

# VIRGINIA RULES AND ABA MODEL RULES SUMMARY, ANALYSIS AND COMPARISON

## INTRODUCTION

This document: (1) summarizes each Virginia Rule and Comment; (2) analyzes each one's place in the Virginia Rules generally; and (3) compares it to the parallel ABA Model Rule and Comment (if there is one).

This document follows the Virginia Rules' order. An underlined left-margin heading indicates each Virginia Rule and Comment. Any parallel ABA Model Rule or Comment follows the Virginia Rule or Comment.

If Virginia did not adopt an ABA Model Rule or Comment, this document identifies such an ABA Model Rule or Comment with a left margin underlined heading, and addresses it in what seems to be the most appropriate order.

Both Virginia and non-Virginia lawyers may therefore find this document useful in studying the ABA Model Rules and Comments, each of which it also summarizes and analyzes.

Given both Virginia's and the ABA's recent reorganization of their Rule 7 marketing provisions, this document's Rule 7.1, 7.2 and 7.3 summaries contain a chart explaining where it addresses each Virginia and ABA Model Rule marketing provision.

Other documents provide additional guidance, so Virginia and non-Virginia lawyers would be wise to also consult those for a better understanding of both the Virginia Rules and the ABA Model Rules.

The “**ABA Model Rules General Notes**” and the “**Virginia Rules General Notes**” address one or both Rules’: (1) bewilderingly inconsistent titles; (2) significantly erroneous use of the words “should” and “must”; (3) confusing use of the undefined word “associated”; (4) puzzling use of the words “conflict[s] of interest[s]”; (5) other inconsistent words and phrases; (6) erratic punctuation; and (7) troubling inconsistencies between the official 2021 ABA Model Rule book and the ABA Model Rules online version.

The “**Virginia Rules Specific Notes**” and the “**ABA Model Rules Specific Notes**” each contain approximately five hundred pages of what are, or seem to be, mistakes, inconsistencies and arguably poor wording in the Virginia Rules and the ABA Model Rules. These documents incorporate features to encourage easy reference and discussion, and also assign a code for each page indicating the mistake’s or inconsistency’s arguable significance.

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# Preamble: A Lawyer's Responsibilities

## Rule

### Virginia Rules Preamble Paragraph 1

The first Virginia Rules Preamble paragraph defines lawyers' basic role – as “a representative of clients or a neutral third party,” and also as “an officer of the legal system and a public citizen having special responsibility for the quality of justice.”

As discussed later in this document, the Virginia Rules have two unique ethics rules addressing lawyers acting in a third-party neutral role. Virginia Rules 2.10 addresses lawyers acting in that role generally, and Virginia Rules 2.11 focuses on lawyers acting as mediators (which is a specific type of third-party neutral role).

**ABA Model Rules Preamble [1]** contains similar language.

In contrast to the first Virginia Rules Preamble paragraph, ABA Model Rules Preamble [1] also recognizes that a lawyer is “a member of the legal profession.” Also in contrast to the first Virginia Rules Preamble paragraph, ABA Model Rules Preamble [1] does not mention lawyers acting as third party neutrals.

### Virginia Rules Preamble Paragraph 2

The second Virginia Rules Preamble paragraph addresses lawyers' “various roles”.

The second Virginia Rules Preamble paragraph describes lawyers' performance of "various functions": "advisor," "advocate;" "negotiator;" "intermediary;" "third party neutral" (without the generally used hyphen), "evaluator."

First, the Virginia Rules Preamble paragraph explains that in the role of "advocate," a lawyer "zealously asserts the client's position under the rules of the adversary system." The word "zealously" has become a loaded term in a way, because some equate it with lawyers' "scorched earth" litigation tactics. But properly considered, the word simply signifies lawyers' core duty to diligently advance their clients' interests, consistent with all of their other ethical responsibilities.

Second, the Virginia Rules Preamble paragraph explains that in the role of "negotiator," a lawyer "seeks a result advantageous to the client but consistent with requirements of honest dealing with others." The word "but" seems alarming, but understandable. Presumably, the word reminds lawyers that they must act honestly while zealously representing their client in any negotiations.

Third, the Virginia Rules Preamble paragraph explains that in the role of "intermediary between clients," a lawyer "seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client." That sentence seems inappropriate, because in 2004 Virginia deleted Virginia Rules 2.2 – which focused on lawyers acting as intermediaries.

Fourth, the Virginia Rules Preamble paragraph explains that in the role of "third party neutral," a lawyer "represents neither party, but helps the parties arrive at their own solution." As explained above, two unique Virginia Rules (Virginia Rules 2.10 and Virginia Rules 2.11) provide specific guidance to lawyers acting as third-party neutrals.

Fifth, the Virginia Rules Preamble paragraph explains that in the role of “evaluator,” a lawyer “examines a client’s legal affairs and reports about them to the client or to others.” Virginia Rules 2.3 addresses lawyers playing that role.

**ABA Model Rules Preamble [2]** contains similar language to that in the second Virginia Rules Preamble paragraph.

In contrast to the second Virginia Rules Preamble paragraph, ABA Model Rules Preamble [2] begins with a key phrase “[a]s a representative of clients.”

ABA Model Rules Preamble [2] then contains language identical to the second Virginia Rules Preamble paragraph describing a lawyer acting as advisor, advocate, negotiator and evaluator (other than an insignificant difference in the last description).

In contrast to the second Virginia Rules Preamble paragraph, ABA Model Rules Preamble [2] does not contain a description of lawyers’ role as intermediary or as third-party neutral. Instead, the ABA Model Rules have a separate and more extensive discussion of those roles (discussed below).

### **ABA Model Rules Preamble [3]**

Virginia did not adopt ABA Model Rules Preamble [3].

ABA Model Rules Preamble [3] first describes a third-party neutral role as “a nonrepresentational role helping the parties to resolve a dispute or other matter.” This is similar to the language in second Virginia Rules Preamble paragraph.

ABA Model Rules Preamble [3] then notes that “[s]ome” of the ABA Model Rules “apply directly to lawyers who are or have served as third-party neutrals.” The ABA Model Rules Preamble paragraph specifically mentions ABA Model Rule 1.12 and ABA Model Rule 2.4. The former addresses the disqualification and imputed disqualification of former

third-party neutrals. The latter addresses lawyers serving as third-party neutrals. As mentioned above, the Virginia Rules contain two unique rules governing lawyers acting as third-party neutrals; Virginia Rules 2.10 and Virginia Rules 2.11. Virginia Rules 2.10 is similar to but not identical to ABA Model Rule 2.4.

ABA Model Rules Preamble [3] then turns to a totally different issue, which is not addressed in the Virginia Rules Preamble. The ABA Model Rules Preamble paragraph notes that “there are [ABA Model] Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity.” Although the ABA Model Rules Preamble paragraph does not mention those ABA Model Rules, presumably this language refers primarily to ABA Model Rule 8.4, which begins with the phrase: “[it] is professional misconduct for a lawyer to . . . .” That introductory sentence sharply contrasts with the introductory language in other ABA Model Rules (such as ABA Model Rule 4.1 and ABA Model Rule 4.2), which apply on their face only to lawyers acting in a representational capacity. ABA Model Rule 8.4’s prohibitions apply to lawyers in their non-representational role and in their private non-lawyer conduct. The other ABA Model Rules apply only when lawyers are representing their clients.

ABA Model Rules Preamble [3] concludes with an example of such application: “a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation” – mentioning ABA Model Rule 8.4. ABA Model Rule 8.4(c) explains that “[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” As this document explains in its discussion of the parallel Virginia

Rules 8.4(c), Virginia follows that unconditional (and completely unrealistic) prohibition with a wise condition: “. . . which reflects adversely on the lawyer’s fitness to practice law.”

### **Virginia Rules Preamble Paragraph 3**

The third Virginia Rules Preamble paragraph briefly describes lawyers’ basic duties when acting “[i]n all professional functions”, explaining that lawyers “should be competent, prompt and diligent.”

The third Virginia Preamble paragraph then reminds lawyers to “maintain communication with a client concerning the representation,” and to keep their clients’ information confidential – using the ABA Model Rule 1.6 definition of protected client confidential information: “information relating to representation of a client.” That broad definition of protected client confidential information contrasts with Virginia Rules 1.6(a)’s prohibition on lawyers disclosing: privileged communications; information that the client has asked to be held confidential; and information the disclosure of which “would be embarrassing or would be likely to be detrimental to the client.” In the third Virginia Rule Preamble paragraph, the difference between the Virginia Rule 1.6 and the ABA Model Rule 1.6 formulations probably has little significance, because the next sentence recognizes that disclosure of such information may be “required or permitted” by the Virginia Rules or “other law”.

**ABA Model Rule Preamble [4]** contains the identical language.

### **Virginia Rules Preamble Paragraph 4**

The fourth Virginia Rules Preamble paragraph explains that lawyers’ conduct should “conform to the requirements of the law, both in professional service to clients and

in the lawyers' business and personal affairs." The fourth Virginia Rules Preamble paragraph then warns that lawyers: should not use the law's procedures to "harass or intimidate others;" should "demonstrate respect for the legal system" and for other participants; "should uphold legal process."

**ABA Model Rules Preamble [5]** contains the identical language.

### **Virginia Rules Preamble Paragraph 5**

The fifth Virginia Rules Preamble paragraph addresses lawyers' duties as "public citizen[s]".

Among other things, the fifth Virginia Rules Preamble paragraph explains that lawyers "should seek improvement of the law," "cultivate knowledge of the law beyond its use for clients," and "employ that knowledge in reform of the law and work to strengthen legal education." The fifth Virginia Rules Preamble paragraph also reminds lawyers that they "should be mindful of deficiencies in the administration of justice" and recognize that "the poor" and sometimes others "cannot afford legal assistance.

Interestingly, the fifth Virginia Rules Preamble paragraph explains that lawyers "should therefore devote professional time and civic influence in their behalf" – without mentioning "resources" (which the parallel ABA Model Rules Preamble [6] mentions, as explained below). This absence is somewhat ironic, because unlike ABA Model Rule 6.1, Virginia Rules 6.1(c) recognizes that Virginia lawyers can satisfy their aspirational pro bono goals financially – as "an alternative method for fulfilling a lawyer's responsibility under this [Virginia] Rule [6.1]."

The fifth Virginia Rules Preamble paragraph concludes with a suggestion that lawyers “should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.”

**ABA Model Rules Preamble [6]** contains the identical language.

In addition, ABA Model Rules Preamble [6] contains several phrases not found in the fifth Virginia Rules Preamble paragraph. ABA Model Rules Preamble [6] paragraph explains that lawyers should “further the public’s understanding” in the rule of law and the justice system “because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.”

As mentioned immediately above, ABA Model Rules Preamble [6] explains that lawyers “should devote professional time and resources” to assist the poor and certain others – explaining that lawyers’ devotion of their time and their resources (and their “civic influence”) should be used “to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel.” The ABA Model Rules only use the arguably pejorative term “poor” in a few places. ABA Model Rule 6.1 (the pro bono rule) uses the more politically correct phrase “of limited means.”

### **Virginia Rules Preamble Paragraph 6**

The sixth Virginia Rules Preamble paragraph notes that many of lawyers’ “professional responsibilities” are subject to the ethics Rules, as well as “substantive and procedural law.” The sixth Virginia Rules Preamble paragraph then explains that lawyers are “also guided by personal conscience and the approbation of professional peers,” and

should strive to maximize their skill, improve the law and the legal profession and “exemplify the legal profession’s ideals of public service.”

**ABA Model Rules Preamble [7]** contains the identical language.

### **Virginia Rules Preamble Paragraph 7**

The seventh Virginia Rules Preamble paragraph recognizes that lawyers’ responsibilities as client representatives, officers of the legal system and public citizens “are usually harmonious.”

The seventh Virginia Rules Preamble paragraph then assures lawyers that “when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done.” That is an intriguing sentence. By seeming to condition a lawyer’s ability to be a “zealous advocate” on the opposing party being “well represented,” the seventh Virginia Rules Preamble paragraph begs an obvious question: what if the opposing party is not “well represented?” That interesting question is left unanswered. Presumably lawyers must be “zealous advocates” even if the other side has hired an incompetent lawyer.

The seventh Virginia Rules Preamble paragraph concludes with another example: lawyers’ preservation of protected client confidential information “ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.”

**ABA Model Rules Preamble [8]** contains the identical language.

### **Virginia Rules Preamble Paragraph 8**

The eighth Virginia Rules Preamble paragraph addresses “conflicting responsibilities” that lawyers may face.

Recognizing that “[v]irtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system and to the lawyer’s own interest in remaining an upright person while earning a satisfactory living,” the eighth Virginia Rules Preamble paragraph explains that the Virginia Rules “prescribe terms for resolving such conflicts.” But the eighth Virginia Rules Preamble paragraph then notes that “many difficult issues of professional discretion can arise,” which “must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.”

Interestingly, the eighth Virginia Rules Preamble paragraph does not contain language found in ABA Model Rules Preamble [9] emphasizing civility, as explained below. The Virginia Rules elsewhere encourage civility. And Virginia’s unique Virginia Principles of Professionalism for Virginia Lawyers articulate inspirational goals of civility in several contexts.

**ABA Model Rules Preamble [9]** contains the identical language.

In contrast to the eighth Virginia Rules Preamble paragraph, ABA Rules Preamble [9] also contains a concluding sentence not found in the eighth Virginia Rules Preamble paragraph. The sentence identifies one of the “principles” underlying the ABA Model Rules as including “the lawyer’s obligation zealously to protect and pursue a client’s legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.”

### **Virginia Rules Preamble Paragraph 9**

The ninth Virginia Rules Preamble paragraph first notes that “[t]he legal profession is largely self-governing,” which is “unique in this respect because of the close relationship

between the profession and the processes of government and law enforcement.” The ninth Virginia Rules Preamble paragraph concludes with recognition that “ultimate authority over the legal profession is vested largely in the courts.”

**ABA Model Rules Preamble [10]** contains the identical language.

### **Virginia Rules Preamble Paragraph 10**

The tenth Virginia Rules Preamble paragraph addresses the importance of the legal profession’s self-governance.

The tenth Virginia Rules Preamble paragraph notes that to the extent that lawyers “meet the obligations of their professional calling, the occasion for government regulation is obviated.” The tenth Virginia Rules Preamble paragraph also explains that self-regulation frees lawyers “from government domination,” which makes the legal profession “an important force in preserving government under law.”

The tenth Virginia Rules Preamble paragraph concludes with an explanation for the independent legal profession’s importance: “for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.” This noble language seems unfortunately inapt – because Virginia lawyers’ right to practice law is dependent on the government.

**ABA Model Rules Preamble [11]** contains the identical language.

### **Virginia Rules Preamble Paragraph 11**

The eleventh Virginia Rules Preamble paragraph addresses the “special responsibilities of self-government.”

The eleventh Virginia Rules Preamble paragraph warns lawyers that they have a responsibility to assure that the legal profession’s regulations “are conceived in the public

interest and not in furtherance of parochial or self-interested concerns of the bar.” The eleventh Virginia Rules Preamble paragraph also warns that all lawyers must take responsibility for following the ethics rules and “should also aid in securing their observance by other lawyers.”

The eleventh Virginia Rules Preamble’s paragraph concludes by warning that “[n]eglect of these responsibilities compromises the independence of the profession and the public interest which it serves.”

**ABA Model Rules Preamble [12]** contains the identical language.

### **Virginia Rules Preamble Paragraph 11**

The twelfth Virginia Rules Preamble paragraph addresses lawyers’ “vital role in the preservation of society,” which “requires an understanding by lawyers of their relationship to our legal system.”

