthy, positive work/life choices to assure not only a quality of life within their families and communities, but also to help them make responsible decisions for their clients.* It includes maintaining their own long-term well-being. This definition highlights that complete health is not defined solely by the absence of illness; it includes a positive state of wellness."[1]

[1]The Path To Lawyer Well-Being Report

## II. Promoting Well-being in the Legal Field

a. **Virginia**

i. **Virginia Supreme Court:** In late 2017, Chief Justice Lemons established a commission, chaired by Supreme Court Justice Mims, to study well-being as it pertains to various sectors of the legal profession in Virginia. In addition to studying well-being, this task force will study how to implement the recommendations from The Path to Lawyer Well-Being report.[2]

ii. **Virginia State Bar Association Recognizes Importance of Well-being in MCLE Opinion 19 Amendment:** In 2009, VSB issued an opinion titled "Substance Abuse, Mental Health Disorders, Stress, & Work/Life Balance Topics" which occasionally awarded CLE credit for topics relating to those mentioned in the title.[3] However, after the Task Force released The Path to Lawyer Well-Being report in 2017, the VSB proposed an amendment to Opinion 19. In the amendment, VSB emphasized that CLE programs promoting lawyer well-being were approvable for CLE credit, so long as they met the other CLE requirements.[4]

iii. **Lawyers Helping Lawyers:**[5] LHL is a confidential, non-disciplinary assistance to members of the Virginia legal profession who experience impairment due to substance abuse treatment. LHL provides tailored services to meet the needs of each individual client. LHL also provides educational services to educate members of the legal community on the impact of alcoholism, drug addition, and mental health disorders in the legal profession. The educational courses are intended to increase awareness of LHL and their goals.

b. **ABA Resolution 106 § 3(2)(a)-(c)[6]:**

i. "As part of the required Credit Hours referenced in Section 3(A)(1), lawyers must earn Credit Hours in each of the following areas:
(a) Ethics and Professionalism Programming (an average of at least one Credit Hour per year);
*(b) Mental Health and Substance Use Disorders Programming (at least one Credit Hour every three years);* and
(c) Diversity and Inclusion Programming (at least one Credit Hour every three years)."

ii. **Comment 4[7]:** The ABA acknowledges that many jurisdictions award MCLE credit to courses with a "well-being" related topic. However, given the stigma against receiving help in the legal profession, the ABA requires

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[3] http://www.vsb.org/pro-guidelines/index.php/rule_changes/item/mcle_opinion19_lawyer_well_being
[4] http://www.vsb.org/pro-guidelines/index.php/rule_changes/item/mcle_opinion19_lawyer_well_being
[5] http://www.valhl.org/faqs/
[6] https://www.americanbar.org/content/dam/aba/images/abanews/2017%20Midyear%20Meeting%20Resolutions/106.pdf
[7] The Path To Lawyer Well-Being Report

lawyers to participate in substance use and mental health related trainings to ensure they have a minimal understanding of the topic.

iii. **Rationale for Requirements:** The ABA's decision to require a MCLE course specific to substance use and mental health was motivated by the ABA Commission on Lawyer Assistance Programs and Hazelden Betty Ford Foundation's study detailing well-being and lawyers.[8] This study found, inter alia, that a lawyer's well-being influences ethics and professionalism, specifically competency rules (1.1 & 1.3) and transactions with persons other than clients (4.1-4.4) of the ABA's Model Rules of Professional Conduct.[9] Failure to have an effective work-life balance can result in the development of both substance abuse problems and depression, translating into ineffective legal counsel.[10]

c. **Other State initiatives in Promoting Well-being**

i. **DC:** Although D.C. does not require MCLE, the D.C. Bar offers a Legal Assistance Program, which provides mental health service to D.C. Bar Members struggling with mental illness.[11]

ii. **MD:** Like D.C., Maryland does not require MCLE credits, but the Maryland Bar offers services to lawyers struggling from mental health illness, substance abuse, and burnout to name a few issues.[12]

iii. **WV**: In West Virginia, attorneys are required to take at least three hours worth (every two fiscal years) of training from a range of topics, including substance abuse.[13] In March 2018, The West Virginia Supreme Court ordered the establishment of a task force titled "The West Virginia Task Force on Lawyer Well-being." This task force has the duty to research and recommend the best methods for combating mental health and substance abuse issues in the legal profession. The task force will present its recommendations on how to improve well-being in the work place to the WVSC before the end of 2018.[14]

iv. **NV:** Beginning in 2014, the Nevada Bar Association requires one hour every three years of education in substance abuse, addictive disorders, and/or mental health.[15]

d. **Summary: Comparing VA to ABA, D.C., MD, WV, and NV.**

i. The ABA and Nevada are the most similar in their approaches to reinforcing well-being in MCLE training, as they both require some education in well-being to ensure that attorneys are aware of the importance of the topic. VA and WV are similar because neither requires completing a CLE course related to mental health or substance abuse, but both prioritize the topics evidenced by the affording credit to those CLE

[8] "ABA Approves Changes to CLE Model Rule, Adding Substance Use, Mental Health Requirement"
[9] The Path To Lawyer Well-Being Report
[10] *See* The Path To Lawyer Well-Being Report
[11] https://www.dcbar.org/bar-resources/lawyer-assistance-program/
[12] https://www.msba.org/health-wellness/
[13] https://www.wvbar.org/wp-content/uploads/2012/04/rules.pdf
[14] http://www.courtswv.gov/public-resources/press/releases/2018-releases/March22_18.pdf
[15] https://www.nvbar.org/member-services-3895/cle/cle-requirements/

courses related to well-being. Finally, D.C. and MD are jurisdictions that don't require any CLE training, but nonetheless, they provide free services for those struggling with mental illness or substance abuse.

## III. Why is Lawyer Well-being Important?

a. **Good for business:** A lawyer who has a positive well-being is more likely to preform better quality work, cope better with stress, and avoid succumbing to temptations to violate ethical issues.[16] It also reduces the potential ethical violations that coworkers of an un-well lawyer could commit, such as not reporting misconduct under VSB Rule 8.3.[17]

b. **Good for Clients:** When a lawyer does not prioritize wellness, his or her ability to represent a client competently diminishes drastically. Studies show that that 40 to 70 percent of malpractice or disciplinary proceedings involve impairment from substance abuse, depression, or both.[18] While some ethics violations due to a lawyer's impairment are deliberate, most malpractice arises from unconscious ethical violations due to reduced cognitive functioning.[19]

c. **It's the right thing to do:** Poor well-being has negative long-term consequences on one's legal career and one's physical health. Avoiding the subject will only cause more detriment to the profession.[20] Also, the public is entitled to presume that his or her attorney is fit to practice law, and the failure of that presumption because of attorney's unethical behavior from poor well-being violates the public's trust, which has far reaching consequences.[21]

## IV. Sign of Poor Lawyer Well-being – Giving Rise to Ethical Obligations for Supervising and Associate Attorneys Under Virginia LEOs 1886 and 1887

a. **Development of Substance Use Disorders:** 21% of U.S. attorneys are affected by substance abuse disorders (including alcoholism), compared to about 6% of the general public in the same age group.[22] The ABA estimates that 60% of disciplinary action cases, especially with regards to misappropriation of clients funds, is attributable to a lawyer's substance abuse.[23]

i. **Substance Abuse Disorder Causes[24]:**

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[16] "Behavioral Legal Ethics, Decision Making, And The New Attorney's Unique Professional Perspective" by Catherine Gage O'Grady
[17] ABA Opinion 03-431
[18] The Path To Lawyer Well-Being Report
[19] "How Improving Decision-Making And Mindfulness Can Improve Legal Ethics And Professionalism" by Peter H. Huang
[20] The Path To Lawyer Well-Being Report
[21] "The Mentally Ill Attorney" by Len Klingen
[22] Cite Ten Tips for Lawyers dealing with stress, mental health and substance abuse issues
[23] "Substance Abuse within the Legal Profession: A Symptom of a Greater Malaise" by Lynn Pregenzer
[24] "Attorney and Substance Abuse" by Justin J. Anker

