

INTRODUCTION AND PROJECT OVERVIEW

Like other lawyers who deal with ethics issues, I have read nearly every one of the Virginia Rules and the ABA Model Rules many times (if not hundreds of times). But I had never read them front-to-back and side-by-side. I usually bring some work along on vacations with my understanding wife Karen. In February, 2019, I brought along a copy of the Virginia Rules and the ABA Model Rules.

As I read them, it dawned on me that Virginia lawyers could use: (1) a summary and explanation of each Virginia Rule; (2) an analysis of how that Rule fits in with the other Virginia Rules; and (3) a comparison of that Virginia Rule and the parallel ABA Model Rule. I also noticed hundreds of mistakes, inconsistencies, and incorrect or otherwise poor wording in both the Virginia Rules -- and even in the ABA Model Rules. This observation caused some embarrassment, because I wondered why I had never noticed all of them before.

Over the next three years, I spent nearly every weekend and most “vacations” personally preparing several documents – comprising about 3,000 pages – over 550,000 words.

Virginia Rules and ABA Model Rules Summary, Analysis and Comparison

The largest of these documents (about 1,800 pages) is my summary, analysis and comparison of the Virginia Rules. This document follows the Virginia Rules' order.

Virginia lawyers interested in my thoughts about the ABA Model Rules might also find the analysis and comparison useful in helping to understand the ABA Model Rules.

This document might also be helpful to non-Virginia lawyers to the extent that those parrot or parallel similar ABA Model Rules. In most cases, my summary and analysis of the ABA Model Rules and Comments follow immediately my summary and analysis of the parallel Virginia Rules and Comments. To the extent that there is any variation in the numbering, word searches should help any non-Virginia lawyer find my summary and analysis of an ABA Model Rule or Comment.

While preparing this lengthy document, I also worked on four additional documents.

ABA Model Rule General Notes

This document (about 100 pages) has several sections.

Although not substantively important, the section entitled "Inconsistent Rule Titles" describes almost humorously inconsistent ABA Model Rule titles. Here are some examples:

- ABA Model Rule 1.9's title refers to plural "Former Clients." But ABA Model Rule 1.18's title refers to a singular "Prospective Client."
- ABA Model Rule 1.11's title refers to persons in the plural, separated by the word "and." But the next Rule's title refers to persons in the singular, separated by the word "or."
- ABA Model Rule 4.3's title refers to a singular "Person." But the next Rule's title refers to plural "Third Persons."

On a much more serious note, the section entitled “Inconsistent Guidance: ‘Should’ and ‘Must’” describes many remarkable ABA Model Rules and Comments that use the word “should” where the word “must” would clearly be required, or more appropriate. Here are some examples:

- ABA Model Rule 1.0 cmt. [2]’s sixth sentence refers to some unidentified “Rule” as indicating that “the same lawyer should not represent opposing parties in litigation.”
- ABA Model Rule 1.8 cmt. [2]’s concluding sentence states that “[w]hen necessary” lawyers “should discuss” certain issues with their clients.
- ABA Model Rule 1.5 cmt. [9] is the worst offender. That Comment understandably states that lawyers “must comply” with a mandatory fee dispute resolution procedure established by a bar, but just two sentences later inexplicably only suggests that lawyers “should comply” with a procedure prescribed by law.
- ABA Model Rule 1.14 cmt. [2]’s second sentence suggests that lawyers dealing with a client suffering from a disability “should” treat that person “as far as possible” as a normal client – which contrasts with black letter ABA Model Rule 1.14(a)’s requirement that lawyers “shall” do so.
- ABA Model Rule 3.6 cmt. [7]’s concluding sentence states that ABA Model Rule 3.6(c) responsive statements “should be limited” to certain information – which contrasts with black letter ABA Model Rule 3.6(c)’s requirement that such responsive statements “shall be limited” to certain information.

The section entitled “Inconsistent Use of the Undefined Word ‘Associated’” describes the ABA Model Rules’ pervasive and substantively significant inconsistency in their use of the word “associated.”

ABA LEO 356 (12/16/88) provides the presumably intended definition of what “associated” means in the law firm context – general access to the firm’s clients’ confidences.

But the ABA Model Rules indiscriminately use that word and its variations. The ABA Model Rules and Comments state that lawyers can be “associated” with: lawyers in another firm; lawyers from another state; even nonlawyers. Several ABA Model Rules

and Comments use the word “associate” in its colloquial sense – as a law firm’s non-partner lawyer. Ironically, an “associate” is less likely than a partner to be “associated” with her law firm.

And it seems clear that under the ABA Model Rules some lawyers in a law firm can be “associated” “with,” “in,” or “within” (the ABA Model Rules and Comments use all three words) a law firm -- while other lawyers in that law firm are not “associated” with the firm. Some ABA Model Rules and Comments explicitly apply only to lawyers “associated” with a law firm. But other ABA Model Rules and Comments deliberately avoid that limiting characterization – instead using phrases like “[l]awyers in a firm,” “all lawyers in the firm,” “another lawyer in the lawyer’s firm.”