The twelfth Virginia Rules Preamble paragraph concludes by explaining that the Virginia Rules “when properly applied, serve to define that relationship.”

**ABA Model Rules Preamble [13]** contains the identical language.

# Scope

The Virginia Rules Scope section does not have numbered paragraphs, in contrast to the ABA Model Rules Scope section.

The ABA Model Rules Scope continues the numbering sequence of the ABA Model Rules Preamble. So the first ABA Model Rules Scope paragraph is ABA Model Rules Scope [14].

## **Virginia Rules Scope Paragraph 1**

The first Virginia Rules Scope paragraph addresses the Virginia Rules' general nature.

The first Virginia Rule Scope paragraph explains that the Virginia Rules of Professional Conduct “are rules of reason,” which “should be interpreted with reference to the purposes of legal representation and of the law itself.” The first phrase makes, but the second phrase does not provide much useful guidance.

The first Virginia Rules Scope paragraph next explains that some of the rules are “imperatives,” using the terms “shall” or “shall not.” The imperative rules using those terms “define proper conduct for purposes for professional discipline.”

Interestingly, the Virginia Rules' use of “shall” and “shall not” may be increasingly obsolete. In many states, laws are moving in the direction of using the word “must” instead of the word “shall” as an imperative – because the word “shall” has many different possible meanings.

The first Virginia Rules Scope paragraph next explains that the word “may” denotes actions that are “permissive” – “defin[ing] areas under the Rules in which the

lawyer has professional discretion.” The first Virginia Rules Scope paragraph then assures lawyers that “[n]o disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion.”

The first Virginia Rules Scope paragraph describes the dual nature of the Virginia Rules – which “are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer’s professional role.” The first half of that sentence makes sense. But the second half could be much clearer. Apparently, the Rules that are “partly constitutive [a rarely used word] and descriptive in that they define a lawyer’s professional role” refers to non-obligatory provisions that lawyers will not be punished for violating. But Rule provisions that are “descriptive” and “define a lawyer’s professional role” could also be obligatory, and lawyers could also face professional discipline for violating those provisions.

The next sentence seems to clear up any confusion. The first Virginia Rules Scope paragraph recognizes that “[m]any of the Comments use the term ‘should’. Unlike the ABA Model Rules, the Virginia Rules Terminology (discussed below) defines that word “should” – “when used in reference to a lawyer’s action denotes an aspirational rather than a mandatory standard.” That is an interesting definition, because several Virginia Rules Comments use the word “should” – although the preceding black letter rule imposes an obligation or common sense confirms that “must” would be appropriate if not required.

The first Virginia Rules Scope paragraph concludes with an explanation that “[c]omments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.”

**ABA Model Rules Scope [14]** contains the identical language.

ABA Model Rules Scope [14] recognition that “[m]any of the Comments use the term ‘should’” is more significant than the identical sentence appearing in the first Virginia Rules Scope paragraph, for two reasons.

First, the ABA Model Rules Terminology does not define that term “should.” Second, numerous ABA Model Rules Comments explain that lawyers “should” take some action that the preceding black letter ABA Model Rule clearly requires. Similarly, numerous ABA Model Rules Comments explain that lawyers “should” avoid taking some action that the preceding black letter ABA Model Rule clearly prohibits.

One might suppose that the ABA Model Rules Comments simply reflect a universal practice of using “should” in the Comments – perhaps replying on ABA Model Rule Scope [14]’s assurance that “[c]omments do not add obligations to the Rules.” But many of the ABA Model Rule Comments use the words “must” or “shall.” Some ABA Model Comments use both words in the same Comment. So there is no uniformity in the ABA Model Rules Comments – which is intellectually inexplicable, possibly confusing, and seems to be plainly wrong in some situations.

### **Virginia Rules Scope Paragraph 2**

The second Virginia Rules Scope paragraph addresses the Virginia Rules’ format.

The second Virginia Rules Scope paragraph contains a unique explanation – noting that the Virginia Rules follow the format of the ABA Model Rules of Professional Conduct rather than the former ABA Model Code of Professional Responsibility or the former Virginia Code of Professional Responsibility. Given the twenty years since

adoption of the Virginia Rules of Professional Conduct, this portion of the second Virginia Rules Scope paragraph seems unnecessary.

The second Virginia Rules Scope paragraph concludes with a still-useful acknowledgement that other states' court and bar interpretations of similar language in the ABA Model Rules "might be helpful in understanding Virginia's Rules," but that "those foreign interpretations should not be binding in Virginia."

**ABA Model Rules Scope** does not contain a similar provision.

### **Virginia Rules Scope Paragraph 3**

The third Virginia Rules Scope paragraph addresses other sources of guidance for lawyers' conduct.

The third Virginia Rules Scope paragraph notes that the Virginia Rules "presuppose a larger legal context shaping the lawyer's role" – including: (1) court rules governing licensures, (2) statutes governing licensures, (3) "laws defining specific obligations of lawyers," and (4) "substantive and procedural law in general."

The third Virginia Rules Scope paragraph next notes that lawyers' compliance with the ethics rules "depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings."

The third Virginia Rules Scope paragraph then acknowledges that "no worthwhile human activity can be completely defined by legal rules," so the Virginia "Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer."

The third Virginia Rules Scope paragraph concludes by stating that the Virginia Rules "simply provide a framework for the ethical practice of law."

**ABA Model Rules Scope [15] and [16]** contain identical language.

ABA Model Rules Scope [15] also contains a sentence not found in the third Virginia Rules Scope's paragraph, explaining that ABA Model Rule's "[c]omments are sometimes used to alert lawyers to their responsibilities under such other law."

#### **Virginia Rules Scope Paragraph 4**

The fourth Virginia Rules Scope paragraph addresses the creation of attorney-client relationships.

The fourth Virginia Rules Scope paragraph first notes that "for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists."

In other words, substantive law rather than the ethics rules "determine whether a client-lawyer relationship exists."

Interestingly, the Virginia Rules (and the ABA Model Rules) use many variations when describing what presumably is a contractual relationship between a lawyer and a client. Some Virginia Rules and Virginia Rule Comments use the term "client-lawyer relationship." Other Virginia Rules and Virginia Rule Comments use the term "lawyer-client" relationship, and "attorney-client" relationship. Presumably all of those terms are meant to be synonymous.

The fourth Virginia Rules Scope paragraph then acknowledges that "[m]ost of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so." This is not surprising, because that constitutes a full attorney-client relationship. But the fourth Virginia Rules Scope paragraph also explains that "there are some duties, such as that

of confidentiality under [Virginia] Rule 1.6, that may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established.”

Surprisingly, the fourth Virginia Rules Scope paragraph does not refer to Virginia Rule 1.18, as does ABA Model Rule Scope [17], discussed immediately below. Virginia Rule 1.18 describes what amount to three levels of relationship between a lawyer and a would-be client. First, under Virginia Rule 1.18 cmt. [2], lawyers owe no loyalty or confidentiality duties to “[a] person who communicates unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship.” Second, lawyers owe certain duties to whom Virginia Rule 1.18(a) calls a “prospective client.” That is a would-be client “who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter.” Even if a “prospective client” does not become an full client, lawyers “may not use or reveal information learned in the consultation [with such a “prospective client”], except as [Virginia] Rule 1.9 would permit with respect to information of a former client.” In other words, “prospective clients” who never become full clients receive the confidential rights of former clients.

Other Virginia Rule 1.18 provisions govern the complicated loyalty implications of lawyers’ dealings with “prospective clients.” First a lawyer who consults with such a “prospective client” but who does not end up with a full client relationship can represent other clients adverse to such a “prospective client” in the same matter if he had not received “information from the prospective client that could be significantly harmful to that [prospective client] in the matter.” In other words, a lawyer who just receives background

non-damaging information while consulting with a “prospective client” can herself represent the adversary or some other adversary of the “prospective client.”

Second, even if such a lawyer is individually disqualified from adversity to a now-former “prospective client” because he obtained “significantly harmful” information during the consultation, that lawyer's colleagues can represent the now-former prospective client’s adversary if the lawyer is screened from those lawyers under the screening provision of Virginia Rule 1.18(d) (which also has other conditions on avoiding the imputation of such an individually disqualified lawyer's disqualification).

Not surprisingly, the fourth Virginia Rules Scope paragraph concludes with an understandable recognition that determining “whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.”

**ABA Model Rules Scope [17]** contains the identical language.

In contrast to the fourth Virginia Rules Scope paragraph, ABA Model Rules Scope [17] also refers to ABA Model Rule 1.18, which specifically addresses lawyers’ various duties and responsibilities various duties and responsibilities: (1) when would-be clients send unsolicited communications to lawyers; (2) when would – be clients and lawyers consult with one another about the possibility of the latter representing the former; and (3) when they have a “meeting of the minds” and create an attorney-client relationship. As explained above, under ABA Model Rule 1.18 (which is similar to Virginia Rule 1.18), lawyers’ confidentiality duty arises only if the would-client becomes a “prospective client” after he “consults” with a lawyer (Virginia Rule 1.18(a) uses the similar word “discusses”).

## **Virginia Rules Scope Paragraph 5**

The fifth Virginia Rules Scope paragraph addresses government lawyers' ethics responsibilities.

The fifth Virginia Rule Scope paragraph begins with an obvious blanket statement – that the Virginia Rules “apply to all lawyers, whether practicing in the private or the public sector.”

The fifth Virginia Rules Scope paragraph next notes that “the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships.” This different authority might derive from “various legal provisions, including constitutional, statutory and common law.” The fifth Virginia Rules Scope paragraph then provides an example: government agency lawyers (and maybe “other government law officers”) “may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment” – which generally is “vested” in the Virginia “Attorney General and the commonwealth attorneys in state government, and their federal counterparts.”

The fifth Virginia Rules Scope paragraph similarly states that government lawyers also “may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients.” Although not providing an example, this explanation presumably covers such situations as one government lawyer advising a governmental tribunal overseeing some profession such as dentists or doctors, while another governmental lawyer appears before that tribunal in seeking to discipline or take away the license of such regulated professionals.

The fifth Virginia Rules Scope paragraph concludes by explaining that governmental lawyers “also may have authority to represent the ‘public interest’ in circumstances where a private lawyer would not be authorized to do so.” The Virginia Rule Comment does not provide any further explanation or examples.

**ABA Model Rules Scope [18]** contains similar language, but differs from the fifth Virginia Rules Scope paragraph in three ways.

First, ABA Model Rules Scope [18] does not contain the initial sentence in the fifth Virginia Rules Scope paragraph explaining that the Virginia Rules apply to lawyers “in the private or the public sector.” Second, ABA Model Rules Scope [18] understandably uses the phrase “attorney general” and the phrase “state’s attorney” rather than the Virginia-specific references in the fourth sentence of the fifth Virginia Rules Scope paragraph. Third, ABA Model Rules Scope [18] does not contain the intriguing but unexplained sentence in the fifth Virginia Rules Scope paragraph explaining that government lawyers may be able to represent the “public interest” in circumstances where private lawyers may not.

### **Virginia Rules Scope Paragraph 6**

The sixth Virginia Rules Scope paragraph addresses the effect of lawyers’ failure to comply with a Virginia Rule.

The sixth Virginia Rules Scope paragraph first explains that lawyers may be disciplined for failing to comply with a Rules’ “obligation or prohibition.”

The sixth Virginia Rules Scope paragraph also assures lawyers that the “disciplinary assessment” of their conduct “will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of

the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation.” This assurance presumably means that lawyers will be given the benefit of the doubt in many disciplinary contexts.

The sixth Virginia Rules Scope paragraph concludes with another assurance – that any discipline and “the severity of any sanction” will “depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.”

**ABA Model Rules Scope [19]** contains identical language.

### **Virginia Rules Scope Paragraph 7**

The seventh Virginia Rules Scope paragraph addresses what should not result from lawyers’ failure to comply with the Virginia Rules.

Significantly, the seventh Virginia Rules Scope paragraph explains that a rule violation “should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached,” because the Rules “are not designed to be a basis for civil liability.”

The seventh Virginia Rules Scope paragraph next recognizes that the Rules’ “purpose... can be subverted when they are invoked by opposing parties as procedural weapons.” The seventh Virginia Rules Scope paragraph then addresses the related issue of standing – noting that “[t]he fact that a Rule is a just basis for a lawyer’s self-assessment” and a basis for a possible discipline “does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule.”

The seventh Virginia Rules Scope paragraph concludes by confirming that “nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of the violating such a duty.”

Significantly, the seventh Virginia Rules Scope paragraph does not contain a sentence found in ABA Model Rules Scope [20] warning that lawyers’ rule violation “may be evidence of breach of the applicable standard of conduct.” This is explained immediately below. The absence of this provision in the seventh Virginia Rules Scope paragraph presumably means that a lawyer’s ethics violation would not be admissible in a malpractice action against that lawyer.

**ABA Model Rules Scope [20]** contains similar language.

ABA Model Rules Scope [20] differs from the seventh Virginia Rules Scope paragraph in two ways.

First, ABA Model Rule Scope [20] additionally explains that “violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation.” Second, ABA Model Rules Scope [20] contains a concluding sentence that Virginia did not adopt: “since the Rules do establish standards of conduct by lawyers, a lawyer’s violation of a Rule may be evidence of breach of the applicable standard of conduct.”

### **Virginia Rules Scope Paragraph 8**

The eighth Virginia Rules Scope paragraph addresses the distinction between the ethics duty of confidentiality and the evidentiary attorney-client privilege and work product doctrine.

The eighth Virginia Rules Scope paragraph first notes that the “Rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege.” As explained in this document’s analysis of Virginia Rule 1.6 cmt. [3], that Virginia Rule Comment erroneously states that the attorney-client privilege “includes the work product doctrine.” This seems contrary to well-settled law, which recognizes those two evidentiary protections as very different in their source, scope and application. In contrast, ABA Model Rule 1.6 cmt. [3] properly refers to “the attorney-client privilege” and “the work product doctrine” as separate but “related bodies of law.”

The eighth Virginia Rules Scope paragraph next explains that those evidentiary protections “were developed to promote compliance with law and fairness in litigation,” and that the attorney-client privilege underlies clients’ expectation “that communications within the scope of the privilege will be protected against compelled disclosure.” The eighth Virginia Rules Scope paragraph correctly notes that “the attorney-client privilege is that of the client and not of the lawyer.”

The eighth Virginia Rules Scope paragraph then explains that “[t]he fact that in exceptional situations” lawyers following the ethics rules may or must “disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client and work product privileges.”

Interestingly, this unique eighth Virginia Rules Scope paragraph statement parallels the expansive definition of protected client confidential information under ABA

Model Rule 1.6(a) – which prohibits lawyers (absent consent or some Rule provision) from disclosing “information relating to the representation of a client.” That ABA Model Rule provision differs dramatically from Virginia Rule 1.6(a). The key Virginia Rule 1.6(a) confidentiality provision prohibits Virginia lawyers from disclosing (absent client consent or some Rules provision): (1) “information protected by the attorney-client privilege under applicable law;” (2) “other information gained in the professional relationship that the client has requested be held inviolate;” or (3) “other information gained in the professional relationship . . . the disclosure of which would be embarrassing or would be likely to be detrimental to the client.” Thus, the Virginia Rule 1.16(a) confidentiality provision protects a narrower range of information than the ABA Model Rule 1.16 confidentiality provision.