(1) **Socio-cultural influences within the work environment:** This is the most consistent predictor of workplace drinking. Of 559 attorneys surveyed, 66% report social drinking connected to work.
(2) **Stress within the legal profession as a function of workload and time constraints:** The exceedingly high number of work hours, the unpredictability of trials and the heavy workloads that need to be completed under time constraints contribute to stress in attorneys. The intense workload results in poor work/life balance, contributing to work-related burnout, which contributes to substance abuse development.
(3) **Stress within the legal profession due to exposure to trauma exposed clients:** Lawyers dealing with clients suffering from PTSD are at risk for developing Secondary Traumatic Stress (STS). STS symptoms mimic those of PTSD and contribute to the development of substance abuse disorder.

ii. **Most Common Signs of Substance Abuse Disorder:** Impaired (typically from substance abuse or alcohol) lawyers will call attention to themselves by engaging in a pattern of misbehavior such as (to name the most prevalent) [25]:
(1) Missing deadlines;
(2) Failing to make filings needed to complete a transaction;
(3) Client neglect;
(4) Breached promises to accomplish certain tasks; or
(5) Failing to raise arguments that a reasonable lawyer would make.

b. **Development of Mental Illness:** Approximately 28% of attorneys suffer from depression, 19% experience anxiety, and 11.5% have reported experiencing suicidal thoughts.[26]

i. **Most Common Causes of Mental Illness[27]:**
(1) **Lawyer Personality traits and work place environment:** the aggressive, adversarial, and competitive nature of the profession trigger mental illness in those who are genetically predisposed to mental illness and aid in the development of mental illness in lawyers
(2) **Terrible work/life balance:** the number of hours attorney's are forced to work make it extremely difficult to find work/life balance in both their personal and professional lives. Included in this is the pressure to make money from billable hours.
(3) **Work Burnout:** Terrible work/life balance is associated with attorney work burnout which increases the likelihood of depression

ii. **Most Common Signs of Mental Illness:** Avoiding clients calls, failure to communicate, or unwillingness to communicate is the typical first sign that an attorney with mental illness may commit malpractice.[28]

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[25] "Turning in Impaired lawyer for Misconduct" by John Freeman
[26] "Ten Tips For Lawyers Dealing With Stress, Mental Health, And Substance Use Issues" by Bree Buchanan
[27] "Why Are So Many Lawyers Depressed" by Brent Hale

iii. **Why is mental illness so closely connected with professional ethics violations?**: It is no surprise that lawyers suffering from depression are likely to violate the basic tenants of professional conduct because depression overwhelms every aspect of life.[29]

## V. Application of the Virginia Professional Ethics Rules Most Frequently Violated Due to Poor Attorney Well-being

a. **Rule 1.1: Competence[30]:** A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

i. **Proposed Rule Change:** On June 14, 2018, the Virginia State Board proposed adding a new comment, "comment 7," to this rule. Comment 7 would call attention to the importance of maintaining well-being in order to competently represent clients. The comment does not define well-being, nor define specific actions to maintain well-being, but it establishes that attorney's must be aware that well-being plays a role in maintaining competence to practice law. The proposed rule change has been submitted to the Virginia Supreme Court for review.[31]

b. **Rule 1.3: Diligence[32]:**

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

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

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

**Comment 3:** "Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness."

i. NOTE: Connect back to frequent substance abuse signs from above – being impaired from substances → procrastination[33] → missing deadlines, failing to make filings, breaching promises, etc.

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[28] "Mental Health- Investing Time Today To Avoid Malpractice Tomorrow" Podcast Transcript

[29] "Depression Among Lawyers" by Joan E. Mounteer

[30] "Lawyer Depression: Taking a Closer Look at First Time Ethics Offenders" by Page Thead Pulliam

[31] http://www.vsb.org/pro-guidelines/index.php/rule_changes/item/revisions_to_rule_1.1_competence

[32] "Lawyer Depression: Taking a Closer Look at First Time Ethics Offenders" by Page Thead Pulliam

c. **Rule 1.4: Communication[34]:**

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
(c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter**.**

i. NOTE: Connect back to mental illness → avoiding clients phone calls → fails to keep them reasonably informed

d. **Rule 1.15: Safekeeping Property[35]:**

i. (b) Specific Duties. A lawyer shall:
(1) promptly notify a client of the receipt of the client's funds, securities, or other properties;
(2) identify and label securities and properties of a client, or those held by a lawyer as a fiduciary, promptly upon receipt;
(3) maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accountings to the client regarding them;
(4) promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer that such person is entitled to receive; and
(5) not disburse funds or use property of a client or third party without their consent or convert funds or property of a client or third party, except as directed by a tribunal.

NOTE: One of the ethics violations most common among unwell lawyers, particularly those suffering with substance abuse, is misappropriate a client's funds.[36]

e. **Rule 1.16: Declining or terminating representation[37]:**

i. (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
*(1) the representation will result in violation of the Rules of Professional Conduct or other law;*
*(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or*
(3) the lawyer is discharged.

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[33] "Drug and Alcohol Abuse & Addiction in the Legal Profession" by the Legal Profession Assistance Conference
[34] "Lawyer Depression: Taking a Closer Look at First Time Ethics Offenders" by Page Thead Pulliam

[36] "Substance Abuse within the Legal Profession: A Symptom of a Greater Malaise" by Lynn Pregenzer
[37] "Lawyer Depression: Taking a Closer Look at First Time Ethics Offenders" by Page Thead Pulliam

ii. NOTE: Emphasis added to (1) and (2) because those are the two an attorney who struggles with mental illness and substance abuse most frequently struggles with.

f. **Rule 5.1: Responsibility of Partners and Supervisory lawyers[38]:**

(a) A partner in a law firm, or a lawyer who individually or together with other lawyers possesses managerial authority, *shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct*.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

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

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

g. **Rule 8.1: Bar Admission And Disciplinary Matters[39]**

An applicant for admission to the bar, or a lawyer already admitted to the bar, in connection with a bar admission application, any certification required to be filed as a condition of maintaining or renewing a license to practice law, or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact;

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter;

(c) fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6; or

(d) obstruct a lawful investigation by an admissions or disciplinary authority**.**

h. **Rule 8.3: Reporting Misconduct[40]:**

(a) A lawyer having reliable information that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness to practice law shall inform the appropriate professional authority.

i. **Rule 8.4: Misconduct[41]:**

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[39] VSB Rules

[40] VSB Rules

[41] VSB Rules

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law;

## VI. Virginia Bar Professional Ethics Disciplinary Cases Related to Poor Well-Being

a. **Thomas Haddock[42]:**
   i. Mr. Haddock was the attorney for a California woman ("Client") seeking help modifying a petition for child support filed against her by her ex-husband. While representing Client, Mr. Haddock signed a consent order, on behalf of Client, without Client's authorization to sign this consent order nor did he notify her of his signing of the consent order. Throughout the case, Client repeatedly contacted Mr. Haddock's office through phone, text, and email to inquire about the status of her case. Mr. Haddock failed to respond to Client, failed to advise Client of what was transpiring in the case, failed to keep her informed of pertinent facts and communications from opposing counsel, and failed to either advise her that he had executed the Consent Orders or obtain Client's authority to do so.
   ii. Haddock was charged violating rules 1.1, 1.2(a), 1.3(a), 1.4, 1.15, and 1.16(a)(2).
   iii. During the time Mr. Haddock represented client, he was suffering from depression and anxiety, which prevented him from responding to his clients or attending to their matters.

b. **Shelley Collette:**
   i. Ms. Collette has been in front of the VSB due to multiple complaints from both clients and judges. Ms. Collette has had her license suspended for issues related to impairment and larceny. On multiple occasions, Ms. Collette was cited as violating VSB rules 1.3, 1.4, 1.15(a)(1), 1.15(b)(1), 1.15(b)(3), 1.15(c)(1), 1.15(c)(2)(i) & (ii), 1.15(d)(2)-(4), and 1.16[43].
   ii. Ms. Collette attributes her problems as an attorney to ADHD and PTSD.[44]

c. **Robert Lyman Isaac Shearer[45]:**
   i. Client obtained Mr. Shearer as council to represent Client in a custody hearing. After an initial custody hearing. Mr. Shearer stopped responding

[42] http://www.vsb.org/docs/Haddock-061318.pdf
[43] http://www.vsb.org/docs/Collette-032318.pdf
[44] https://valawyersweekly.com/2018/03/24/troubled-winchester-lawyer-gives-up-license/
[45] http://www.vsb.org/docs/Shearer-070318.pdf

to Client's emails, texts, and phone calls. After Mr. Shearer consistently ignored Client's contact attempts, Client traveled to Mr. Shearer's physical office where Client learned Mr. Shearer had moved offices without leaving a forwarding address. Mr. Shearer also mishandled Client's money by not depositing his funds into a trust account.

ii. VSB concluded Mr. Shearer violated VSB Rules 1.3(a), 1.4(a), 1.15(a)(1), 1.15(b)(4), 1.16(d), and 8.1(c).

iii. Mr. Shearer testified that during this period of attorney misconduct, he was suffering from numerous personal issues including dealing with health issues of his brother and mother. He also testified that he turned to alcohol during this stressful period. As of March 2018, Ms. Shearer claims to be sober and receiving treatment from Lawyers Helping Lawyers.