Unfortunately, the ABA Model Rules and Comments are hopelessly befuddled in analyzing the impact of a lawyer’s “association” with a law firm. In some ABA Model Rules, “associated” lawyers are the source of an imputed prohibition or disqualification, while in other ABA Model Rules and Comments “associated” lawyers are the targets of such an imputed prohibition or disqualification. There seems to be no intellectual or grammatical consistency. Here are some examples:

- ABA Model Rule 1.8(k) describes only “associated” lawyers as both the source of the imputed prohibition and the targets of the imputed prohibition (rendering all of that important Rule’s many provisions inapplicable to lawyers not “associated” with their law firm).
- Key ABA Model Rule 1.10(a) similarly applies only to lawyers “associated” with their law firm – excluding from its application lawyers who are not “associated” with their firm. And that Rule also highlights the ABA Model Rules’ presumably deliberate distinction between “associated” and non-“associated” lawyers. ABA Model Rule 1.10(b)(2) explains that a law firm’s freedom to represent a client adverse to a client who had been represented by a “formerly associated lawyer” disappears if “any lawyer remaining in the firm” has material protected confidential information.

- In contrast to ABA Model Rules 1.8 and 1.10, ABA Model Rule 1.11(b) describes an “associated” lawyer as the source of the imputed disqualification, but all lawyers in the firm as targets of that imputed disqualification (explaining that “no lawyer in a firm with which that [individually disqualified] lawyer is associated may knowingly undertake or continue representation in such a matter.”).

The section entitled “Inconsistent Words: ‘Conflict[s] of Interest[s]’” describes the ABA Model Rules’ substantively inconsequential but annoyingly inconsistent use of the singular and the plural of those words.

The section entitled “Inconsistencies: Other Words and Phrases” describes ABA Model Rules and Comments that cast doubt on the meaning of important terms. Is adversity to a “person” different from adversity to a person’s “interests” or “positions”? Do the adjectives “materially,” “seriously,” “substantial,” etc. define different levels of adversity’s magnitude or intensity? In ABA Model Rule 1.14 Comments, is the term “severely incapacitated” intended to differ from terms such as “diminished mental capacity,” “diminished capacity,” and “seriously diminished capacity”?

The section entitled “Inconsistent Phrases and Words: Stylistic Issues” describes ABA Model Rules and Comments containing inconsistencies that seem purely stylistic. For instance, in describing conflicts one Rule uses the phrase “involves a ... conflict,” another Rule uses the phrase “presents a conflict,” and another Rule’s Comment uses the phrase “affected by a conflict.”

The section entitled “Inconsistent Punctuation” describes examples of the ABA Model Rules sometimes using a hyphen and sometimes not using a hyphen in terms such as “contingent fee,” “nonlawyer,” “income tax return,” etc. The Rules are also inconsistent in their use of the Oxford comma, which in some situations might cause some confusion: ABA Model Rule 6.1 cmt. [3] and ABA Model Rule 6.5 cmt. [1].

The section entitled “Inconsistencies: 2021 ABA Model Rule Book and Online Version” describes a few troubling inconsistencies between what I assume is the official “book” version of the ABA Model Rules and the online version. Among other things, ABA Model Rule 1.10 cmt. [1] in the 2021 Edition book refers to a different ABA Model Rule than the online version. ABA Model Rule 1.10 cmt. [3]’s first sentence in the 2021 Edition book contains the word “where” -- in contrast to the online version’s mysterious use of the word “whether” in the same place.

ABA Model Rule Specific Notes

This document (about 550 pages) describes what seem to be mistakes, inconsistencies and poor wording in the ABA Model Rules and Comments.

Some of them seem clearly erroneous. Here are some examples:

- ABA Model Rule 1.2 cmt. [13] describes a “know or reasonably should know” standard – explicitly referring to ABA Model Rule 1.4(a)(5). But that ABA Model Rule contains a “knows” standard, not a “reasonably should know” standard, in describing lawyers’ knowledge of their clients’ expectation of unethical assistance.
- ABA Model Rule 1.9 cmt. [1] requires the consent of “all affected clients” in the described scenario -- which contrasts with black letter ABA Model Rule 1.9(a)’s limitation of the consent requirement to “the former client.”
- ABA Model Rule 1.9 cmt. [6]’s first sentence mentions a lawyer’s knowledge that is “aided by inferences, deductions or working presumptions” -- which seems to contrast with ABA Model Rule 1.9 cmt. [5]’s first sentence’s “actual knowledge” standard.
- ABA Model Rule 1.11(d)(2)(ii) allows “a lawyer serving as a law clerk to ... [an] arbitrator” to “negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).” But ABA Model Rule 1.12(b) does not include law clerks to arbitrators in its presumably deliberately chosen list of lawyers who can negotiate for private employment.
- ABA Model Rule 1.18 cmt. [9]’s concluding sentence points to ABA Model Rule 1.15 for guidance “when a prospective client entrusts valuables or papers to the lawyer’s care.” But ABA Model Rule 1.15 does not contain either word – and one

might wonder what the lawyer must do if the prospective client entrusts non-valuable items to the lawyer's care.