Thus, the eighth Virginia Rules Scope paragraph arguably describes clients’ expectation of confidentiality that does not accurately define Virginia lawyers’ confidentiality duty. The eighth Virginia Rules Scope paragraph indicates that “as a general matter,” clients have a “reasonable expectation that information relating to the client will not be voluntarily disclosed” – while Virginia Rule 1.6(a) explicitly allows lawyers to disclose information “relating to the client” that is outside the scope of the specific provision of Virginia Rule 1.6(a). Virginia’s Rule 1.6(a)’s narrower definition of protected client confidences is much closer to common usage and common sense than the ABA Model Rule 1.6 provisions.

**ABA Model Rules Scope** does not contain a similar provision.

### **Virginia Rules Scope Paragraph 9**

The ninth Virginia Rules Scope paragraph focuses specifically on lawyers’ discretion to disclose protected client confidential information under Virginia Rule 1.6.

The ninth Virginia Rules Scope paragraph explains that lawyers' "exercise of discretion not to disclose information under [Virginia] Rule 1.6 should not be subject to reexamination," because doing so "would be incompatible with the general policy of promoting compliance with law through assurances that communications will be protected against disclosure."

**ABA Model Rule Scope** does not contain a similar provision.

### **Virginia Rule Scope Paragraph 10**

The tenth Virginia Rules Scope paragraph explains that the Virginia Preamble "and this note on Scope provide general orientation," but that in contrast "[t]he text of each Rule and the following Terminology section are authoritative and the Comments accompanying each Rule are interpretive." It is not clear what the odd reference to "this note on Scope" means. Presumably it refers to the Virginia Scope paragraphs.

**ABA Model Rule Scope [21]** contains essentially the same language.

# Terminology

The Virginia Rules Terminology section paragraphs are not numbered. This contrasts with the ABA Model Rules Terminology definitions, which are in Rule 1.0 of the ABA Model Rules, and which are separately indicated by small letters.

This analysis discusses the Virginia Rule and ABA Model Rule definitions in alphabetical order.

The Virginia Rules do not contain any Comments explaining the Virginia Terminology Section. Because there are no Virginia Rule Comments, this analysis will address and analyze the ABA Model Rule Comments under the pertinent definition, rather than at the end of the definitions.

## **Virginia Terminology: “Belief” or “believes”**

The Virginia Rules Terminology definition of “belief” or “believes” “denotes that the person involved actually supposed the fact in question to be true,” which “may be inferred from circumstances.”

**ABA Model Rule 1.0(a)** contains the identical definition.

There are no ABA Model Rule Comments providing any additional guidance on this definition.

## **Virginia Terminology: “Consult” or “Consultation”**

The Virginia Rules Terminology definition of “consult” or “consultation” “denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.”

The **ABA Model Rules Terminology** section does not contain a similar definition.

This is not surprising, because the ABA Model Rules' provisions governing consent usually use the term "informed consent." This contrasts with the Virginia Rules' general use of the term "consent after consultation." The terms are presumably synonymous, but the definition of "informed consent" is more detailed than the Virginia Rules definition of "consultation."

### **ABA Model Rule 1.0(b) "Confirmed in writing"**

Virginia did not adopt ABA Model Rule 1.0(b), which defines "confirmed in writing."

ABA Model Rule 1.0(b) definition of "confirmed in writing" denotes "informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent" (referring to the definition of "informed consent" appearing in ABA Model Rule 1.0(e)).

ABA Model Rule 1.0(b)'s definition then explains that, "if it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter."

Significantly, ABA Model Rule 1.0(b)'s definition does not require that clients sign written consents. Instead, the term "confirmed in writing" means either: (1) that the client or another person whose consent is obtained gives a written consent to the lawyer, or (2) that the lawyer confirms the client's or other person's earlier oral informed consent.

**ABA Model Rule 1.0 cmt. [1]** addresses the timing of such written confirmation.

ABA Model Rule cmt. [1] first essentially mimics the black letter ABA Model Rule 1.0(b) language, explaining that "[i]f it is not feasible to obtain or transmit a written

confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.”

Virginia Rule 1.7 cmt. [20] provides guidance about Virginia Rule 1.7(b)(4)’s “memorialized in writing” requirement. That Virginia Rule Comment explains that “[p]referably, the attorney should present the memorialization to the client for signature or acknowledgment.” But the Virginia Rule Comment then acknowledges that “however, any writing will satisfy this requirement, including, but not limited to, an attorney’s notes or memorandum, and such writing need not be signed by, reviewed with, or delivered to the client.”

Virginia Rule 1.8(a)(3) (which governs lawyers’ business transactions with clients) is more demanding – requiring that “the client consents in writing thereto.” That would seem to require the client’s signature or at least the client’s written agreement communicated to the lawyer.

As is typical, ABA Model Rule 1.8(a)(3) is more demanding than its Virginia counterpart – requiring that “the client gives informed consent, in a writing signed by the client.”

ABA Model Rule 1.0 cmt. [1] next explains that if a lawyer “has obtained a client’s informed consent” (presumably in an oral conversation), the lawyer “may act in reliance on that consent” – “as long as it is confirmed in writing within a reasonable time thereafter.”

This confirmation timing issue can be important in the ABA Model Rules context, because clients’ consent to conflicts-related adversity (primarily under ABA Model Rule 1.7) must be confirmed in writing. Throughout the ABA Model Rules, clients’ consent normally must be “confirmed in writing.”

## **Virginia Terminology: “Firm” or “law firm”**

The Virginia Terminology definition of “firm” or “law firm” “denotes a professional entity, public or private, organized to deliver legal services, or a legal department of a corporation or other organization.”

The Virginia Rules Terminology definition refers to a Virginia Rule 1.10 Comment. Although the definition does not point to a specific Virginia Rule 1.10 Comment, presumably the definition refers to Virginia Rule 1.10 Comment [1] - [1d], which appear under the subheading “Definition of Firm.”

This document addresses the meaning of “firm” in its analysis of Virginia Rule 1.10. In addressing the corporate in-house context, Virginia Rule 1.10 cmt. [1a] notes that “there is ordinarily no question that the members of the [“law department of an organization”] constitutes a firm within the meaning of the [Virginia] “Rules of Professional Conduct.” But Virginia Rule 1.0 cmt. [1a] then introduces some ambiguity, explaining that “there can be uncertainty as to the identity of the client.” The Virginia Rule Comment then gives an example: “[i]t may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed.” The identical language appears in ABA Model Rule 1.0 cmt. [3].

As long as an in-house lawyer’s employer (usually the corporate family’s parent) wholly owns the affiliates, it may not matter much whether or not the in-house lawyer represents the affiliates. Most if not all courts protect as privileged communications between such in-house lawyers and their employer’s affiliates’ employees. But it could be important to know whether such in-house lawyers represent such affiliates if an affiliate

becomes independent (was sold, spun off, declared bankruptcy, etc.). And not surprisingly, it could become critical for such in-house lawyers to know what their relationship was with such now-former corporate family affiliates if those former affiliates ever become adversaries – disputing some sale or spin issue, falling into the hands of a bankruptcy trustee looking for deep pockets, etc.

**ABA Model Rule 1.0(c)** contains a more extensive definition of “firm” or “law firm.” ABA Model Rule 1.0(c) explains that the term “denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law”; or “lawyers employed in a legal services organization or the legal department of a corporation or other organization.”

As a practical matter, that expanded definition is essentially the same as the Virginia Rules Terminology definition. Similarly, the term “public” that appears in the Virginia Rules Terminology definition (but not in ABA Model Rule 1.0(c)) presumably is included in the ABA Model Rules term “other organization” (a term which also appears in the Virginia Rules Terminology) definition.

Most significantly, both the Virginia Rules Terminology and ABA Model Rule 1.0(c) include corporations’ law departments. Thus, all of the rules (including those addressing individual and imputed prohibitions) apply to corporate law departments the same way they apply to law firms.

**ABA Model Rule 1.0 cmt. [2]** addresses whether two or more lawyers “constitute a firm” within the ABA Model Rule 1.0(c) definition of “firm.” Essentially the identical language appears in Virginia Rule 1.10 cmt. [1].

Not surprisingly, ABA Model Rule 1.0 cmt. [2] and the Virginia parallel provision in Virginia Rule 1.10 cmt. [1] explain that “[w]hether two or more lawyers constitute a firm . . . can depend on the specific facts.” ABA Model Rule 1.0 cmt. [2] provides examples of two lawyers who do not and do constitute a “firm”: “two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm.” But they would be regarded as a “firm” “if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm.” That standard is a remarkable example of circular reasoning.

ABA Model Rule 1.0 cmt. [2] next explains that “[t]he terms of any formal agreement between associated lawyers are relevant in this determination, as is the fact that they have mutual access to information concerning the clients they serve.”

ABA Model Rule 1.0 cmt. [2] then notes that “it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved”. That sentence does not provide any useful guidance. The ABA Model Rule Comment provides what may be offered as an example: “[a] group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.” (emphasis added.)

This is a remarkable sentence – describing “the Rule that the same lawyer should not represent opposing parties in litigation” (emphasis added.) Not surprisingly, ABA Model Rule 1.0 cmt. [2] does not cite “the Rule” indicating only that “the same lawyer should not represent opposing parties in litigation.” There is no such Rule. ABA Model Rule Scope [14] explains that “Comments[] that use the term ‘should’ . . . do not add

obligations to the [ABA Model] Rules but provide guidance for practicing in compliance with the [ABA Model] Rules.” As explained elsewhere, common usage and common sense also makes it plain that the term “should” is aspirational rather than mandatory. It is simply incorrect to state that under the ABA Model Rules a lawyer “should” not represent opposing litigation parties. A lawyer may never do so. The prohibition is mandatory, not aspirational. ABA Model Rule 1.7(b)(3).

**ABA Model Rule 1.0 cmt. [3]** addresses law departments. ABA Model Rule 1.0 cmt. [3] is essentially the same as Virginia Rule 1.10 cmt. [1a].

ABA Model Rule 1.0 cmt. [3] explains that “[w]ith respect to the law department of an organization, including the government, there is ordinarily no question that members of the department constitute a firm within the meaning of the Rules of Professional Conduct.” This confirms the often misunderstood and perhaps counterintuitive definition of “firm” that appears in ABA Model Rule 1.0(c) and is the third definition in the Virginia Rules Terminology section.

ABA Model Rule 1.0 cmt. [3] contains the phrase “including the government,” but Virginia Rule 1.10 [1a] does not include that term. The significance of the absence of that phrase is not clear. The fifth Virginia Scope paragraph essentially matches ABA Model Rule Scope [18] in describing the ethics rules’ application to government lawyers. The only significant difference is the Virginia Scope paragraph’s acknowledgement that government lawyers “may have authority to represent the ‘public interest’ in circumstances where a private lawyer would not be authorized to do so.” Other than the absence of that phrase, that ABA Model Rule Scope paragraph is essentially the same.

Significantly for in-house lawyers in the private sector, ABA Model Rule 1.0 cmt. [3] and parallel Virginia Rule 1.10 cmt. [1a] acknowledge that for lawyers in a law department “[t]here can be uncertainty, however, as to the identity of the client.” The ABA Model Rule Comment and the Virginia Rule Comment provide an example that might be of great practical importance: “it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated of corporation, as well as the corporation by which the members of the department are directly employed.”

When an in-house lawyer’s employer/client wholly owns a corporate subsidiary, the existence or non-existence of an attorney-client relationship with that subsidiary may not be very significant. Under general corporate law, all of that wholly-owned subsidiary’s employees owe a fiduciary duty to the ultimate parent, as does the in-house lawyer. And in all or most courts, the attorney-client privilege will protect communications between the parent’s in-house lawyer and a wholly-owned subsidiary’s employees. But if the subsidiary is not wholly owned, it could be critically important to know whether the controlling parent’s in-house lawyer also represents the subsidiary that the in-house lawyer’s employer/client does not completely own.

And it could be even more critical if the subsidiary declares bankruptcy, or if the parent sells the subsidiary or spins it off. In those circumstances, in-house lawyers should always know whether or not they had represented the now-former subsidiary. If so, the in-house lawyer’s former client might now be a bankrupt subsidiary (sometimes in a bankruptcy trustee’s hands), controlled by another corporate parent who may have post-closing disputes with the former owner, or a newly independent subsidiary with its own independent interests. Knowing whether an in-house lawyer also represents a corporate

client's subsidiary or other corporate family member also affects loyalty and confidentiality duties that always arise in connection with joint representations (which are addressed in Virginia Rule 1.6 and Virginia Rule 1.7, among other places). Such former client subsidiary corporations normally have all of the rights that former clients have under the applicable ethics rules.

Both ABA Model Rule 1.0 cmt. [3] and Virginia Rule 10 cmt. [1a] also provide a less important example: “[a] similar question can arise concerning an unincorporated association and its local affiliates.”

**ABA Model Rule 1.0 cmt. [4]** addresses legal aid and legal services.

ABA Model Rule 1.0 cmt. [4] explains that “[d]epending upon the structure of the [legal aid and legal services] organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.”

ABA Model Rule 1.0 cmt. [4] contains essentially the same language as Virginia Rule 1.10 cmt. [1b]. In contrast to the ABA Model Rule Comment's reference to “lawyers in legal aid and legal services organizations,” Virginia Rule 1.10 cmt. [1b] Comment does not contain the phrase “and legal services organizations.” That difference is presumably not very significant.

### **Virginia Terminology: “Fraud” or “fraudulent”**

The Virginia Rules Terminology definition of “fraud” or “fraudulent” “denotes conduct having a purpose to deceive.”

The Virginia Rules Terminology definition then explains that the terms do not include “merely negligent misrepresentation or failure to apprise another of relevant information.”

**ABA Model Rule 1.0(d)** contains a different formulation that is essentially the same, but does not include the exclusionary portion of the Virginia Rules Terminology definition.

Under ABA Model Rule 1.0(d), the term “fraud” or “fraudulent” “denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.” The ABA Model Rules 1.0(d) definition does not explicitly exclude from the definition “merely negligent misrepresentation or failure to apprise another of relevant information” that is found in the Virginia Rules Terminology definition.

**ABA Model Rule 1.0 cmt. [5]** addresses the meaning of the terms “fraud” and “fraudulent.”

ABA Model Rule 1.0 cmt. [5] confirms the meaning in the ABA Model Rule 1.0(d) definition – indicating that the terms refer “to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.”

The fourth Virginia Rules Terminology paragraph contains the phrase “purpose to deceive,” but not the reference to substantive or procedural law in applicable jurisdictions – although that probably goes without saying.

Significantly, ABA Model Rule 1.0 cmt. [5] contains a phrase that is found in the fourth Virginia Rules Terminology’s paragraph, but not in black letter ABA Model Rule 1.0(d) – excluding from the definition of “fraud” “merely negligent misrepresentation or negligent failure to apprise another of relevant information.”

Perhaps even more significantly, ABA Model Rule 1.0 cmt. [5] contains a phrase that does not appear in the Virginia Rules or Comments: “[f]or purposes of these Rules,

it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.” That provision allows for lawyers’ professional discipline for fraudulent conduct even if no one relied on or harmed by the improper conduct. And presumably the same is true for the rules prohibiting lawyers from assisting their clients’ fraud (such as Virginia Rule 1.2(c) and the parallel ABA Model Rule 1.2(d)), and remaining silent if that silence would assist clients’ fraud (such as Virginia Rule 4.1(b) and the parallel ABA Model Rule 4.1(b)). Thus, perhaps not surprisingly, lawyers might face professional discipline if they engage in such fraudulent conduct even if no one relied on their misrepresentations or suffered any damages because of them.