VII. **The Task Force's Recommendations on Lawyer Well-being**[46]:

a. The Path to Lawyer Well-Being report provides judges, regulators, legal employers, law schools, bar associations, and lawyer professional liability carriers with recommendations on what each party can do to promote lawyer well-being in the work place.

b. **Recommendations for Judges:**

i. Judges should communicate that wellbeing is a priority. Judges are not immune from the same stressors that lawyers face, in addition to stressors that come from being a jurist.

ii. Policies should be developed for handling impaired judges.

iii. Judges should reduce the stigma of mental health and substance abuse. As mentioned, the stigma surrounding mental health and substance abuse disorders is a deterrent to receiving treatment. Since judges are undisputed leaders in the legal profession, the ABA recommends judges work to reduce the stigma by creating an open dialogue around the topic and engaging in volunteer opportunities for lawyer assistance programs. This is a strong way to convey to lawyers, law students, and other judges the importance of lawyer assistance programs.

iv. More judicial well-being surveys should be conducted**.** Very little research has been conducted on wellness in the judiciary. The National Task Force on Lawyer Well-being recommends conducting surveys to determine the state of well-being and the prevalence of issue directly related to judicial fitness such as a burnout, compassion fatigue, mental health, substance use disorders, and help seeking behaviors

v. Well-being programming should be provided for judges and staff**.** By inviting lawyer assistance program directors to judicial conferences to educate the judiciary and their staff, more members and agents of the judiciary will be aware of resources available to those struggling with issues related to wellness.

vi. Judges should assist in monitoring impaired lawyers and partner with lawyer assistance programs. Judges are usually among the first to notice

[46] The Path to Lawyer Well-Being Report

when a lawyer is suffering from an impairment, whether it's because a lawyer repeatedly appears to court late and under the influence or the lawyer frequently requests extensions for pleading deadlines. By partnering with lawyer assistance programs, and referring an impaired lawyer to the program, judges can reduce client harm and save the lawyers career.

vii. ***In resolution 6, Virginia Supreme Court Chief Justice Lemons expressed support for these recommendations. He reiterated that lawyer well-being is a critical component of lawyer competence.***[47]

c. **Recommendations for Regulators:** Regulators are defined as lawyers and staff in regulatory offices; volunteer lawyer and non-lawyer committee, board, and commission members; and professional liability lawyers who advise law firms and represent lawyers in the regulatory process.
   i. Among many other recommendations, the Task Force for suggests creating regulatory objectives centered on lawyer well-being to emphasize the importance of having a healthy, competent lawyer for the success of the legal profession. Not only is creating regulatory objectives focusing on lawyer well-being a priority, but revising preexisting regulatory objectives is a must. For example, the task force suggests modifying RPC Rule 1.1 to include maintaining well-being as a requirement for being a competent attorney. Another example is expanding CLE requirements to include well-being topics. Virginia has either proposed or adopted both of these suggestions, demonstrating how important maintaining well-being is for the ethical practice of law.
   ii. Other recommendations for regulators involve mandating law schools to provide well-being education as an accreditation requirement. In addition to implementing an well-being accreditation requirement, the Task Force recommends that regulators re-evaluate how bar applications inquire into mental health history and change bar admission eligibility based on mental health and other physical impairments. By changing the bar admissions process, future licensed attorneys know from the beginning of their career the importance of mental and physical fitness in the profession.

d. **Recommendations for Legal Employers:** a few of the major recommendations…
   i. Legal employers should establish organizational infrastructure to promote well-being, such as creating a lawyer well-being committee, assessing individual employee well-being, and assessing work place attitudes towards well-being to determine what internal changes are needed to reduce any stigma and apprehension towards obtaining any needed services.
   ii. Legal employers should monitor employees for signs of work addiction and poor self-care. There are many health and relationship problems associated with work addiction and poor self-care, such as development

[47] http://www.vsb.org/site/news/item/lawyer_well_being

of depression, weight gain, anxiety, anger, work burnout, and family conflict to name a few. Also, the Task Force recommends creating a healthy social work environment and encouraging office interconnectivity. Social support from coworkers prevents negative well-being, especially work burnout. Social support also reduces the competitive nature of the profession, lowering risks of poor well-being.

iii. Legal employers should provide education and training on lawyer well-being, especially during new lawyer orientation. By educating new lawyers on the psychological challenges of the job, new employees can take proactive steps to avoid developing poor well-being from the beginning.

e. **Recommendations for Law Schools**: Studies show after the first year of law school, law students show a significant increase in anxiety and depression. Law students are among the most dissatisfied, demoralized, and depressed of any graduate student population. Some of the recommendations for law school include:

i. Law school faculty should be trained in mental illness and substance use disorders so they can effectively identify when a student is struggle, but also so students feel more comfortable approaching faculty when they are struggling. Faculty should also be encouraged to step out of a teaching position and open up about their experiences in the field as a way of showing respect and concern for their students. This creates a more open environment for dialogue as students often worry if they open up to faculty about mental health or substance abuse issues, there will be negative consequences because of the perception that faculty must disclose any competence issues to the state bar.

ii. Law schools should provide mental health and substance use disorder resources. Not only should law schools be responsible for providing those resources, but they should also publicize them and highlight the benefits so students don't feel stigmatized for utilizing these resources.

f. **Recommendations for Bar Associations:** Bar associations share the common goal of promoting members' professional growth, quality of life, and professional quality. Some recommendations to encourage those goals include:

i. Bar associations should be sponsoring high-quality CLE programming on well-being related topics. This demonstrates how bar associations encourage and support the need for attorney well-being and understand the importance of attorney wellbeing in the profession. This also includes providing materials to attorneys and legal organizations on "Best practices" for maintaining attorney well-being. *Virginia has already adopted this through MCLE opinion 19.*

ii. Bar associations should also sponsor empirical research on attorney well-being through annual surveys. This would help in gaining awareness and monitoring well-being progress in the profession.

g. **Recommendations for Lawyer Professional Liability Carriers:** LPL carriers have a vested interest in encouraging attorney well-being. Happier,

healthier lawyers generally equate to better risks. Better risks create stronger risk pools and stronger risk pools enjoy a lower frequency and less severe claims. This increases LPL carriers' profitability. Some recommendations include:

i. LPL carriers should actively support lawyer assistance programs. Lawyer assistance programs should support such programs because these programs assist in preventing an already struggling lawyer from a further downward spiral, which reduces the probability of a severe malpractice claim.
ii. LPL carriers should collect data whenever lawyer impairment contributes to a malpractice or disciplinary claim. LPL carriers are in a prime position to collect this data, which would continue to provide insight on the relationship between well-being and malpractice claims.

h. **Recommendations for Lawyer Assistance Programs**: While every state has a lawyer assistance program, their structures, services, and funding vary widely. Some recommendations to ensure lawyer assistance programs best serve their role in the legal community regardless of funding are:

i. Lawyer assistance programs should advocate for more stable, adequate funding to be used for outreach, screening, counseling, peer assistance, monitoring, and preventative education.
ii. Lawyer assistance programs should emphasize confidentiality. One of the biggest deterrents to lawyers utilizing these programs is the fear and shame disclosure of mental illness and substance abuse issues creates.
iii. Lawyer assistance programs should become more uniform and adopt the same foundational elements. This would ensure each program provides effective leadership and services to lawyers, judges, and law students.