- ABA Model Rule 5.5 cmt. [15]'s concluding sentence contains the phrase "systematic or continuous presence" – which contrast with black letter ABA Model Rule 5.5(b)(1) and even with ABA Model Rule 5.5 cmt. [15]'s first sentence – which contains the proper phrase "systematic and continuous presence."

The ABA Model Rules Specific Notes document contains several multi-page descriptions of particularly confusing ABA Model Rules and Comments. Here are some examples:

- ABA Model Rule 1.13 cmt. [10] (discussed on pages 224-226 of the ABA Model Rules Specific Notes) contains a perplexing mix of scenarios where adversity exists or may exist, and an odd under-inclusive list of disclosures lawyers must make in those varied circumstances.
- ABA Model Rule 1.17 (discussed on pages 262-265 of the ABA Model Rules Specific Notes) contains a dizzying list of undefined terms that the Rule seems to equate – but which in real life define totally different things: "practice;" "representation;" "matter;" "file."

Not all 500 plus pages of the ABA Model Rules Specific Notes describe apparent errors. The Notes also point to some confusing language and purely stylistic issues. Here are some examples:

- ABA Model Rule 1.5 and its Comments: (1) include as a factor in assessing a fee's reasonableness the lawyer's inability to handle other matters "if apparent to the client" – why does that matter?; (2) leave out a hyphen in several "contingent fee" references, in contrast to another ABA Model Rule Comment; (3) use three different phrases in describing a fee division; (4) offer only a suggestion that lawyers "should not exploit a fee arrangement"; (5) describe fee divisions between a lawyer and another lawyer to whom a matter is referred (which would seem to be unavailable if a referral means a total hand-off, as in ABA Model Rule 1.1 cmt. [1]).
- ABA Model Rule 1.17 and its Comments: (1) use both the terms "geographic" and "geographical;" (2) boast that practicing law is "not merely a business," but then allow a lawyer who sold her practice to serve as in-house counsel "to a business" (inexplicably leaving out a later in-house counsel role for a labor union, a university, etc.); (3) warn that a law practice's "sale may not be financed by increases in fees" -- it would seem that the purchase would be financed, not the sale.

To make collaboration easier, each reference identifies the Rule or Comment number, contains a separate number if there is more than one reference to that Rule or Comment, and a “Code” number – which reflects my assessment of the significance of the mistake, inconsistency, poor wording, etc. Those Code numbers are in decreasing order of importance: (1) Urged improvement; (2) Recommended improvement; (3) Substantive suggestion; (4) Stylistic note.

Virginia Rules General Notes

This short document (about 15 pages) identifies inconsistent Rule titles, and several places where the Virginia Rules and Comments provide inconsistent guidance by using the word “should” where the word “must” would be more appropriate.

This Virginia Rules General Notes is a very small subset of the more extensive 100 page ABA Model Rules General Notes (described above).

Virginia Rules Specific Notes

This document (about 550 pages) describes what seem to be mistakes, inconsistencies and poor wording in the Virginia Rules and Comments. Many of these match similar issues in the ABA Model Rules (described above). There are also unique problems with the Virginia Rules.

As with the ABA Model Rules Specific Notes (described below), each page contains the Virginia Rule or Comment number, a separate number if there is more than one reference to that Rule or Comment, and a “Code number” – which reflects my assessment of the significance of the mistake, inconsistency, poor wording, etc.

Acknowledgments

I prepared all of these documents: (1) with respect for every lawyer who has worked on drafting and revising the ABA Model Rules since 1983, and the Virginia Rules since 2000; (2) with embarrassment, for the many hundreds of times I have overlooked what seem like important issues in both sets of Rules, and the many apparent mistakes, inconsistencies and poor wording; (3) with the acknowledgment that many apparent mistakes, inconsistencies and poor wording will not risk lawyers' ethics violations or otherwise significant misunderstanding, but with the recognition that our profession's ethics rules should be clear, consistent and as easily applied as possible; (4) with humility, for what I am sure are mistakes in the approximately 3,000 pages and over 550,000 words I have prepared – for which I am solely responsible, because I wrote every word myself.

Most importantly, I prepared these documents: (1) with gratitude for my McGuireWoods colleagues with whom I have enjoyed practicing law every day since May 23, 1977, as the luckiest lawyer in America; (2) with special appreciation for the McGuireWoods Business Resource Center's heroic efforts to type up all of my dictation – quarterbacked first by my late colleague Crystal Coppinger and then by my colleague indefatigable Sara Eagen; and (3) with eternal thankfulness for my wonderful wife Karen, for making me the luckiest man in the world.