#### **ABA Model Rule 1.0 (e): “Informed consent”**

Virginia did not adopt ABA Model Rule 1.0(e), which defines “informed consent.”

ABA Model Rule 1.0(e) defines “informed consent.”

ABA Model Rule 1.0(e) explains that the term “denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”

Presumably the ABA Model Rules Terminology section included this definition of “informed consent” because the ABA Model Rules require clients’ and other persons’ consent to be “informed consent.”

In contrast, the Virginia Rules generally require such a consent to be “consent after consultation.” That Virginia Rules Terminology definition of “consultation” (discussed above) is narrower than the ABA Model Rules Terminology 1.0(e) definition of “informed consent,” in two ways. First, in contrast to ABA Model Rule 1.0(e)’s reference to “the

agreement by a person,” the Virginia Rules Terminology definition of “consult” or “consultation” goes only to “communication of information” that permits “the client” to understand the situation. In other words, ABA Model Rule 1.0(e)’s definition covers clients and other persons, while the Virginia provision only covers clients. Second, ABA Model Rule 1.0(e) explicitly requires an “explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”

The Virginia Rules Terminology definition of “consultation” only includes the requirement that the lawyer has communicated information “reasonably sufficient to permit the client to appreciate the significance of the matter in question.” Still, presumably these two terms are synonymous or nearly synonymous.

**ABA Model Rule 1.0 cmt. [6]** addresses “informed consent.”

ABA Model Rule 1.0 cmt. [6] explains that informed consent is required from clients or other persons in various ABA Model Rules, including ABA Model Rules 1.2(c), 1.6(a) and 1.7(b). Not surprisingly, the ABA Model Rule Comment explains that the required communications will vary according to “the Rule involved and the circumstances giving rise to the need to obtain informed consent.”

The ABA Model Rule Comment next essentially repeats the substance of black letter ABA Model Rule 1.0(e). ABA Model Rule 1.0 cmt. [6] explains that “[o]rdinarily, this [communication obtaining a client’s or a person’s “informed consent”] will require communication that include a disclosure of the fact and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client’s or other person’s options and alternatives.” ABA Model Rule 1.0

cmt. [6] notes that “[i]n some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel.”

ABA Model Rule 1.0 cmt. [6] then assures lawyers that they “need not inform a client or other person of facts or implications they already know,” but warns that a lawyer “who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid.” The ABA Model Rule Comment also acknowledges that assessing whether there has been a sufficiently informed consent depends (among other things) on “whether the client or other person is experienced in legal matters generally and in making decisions of the type involved,” and whether they are “independently represented by other counsel in giving the consent.”

ABA Model Rule 1.0 cmt. [6] concludes by taking the common sense approach that “[n]ormally, such [experienced] persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.”

**ABA Model Rule 1.0 cmt. [7]** also addresses the definition of “informed consent.”

ABA Model Rule 1.0 cmt. [7] first notes that “[o]btaining informed consent will usually require an affirmative response by the client or other person.” Significantly, “[i]n general, a lawyer may not assume consent from a client’s or other person’s silence.” In other words, lawyers may not proceed to engage in action that requires clients’ or other persons’ consent, and take the clients’ or other person’s lack of objection as a valid consent under the ethics rules.

This is one reason why the term “consent” probably makes more sense than the similar but different term “waiver,” which some lawyers use (and which appears in the

ABA Model Rules). Inaction can sometimes result in a waiver, but probably cannot result in a consent. To be sure, ABA Model Rule 1.0 cmt. [7] acknowledges that “[c]onsent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter.”

ABA Model Rule 1.0 cmt. [7] notes that some ABA Model Rules “require that a person’s consent be confirmed in writing” (referring to ABA Model Rule 1.7(b) and ABA Model Rule 1.9(a). ABA Model Rule 1.0 cmt. [7] then adds that “[o]ther [ABA Model] Rules require that a client’s consent be obtained in a writing signed by the client” (referring to ABA Model Rule 1.8(a) and ABA Model Rule 1.8(g). ABA Model Rule 1.0 cmt. [7] understandably concludes with references to the definition of “signed.” (ABA Model Rule 1.0(n)).

### **Virginia Terminology: “Knowingly”, “known,” or “knows”**

The Virginia Rules Terminology’s definition of “knowingly,” “known,” or “knows” “denotes actual knowledge of the fact in question,” although, “[a] person’s knowledge may be inferred from circumstances.”

This fairly narrow definition excludes “should have known” concepts, and can play a key role in analyzing several ethics issues.

For instance, under Virginia Rule 4.2, lawyers may not communicate about a matter with a person “the lawyer knows to be represented by another lawyer in the matter,” except under certain circumstances. The same language appears in ABA Model Rule 4.2. In that setting, “knows” plays a key role – the *ex parte* communication prohibition does not apply even if a lawyer “should have known” that the person with whom the lawyer whether to communicate *ex parte* has a lawyer in that matter.

Other example of the distinction between “know” and some lesser negligence standard involves lawyers’ duty to avoid offering evidence. Under Virginia Rule 3.3(a)(4), “[a] lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false.” Virginia Rule 3.3 cmt. [8] bluntly reminds lawyer that “[t]he prohibition against offering false evidence only applies if the lawyer knows the evidence is false.” To make the point even more clear, Virginia Rule 3.3 cmt. [8] immediately follows that statement with the following: “[a] lawyer’s reasonable belief or suspicion that evidence is false does not preclude its presentation to the trier of fact.” Many lawyers do not realize that they can present evidence that they reasonably believe is false. Of course, tactical considerations normally defer lawyers from doing so, because a witness presenting such evidence may have trouble withstanding cross examination. But as an ethical matter, presenting such evidence does not violate the ethics rules.

**ABA Model Rule 1.0(f)** contains the identical language. There are no ABA Model Rule Comments providing any guidance.

### **Virginia Terminology: “Partner”**

The Virginia Rules Terminology’s definition of “partner” “denotes a member of a partnership or a shareholder or member of a professional entity, public or private, organized to deliver legal services, or a legal department of a corporation or other organization.”

**ABA Model Rule 1.0(g)** is narrower than the Virginia Rules Terminology definition. Under ABA Model Rule 1.0(g), the word “partner” “denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.”

Thus, the ABA Model Rule 1.0(g) definition does not contain the phrase “public or private,” and does not explicitly include “a legal department of a corporation or other organization.” Both the Virginia Terminology and ABA Model Rule 1.0(c) explicitly indicate that the term “Firm” (discussed above) includes “the legal department of a corporation.”

In one way, ABA Model Rule 1.0(g) is broader than the Virginia Rules Terminology definition. The ABA Model Rule definition includes the phrase “or a member of an association authorized to practice law.” It is unclear what this means, and there are no ABA Model Rule Comments providing any guidance.

These differences may not be significant, because few provisions in the Virginia Rules or the ABA Model Rules differentiate between partners and non-partners in law firms (including law departments). The main distinction probably is in Virginia Rule 5.1 and the parallel ABA Model Rule 5.1 – which addresses the duty of partners and supervisory lawyers to take reasonable steps to assure that their subordinates comply with the ethics rules, and their occasional liability for those subordinates’ ethics violations. ABA Model Rule 5.2 applies a different standard to subordinate lawyers. Virginia did not adopt ABA Model Rule 5.2.

### **Virginia Terminology: “Reasonable” or “reasonably”**

The Virginia Rules Terminology’s definition of “reasonable” or “reasonably” “denotes the conduct of a reasonably prudent and competent lawyer” when “used in relation to conduct by a lawyer.” That definition is essentially useless, because it defines “reasonable” or “reasonably” using the term “reasonably.”

**ABA Model Rule 1.0(h)** contains the identical useless language. There are no ABA Model Rule Comments providing any guidance.

**Virginia Terminology: “Reasonable belief” or “reasonably believes”**

The Virginia Rules Terminology’s definition of “reasonable belief” and “reasonably believes” “denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable,” when “used in reference to a lawyer.” This definition is also essentially useless.

**ABA Model Rule 1.0(i)** contains the identical useless language. There are no ABA Model Rule Comments providing any guidance.

**Virginia Terminology: “Reasonably should know”**

The Virginia Rules Terminology’s ninth definition of “reasonably should know” “denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.” This definition is also essentially useless.

**ABA Model Rule 1.0(j)** contains the identical useless language. There are no ABA Model Rule Comments providing any guidance.

**ABA Model Rule 1.0(k): “Screened”**

Virginia did not adopt ABA Model Rule 1.0(k), which defines “screened.”

The ABA Model Rule 1.0(k) definition of “screened” “denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.”

As mentioned above, Virginia Rules Terminology section does not contain a similar definition. This is perhaps not surprising, because the Virginia Rules do not allow hiring law firms to avoid imputation of a new hire's individual disqualification by screening the new hire from other lawyers in the firm. In contrast, ABA Model Rule 1.10(a)(2)(i) allows what could be called self-help screening to avoid such imputed disqualification.

But the Virginia Rules (like the ABA Model Rules) have always allowed such hiring law firms to sometimes avoid imputation of a former government lawyer's individual disqualification when he or she is hired by a law firm by screening that former government lawyer. Virginia Rule 1.11(b)(1) explains that such imputation can be avoided if "the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom" (ABA Model Rule 1.11(b)(1) contains essentially the same language although it includes the word "timely").

Similarly, the Virginia Rules have always allowed a similar avoidance of imputation when law firms hire individually disqualified judges, other adjudicative officers, arbitrators or certain law clerks under Virginia Rule 1.12(c)(1) (which is similar, to, but narrower than ABA Model Rule 1.12(c)(1) – which also covers arbitrators, mediators and other third-party neutrals).

Perhaps most importantly, law firms frequently agree to "screen" a new lateral hire as part of an arrangement with the new hire's former client under which the former client consents to the hiring law firm's continuing or future representation of clients adverse to the new hire's former client. Not surprisingly, such consents normally includes screening of the new hire. But absent such a consent, the hiring law firm cannot avoid disqualification by screening the new hire. Thus, Virginia law firms often screen new

lateral hires, but as part of a contractual arrangement rather than as a self-help measure authorized by the ethics rules.

Although it would be helpful if Virginia adopted a definition of “screened,” common sense would presumably follow the same definition as that in ABA Model Rule 1.0(k).

**ABA Model Rule 1.0 cmt. [8]** addresses the definition of “screened” that appears in ABA Model Rule 1.0(k) (but which does not appear in the Virginia Rule’s Terminology section).

The ABA Model Rule 1.0 cmt. [8] explains that the term “applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under [ABA Model] Rules 1.10, 1.11, 1.12 or 1.18.”

**ABA Model Rule 1.0 cmt. [9]** addresses the process that must underlie a “screen” for the screen to be effective.

ABA Model Rule 1.0 cmt. [9] begins with an explanation that “[t]he purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected.” Thus, the ABA Model Rule Comment understandably first explains that “[t]he personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter.” ABA Model Rule 1.0 cmt. [9] then turns to lawyers on the other side of the screen: “[s]imilarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter.

ABA Model Rule 1.0 cmt. [9] next adds that “[a]dditional screening measures that are appropriate for the particular matter will depend on the circumstances.” The ABA

Model Rule Comment explains that “it may be appropriate” for the firm to insist on a “written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other information, including information in electronic form, relating to the matter.” The ABA Model Rule Comment also makes a similar suggestion that “it may be appropriate” for the firm to send “written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter,” and to assure “denial of access by the screened lawyer to firm files or other information, including information in electronic form, relating to the matter.”

The ABA Model Rule 1.0 cmt. [9] concludes with a suggestion that “it may be appropriate” for the law firm to send out “periodic reminders of the screen to the screened lawyer and all other firm personnel.”

The screening of lateral hires from the files at her new firm does not make much sense. The screen protects the lateral hire’s former client’s confidences – which the new lateral hire possesses but must not share with her new colleagues. It should not matter if the new lateral hire accesses files at her new firm, or (frankly) even obtains information about the matter from new colleagues in communications or discussions. It is her information that must be kept secret from her new colleagues, not vice versa.

The ABA Model Rule 1.0 cmt. [9]’s reference to screening the new lateral hire from new law firm’s files also seems inconsistent with an ABA Model Rule 1.7 provision. Presumably the new lateral hire’s screening from her new law firm’s files results from those files having some significant information which the new lateral hire must be prevented from accessing. Apart from the illogical information-flow issue discussed

immediately above, it certainly is true that law firms' files can contain highly significant information (confidential and otherwise) about the firm's current and former clients.

But under ABA Model Rule 1.10(b), a law firm may take on a matter adverse to even one of its own former clients as long as no "lawyer remaining in the firm" has material information protected by ABA Model Rule 1.6 or ABA Model Rule 1.9(c). Virginia Rule 1.10(b)(2) takes the same approach. As explained more fully in this document's analysis of Virginia Rule 1.10, on its face it is irrelevant if the law firm still possesses highly confidential files about the client formerly represented by a lawyer who has since left the firm. In other words, a firm can be directly adverse to one of its own former clients as long as no lawyer left in the firm has material confidential information – even though highly confidential files remain in the firm. Similarly, ABA Model Rule 1.10 does not require that all of the other law firm lawyers and staff to be "screened" from those files. ABA Model Rule 1.10 cmt. [9]'s emphasis on such screening in the case of lateral hires (which does not make any sense in that context) would seem to justify if not demand screening under ABA Model Rule 1.10(b).

Virginia Rule 1.10(b) raises the same issue (although the Virginia Rules do not explicitly address screening of lateral non-governmental lawyer hires).

Neither the Virginia Rules nor Comments provide such detailed explanations of an appropriate and ethically efficient "screen." The ABA Model Rules provide common sense guidance, although the issue often comes up in disqualification motions – in which courts may expect the screening firm to have taken additional steps. For instance, some courts have held that the newly hired lawyer and the other law firm lawyers must have been warned that they would be punished if they violate the "screen."

**ABA Model Rule 1.0 cmt. [10]** addresses the key issue of timing.

ABA Model Rule 1.0 cmt. [10] confirms that “[i]n order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.”

This timeliness requirement appears explicitly in ABA Model Rule 1.11(b)(1)’s use of the phrase “timely screened” when discussing the avoidance of imputing former government officers and employee’s individual disqualification) and in ABA Model Rule 1.12(c)(1) (using the phrase “timely screened” when addressing the conflicts implications of hiring former judges, adjudicative officers, arbitrators, mediators or other third-party neutrals.

Interestingly, Virginia Rule 1.12(c)(1) contains the word “timely” in its rule governing the latter type of lateral hire, but does not use the word “timely” in Virginia Rule 1.1(b)(1) (which addresses the former type of lateral hire).

Significantly, this screening obligation arises when the lawyer or law firm “knows or reasonably should know” that they need a screen. That time normally occurs when the law firm hires the individually disqualified new hire. This means that law firms or law departments risk disqualification if they do not impose a screen before the individually disqualified lawyer joins the law firm or law department.

But in some circumstances, the law firm or law department may not know that the new hire is individually disqualified. For instance, if a law firm hires a lawyer who has represented Acme Company, the law firm would not know to screen that individually disqualified lawyer from other lawyers in the firm if the firm was not representing a client adverse to Acme at the time the new hire joins the firm. But if the firm later takes on a

client in a matter adverse to Acme (in the same or substantially related matter to that in which the hire had represented Acme at her old firm), the law firm may seek to avoid disqualification by immediately screening the individually disqualified new hire from the rest of the firm. In some courts, that would be too late – because those courts might presume that the new hire might have disclosed information to other lawyers in the hiring firm about her earlier work for Acme. Of course, a court might decline to disqualify the law firm if it immediately screened the individually disqualified new hire when the firm decided to take on the matter adverse to Acme, and can establish that while at her new firm she had not disclosed to anyone in her new firm any material confidences about her earlier work for Acme.