VIII. **Conclusions on Ethics of Attorney Well Being:** The prevalence of poor attorney well-being demonstrated by substance abuse disorder and mental illness in the legal profession is a very apparent issue. Given the tremendous impact attorney well-being has on an attorney's ability (and duty) to practice law ethically, it is imperative that all sectors of the legal field take steps to promote well-being to avoid poor well-being from further damaging the legal profession and the perception of the legal profession.

## Part II – Ethical Obligations of Attorneys and Law Firms Arising from the Use of Technology in the Practice of Law (15 Minutes)

### I. VSB Rules of Professional Conduct Most At Risk for Being Violated Due to Cyber Security Hack

**a. Rule 1.1 – Comment (6): Competence**

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

Comment (6): To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education in the areas of practice in which the lawyer is engaged. Attention should be paid to the benefits and risks associated with relevant technology. The Mandatory Continuing Legal Education requirements of the Rules of the Supreme Court of Virginia set the minimum standard for continuing study and education which a lawyer licensed and practicing in Virginia must satisfy. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.

**b. Rule 1.4: Communication**

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
(c) A lawyer shall inform the client of facts pertinent to the matter and of communication from another party that may significantly affect settlement or resolution of the matter.

**c. Rule 1.6: Confidentiality of Information**

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

1. such information to comply with law or a court order;
2. such information to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any

proceeding concerning the lawyer's representation of the client;

3. such information which clearly establishes that the client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation;
4. such information reasonably necessary to protect a client's interests in the event of the representing lawyer's death, disability, incapacity or incompetence;
5. such information sufficient to participate in a law office management assistance program approved by the Virginia State Bar or other similar private program;
6. information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes, provided the lawyer exercises due care in the selection of the agency, advises the agency that the information must be kept confidential and reasonably believes that the information will be kept confidential;
7. such information to prevent reasonably certain death or substantial bodily harm.

(c) A lawyer shall promptly reveal:

8. the intention of a client, as stated by the client, to commit a crime reasonably certain to result in death or substantial bodily harm to another or substantial injury to the financial interests or property of another and the information necessary to prevent the crime, but before revealing such information, the attorney shall, where feasible, advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client's criminal intention unless thereupon abandoned. However, if the crime involves perjury by the client, the attorney shall take appropriate remedial measures as required by Rule 3.3; or
9. information concerning the misconduct of another attorney to the appropriate professional authority under Rule 8.3. When the information necessary to report the misconduct is protected under this Rule, the attorney, after consultation, must obtain client consent. Consultation should include full disclosure of all reasonably foreseeable consequences of both disclosure and non-disclosure to the client.

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

**d. Rule 1.15: Safekeeping Property**

(a)Depositing Funds.

1. All funds received or held by a lawyer or law firm on behalf of a client or a third party, or held by a lawyer as a fiduciary, other than reimbursement of advances for costs and expenses shall be deposited in one or more identifiable trust accounts; all other property held on behalf of a client should be placed in a safe deposit box or other place of safekeeping as soon as practicable.
2. For lawyers or law firms located in Virginia, a lawyer trust account shall be maintained only at a financial institution approved by the Virginia State Bar, unless otherwise expressly directed in writing by the client for whom the funds are being held.
3. No funds belonging to the lawyer or law firm shall be deposited or maintained therein except as follows:
4. funds reasonably sufficient to pay service or other charges or fees imposed by the financial institution or to maintain a required minimum balance to avoid the imposition of service fees, provided the funds deposited are no more than necessary to do so; or
5. funds in which two or more persons (one of whom may be the lawyer) claim an interest shall be held in the trust account until the dispute is resolved and there is an accounting and severance of their interests. Any portion finally determined to belong to the lawyer or law firm shall be withdrawn promptly from the trust account.

(b) Specific Duties. A lawyer shall:

6. promptly notify a client of the receipt of the client's funds, securities, or other properties;
7. identify and label securities and properties of a client, or those held by a lawyer as a fiduciary, promptly upon receipt;
8. maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accountings to the client regarding them;
9. promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer that such person is entitled to receive; and
10. not disburse funds or use property of a client or third party without their consent or convert funds or property of a client or third party, except as directed by a tribunal.

(c) Record-Keeping Requirements. A lawyer shall, at a minimum, maintain the following books and records demonstrating compliance with this Rule:

1. Cash receipts and disbursements journals for each trust account, including entries for receipts, disbursements, and transfers, and also including, at a minimum: an identification of the client matter; the date of the transaction; the name of the payor or payee; and the manner in which trust funds were received, disbursed, or transferred from an account.
2. A subsidiary ledger containing a separate entry for each client, other person, or entity from whom money has been received in trust.
   The ledger should clearly identify:
   a. the client or matter, including the date of the transaction and the payor or payee and the means or methods by which trust funds were received, disbursed or transferred; and
   b. any unexpended balance.
3. In the case of funds or property held by a lawyer as a fiduciary, the required books and records shall include an annual summary of all receipts and disbursements and changes in assets comparable in detail to an accounting that would be required of a court supervised fiduciary in the same or similar capacity; including all source documents sufficient to substantiate the annual summary.
4. All records subject to this Rule shall be preserved for at least five calendar years after termination of the representation or fiduciary responsibility.

(d) Required Trust Accounting Procedures. In addition to the requirements set forth in Rule 1.15 (a) through (c), the following minimum trust accounting procedures are applicable to all trust accounts.

1. Insufficient Fund Reporting. All accounts are subject to the requirements governing insufficient fund check reporting as set forth in the Virginia State Bar Approved Financial Institution Agreement.
2. Deposits. All trust funds received shall be deposited intact. Mixed trust and non-trust funds shall be deposited intact into the trust fund and the non-trust portion shall be withdrawn upon the clearing of the mixed fund deposit instrument. All such deposits should include a detailed deposit slip or record that sufficiently identifies each item.
3. (3) Reconciliations.
   a. At least quarterly a reconciliation shall be made that reflects the trust account balance for each client, person or other entity.

b. A monthly reconciliation shall be made of the cash balance that is derived from the cash receipts journal, cash disbursements journal, the trust account checkbook balance and the trust account bank statement balance.
c. At least quarterly, a reconciliation shall be made that reconciles the cash balance from (d)(3)(ii) above and the subsidiary ledger balance from (d)(3)(i).
d. Reconciliations must be approved by a lawyer in the law firm.

4. The purpose of all receipts and disbursements of trust funds reported in the trust journals and ledgers shall be fully explained and supported by adequate records.

**e. Rule 5.1: Responsibility of Partners and Supervisory Lawyers**

(a) A partner in a law firm, or a lawyer who individually or together with other lawyers possesses managerial authority, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

1. the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
2. the lawyer is a partner or has managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

**f. Rules 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.

**g. Rules 7.1: Communications Concerning A Lawyer's Services:**

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a while not materially misleading.

**h. Rules 8.3: Reporting Misconduct**

(a) A lawyer having reliable information that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness to practice law shall inform the appropriate professional authority.
(b) A lawyer having reliable information that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.
(c) If a lawyer serving as a third party neutral receives reliable information during the dispute resolution process that another lawyer has engaged in misconduct which the lawyer would otherwise be required to report but for its confidential nature, the lawyer shall attempt to obtain the parties' written agreement to waive confidentiality and permit disclosure of such information to the appropriate professional authority.
(d) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge who is a member of an approved lawyer's assistance program, or who is a trained intervenor or volunteer for such a program or committee, or who is otherwise cooperating in a particular assistance effort, when such information is obtained for the purposes of fulfilling the recognized objectives of the program.
(e) A lawyer shall inform the Virginia State Bar if:

1. the lawyer has been disciplined by a state or federal disciplinary authority, agency or court in any state, U.S. territory, or the District of Columbia, for a violation of rules of professional conduct in that jurisdiction;
2. the lawyer has been convicted of a felony in a state, U.S. territory, District of Columbia, or federal court ;
3. the lawyer has been convicted of either a crime involving theft, fraud, extortion, bribery or perjury, or an attempt,

solicitation or conspiracy to commit any of the foregoing offenses, in a state, U.S. territory, District of Columbia, or federal court.

The reporting required by paragraph (e) of this Rule shall be made in writing to the Clerk of the Disciplinary System of the Virginia State Bar not later than 60 days following entry of any final order or judgment of conviction or discipline.

**i. Rules 8.4: Misconduct**

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law;

(d) state or imply an ability to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official; or

(e) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

## II. Application of Ethics Rules: Why Attorneys Must Take Adequate Care

a. ABA reports that 22 percent of all size law firms were hit with a data breach in 2017. That's a 14 percent increase from 2016.[48]
b. Attorneys need to take steps to protect client information [49]
   i. RPC 1.6(a): attorney may not reveal confidential info[50]
   ii. RPC 4.4(b): outlining attorney's duty o respect others' privilege and taking appropriate steps to communicate with clients[51]
   iii. RPC 1.1 Comment 8: ethical obligation requiring attorneys to be updated on technology-related risks and reasonably act to protect against them to provide competent representation[52]
c. Modern technology advantages are making law firms more vulnerable to cyber attacks
d. Law firms tend to have weaker security measures because resources are not typically allocated to ensuring information is protected
e. Law firms handle a wide variety of sensitive and high profile information
f. Another important consideration is proper discarding of technology carrying sensitive, digital information related to clients[53]

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[48] "Top legal ethics trends 2018: cyber-safety, the 'Uber effect,' and more" by Karen Rubin

[49] "Getting Serious About Law Firm Cyber Security" by Karen Randall & Steven Kroll

[50] "Getting Serious About Law Firm Cyber Security" by Karen Randall & Steven Kroll

[51] "Getting Serious About Law Firm Cyber Security" by Karen Randall & Steven Kroll

[52] "Getting Serious About Law Firm Cyber Security" by Karen Randall & Steven Kroll

[53] "Attorneys Must Be Mindful of How They Discard Digital Technology by Marilyn Odendahl

i. The article explores ways of disposing and recycling of technology carrying private information and encourages attorneys to be mindful of preserving sensitive information such as keeping the hard drives of computers before recycling them and either saving those hard drives or ensuring they are properly destroyed

## III. Cyber Threats Facing Law Firms

a. Law firms are attractive targets of cyber-attacks because they deal with sensitive information such as trade secrets, other intellectual property, regulated info (health and financial info) , insider info related to corporate deals[54]
b. Spear-phishing emails or malicious messages tailored toward specific individuals to appear legitimate. Once the messages are opened, it infects the entire computer network with malware.
   i. 88.8% of all business organizations were targeted by fraudulent emails.[55]
   ii. Don't just be suspicious of links in emails but also PDF's or other documents.[56]
c. Ransomware – encrypting a victim's files and then attempting to sell the victim a key to unlock the files. This either involves extortion or lost access to files.[57]
   i. Ziprick & Cramer Law Firm – firm was victim of single cyber attack where a "Cryptolocker-type virus" infected the computers. This type of virus encrypts files so they become unreadable and then the hackers demand money to restore the data.[58]
d. Hacktivists – when email accounts are hacked.[59]
   i. Another type of hactivist group targets law firms handling controversial cases, "Anonymous" is an example of such a group that hacks into firms' e-mail correspondence[60]
   ii. Puckett & Faraj Law Firm – when representing a Marine Sergeant accused of murdering unarmed Iraqi civilians, the firms emails were hacked and more than 2 gigs of correspondences were stolen and leaked. The firms email passwords were not secure enough to prevent the hackers.
e. Cyber actors compromising Internet of Things (IoT) devices[61]
   i. Examples of IoT devices: routers, streaming devices, network attached storage devices, IP cameras
   ii. Cyber actors use IoT devices as proxies for anonymous routing of malicious internet traffic for the purpose of cyber-attacks, sending spam e-

[54] "Getting Serious About Law Firm Cyber Security" by Karen Randall & Steven Kroll
[55] "Email Fraud Continues to Inundate Inboxes" by Jess Nelson
[56] "Email Fraud Continues to Inundate Inboxes" by Jess Nelson
[57] "Getting Serious About Law Firm Cyber Security" by Karen Randall & Steven Kroll
[58] "Getting Serious About Law Firm Cyber Security" by Karen Randall & Steven Kroll
[59] "Getting Serious About Law Firm Cyber Security" by Karen Randall & Steven Kroll
[60] "Getting Serious About Law Firm Cyber Security" by Karen Randall & Steven Kroll
[61] FBI: Cyber Actors Use Internet of Things Devices as Proxies for Anonymity and Pursuit of Malicious Cyber Activities: https://www.ic3.gov/media/2018/180802.aspx

mails, disguise internet browsing, click-fraud activities, buy/sell illegal images & goods among other activities[62]

iii. Potential indicators of compromised IoTs: devices are slow or inoperable, major spike in monthly Internet usage, increase in internet bill, slow internet connections[63]

## IV. Recommended Steps to Meet Ethical Obligations[64]

a. Perform a data risk assessment
   i. form cross-organizational committee including employees from all departments of the firm (i.e. IT, human resources, finance, etc.) to execute risk management plan[65]
b. Update IT Systems
   i. Implement plan protecting privacy and security of firm's data such as using encryption to send sensitive information via email[66]
   ii. Inventory and assign categorization of risk to all of the firm's software systems and data designating stronger protection for more sensitive data[67]
c. Prepare an incident response plan
d. Conduct employee trainings
e. Procure cyber liability insurance
f. Protect & defend against cyber actors compromising IoT devices[68]
   i. Regularly reboot IoT devices, change username & passwords, isolation of IoT devices from other network connections, regular use & update of anti-virus[69]
g. Consider becoming a member of Legal Service Information Sharing and Analysis Organization (LS-ISAO) to be alerted when their firms are subject to potential cyber threats[70]
h. Be wary of using public wi-fi networks to avoid hackers gaining access to the information you're working on while logged into these networks[71]
   i. Alternatives include connecting to personal hot spot if you have one, avoid certain sites when on the public network, ensure you're on your own secure Wi-Fi session through use of VPN[72]

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[62] FBI: Cyber Actors Use Internet of Things Devices as Proxies for Anonymity and Pursuit of Malicious Cyber Activities: https://www.ic3.gov/media/2018/180802.aspx

[63] FBI: Cyber Actors Use Internet of Things Devices as Proxies for Anonymity and Pursuit of Malicious Cyber Activities: https://www.ic3.gov/media/2018/180802.aspx

[64] "Perform a cybers security checkup for a healthy start in 2018" by BridgeTower Media Newswires

[65] "Getting Serious About Law Firm Cyber Security" by Karen Randall & Steven Kroll

[66] "Getting Serious About Law Firm Cyber Security" by Karen Randall & Steven Kroll

[67] "Getting Serious About Law Firm Cyber Security" by Karen Randall & Steven Kroll

[68] FBI: Cyber Actors Use Internet of Things Devices as Proxies for Anonymity and Pursuit of Malicious Cyber Activities: https://www.ic3.gov/media/2018/180802.aspx

[69] FBI: Cyber Actors Use Internet of Things Devices as Proxies for Anonymity and Pursuit of Malicious Cyber Activities: https://www.ic3.gov/media/2018/180802.aspx

[70] "Getting Serious About Law Firm Cyber Security" by Karen Randall & Steven Kroll

[71] Public Wi-Fi – Should Lawyers Just Say No? – ALPS Blog

[72] Public Wi-Fi – Should Lawyers Just Say No? – ALPS Blog

## Part III – 2018 LEO's, Rule Changes, & More Disciplinary Examples (45 Minutes)

### I. Virginia Legal Ethics Opinions

a. LEO 1750[73] (Approved): Regarding lawyer advertising and solicitation.
Virginia RPCs: 7.1 and 7.3

i. Also relevant: LEOS 1029, 1119, 1297, 1321 concerning advertising and solicitation withdrawn

ii. Regarding the issue of television advertisements involving actors who portray attorneys, the Committee is of the opinion that failure to disclose that the actor is not actually employed by the law firm is misleading when the language in the commercial implies that the actor is part of the law firm.

Regarding the use of the phrase "no recovery, no fee" or similar language such as "We guarantee to win, or you don't pay," the Committee is of the opinion that this language is misleading when used without explaining that litigation expenses and court costs are payable regardless of recovery.

With respect to the trade or fictitious names attorneys use to advertise their firms, firms are permitted to use such names as long as they are not misleading. The Committee is of the opinion that it is misleading to use names of lawyers not associated with the firm or its predecessor or the name of a non-lawyer. Furthermore, firms can only state or imply a partnership between lawyers through a name if such partnership actually exists. Firms are permitted to use names of lawyers associated with the firms, the firm's predecessor, or the names of deceased or retired members of the firm. The Committee is of the opinion that it is misleading for attorneys to advertise using a certain corporate trade or fictitious name unless they actually practice under that name. The Committee has stated that usage of the name should include displaying the name on business cards, letterheads, or office signs. Regarding office space, the Committee has opined that it may be misleading for an attorney to advertise the use of a non-exclusive office space when that space is not actually where the attorney provides legal services.