### **Virginia Terminology: “Should”**

The Virginia Rules Terminology’s definition of “should” “denotes an aspirational rather than a mandatory standard,” when “used in reference to a lawyer’s action.”

The ABA Model Rules do not contain a similar definition. That may not be significant, because the common-sense meaning of “should” denotes “aspirational” rather than “mandatory” conduct.

But as explained throughout this document, numerous Virginia and (especially) ABA Model Rules Comments inexplicably use the term “should” when the parallel black letter ABA Model Rules clearly mandate action or prohibit action.

### **Virginia Terminology: “Substantial”**

The Virginia Rules Terminology’s definition of “substantial” “denotes a material matter of clear and weighty importance,” when “used in reference to degree or extent.”

Among other things, the term “substantial” plays a key role in determining whether lawyers have a duty under Virginia Rule 8.3(b)(a) to report another lawyer’s ethics violation. That duty arises when lawyers have “reliable information” that the other lawyer has committed an ethics violation “that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness to practice to law” (that is a different standard from that in ABA Model Rule 8.3(a), which uses a “knows” standard rather than the Virginia “reliable information” standard – but contains the same “substantial question” phrase as the Virginia Rule). Both the Virginia Rule and the ABA Model Rule also use the same phrase in the provision requiring lawyers to report judges’ misconduct. Virginia Rule 8.3(b), ABA Model Rule 8.3(b).

Thus, the Virginia definition of “substantial” as applied in that context goes to the “clear and weighty importance” of the other lawyer’s “honesty, trustworthiness or fitness to practice to law.” It does not go to the weight of the evidence that the reporting lawyer has about the other lawyer’s ethics violation.

Virginia Rule 8.3 cmt. [3] explicitly explains as much: “[t]he term ‘substantial’ refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.” ABA Model Rule 8.3 cmt. [3] has the identical language.

The word “substantially” likewise plays a key role in assessing lawyers’ ability to represent clients in matters adverse to a former client. Virginia Rule 1.9(a): “[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client” (absent consent). Unfortunately, Virginia Rule 1.9 does not have any Comments providing any guidance about the

meaning of the phrase “substantially related.” ABA Model Rule 1.9 cmt. [3] provides extensive guidance, which is addressed in this document’s analysis of ABA Model Rule 1.9.

**ABA Model Rule 1.0(l)** contains the identical language.

### **ABA Model Rule 1.0(m): “Tribunal”**

Virginia did not adopt ABA Model Rule 1.0(m), which defines “tribunal.”

ABA Model Rule 1.0(m) definition of “tribunal” “denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity.” ABA Model Rule 1.0(m) then explains that such an entity “acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party’s interests in a particular matter.”

There are no ABA Model Rule Comments providing any guidance.

As mentioned above, the Virginia Rules Terminology section does not contain a definition of “tribunal.” This is unfortunate, because determining whether an entity is considered a “tribunal” can be important when (among other things) addressing lawyers’ duties under provisions requiring disclosure to tribunals (such as Virginia Rule 3.3), lawyers fairness to opposing parties and counsel when acting before tribunals (under Virginia Rule 3.4), and lawyers’ duties to act responsibly when appearing before tribunals (under Virginia Rule 3.5).

Significantly, differentiating between tribunals acting in an adjudicative and a nonadjudicative capacity is not as significant in Virginia, because Virginia did not adopt ABA Model Rule 3.9 – which applies some, but not all, of the ABA Model Rules’ duties

and prohibitions to lawyers who are “representing a client before a legislative body or administrative agency in a nonadjudicative proceeding.”

### **ABA Model Rule 1.0(n): “Writing” or “written”**

Virginia did not adopt ABA Model Rule 1.0(n), which defines “writing” or “written.”

ABA Model Rule 1.0(n) definition of defines “writing” or “written” “denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and electronic communications.”

ABA Model Rule 1.0(n) then indicates that the term “‘signed’ writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.”

There are no ABA Model Rule Comments providing any guidance.

The term “writing” can be significant when assessing lawyers’ conduct under rules requiring written explanations or client consents, such as Virginia Rule 1.8(a)’s provisions governing lawyers business transactions with clients.

# RULE 1.1

## Competence

### Rule

#### Virginia Rule 1.1

Virginia Rule 1.1 addresses lawyers' basic competence duty.

Virginia Rule 1.1 contains the unsurprising requirement that lawyers “shall provide competent representation to a client.” Virginia Rule 1.1 then explains that such competent representation “requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

**ABA Model Rule 1.1** contains the identical language.

## Comment

### Virginia Rule 1.1 Comment [1]

Virginia Rule 1.1 cmt. [1] addresses the standards for determining whether lawyers can provide competent representation.

Virginia Rule 1.1 cmt. [1] lists several factors “[i]n determining whether a lawyer employs the requisite knowledge and skill in a particular matter.” The word “employs” seems odd. The sentence seems focused on lawyers’ pre-representation ability – rather than the lawyer’s post-retention conduct. And of course the word “employs” normally refers to an employment situation, although it clearly has a broader meaning.

The factors focus on both the matter and the lawyer. The former analysis assesses “the relative complexity and specialized nature of the matter.” The latter analysis examines the lawyer’s training, experience, preparation, etc. The latter analysis also considers “whether it is feasible” to refer the matter to another competent lawyer or involve another competent lawyer in the matter.

The reference to lawyers’ possible referral of the matter to “a lawyer of established competence in the field in question” seems misplaced. If the lawyer completely refers the matter to a different “competent lawyer,” the referring lawyer has no further involvement. Theoretically it makes sense to assess the competence of the referral (such as determining whether the referring lawyer has competently selected a lawyer who will handle the case going forward), but the thrust of Virginia Rule 1.1 cmt. [1] clearly involves the original lawyer going forward herself rather than handing off the matter. This contrasts with the possibility of the lawyer continuing with the matter – but involving another lawyer who might be more “competent in the field in question.”

Virginia Rule 1.1 cmt. [1] describes two levels of such involvement – mentioning “whether it is feasible to . . . associate or consult with” such a clearly competent lawyer. Presumably the word “associate” involves a more intimate continuing relationship than the word “consult.” But either one of those possibilities presumably permits the original lawyer to arrange for such other lawyers’ involvement to competently handle the case going forward rather than entirely referring it to another lawyer. Of course, involving another lawyer would implicate a number of other ethics issues, such as fee-sharing under Virginia Rule 1.5(e).

Virginia Rule 1.1 cmt. (1) concludes by noting that “[i]n many instances, the required proficiency is that of a general practitioner,” but “in some circumstances” “[e]xpertise in a particular field of law may be required.”

**ABA Model Rule 1.1 cmt. [1]** contains the identical language. Thus, the ABA Model Rule Comment implicates all of the issues discussed above.

### **Virginia Rule 1.1 Comment [2]**

Virginia Rule 1.1 cmt. [2] addresses various ways in which lawyers may competently handle a representation.

Virginia Rule 1.1 cmt. [2] first assures lawyers that they “need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar.” That presumably reflects lawyers’ ability to bring themselves “up to speed” in a new legal area.

The Virginia Rule Comment then acknowledges that “newly admitted lawyer[s] can be as competent as a practitioner with long experience.” That may be a bit more of a stretch, but certainly applies if the newly admitted lawyer studied that particular area in law school or is otherwise familiar with it.

Virginia Rule 1.1 cmt. [2] next notes that “all legal problems” require certain important legal skills: (1) “analysis of precedent”; (2) “the evaluation of evidence”; and (3) “legal drafting.” The Virginia Rule Comment also pinpoints “[p]erhaps the most fundamental legal skill” that “necessarily transcends any particular specialized knowledge” – “determining what kind of legal problems a situation may involve.”

The Virginia Rule Comment concludes by recognizing two other ways that lawyers may “provide adequate representation.” The word “adequate” seems inapt. Although the term presumably is intended to be synonymous with the term “competent,” it seems to define a lower standard of care than the term “competent.” First, such lawyers may provide such adequate representation “in a wholly novel field through necessary study.” Second, they can provide “[c]ompetent representation” “though the association of a lawyer of established competence in the field in question.”

Oddly, this Virginia Rule 1.1 cmt. [2] language is word-for-word the same as the identical wording in Virginia Rule 1.1 cmt. [1]. Perhaps the Virginia Rule 1.1 cmt. [1] reference focuses on lawyers’ ability to accept a new representation (looking ahead to the possibility of such association with another lawyer), while Virginia Rule 1.1 cmt. [2] focuses on whether such association met a competence standard at the time that other lawyer becomes involved. That is a fairly subtle difference.

**ABA Model Rule 1.1 cmt [2]** contains the identical language.

### **Virginia Rule 1.1 Comment [2a]**

Virginia Rule 1.1 cmt. [2a] does not appear in the ABA Model Rule 1.1 Comments.

Virginia Rule 1.1 cmt. [2a] explains that negotiating is an “important skill,” and that “[o]ften it is possible to negotiate a solution which meets some of the needs and interests of all the parties to a transaction or dispute, i.e., a problem-solving strategy.” Virginia Rule 1.1 cmt. [2a] exemplifies the Virginia Rules’ unique theme encouraging alternative dispute resolution. Most notably, Virginia Rule 1.2 cmt. [1] requires (not just suggests) that “a lawyer shall advise the client about the advantages, disadvantages, and availability of dispute resolution processes that might be appropriate in pursuing these [client-selected] objectives.”

**ABA Model 1.1** does not contain a similar comment.

### **Virginia Rule 1.1 Comment [3]**

Virginia Rule 1.1 cmt. [3] addresses lawyers' representation “[i]n an emergency.”

Virginia Rule 1.1 cmt. [3] does not provide any guidance about what constitutes an “emergency” triggering these ethical principles. In that situation, lawyers may “give advice or assistance in a matter” even if they do not have “the skill ordinarily required” – it would be “impractical” to refer the matter to or consult with another lawyer about the matter. But even then, such emergency assistance “should be limited to that reasonably necessary in the circumstances.”

**ABA Model Rule 1.1 cmt. [3]** contains the identical language.

### **Virginia Rule 1.1 Comment [4]**

Virginia Rule 1.1 cmt. [4] addresses lawyers' ability to achieve the required competence.

Virginia Rule 1.1 cmt. [4] first acknowledges that lawyers without the necessary competence may nevertheless "accept representation where the requisite level of competence can be achieved by reasonable preparation." In other words, lawyers may take a matter even if handling it competently will require preparation.

Virginia Rule 1.1 cmt. [4] then notes that this principle also applies to "appointed...counsel for an unrepresented person" – referring to Virginia Rule 6.2. Virginia Rule 6.2 explains that lawyers "should not seek to avoid appointment by a tribunal to represent a person, except for good cause." Virginia Rule 6.2 cmt [2] indicates that "[g]ood cause exists if the lawyer could not handle the matter competently" (referring back to Virginia Rule 1.1). Thus, Virginia Rule 1.1 cmt. [4] seems to indicate that lawyers may not seek to avoid tribunal appointment under Virginia Rule 6.2 by pointing to their lack of competence – if they could gain that competence after the appointment.

**ABA Model Rule 1.1 cmt. [4]** contains the identical language.

ABA Model Rule 6.2 and ABA Model Rule 6.2 cmt. [2] also contain language identical to that in the parallel Virginia Rule 6.2 and Virginia Rule 6.2 cmt. [2].

## **Virginia Rule 1.1 Comment [5]**

Virginia Rule 1.1 cmt. [5] addresses what steps lawyers normally must take to competently handle a client's matter.

Virginia Rule 1.1 cmt. [5] acknowledges that competent handling of a matter includes legal and factual inquiry and analysis, as well as using the "methods and procedures" of competent practitioners. The Virginia Rule Comment also notes that competent handling includes "adequate preparation," which varies depending on "what is at stake" in the matter (making the obvious point that "major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence").

**ABA Model Rule 1.1 cmt. [5]** contains essentially the identical language. But there are several differences.

First in contrast to Virginia Rule 1.1 cmt. [5], ABA Model Rule 1.1 cmt. [5] understandably acknowledges that major matters "ordinarily require more elaborate treatment than matters of lesser complexity and consequence." Virginia Rule 1.1 cmt. [5] does not contain the obvious term "complexity."

Second in contrast to Virginia Rule 1.1 cmt. [5], ABA Model Rule 1.1 cmt. [5] contains a concluding sentence indicating that "[a]n agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c)."

That point seems inherent in an attorney-client relationship, although obviously there are ethical limits on such contractual restrictions on lawyers' representation.

Presumably this scope limitation concept involves lawyers limiting a representation's scope to matters that the lawyers can competently handle. That concept seems appropriate, although it would be easy to violate the ethics rules and duties to clients if the clients would be materially harmed by such lawyers' carving out of some key issue that the scope-limiting lawyer would be unable to handle. ABA Model Rule 1.2(c) acknowledges that lawyers "may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."

Virginia has a somewhat similar provision, but numbers it Virginia Rule 1.2(b). In contrast to ABA Model Rule 1.2(c), Virginia Rule 1.2(b) states that lawyers "may limit the objectives [not the "scope" – which is the term used in the ABA Model Rule] of the representation if the client consents after consultation." Virginia also adopted Comments to Virginia Rule 1.2 that differ from the ABA Model Rule 1.2 Comments. Still, it is unclear why Virginia Rule 1.1 cmt. [5] does not acknowledge that lawyers and clients can limit a representation's scope.

### **Virginia Rule 1.1 Comment [6]**

Virginia Rule 1.1 cmt. [6] addresses what steps lawyers should take to maintain their ability to competently handle a client's matter.

Virginia Rule 1.1 cmt. [6] first explains that lawyers "should engage in continuing study and education in the areas of practice in which the lawyer is engaged," in order "[t]o maintain the requisite knowledge and skill."

The Virginia Rules Comment then notes that "[a]ttention should be paid to the benefits and risks associated with relevant technology." The Virginia Rules Comment

also reminds lawyers that the Virginia Supreme Court's MCLE requirements "set the minimum standard for continuing study and education which a lawyer licensed and practicing in Virginia must satisfy."

Virginia Rules 1.1 cmt. [6] concludes with a suggestion that lawyers "should consider making use [of "a system of peer review"] in appropriate circumstances." It is unclear what "a system of peer review" means in that context.

**ABA Model Rule 1.1 cmt. [8]** contains essentially the same concepts, without the reference to the Virginia MCLE requirements and a "peer review" system.

#### **ABA Model Rule 1.1 Comment [6]**

Virginia did not adopt ABA Model Rule 1.1 cmt. [6].

ABA Model Rule 1.1 cmt. [6] addresses a lawyer's retention of or contracts with "other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client."

ABA Model Rule 1.1 cmt. [6] understandably explains that such lawyers considering such retention or contracting: (1) "should ordinarily obtain informed consent from the client;" and (2) "must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client."

The phrase "retains or contracts with" seems inapt. ABA Model Rule 1.1 cmt. [1] (discussed above) uses the phrase "associate or consult" with such other lawyers from another firm. That phrase seems more appropriate than ABA Model Rule 1.1 cmt. [6]'s phrase "retains or contracts with." The lawyer might "retain" another lawyer on behalf of

the client, but normally would not “retain” a lawyer herself. The word “contracts” seems more apt, but even then one would expect that any “contract” would be on behalf of the lawyer’s client.