With respect to advertising that an individual injured in a car accident "must consult an attorney before speaking to any

[73] http://www.vsb.org/docs/SCV-LEO1750-order-042018.pdf

representative of an insurance company," the Committee stated that, because there is no legal requirement that requires such consultation, this statement would be misleading.

Regarding when attorneys may advertise participation in lawyer referral services, the Committee has stated the lawyer referral service must: "be operated in the public interest for the purpose of providing information to assist the clients; be open to all licensed lawyers in the geographical area served who meet the requirements of the service; require members to maintain malpractice insurance or provide proof of financial responsibility; maintain procedures for the admission, suspension, or removal of a lawyer from any panel; and not make any fee-generating referral to any lawyer who has an ownership interest in the service, or that lawyer's law firm" to qualify as a lawyer referral service for the purpose of advertising lawyer referral services without being misleading.

Regarding use of statements such as "We've collected millions for thousands," or "We've collected $30 million in 1996," for the purpose of advertising, the Committee has opined that such statements can be misleading because such case outcomes depend on a variety of factors and such results are obtained as result of specific circumstances in a case that may not be duplicated in another case. Additionally, according to the Committee, attorneys' self-laudatory claims such as "the best lawyers" "the biggest earnings" cannot be factually substantiated and therefore violate Rule 7.1.

In response to attorneys inquiring whether they may use client testimonials stating things like this lawyers is "the best" or this lawyer will get you "quick results," to get around the prohibition of comparative statements, the Committee opined that such comparative statements would still be in violation of Rule 1.7 regardless of them coming from a third party. However, the Committee does allow testimonials of clients making "soft endorsements," such as "the lawyer always returned phone calls" or "the attorney always appeared concerned."

The Committee has permitted attorneys to advertise that they have been listed in publications such as The Best Lawyers in America, given they actually have been listed, as long as statements in the publication do not violate Rule 7.1. Moreover, lawyers may advertise statements regarding their

professional credentials as long as the explanation of such credentials' significance in laymen's terms is not exaggerated.

Regarding lawyers' use of "expert" or "expertise," in public communications, the Committee opined that such usage is misleading when claims of expertise cannot be substantiated and thus prohibited. On the other hand, the Committee stated that attorneys can generally state that they are "specialists," or that they practice a "specialty," or that they "specialize in" particular fields as longs as these statements are not false or misleading.

b. LEO 1885[74] (Pending): Ethical Considerations for a Lawyer's Participation in Online Attorney-Client Matching
Virginia RPCs 1.15, 1.16, 5.4(a), 7.3(a)
    i. A vote by the VSB Council shows that a majority of the council is in favor of LEO 1885, which "concludes that a lawyer may not participate in an attorney-client matching service under the facts presented" in the LEO because participation under the facts presented "violates the Rules of Professional Conduct" governing fee sharing with nonlawyers, paying for referrals, and safeguarding client funds." LEO 1885 is pending approval by the Supreme Court of Virginia as of August 23, 2018.

    The facts surrounding participation in the online attorney matching service (ACMS), which is operated for profit, are outlined below. The lawyer participating in the ACMS:

        1. "provides a client with limited scope legal services advertised to the public by the ACMS for a legal fee set by the ACMS;
        2. "allows ACMS to collect the full, prepaid legal fee from the client, and to make no payment to the lawyer until the legal service has been completed;
        3. "authorizes the ACMS to electronically deposit the legal fee to the lawyer's operating account when she completes the legal service; and
        4. "authorizes the ACMS to electronically withdraw from the lawyer's bank account a "marketing fee" which, by prior agreement between the ACMS and the lawyer, is set by the ACMS and based upon the dollar amount of the legal fee paid by the client."

[74] http://www.vsb.org/docs/LEO1885_SCV_petition111717.pdf

The proposed opinion concludes that a lawyer may not participate in programs such as the one outlined above because "a lawyer's participation in the program violates Rules 1.15 and 1.16 because it does not permit the lawyer to fulfill her duties to safeguard her client's funds and to refund unearned fees at the conclusion of the representation." Additionally, the participation is prohibited because, "the program violates Rules 5.4(a) and 7.3(d) because it involves sharing with a non-lawyer and giving something of value (the 'marketing fee') in exchange for a recommendation of the lawyer's services.

c. LEO 1887[75] (Approved): Duties when a lawyer over whom no one has supervisory authority is impaired.
Virginia RPCs: 1.16 and 8.3
    i. According to the Committee, lawyers who are not partners or in supervisory roles at a law firm do not have a duty to *proactively* address the impairment of other lawyers. However, reporting lawyers are required to take action once they have reliable information that an impaired lawyer has "committed a violation of the Rules that raises a *substantial question as to that lawyer's honesty, trustworthiness, or fitness to practice law*."

    The Committee has emphasized that a lawyer's impairment is not necessarily a violation of the RPCs and that not every violation of the RPCs will raise a substantial question as to that lawyer's honesty, trustworthiness, or fitness to practice law. Therefore, in situations where a lawyer may seem impaired, but has not violated the RPCs, the reporting lawyer has no duty to action. In situations, where a reporting lawyer has reliable information that a materially impaired lawyer is continuing to represent clients in violation of RPCs 1.16(a)(2) and 8.3(a), the reporting lawyers is required to report the conduct of the impaired attorney to the Bar.

    The Committee has also suggested that lawyers concerned with the possible impairment of other lawyers can encourage the impaired lawyer to contact Lawyers Helping Lawyers for assistance regardless of whether a complaint to the Bar is warranted.

d. LEO 1888[76] (Withdrawn): Prosecutor's duty to disclose evidence that tends to negate the guilt of the accused.

[75] http://www.vsb.org/docs/SCV-LEO1887-order-083017.pdf

i. The Standing Committee on Legal Ethics voted not to send the proposed LEO 1888 to Council after deciding to consider alternative methods of addressing this issue due to an influx of comments both in support or and in opposition to the proposed LEO 1888.

e. LEO 1889[77] (Pending): Regarding Court-Appointed Lawyers and Parental Rights.
Virginia RPCs: 1.1, 1.2, 1.3, 1.4, and 3.1
   i. This pending LEO concerns, first, whether court-appointed counsel for a parent have an ethical duty to appeal an order of Juvenile and Domestic Relations District Court terminating a parent's residual parental rights or other order pertaining to the removal or foster care in respect to a child when the parent: fails to appear after notice, fails to maintain contact with counsel, and has never advised or requested counsel to appeal an adverse ruling, and, second, whether court-appointed counsel have an ethical duty to appeal a termination in the Circuit Court if the parent has never appeared or contacted counsel.

      In response to both these concerns, the Committee has concluded that, absent direction from the client at some point in the proceeding to appeal an adverse ruling, the court-appointed counsel should not be obligated to initiate an appeal in either case.

      As the Standing Committee on Legal Ethics approved this LEO on January 10, 2018, the Virginia State Bar has requested that the Supreme Court of Virginia approve proposed LEO 1889.

f. LEO 776[78] (Withdrawn): Threatening Prosecution on a Civil Matter

g. LEO 1888[79] (Withdrawn): Prosecutor's Duty to Disclose Evidence That Tends to Negate the Guilt of the Accused:
   i. Standing Committee on Legal Ethics voted not to send LEO to council

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[76] http://www.vsb.org/pro-guidelines/index.php/rule_changes/item/leo_1888_prosecutors_duty_to_disclose
[77] http://www.vsb.org/docs/Final_Petition_LEO1889_scv_filed_6-21-2018.pdf
[78] http://www.vsb.org/pro-guidelines/index.php/rule_changes/item/leo_776_threatening_prosecution_in_a_civil_matter
[79] http://www.vsb.org/pro-guidelines/index.php/rule_changes/item/leo_1888_prosecutors_duty_to_disclose

## II. Updates to Virginia Rules

### a. Adopted

i. Adopted Changes to Rules Governing Status of Emeritus Members Permitted to Provide Pro Bono Legal Services[80]

1. Paragraph 3(e) of Part 6, Section IV of the Rules of the Supreme Court of Virginia was amended to change the number of years an attorney must have been "engaged in the active practice of law for a minimum of five out of the seven years immediately preceding the application to become an emeritus member" and to eliminate the requirement of an attorney to practice under direct legal aid attorney supervision.

ii. Adopted Change in Rule 6.1: Volunteer Pro Bono Publico Legal Services Reporting:[81]

1. Part 6, Section IV of the Rules of the Supreme Court of Virginia will include a provision requesting each member of the Virginia State Bar to report their pro bono hours and/or financial contribution in support of pro bono legal services on their annual dues statements. The adoption of this revision aligns with the goal of Rule 6.1 compelling attorneys to devote at least 2% of their professional time to pro bono legal services annually. This adoption will be effective as of December 1, 2018.

iii. Adopted 3-Year Extension to Clients' Protection Fund

1. Governor Northam signed revisions to Virginia Code Section 54.1-3913.1 regarding Clients' Protection Fund thereby extending the sunset provision from July 1, 2020 to July 1, 2023. Both houses of the General Assembly unanimously approved the revisions, which became effective July 1, 2018.[82]

### b. Amendments

i. MCLE Board amended Opinion 19 on Lawyer Well-Being[83]

1. "The revised Opinion 19 makes clear that lawyer well-being topics will be considered for CLE credit, so long as other MCLE requirements are satisfied." The opinion includes a long list of topics that may be approvable for CLE credit such as work/life balance, navigating the practice of law in a health manner, and promotion of lawyer autonomy and control over lawyers' schedules and lives.

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[80] http://www.vsb.org/pro-guidelines/index.php/rule_changes/item/para3_emeritus_2017
[81] http://www.vsb.org/pro-guidelines/index.php/rule_changes/item/paragraph_22_pro_bono_reporting
[82] http://www.vsb.org/pro-guidelines/index.php/rule_changes/item/cpf_sunset_provision_2017
[83] http://www.vsb.org/pro-guidelines/index.php/rule_changes/item/mcle_opinion19_lawyer_well_being

ii. Adoption of Amendments to Paragraph 13 to Definitions of Burden of Proof and Disciplinary Record:[84]
iii. Adoption of Amendment of Rule 1A:1:[85] Admission to Practice in this Commonwealth Without Examination
    1. Amendments to Part 6, Section IV, Paragraph 13-1 of the Rules of the Supreme Court of Virginia regarding the definitions of "disciplinary record" and "burden of proof" were approved by the Committee on Lawyer Discipline (COLD).

       The amendment provides clarity to the definition of "disciplinary record," by adding "Disciplinary Record does not include administrative or Impairment Suspensions."

       The amendments also provide the following definition of burden of proof: "The burden of proof in all Disciplinary Proceedings is clear and convincing evidence." These amendments became effective June 15, 2018.

**c. Trends in Professional Responsibility: Proposed Revisions**

i. Virginia RPC 1.1: Competence:
    1. The proposed revision to this rule is the addition of comment 7,[86] which brings attention to the idea that lawyers maintaining their well-being is, in turn, an aspect of maintain competence to represent clients.

ii. Virginia RPC 1.10(a): Imputed Disqualification
    1. **Original Rule:** Imputed Disqualification: General Rule (a) While lawyers are associated in a firm, none of them shall 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).

    2. **Proposed Rule:** (a) While lawyers are associated in a firm, none of them shall 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) **unless the**

[84] http://www.vsb.org/pro-guidelines/index.php/rule_changes/item/amend_para_13-1_2017-11
[85]http://www.courts.state.va.us/courts/scv/amendments/2018_0914_rule_1a_1.pdf
[86]http://www.vsb.org/pro-guidelines/index.php/rule_changes/item/revisions_to_rule_1.1_competence

**prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by other lawyers in the firm.**

The "proposed revision provides that a conflict is not imputed to other lawyers in a firm when the conflict arises from a personal interest of the affected lawyer and does not present a significant risk of materially limiting the representation by other lawyers in the firm."

The revision also proposes to add Comment 3 to the rule, which provides examples of personal interest conflicts that may or may not affect other lawyers' ability to represent a client. One example is when a lawyer has a personal relationship with a witness involved in a case. According to the proposed revision, this personal relationship "would not create a conflict for other lawyers in that firm unless those lawyers' relationship with the conflicted lawyer would materially limit their own representation of the client."

The revision also proposes to add Comment 4, which explains the imputation rules for nonlawyers in firms and provides guidance consistent with the current LEO 1800.

iii. Virginia RPC 1.8: conflict of interest and prohibited transactions

1. **Original Rule:** 1.8(e)(1) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
   (1) a lawyer may advance court costs and expenses of litigation, provided the client remains ultimately liable for such costs and expenses; and
2. **Proposed Revision:** 1.8(e)(1) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
   (1) a lawyer may advance court costs and expenses of litigation, **the repayment of which may be contingent on the outcome of the matter**; and

iv. Virginia's Advisory Committee on Rules of Court Has Presented Options for Legal Ghostwriter Rule[87]

1. The Committee has presented five proposals for alternative rules to Rule 1:5 of the Supreme Court of Virginia for governing lawyers' ghostwriting on civil pro se pleadings. The proposals carry different levels of disclosure and responsibility required for lawyers wanting to help pro se litigants in the hope to increase access to justice without having to be involved in the legal proceedings for prolonged periods of time. Below are the proposed alternatives to the current Rule 1:5:

   1) An attorney may prepare papers for submission to a court by a pro se party without filing a notice of appearance and without causing any indication of such assistance to be reflected on the papers.

   2) If an attorney prepares papers for submission to a court by a pro se party it shall be indicated thereon that an attorney assisted in their preparation. Such assistance shall not be deemed appearance of record in the action, and counsel need not be identified.

   3) If an attorney prepares papers for submission to a court by a pro se party the attorney shall be identified on the papers by name and contact information with a notation that the attorney has assisted in their preparation. Such assistance shall not be deemed appearance of record in the action, and no notice of limited appearance is required.

   4) If an attorney prepares for submission to a court by a pro se party the attorney shall be identified on the papers by name and contact information with a notation that the attorney has assisted in their preparation. Such assistance shall be deemed appearance as counsel of record in the action for all purposes, unless a notice of limited scope representation is filed contemporaneously with such papers.

   5) Any attorney who prepares any document that is to be filed in the court by a person who is known by the attorney, or who is reasonably expected by the attorney,

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to be proceeding pro se, shall be considered to have entered an appearance in the proceeding for all purposes and shall be subject to all rules that govern attorneys who have formally appeared in the proceeding.

All litigants who are proceeding pro se shall certify in writing and under penalty of perjury that each document filed with the court has not been prepared by, or the aid of, an attorney or shall identify any attorney who has prepared, or assisted in preparing, the document.

v. Proposed revision to Part 6, Section I of the Rules of the Supreme Court of Virginia on the unauthorized practice of law:[88]
    1. Legal Ethics committee is seeking comments on this revision, which aims to "more succinctly and clearly set out the general prohibition against the unauthorized practice of law, a definition of the practice of law, exceptions (i.e. activity that is the practice of law but which nonlawyers and foreign lawyers may perform), exclusions (i.e., activity that is not considered the practice of law), commentary, and annotations."

## III. Disciplinary Cases: Embezzlement, Fraud, Incompetence, and More

a. Attorney Required to Pay 2.5 Million in Damages for Mismanagement of Client's Trust[89]
    i. Attorney Philip Farthing must pay over $2.5M worth of damages to the family members of the late Ivan Higgerson for the mismanagement of Higgerson's estate. Farthing was named the trustee of Higgerson's trust. Although Farthing is not a licensed or trained investor, he used funds from the trust for margin trading incurring over $1M in debt for the Higgerson estate.

    Judge Brown found that Farthing was in breach of his duties of loyalty and care to Ms. Higgerson, the trust's sole beneficiary, for failure to reflect that he was day trading and margin trading in his accounts to Ms. Higgerson. In addition to his blatant mismanagement of the trust, Judge brown found that Farthing paid himself $770,000 of fees in excess of what is deemed reasonable compensation.