The phrase “provide or assist” also seems odd. The latter word (“assist”) makes sense. But without that word the sentence would read “to provide . . . legal services to a client.” That seems to describe a replacement lawyer – thus reflecting ABA Model Rule 1.1 cmt. [1]’s discussion of “whether it is feasible to refer the matter to” another lawyer. Perhaps ABA Model Rule 1.1 cmt. [6] is meant to describe two very different possibilities: (1) the original lawyer “retain[ing]” a lawyer “to provide . . . legal services to a client” – thus describing the steps in a complete referral of the matter to another lawyer; or (2) the original lawyer “contract[ing]” with another lawyer “to . . . assist in the provision of legal services to a client” (essentially matching the phrase “associate or consult” contained in ABA Model Rule 1.1 cmt. [1].) Still, there is a confusing mismatch between the possible steps described in ABA Model Rule 1.1 cmt. [1] and in ABA Model Rule 1.1 cmt. [6].

The ABA Model Rule 1.1 cmt. [6] refers to several other ABA Model Rules for guidance: ABA Model Rule 1.2 (addressing authority allocation); ABA Model Rule 1.4 (requiring specified communication to clients); ABA Model Rule 1.5(e) (governing fee sharing); ABA Model Rule 1.6 (the main ABA Model Rule confidentiality rule); ABA Model Rule 5.5(a) (addressing unauthorized practice of law).

ABA Model Rule 1.1 cmt. [6] then lists factors that will affect the “reasonableness of the decision to retain or contract with other lawyers outside the lawyer’s own firm.” The list includes: (1) “the education, experience and reputation of the nonfirm lawyers;”

(2) “the nature of the services assigned to the nonfirm lawyers;” and (3) “the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.”

The first few of these factors seem appropriate when assessing the “reasonableness of the decision to retain or contract with other lawyers.” But the last few factors seem to go more to the professional atmosphere in the pertinent jurisdiction (“in which the services will be performed”) rather than the assessment of additional lawyers’ individual qualities. Those may certainly affect the decision whether to arrange replacement or additional lawyers to take over or assist in representing the client, but it seems to focus more on ethic issues other than “competence.” Lawyers’ “competence” would seem to focus on those lawyers’ abilities rather than the milieu in which the lawyers may take over the representation or assist in the representation.

### **Virginia Rule 1.1 Comment [7]**

Virginia Rule 1.1 cmt. [7] addresses the increasingly important issue of lawyer “wellness.”

Virginia Rule 1.1 cmt. [7] emphasizes that a lawyer’s “mental, emotional, and physical well-being impacts the lawyer’s ability to represent clients,” and that maintaining such well-being “is an important aspect of maintaining competence to practice law” (referring to Virginia Rule 1.16(a)(2)). Virginia Rule 1.16(a)(2) requires that lawyers must withdraw from representing a client if “the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client.” Virginia Rule 1.16 does not have any explanatory Comments focusing on that mandatory withdrawal standard.

**ABA Model Rule 1.1** does not contain a Comment similar to Virginia Rule 1.1 cmt. [7].

### **ABA Model Rule 1.1 Comment [7]**

Virginia did not adopt ABA Model Rule 1.1 cmt. [7].

ABA Model Rule 1.1 cmt. [7] addresses allocation of work when lawyers from different law firms both represent the same client on the same matter.

ABA Model Rule 1.1 cmt. [7] explains that lawyers from different firms who are providing legal services to the same client on a matter “ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them.” The ABA Model Rule Comment refers to ABA Model Rule 1.2, which specifically addresses allocation of authority between the client and the lawyer.

ABA Model Rule 1.1 cmt. [7] contains the same odd use of the term “should” as many other ABA Model Rule Comments. It seems far too tentative to state that “lawyers ordinarily should consult with each other and the client” when the lawyers are jointly representing the client. One would think that the phrase should instead be “ordinarily must” or even “must.”

ABA Model Rule 1.1 cmt. [7] concludes by acknowledging that such “allocations of responsibility” in a matter “pending before a tribunal” may impose “additional obligations” on lawyers and parties that are “a matter of law beyond the scope of these Rules”. ABA Model Rule 1.1 cmt. [7] does not explain that statement. Presumably it refers to tribunals’

common requirement that local counsel accompany to court hearings, etc., other lawyers who are admitted in the case pro hac vice.

# RULE 1.2

## Scope of Representation

ABA Model Rule 1.2 has a different title: "Scope of Representation and Allocation of Authority Between Client and Lawyer."

### Rule

#### Virginia Rule 1.2(a)

Virginia Rule 1.2(a) addresses the scope of a representation and allocation of clients' and lawyers' responsibilities during such a representation.

Virginia Rule 1.2(a) begins by requiring that lawyers "shall abide by a client's decision concerning the objectives of representation," subject to other Virginia Rule 1.2 provisions (which include provisions not found in ABA Model Rule (1.2)). Virginia Rule 1.2(a) then requires lawyers to "consult with the client as to the means by which [those objectives] are to be pursued." This dual approach is consistent with the normal allocation between clients (who select a representation's objectives) and lawyers (who normally choose the means by which those objectives will be pursued, after consulting with the client).

Virginia Rule 1.2(a) next specifically focuses on settlements – explaining that lawyers "shall abide by a client's decision, after consultation with the lawyer, whether to accept an offer of settlement of a matter." In other words, clients may decide to settle a matter over their lawyers' objection.

But as discussed more fully below, this provision seems to require a consultation between the client and a lawyer before the client can decide to “accept an offer of settlement of a matter.” Clients obviously are free to accept or reject a settlement offer without consulting their lawyers – although wise clients would seek such a consultation. This Virginia Rule 1.2(a) sentence also strangely limits its articulated example to clients’ acceptance of a settlement offer. Of course, lawyers must also abide by their client’s decision to make a settlement offer, in addition to accepting a settlement offer.

Virginia Rule 1.2(a) then applies essentially the same principle to criminal cases, explaining that a lawyer “shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.” As with settlements on the civil side, criminal defense lawyers thus must follow their clients’ decision about those key issues. But as mentioned above, the phrase “after consultation with the lawyer” seems inappropriate because – clients can make such decisions on their own.

**ABA Model Rule 1.2(a)** addresses the same issue, but differs in several ways from Virginia Rule 1.2(a).

First, ABA Model Rule 1.2(a) explicitly refers to lawyers’ “implied[ ] authorization to carry out the representation.” That concept is included in ABA Model Rule 1.2(a) itself. This contrasts with Virginia Rule 1.2, which includes that identical language in Virginia Rule 1.2(d), although that Virginia Rule is explicitly referenced in Virginia Rule 1.2(a).

Second, ABA Model Rule 1.2(a) notes that ABA Model Rule 1.4 (requiring lawyers to communicate with their clients) requires consultation about “the means by which [the clients’ selected objectives] are to be pursued.” Perhaps Virginia Rule 1.2(a)’s awkward

phrase “after consultation with a lawyer” was intended to parallel ABA Model Rule 1.2(a)’s reference to lawyers’ Virginia Rule 1.4 duty to communicate with their clients on important matters.

Third, in contrast to Virginia Rule 1.2(a), ABA Model Rule 1.2(a) does not contain the phrase “after consultation with the lawyer” in the sentences requiring lawyers to abide by clients’ decision about: (1) accepting a settlement offer in a civil matter; or (2) entering a plea, waiving a jury trial, or testifying in a criminal matter.

Fourth, ABA Model Rule 1.2(a) wisely refers to lawyers’ obligation to “abide by a client’s decision whether to settle a matter.” As explained above, Virginia Rule 1.2(a) is much more limited – only requiring lawyers to follow their client’s decision “after consultation with the lawyer, whether to accept an offer of settlement of a matter.” ABA Model Rule 1.2(a) covers both clients’ decision whether to offer a settlement or whether to accept a settlement.

### **ABA Model Rule 1.2(b)**

Black letter Virginia Rules do not contain a parallel to ABA Model Rule 1.2(b), which addresses the implications of lawyers’ representation of clients with presumably controversial views or taking controversial actions.

ABA Model Rule 1.2(b) confirms that “[a] lawyer’s representation of a client, including representation by appointment, “does not constitute an endorsement of the client’s political, economic, social or moral views or activities.”

The Virginia Rules contain similar but not identical language in Virginia Rule 1.2 cmt. [5] (discussed below).

### **Virginia Rule 1.2(b)**

Virginia Rule 1.2(b) addresses lawyers' ability to limit representations' objectives, with client consent.

Virginia Rule 1.2(b) explains that lawyers "may limit the objectives of the representation if the client consents after consultation." The phrase "consents after consultation" is the standard Virginia Rule formulation that matches ABA Model Rules' standard formulation "informed consent."

**ABA Model Rule 1.2(c)** contains the identical language as Virginia Rule 1.2(b). In contrast to Virginia Rule 1.2(b), ABA Model Rule 1.2(c) also requires that the limitation be "reasonable under the circumstances."

### **Virginia Rule 1.2(c)**

Virginia Rule 1.2(c) addresses the prohibition on lawyers assisting their clients' crime or fraud, while preserving lawyers' right to discuss the consequences of their clients' actions and to challenge existing law.

Virginia Rule 1.2(c) first bluntly states that lawyers "shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent." Under the Virginia Terminology definition, the term "knows" denotes "actual knowledge of the fact in question," but "[a] person's knowledge may be inferred from circumstances."

Virginia Rule 1.2(c) then lists three types of communications, each given its own subsection.

Virginia Rule 1.2(c)(1) assures that "a lawyer may discuss the legal consequences of any proposed course of conduct with a client." That provision presumably allows lawyers to warn clients that their conduct crosses the line into criminal or fraudulent

conduct. Even if lawyers do not assist in that conduct crossing the line, they may have a duty or discretion to disclose their clients' wrongful conduct or intent under Virginia Rule 1.6, Virginia Rule 3.3 and perhaps under other rules governing lawyers' duty or discretion to disclose their clients' past or intended future misconduct.

Virginia Rule 1.2(c)(2) assures that lawyers “may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.” This essentially parallels the standard in Virginia Rule 3.1, which explains that lawyers “shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law” (emphasis added).

Virginia Rule 1.2(c)(3) addresses permissible communications when federal and state law differs. This provision presumably focuses on states' (including Virginia's) move toward liberalizing marijuana laws, in contrast to federal law's more restrictive current approach. Virginia Rule 1.2(c)(3) assures that lawyers may “counsel or assist” their clients regarding conduct “expressly permitted by state or other applicable law that conflicts with federal law.” But this permissible conduct is conditioned on a requirement “that the lawyer counsels the client about the potential legal consequence of the client's proposed course of conduct under applicable federal law.” In other words, lawyers may assist their clients in conduct permitted by Virginia or other state law (such as increasingly liberal marijuana use laws). But lawyers must also warn those clients about possibly applicable federal law limiting or even prohibiting such conduct. The provision thus permits lawyers to avoid Virginia Rule 1.2(c)'s introductory sentence's prohibition on lawyers “counsel[ing] a client to engage, or assist a client, in conduct that the lawyer

knows is criminal or fraudulent.” Because of the mismatch between state and federal law, lawyers may counsel their clients to engage in conduct permissible under the former but arguably impermissible under the latter.

**ABA Model Rule 1.2(d)** contains language identical to Virginia Rule 1.2(c)(1) and (2) – although not separated into separate numbered subsections.

ABA Model Rule 1.2(d) does not contain the language or concept contained in Virginia Rule 1.2(c)(3).

### **Virginia Rule 1.2(d)**

Virginia Rule 1.2(d) addresses lawyers’ implied authorization to take action on their clients’ behalf.

Virginia Rule 1.2(d) indicates that lawyers “may take such action on behalf of the client as is impliedly authorized to carry out the representation.”

**ABA Model Rule 1.2(a)** contains the identical language.

### **Virginia Rule 1.2(e)**

Virginia Rule 1.2(e) addresses lawyers’ duty if their clients expect them to engage in improper assistance.

Virginia Rule 1.2(e) requires that lawyers “shall consult with the client regarding the relevant limitations on the lawyer’s conduct” – “[w]hen a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law.”

The word “[w]hen” seems odd. It leaves the impression that such an event will likely or even inevitably occur. The language in similar ABA Model Rule 1.2 cmt. [13]

uses the more appropriate introductory word: “[i]f.” As explained below, ABA Model Rule 1.2 cmt. [13] is also substantively different from Virginia Rule 1.2(e).

Virginia Rule 1.2(e) is also interesting because it does not explicitly make the obvious point that lawyers may not provide such ethically impermissible assistance. Instead, Virginia Rule 1.2(e) requires lawyers to “consult with the client” about the client’s expectation. Perhaps the Virginia Rule requires such consultation so that the lawyer can talk the client out of engaging in the improper conduct – even without the lawyer’s assistance that the lawyer obviously cannot give.

**ABA Model Rule 1.12** does not contain a similar provision in its black letter provisions. However, as explained below, ABA Model Rule 1.2 cmt. [13] contains the same concept, although it triggers the lawyers’ duty to consult under a different standard.

## Comment

### Virginia Rule 1.2 cmt. [1]

Virginia Rule 1.2 cmt. [1] addresses the allocation of authority between clients and their lawyers in setting a representation's objectives and means.

Virginia Rule 1.2 cmt. [1] begins with a sentence that is not found in the ABA Model Rules or Comments: “[b]oth lawyer and client have authority and responsibility in the objectives and means of representation.”

There seems to be a word missing in the phrase “responsibility in the objectives and means of representation”. That phrase would be clearer by adding a word between “in” and “representation” – such as “selecting,” “determining”, etc. It also seems inappropriate to say that lawyers have “authority and responsibility” (especially “authority”) in the “objectives” of the representation. The next sentence confirms clients’ “ultimate authority to determine the purposes to be served by legal representation,” although the sentence might leave the wrong impression. Presumably the phrase “the purposes to be served by legal representation” is synonymous with the word “objectives” contained in the preceding sentence. Virginia Rule 1.2 would be more clear if it used consistent terms.

Virginia Rule 1.2 cmt.[1] next reminds lawyers that those “purposes” must be “within the limits imposed by the law and the lawyer’s professional obligations.” Virginia Rule 1.2 cmt. [1] then notes that clients have “a right to consult with the lawyer about the means to be used in pursuing [the clients’] objectives.” This should go without saying. This dichotomy between “objectives” and “means” appears throughout Virginia Rule 1.2

and ABA Model Rule 1.2 – but with different descriptions of clients’ and lawyers’ role in their selection.

Virginia Rule 1.2 cmt. [1] next changes direction, and contains a unique provision (not found in the ABA Model Rules) indicating that lawyers “shall advise the client about the advantages, disadvantages, and availability of dispute resolution processes that might be appropriate in pursuing these objectives.” This explicit mandatory ADR-related disclosure contrasts with the presumed inclusion of such guidance in lawyers’ Virginia Rule 1.4 more generic communication duty. The required disclosure focusing on ADR possibilities is consistent with Virginia’s pro-ADR approach in other rules. For instance, unique Virginia Rule 1.3 cmt. [2] contends that clients “can be represented zealously in either setting” – referring to adversarial settings or “a more collaborative, problem-solving” setting.