[88] http://www.vsb.org/pro-guidelines/index.php/rule_changes/item/revisions_to_UPL
[89] Virginia Lawyers Weekly

b. Attorney Faces Charges for Embezzlement of $650k from Senator's Campaign[90]
    i. David H. Miller, a Fairfax attorney, faced an indictment alleging he embezzled more than $650,000 from Virginia Senate Minority Leader Richard Saslaw's campaign fund. Miller's wife, Linda Wallis, was the treasurer of Saslaw's campaign and took approximately $653,000 from the fund that she and Miller then used for their personal expenses. Miller's wife was convicted and Miller is facing a criminal case as a result of his involvement.
c. Attorney's License Suspended for 3 years After Stonewalling Client[91]
    i. Robert Shearer Jr., a domestic relations attorney, charged client, a father, a flat fee of $11,500 to help to defend client in a custody-and-support case. Once client paid the total sum of $11,500, Shearer transferred the money into his personal account. Shearer did not have a written agreement with client. Shearer was a present at a hearing for client in Prince William County, but stopped responding to all of client's correspondence since.

       The client constantly attempted to reach out to Shearer via e-mail and phone and also drove to Shearer's office only to find that Shearer had moved out of the office without providing a forwarding address. After three weeks of not responding to his client, Shearer claimed he did not have access to his phone and e-mail services as a result of moving, but client ultimately had to hire a new lawyer. Furthermore, Shearer did not return the unearned portion of his fee to client despite the Virginia State Bar Disciplinary Board ordering him to do so.

       Following the client's complaint to the bar, Shearer failed to properly respond to a bar subpoena in a timely manner. The disciplinary board ordered a three-year suspension of Shearer's law license after finding, with clear and convincing evidence, that Shearer violated ethics rules dealing with safekeeping of property, diligence, terminating representation and obstructing an investigation. The disciplinary board also recommended Shearer continue seeking help from Lawyers Helping Lawyers regarding his issues with alcoholism.

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[91] http://www.vsb.org/docs/Shearer-070318.pdf

d. Attorney Disbarred Over Failure to Attend Virginia State Bar Disciplinary Hearing[92]
    i. Brent Barbour, a former attorney residing in Lynchburg, was disbarred as result of failing to make his court appearances and skipping his disciplinary hearing with the Virginia State Bar. Barbour has gotten into trouble over his mishandling of client's cases related to bankruptcy as well bankruptcy issues of his own. His mishandling of cases have lead to ethical charges against him. VSB's investigation of Barbour, in which Barbour refused to cooperate, revealed that Barbour had committed six rule violations. Barbour was disbarred As a result of his repeated misconduct and failure to appear for his VSB disciplinary hearing.
e. Trusts and Estates Attorney was Issued Public Remand for Backlog of Deeds[93]
    i. A supervised staffer of Virginia Beach trusts and estates attorney Kenneth Dodl managed to accumulate a backlog of 94 unrecorded deeds at Dodl's office. Dodl faced public reprimand as a result of poor supervision of this staffer and allowing the backlog to accumulate. 46 of Dodl's clients were affected as a result of this backlog. Furthermore, an investigation into the matter revealed that in addition to failing to record the deeds, Dodl's staffer had falsified the recordation of several deeds. Although Dodl did not have any prior disciplinary record, the disciplinary board found that Dodl violated rules of responsibility regarding non-lawyer assistants, diligence, safekeeping of property, and communication with clients and, therefore imposed the public reprimand of Dodl.
f. Former Attorney Convicted of Embezzlement of 60k From Special Needs Student Ordered to Pay Restitution[94]
    i. Former Richmond attorney Darryl Parker sued a school system on behalf of his client, a special needs student at this school, who was injured at school. After Parker's negotiation, the school's insurer agreed to paying a $60k settlement. Upon the client's endorsement of the settlement check, Parker deposited the check into his trust account and used the money for personal expenses. The client's mother filed a claim with the VSB Clients' Protection Fund and was awarded $50k, which was the previous limit the CPF could pay out. The CPF limit is now $75k. Parker was disbarred and indicted as a result.

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g. Ex-Attorney Pleads Guilty to Filing False Report to Police Claiming He Received Racial Threat to City Leaders[95]
    i. Former Attorney Brian Telfair pleaded guilty, admitting he falsely reported a call he received involving a racial threat to Petersburg City leaders. Telfair had actually organized the call he claimed he received from a "redneck." Judge Ray Lupold of the Petersburg General District Court sentenced Telfair to 12 months of jail time, with 11 months suspended and restitution payment of $7,411 to the Virginia State Police for their investigation of the falsely reported incident.
h. Four Virginia Attorneys Sanctioned for Filing Lawsuit with Frivolous Claims[96]
    i. Four attorneys from Nexus Services Inc., a charitable criminal bonding program, were sanctioned as a result of a lawsuit they filed against the Augusta County Sheriff's office bearing frivolous claims. Among the frivolous claims were the attorneys' claims that they were harassed by the sheriff's office and that deputies from the sheriff's office had held them against their will.

       The harassment claim came from the attorneys' reading of e-mails, which they were given access to as a result of a FOIA request, between a local bail bondsman and the sheriff's deputies "expressing concern about the legality of Nexus' bonding business."

       The second claim came from an incident security cameras later revealed to involve deputies from the sheriff's office driving in front the attorneys' home, briefly stopping, and then driving away.

       Judge Dilon found the lawsuit contained claims the attorneys failed to ensure "had a reasonable basis in law" before filing and ordered the attorneys to pay approximately $30k of the defense's attorney fees as a result.
i. Bankruptcy Lawyer Banned from Courthouse for 6 Months Due to Unruly Behavior[97]
    i. Bankruptcy attorney Richard Gates has been banished from the U.S. Bankruptcy Court for the Eastern District after exhibiting unruly behavior. Gates allegedly threw his shoes and belt into inspection containers on two separate occasions

[95] http://www.richmond.com/news/local/central-virginia/ex-petersburg-city-attorney-who-appealed-conviction-of-lying-to/article_0b6c170f-a710-5a33-af58-2a6a4387260e.html
[96] Virginia Lawyers Weekly
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while using profanity during the contraband examination required for everyone entering the courthouse. Moreover, Gates was accused of striking a woman in the security line with him as result of throwing his belt in one of these incidents. The U.S. Marshals Service had to be summoned to handle the situation. Judge Huennekens ordered a six-month suspension of Gates from the courthouse without automatic reinstatement. In order to practice before the U.S. Bankruptcy Court for the Eastern District, Gates will have to move for readmission to practice once his six-month suspension has ended.

j. Tax Lawyer Disbarred in 3 States Due to Gun and Drug Convictions[98]
    i. Robert Howell, a former tax lawyer, has been disbarred in Virginia, Illinois, and North Carolina. The disbarment came as a result of a charge against Howell for kidnapping a former girlfriend in South Carolina and holding her at gunpoint. Howell also pleaded guilty for a misdemeanor cocaine possession.
k. Law Firm Faces Trial on Claim of Fraudulent Conveyance for Assisting Client with Movement of Funds to Avoid Civil Judgment[99]
    i. Ayers & Stolte law firm faced trial after being accused of making fraudulent conveyances in an attempt to avoid civil judgment for their client, Bon Air Med Spa LLC ("Bon Air"). The firm was representing Bon Air as a defendant in a suit brought by ("La Bella") Dona Skin Care Inc. claiming Bon Air had stolen trade secrets from La Bella. La Bella won the suit along with a judgment of more than $460K.

    Bon Air and its owners signed an $85k promissory note for the law firm's past and future legal costs and then formed a new limited liability company, Belle Femme Enterprises LLC to which they transferred Bon Air's assets. La Bella argued that Bon Air continued operating as Bon Air with the same assets regardless of the formation of Belle Femme Enterprises LLC.

    The court found that, "this series of transactions supports an inference that the participants in each individual transaction were engaged in a larger scheme to fraudulently convey Bon Air's assets to Belle Femme via Ayers & Stolte," and sent the issue to be resolved by a jury in a new trial.
l. Lawyer Arrested for Delivering Contraband to Inmate Client[100]
    i. Dana Tapper, a Richmond Lawyer, was arrested on six felony charges for allegedly delivering drugs and a cellphone to an

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inmate. Prior to this incident, Tapper was in good standing with the Virginia State Bar, but the reported misconduct may have led to bar discipline hearings.

## IV. Q&A and Conclusion