Virginia Rule 1.2 cmt. [1] next notes that lawyers are “not required to pursue objectives or employ means simply because a client may wish that the lawyer do so.” This is certainly true if the objectives or the means would violate the Virginia Rules or other law. Under Virginia Rule 1.16, lawyers may withdraw from representing a client (even if withdrawal would cause “material adverse effect on the interests of the client”) if a client “persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is illegal or unjust” (Virginia Rule 1.16(b)(1)) or if “a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent” (Virginia Rule 1.16(b)(3)). And of course the lawyer can simply refuse to engage in conduct that the client directs – at which time the client can fire the lawyer.

Virginia Rule 1.2 cmt. [1] then states that “[a] clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking.” That language (which does not appear in the ABA Model Rules) continues the Virginia Rule 1.2 theme that lawyers play a significant role in determining representations’ objectives. The ABA Model Rules recognize a much clearer distinction between clients’ sole power to determine a representation’s objectives and lawyers’ role selecting the means (after consulting with their clients).

Virginia Rule 1.2 cmt. [1] continues its discussion of “means” by explaining that lawyers “should assume responsibility for technical and legal tactical issues,” but “should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.” Virginia Rule 1.2 cmt. [1] does not further explain the intriguing phrase “concern for third persons who might be adversely affected”. Presumably it refers to clients’ role in restraining lawyers from taking means that might harm third persons. As explained below, that undefined phrase also appears in ABA Model Rule 1.2 cmt. [1].

As noted above, under Virginia Rule 1.16(b)(3), lawyers may withdraw from a representation (even if withdrawal would cause “material adverse effect on the interests of the client”) if “a client insists upon pursuing an objection that the lawyer considers repugnant or imprudent.” Similar but not identical ABA Model 1.16(b)(4) allows lawyers to withdraw if “the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.”

Virginia 1.2 cmt. [1] concludes with an acknowledgment that the Virginia ethics “Rules in the same circumstance do not define the lawyer’s scope of authority in litigation.”

The Virginia Comment does not provide any further guidance about that phrase, or provide any examples. Presumably lawyers' "scope of authority in litigation" can be governed by statutes, court rules, local court rules, pre-trial or specific court orders, etc. For instance, orders or even local lore might require local lawyers to accompany out-of-state lawyers to all hearings or depositions, might limit lawyers' ability to appear in a hearing by telephone, etc. Although such extrinsic sources "define a lawyer's scope of authority in litigation" the Virginia ethics Rules clearly affect lawyers' litigation-related authority. For instance, under Virginia Rule 3.4(d), a lawyer may "take steps, in good faith, to test the validity of such rule or ruling". So it would be an overstatement to say that the Virginia ethics Rules have no role in defining the lawyers' scope of authority in litigation.

**ABA Model Rule 1.2 cmt. [1]** addresses the same responsibility allocation issue as Virginia Rule 1.2 cmt. [1].

ABA Model Rule 1.2 cmt. [1] differs from Virginia Rule 1.2 cmt. [1] in several ways.

First, ABA Model Rule 1.2 cmt. [1] does not begin with the odd sentence contained in Virginia Rule 1.2 cmt. [1] – acknowledging that both lawyers and clients have "authority and responsibility in the objectives and means of representation." ABA Model Rule 1.2 cmt. [1] instead begins by understandably emphasizing clients' authority: "[ABA Model Rule 1.2](a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation." As explained above in connection with Virginia Rule 1.2 cmt. [1], presumably that phrase is synonymous with the Virginia Rule Comment's word "objectives." Thus, ABA Model Rule 1.2 seems more client-centric than Virginia Rule 1.2, at least in the order of their articulation.

Second, in contrast to Virginia Rule 1.2 cmt. [1], ABA Rule 1.2 cmt. [1] indicates that some decisions “must . . . be made by the client” – “such as whether to settle a civil matter.” Virginia Rule 1.2(a) highlights clients’ decision-making authority only in a subset of that process: “whether to accept an offer of settlement of a matter.” As explained below, Virginia Rule 1.2 cmt. [7] recognizes clients’ similar absolute authority to settle a matter.

Third, ABA Model Rule 1.2 cmt. [1] does not contain the unique Virginia sentence requiring lawyers to advise their clients about ADR processes “that might be appropriate” in pursuing their clients’ stated objectives.

Fourth, ABA Model Rule 1.2 cmt. [1] does not contain several sentences found in Virginia Rule 1.2 cmt. [1]: “(1) noting that lawyers are not required to pursue any objectives their client selects; (2) acknowledging the difficulty of distinguishing between objectives and means in a representation; (3) describing client-lawyer relationship as “partak[ing] of a joint undertaking”; (4) noting that lawyers “should assume responsibility” for “technical and legal tactical issues” while deferring to the client about other specified matters; and (5) explaining that the ethics rules “do not define the lawyer’s scope of authority in litigation.” Some of those concepts appear in ABA Model Rule 1.2 cmt. [2] (as explained below).

### **ABA Model Rule 1.2 Comment [2]**

Virginia did not adopt ABA Model Rule 1.2 cmt. [2].

ABA Model Rule 1.2 cmt. [2] addresses agreements between clients and lawyers about the means the lawyers will use to pursue the clients’ objectives.

ABA Model Rule 1.2 cmt. [2] explains that clients normally defer to lawyers about the means of accomplishing the clients' objectives, while lawyers normally defer to clients regarding such questions as to "expense to be incurred and concern for third persons who might be adversely affected." As explained above, it is unclear what the phrase "concern for third persons who might be adversely affected" means. The language is identical to that in Virginia Rule 1.2 cmt. [1]'s penultimate sentence.

ABA Model Rule 1.2 cmt. [2] then focuses on the process for resolving client-lawyer disagreements. The ABA Model Rule Comment acknowledges that "this Rule does not prescribe how such disagreements are to be resolved" – "[b]ecause of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons." ABA Model Rule 1.2 cmt. [2] then notes that lawyers "should" consult "[o]ther law, however, [which] may be applicable." The word "however" seems to imply that lawyers should look outside the ethics rules for guidance on resolving disagreements with their clients. Not surprisingly, ABA Model Rule 1.2 cmt. [2] advises that lawyers "should also consult with the client and seek a mutually acceptable resolution of the disagreement."

ABA Model Rule 1.2 cmt. [2] concludes by noting what lawyers and clients might do "[i]f such efforts [to resolve a disagreement] are unavailing." First, if "the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation" (referring to ABA Model Rule 1.16(b)(4)). Second, "the client may resolve the disagreement by discharging the lawyer" (referring to ABA Model Rule 1.16(a)(3)).

### **ABA Model Rule 1.2 Comment [3]**

Virginia did not adopt ABA Model Rule 1.2 cmt. [3].

ABA Model Rule 1.2 cmt. [3] begins by explaining that “[a]t the outset of a representation, the client may authorize the lawyers to take specific action on the client’s behalf without further consultation.” Clients presumably may grant such authorization at any time during the representation, not just “[a]t the outset of a representation.”

Interestingly, clients’ authorization allowing their lawyers to negotiate a settlement may well be the most likely setting of ABA Model Rule 1.2 cmt. [3]’s application. Not surprisingly, clients are likely to grant such settlement authorization near the end of a representation. That highlights the unnecessary and probably inappropriate description of clients granting such authorization “[a]t the outset of a representation.”

ABA Model Rule 1.2 cmt. [3] next explains that absent “a material change in circumstances,” lawyers may rely on such advance authorization. Presumably, such client authorization would (for example) allow a lawyer to reject a settlement offer without communicating at the time with the client – if the client has previously authorized the lawyer to reject such an offer below a certain amount, etc.

ABA Model Rule 1.2 cmt. [3] concludes by stating that clients “may . . . revoke such authority at any time.” Given clients’ power over the representation and the lawyer’s role in that representation, this should come as no surprise. As with consents that clients have given to their lawyers’ representation that would otherwise be a conflict (addressed in ABA Model Rule 1.7, among other places), such client revocation only affects future actions. Thus, ABA Model Rule 1.7 cmt. [21] explains that while clients may terminate lawyers’ representation or revoke any consents they have given, it is a separate issue to determine if such revocation “precludes the lawyer from continuing to represent other clients.” This understandable proviso essentially applies standard reliance principles in

that setting. For example, a lawyer who relied on a client's consent to undertake the representation of another client (often adverse to the client who provided the consent), the client's revocation would not automatically require the lawyer's immediate withdrawal from that other representation if the lawyer and the other client had relied on it in some material way. Otherwise, a client could provide a consent, and then revoke it on the eve of trial – requiring the lawyer's hasty withdrawal at that critical moment.

It is less likely that clients' revocation of authorization would have the same possible effect, but there may be occasions when a lawyer's reliance on the client's authorization to take some action would have the same adverse effect on the lawyer or some other third party. For instance, a client's revocation of authorization allowing her lawyer to order an expensive court transcript would not relieve the client of the duty to the cost of that transcript if the lawyer relied on the authorization in ordering the transcript and it was too late to cancel the order.

Jurisdictions disagree about the effect of a client's purported revocation of authorization allowing a lawyer to make a handshake deal on a settlement. Depending on the revocation's timing, some jurisdictions hold that clients are bound by such an apparent agent's agreement to a settlement. Other jurisdictions require the adverse party hoping to enforce the settlement to establish the lawyer's actual authority at the time that the lawyer agreed to the settlement. All of these different scenarios complicate what might seem like a simple principle that clients can revoke authorization (or revoke consents in a conflict setting) at any time.

### **Virginia Rule 1.2 Comment [4]**

Virginia Rule 1.2 cmt. [4] addresses lawyers' representation of clients with diminished capacity.

Virginia Rule 1.2 cmt. [4] explains that lawyers must be guided by Virginia Rule 1.14 "[i]n a case in which the client appears to be suffering mental disability." Virginia Rule 1.14 addresses lawyers' responsibilities when clients no longer have the capacity to make informed decisions.

Virginia Rule 1.2 cmt. [4]'s use of the term "mental disability" describes just a subset of the type of impairment identified and addressed in Virginia Rule 1.14(a): "whether because of minority, mental impairment or some other reason." It would be more appropriate for the Virginia Rule Comment to describe all of the impairments covered by Virginia Rule 1.14. The ABA Model Rule term "diminished capacity" would be preferable, because it covers the entire spectrum of clients' inability to make informed decisions when dealing with their lawyer.

**ABA Model Rule 1.2 cmt. [4]** contains essentially the same language. But in contrast to Virginia Rule 1.2 cmt. [4], the ABA Model Rule Comment uses the more generic and up-to-date phrase "diminished capacity" rather than "mental disability."

### **Virginia Rule 1.2 Comment [5]**

Virginia Rule 1.2 cmt. [5] addresses lawyers' representation of needy clients and unpopular clients.

Virginia Rule 1.2 cmt. [5] first explains that "[l]egal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval."

Virginia Rule 1.2 cmt. [5] concludes with an assurance that “a lawyer’s representation of a client, including representations by appointment, does not constitute an endorsement of the client’s political, economic, social or moral views or activities.”

Some of American history’s greatest legal heroes represented unpopular clients – to contemporaneous scorn, hostility or even worse. Among others, examples include John Adams’ representation of the British officer and several British soldiers charged after the Boston Massacre, and brave civil rights lawyers’ ultimately successful efforts to dismantle segregation.

Presumably Virginia Rule 1.2 cmt. [5]’s term “endorsement” is synonymous with the ABA Model Rule Comment’s term “approval,” discussed below.

**ABA Model Rule 1.2 cmt. [5]** contains essentially the identical language. In contrast to Virginia Rule 1.2 cmt. [5], ABA Model Rule 1.2 cmt. [5]’s articulation of the second concept is slightly different – assuring that “representing a client does not constitute approval of the client’s views or activities.” This shorter list seems to be an arguably narrower list of possibly unpopular clients’ attributes – in contrast to Virginia Rule 1.2 cmt. [5]’s phrase “client’s political, economic, social or moral view or activities.” But actually, the ABA Model Rule reference is broader – because it covers all of an unpopular client’s “views or activities.”

### **Virginia Rule 1.2 Comment [6]**

Virginia Rule 1.2 cmt. [6] addresses acceptable limits on lawyers’ representations of their clients.

Virginia Rule 1.2 cmt. [6] first confirms that lawyers may limit “[t]he objectives or scope of [legal] services” – either in an “agreement with the client or by terms under which

the lawyer’s services are made available to the client.” In other words, lawyers may hold themselves out to represent clients only in a limited fashion, or agree with their clients to a limited representation. But the former will always ultimately result in the latter – an agreement with the client to a limited representation. Virginia Rule 1.2 cmt. [6] provides a fairly unhelpful example: “a retainer may be for a specifically defined purpose.”

Virginia Rule 1.2 cmt. [6] then notes that legal aid agency-related representations “may be subject to limitations on the types of cases the agency handles.” Similarly, the representation by a lawyer retained by an insurer to represent an insured “may be limited to matters related to the insurance coverage.”

Virginia Rule 1.2 cmt. [6] concludes by noting that a representation’s terms “may exclude specific objectives or means that the lawyer regards as repugnant or imprudent.” This Virginia Rule Comment provision understandably allows lawyers to act in a professional, civil and courteous manner - without falling short of diligently (or even zealously) representing their clients. As explained above, lawyers who have already undertaken a representation may withdraw (even if it would cause a “material adverse effect on the interests of the client”) under Virginia Rule 1.16(b)(3) if “a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent.” Presumably an agreement with the client ahead of time might exclude from the means by which the lawyer will pursue the client-selected objective means that would not meet the “repugnant or imprudent” standard. In other words, a client-lawyer agreement is infinitely variable in defining the “means” that the lawyer will not employ – as long as the lawyer can still provide competent and diligent legal services, and does not run afoul of a Virginia Rule

1.7(a)(2) “material limitation” conflict. And even without such an agreement in place, lawyers may withdraw under Virginia Rule 1.16(b)(3) on the grounds described above.

**ABA Model Rule 1.2 cmt. [6]** contains some similar provisions.

Like Virginia Rule 1.2 cmt. [6], ABA Model Rule 1.2 cmt. [6] begins with what seems like a dual scenario under which lawyers may limit representation – in an agreement with the client, or by describing the terms on which the lawyer will provide services to the client. As explained above, the latter will always eventually result in the former.

But there are several differences between ABA Model Rule 1.2 cmt. [6] and Virginia Rule 1.2 cmt. [6].

First, in contrast to Virginia Rule 1.2 cmt. [6]’s opening sentence explaining that lawyers may limit “[t]he objectives or scope of services,” ABA Model Rule 1.2 cmt. [6] starts that sentence by mentioning limitations on “[t]he scope of services.” That different wording may not be material, because presumably the scope of the representation necessarily includes an agreement on the objectives of the representation.

Second, in contrast to Virginia Rule 1.2 cmt. [6], ABA Model Rule 1.2 cmt. [6] does not have the fairly unhelpful example of a retainer for “a specifically defined purpose.”

Third, in contrast to Virginia Rule 1.2 cmt. [6], ABA Model Rule 1.2 cmt. [6] does not mention limitations on representations arranged through a legal aid agency, which may be “subject to limitations on the types of cases the agency handles.”

Fourth, the ABA Model Rule 1.2 cmt. [6] contains a sentence explaining that “[a] limited representation may be appropriate because the client has limited objectives for the representation.” That seems obvious.

Fifth, ABA Model Rule 1.2 cmt. [6] contrasts with Virginia Rule 1.2 cmt. [6]'s acknowledgment that a representation agreement “may exclude specific objectives or means” (such as “objectives or means that the lawyer regards as repugnant or imprudent”), ABA Model Rule 1.2 cmt. [6] mentions only the exclusion of “specific means that might otherwise be used to accomplish the client's objective.” Thus, the ABA Model Rule Comment does not mention exclusion of objectives - only the exclusion of “means.”

Sixth, ABA Model Rule 1.2 cmt. [6] concludes with two examples of such excluded “specific means” – using a different but presumably synonymous term “actions.” ABA Model Rule 1.2 cmt. [6] explains that such excludable “actions” are those “that the client thinks are too costly.” That exclusion does not appear in Virginia Rule 1.2 cmt. [6]. ABA Model Rule 1.2 cmt. [6] concludes with the second example – describing an agreed-upon exclusion of “actions” that “the lawyer regards as repugnant or imprudent.” This is similar to but contrasts with Virginia Rule 1.2 cmt. [6]'s agreed-upon exclusion of “objectives or means that the lawyer regards as repugnant or imprudent.”

### **Virginia Rule 1.2 Comment [7]**

Virginia Rule 1.2 cmt. [7] addresses limitations on the type of representation limitations upon which the client and lawyer may not agree – because those agreed-upon limitations improperly erode rights that clients must retain.

Virginia Rule 1.2 cmt. [7] first confirms that any representation scope agreement must “accord with” the Virginia ethics Rules and “other law.” The Virginia Rule Comment provides three examples: lawyers may not ask their clients “to agree to representations so limited in scope as to violate [Virginia] Rule 1.1 or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.”

Virginia Rule 1.1 requires lawyers to provide “competent representation to a client.” Thus, Virginia Rule 1.2 cmt. [7] prohibits any restrictions on a representation that would prevent the lawyer from competently handling the representation. Presumably that goes to the “means” rather than the lawyer’s general ability to handle the matter. Otherwise, it would seem odd that a lawyer competent to handle a matter could not agree to handle a limited portion of that matter.

Virginia Rule 1.2 cmt. [7] concludes with two other prohibitions on a representation’s limitation. First, clients “may not be asked to . . . surrender the right to terminate the lawyer’s services.” That follows the universal rule that clients can fire their lawyers at any time and for any reason (or for no reason).

Second, Virginia Rule 1.2 cmt. [7]’s conclusion also prohibits lawyers from entering into a representation agreement in which the client “surrender[s] . . . the right to settle litigation that the lawyer might wish to continue.” That freedom permits clients to abandon or settle for less than it is worth a claim that her lawyer is pursuing on the client’s behalf. For example, a client who is represented in a very valuable contingency case might decide to move on with her life, rather than pursue the case to a judgment or settlement. The lawyer cannot stop the client from doing that, even though the client might abandon the case or settle the case for less than its reasonable value, which of course would obviously cost the lawyer his lost contingent fee recovery.

Interestingly, Virginia Rule 1.2 cmt. [7]’s recognition that clients have “the right to settle litigation that the lawyer might wish to continue” seems broader than black letter Virginia Rule 1.2(a)’s description of clients’ settlement power. As mentioned above, Virginia Rule 1.2(a)’s requirement that lawyers “shall abide by a client’s decision” whether

to accept a settlement offer appears to have a condition: “after consultation with the lawyer.” That seems to require clients to consult with their lawyers before accepting a settlement offer – although presumably it does not really mean that. But Virginia Rule 1.2 cmt. [7]’s description of clients’ settlement power does not contain that arguably ambiguous reference.

And as also explained above, Virginia Rule 1.2(a) acknowledges that lawyers “shall abide by a client’s decision . . . whether to accept an offer of settlement of a matter.” This seems to be too narrow a reference. ABA Model Rule 1.2(a) uses a broader and therefore more appropriate phrase: lawyers “shall abide by a client’s decision whether to settle a matter.” That broader term includes clients’ offer to settle, as well as acceptance of the adversary’s offer to settle. Virginia Rule 1.2(a) only mentions clients’ decision “whether to accept an offer of settlement of a matter.” Virginia Rule 1.2 cmt. [7]’s description of clients’ settlement power does not contain this restrictive description.

**ABA Model Rule 1.2 cmt. [7]** contains a more extensive discussion than Virginia Rule 1.2 cmt. [7] of agreements to limit lawyers’ representation of their clients. ABA Model Rule 1.2 cmt. [7] differs in several ways from Virginia Rule 1.2 cmt. [7].

First, in contrast to Virginia Rule 1.2 cmt. [7], ABA Model Rule 1.2 cmt. [7] explicitly indicates that any limitation on a representation “must be reasonable under the circumstances.” The ABA Model Rule Comment provides an example: lawyers and their clients “may agree that the lawyer’s services will be limited to a brief telephone consultation” – if the client’s objective is limited to the lawyer “securing general information about the law” that the client needs “in order to handle a common and typically uncomplicated legal problem.”

But ABA Model Rule 1.2 cmt. [7] then explains that such a limitation “would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely.” Thus, lawyers cannot agree to clients’ limitations of the representation in a way that would prevent the lawyer from competently representing the client.

Second, in contrast to Virginia Rule 1.2 cmt. [7]’s general reference to Virginia Rule 1.1’s competence requirement, ABA Model Rule 1.2 cmt. [7] reminds lawyers that although they must comply with ABA Model Rule 1.1’s competence requirement, any representation “limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Thus, limiting a representation presumably might reflect on lawyers’ ability to competently handle a representation. This makes sense. For example, a lawyer inexperienced in appeals might limit a litigation representation to exclude any appeal.

This articulation differs from Virginia Rule 1.2 cmt. [7]’s formulation that sounds similar, but seems to have a different meaning. Under Virginia Rule 1.2 cmt. [7], clients “may not be asked to agree to representation so limited in scope as to violate [Virginia] Rule 1.1” (which requires competent representation). The Virginia Rule Comment thus prohibits lawyers from limiting the representation to some aspect of a matter that the lawyer cannot competently handle. The ABA Model Rule Comment would seem to permit limitations on a representation to matters lawyers are competent to handle. Both provisions probably intend to take the ABA Model Rule Comment approach, which makes much more sense.

Third, ABA Model Rule 1.2 cmt. [7] does not contain the specific prohibitions found in Virginia Rule 1.2 cmt. [7] on any representation limitation under which clients “surrender

the right to terminate the lawyer’s services or the right to settle litigation that the lawyer might wish to continue.” These might be so basic and obvious that they seem unnecessary.

### **ABA Model Rule 1.2 Comment [8]**

Virginia did not adopt ABA Model Rule 1.2 cmt. [8].

ABA Model Rule 1.2 cmt. [8] first confirms the unsurprising requirement that any representation agreement must comply with the ABA Model Rules, specifically citing ABA Model Rule 1.1, 1.8 and 5.6.

ABA Model Rule 1.1 requires lawyers’ competent representation. ABA Model Rule 1.8 contains a number of provisions, including a provision in ABA Model Rule 1.8(a) governing lawyers’ business transactions with their clients. ABA Model Rule 5.6 governs lawyers’ agreements limiting their right to practice in the future (either as part of an employment agreement or “settlement of a client controversy”).

### **Virginia Rule 1.2 Comment [9]**

Virginia Rule 1.2 cmt. [9] addresses lawyers’ duties when their clients seek to use their services for wrongful purposes.

Virginia Rule 1.2 cmt. [9] requires lawyers to give their clients “an honest opinion about the actual consequences that appear likely to result from a client’s conduct.” It is unclear whether this provision: (1) requires lawyers to provide their clients an opinion – which must be honest – about the consequences of the clients’ planned action; or (2) does not require an opinion, but insists that any such opinion be honest. As explained below, ABA Model Rule 1.2 cmt. [9] takes the second approach – which makes more sense.

In explaining Virginia Rule 1.2(c)'s limitation on lawyers' interactions with their clients about possible criminal or fraudulent conduct, Virginia Rule 1.2 cmt. [9] assures lawyers that "[t]he fact that a client uses [the lawyer's] advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action." Of course, that is an ethical analysis, not a statutory or regulatory assurance. The law does impose some restrictions – including possible aiding and abetting liability, conspiracy liability, etc.

And other ethics rules may apply as well. Virginia Rule 1.2(c) itself prohibits lawyers from counseling or assisting a client in criminal or fraudulent conduct. Virginia Rule 1.6(b) allows but does not require lawyers' disclosure of Virginia Rule 1.6(a) protected client confidential information about client wrongdoing, and Virginia Rule 1.6(c) sometimes requires such disclosure.

Virginia Rule Comment 1.2 cmt. [9] next repeats the statement found in Virginia Rule 1.2(c) that lawyers may not "knowingly assist a client in criminal or fraudulent conduct." For some reason, this Virginia Rule 1.2 cmt. [9] only states that "a lawyer may not knowingly assist" a client in criminal or fraudulent conduct. Black letter Virginia Rule 1.2(c) also prohibits a lawyer from "counsel[ing] a client to engage in . . . conduct that the lawyer knows is criminal or fraudulent." Despite this puzzling absence, the Virginia Rule Comment does not trump the black letter Virginia Rule 1.2(c) broader prohibitions.

Virginia Rule 1.2 cmt. [9] concludes with an acknowledgement that "[t]here is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity." The phrase "with impunity" (which also appears in ABA Model Rule 1.2

cmt. [9]) seems like an unnecessary embellishment. Presumably a lawyer would not recommend means by which a client could commit a crime or fraud but – but would not be caught, or not punished for it.

**ABA Model Rule 1.2 cmt. [9]** addresses the same issues as Virginia Rule 1.2 cmt. [9].

The ABA Model Rule Comment contains some of the same provisions as the Virginia Rule Comment, such as the seemingly unnecessary “with impunity” embellishment mentioned above.

But ABA Model Rule 1.2 cmt. [9] differs in several ways from Virginia Rule 1.2 cmt. [9].

First, ABA Model Rule 1.2 cmt. [9]’s first sentence prohibits lawyers from “knowingly counseling or assisting a client to commit a crime or fraud.” This contrasts with the Virginia Rule Comment’s third sentence, which only prevents lawyers from “knowingly assist[ing]” such client misconduct – not mentioning black letter Virginia Rule 1.2(c)’s prohibition on lawyers’ “counseling.”

Second, ABA Model Rule 1.2 cmt. [9] states that the prohibition “does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from the client’s conduct.” This contrasts with Virginia Rule 1.2 cmt. [9]’s statement that lawyers are “required to give an honest opinion” about such consequences. Thus, ABA Model Rule cmt. [9] allows lawyers to give their “honest opinion” about the consequences of clients’ improper actions, while Virginia Rule 1.2 cmt. [9] on its face seems to require lawyers to do so.

## **Virginia Rule 1.2 Comment [10]**

Virginia Rule 1.2 cmt. [10] addresses lawyers' duties when their clients begin to engage in wrongdoing after the representation starts.

Virginia Rule 1.2 cmt. [10] begins with the remarkably unhelpful statement that “[w]hen the client’s [presumably wrongful] course of action has already begun and is continuing, the lawyer’s responsibility is especially delicate.” It sure is.

Virginia Rule 1.2 cmt. [10] then notes that “except where permitted or required by [Virginia] Rule 1.6,” lawyers are “not permitted to reveal the client’s wrongdoing.” Virginia Rule 1.6(b) describes situations when lawyers may – but are not required to – disclose Virginia Rule 1.6(a) protected client confidential information. Virginia Rule 1.6(c) describes situations where lawyers must disclose Virginia Rule 1.6(a) protected client confidential information.

Interestingly, Virginia Rule 1.2 cmt. [10] does not mention lawyers' occasional duty to disclose protected client confidential information under Virginia Rule 3.3 (in a tribunal setting) and Virginia Rule 4.1 (if silence would assist clients' criminal or fraudulent acts). Thus, Virginia Rule 1.2 cmt. [10] is potentially confusing and incomplete. Rules other than Virginia Rule 1.6 can allow or even require lawyers to disclose protected client confidential information – so it is not correct to say that lawyers are not permitted to do so “except where permitted or required by [Virginia] Rule 1.6.”

Virginia Rule 1.2 cmt. [10] next reminds lawyers that they must “avoid furthering the purpose, for example, by suggesting how it might be concealed.”

Virginia Rule 1.2 cmt. [10] concludes with a similar prohibition on lawyers' “continu[ing] assisting a client in conduct that the lawyer originally supposes is legally

proper but then discovers is criminal or fraudulent.” The Virginia Rule Comment refers to Virginia Rule 1.16, which requires lawyers to withdraw from a representation under Virginia Rule 1.16(a)(1) if continuing the representation “will result in violation of the Virginia Rules of Professional Conduct or other law.” Virginia Rule 1.16 also allows (but does not require) lawyers to withdraw (even if it would cause “material adverse effect on the interests of the client”) if “the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is illegal or unjust” (Virginia Rule 1.16(b)(1)) or if “the client has used the lawyer’s services to perpetrate a crime or fraud” (Virginia Rule 1.16(b)(2)).

**ABA Model Rule 1.2 cmt. [10]** addresses the same issue as Virginia Rule 1.2 cmt. [10].

ABA Model Rule 1.2 cmt. [10] also starts with the same unhelpful language appearing at the beginning of Virginia Rule 1.2 cmt. [10].

But ABA Model Rule 1.2 cmt. [10] differs in several ways from Virginia Rule 1.2 cmt. [10].

First, in contrast to Virginia Rule 1.2 cmt. [10], ABA Model Rule 1.2 cmt. [10] does not mention lawyers’ confidentiality duty, or the exceptions that also appear in ABA Model Rule 1.6. As explained in this document’s analysis of that rule, ABA Model Rule 1.6 does not require disclosure of ABA Model Rule 1.6(a) protected client confidential information. However, ABA Model Rule 3.3 occasionally requires such disclosure in a tribunal setting. In contrast to Virginia Rule 4.1(b), ABA Model Rule 4.1(b) does not require disclosure of protected client confidential information if that would be prohibited by ABA Model Rule 1.6. As explained immediately above, Virginia Rule 1.2 cmt. [10] contains what seems

like an incorrect exclusive focus on Virginia Rule 1.6 as governing lawyers' possible permissive or required disclosure of Virginia Rule 1.6(a) protected client confidential information.

Second, in contrast to Virginia Rule 1.2 cmt. [10], ABA Model Rule 1.2 cmt. [10] provides an additional example of lawyers' improperly assisting clients' wrongdoing (in addition to the example included in the Virginia Rule Comment of lawyers improperly "suggesting how [the wrongdoing] might be concealed"): "by drafting or delivering documents that the lawyer knows are fraudulent." The phrase "drafting or delivering" fraudulent documents is odd. Presumably the word "drafting" involves lawyers' participation in such documents' creation, while the word "delivering" describes lawyers' logistical participation such as communicating a client-created fraudulent document to some third party. A more general word covering both of those actions (and perhaps others) would make more sense – such as "participating in the creation or use of."

Third, in contrast to Virginia Rule 1.2 cmt. [10]'s mere reference to Virginia Rule 1.16 (immediately following the sentence prohibiting lawyers from "continu[ing] [in] assisting a client" in conduct the lawyer discovers to be criminal or fraudulent), ABA Model Rule 1.2 cmt. [10] explicitly states that in such situations "[t]he lawyer must, therefore, withdraw from the representation of the client in the matter" (citing ABA Model Rule 1.16(a)). ABA Model Rule 1.16(a)(1) requires lawyers to withdraw from a representation if "the representation will result in violation of the rules of professional conduct or other law."

Fourth, ABA Model Rule 1.2 cmt. [10] concludes with another concept that does not appear in Virginia Rule 1.2 cmt. [10]. ABA Model Rule 1.2 cmt. [10] notes that "[i]n

some cases, withdrawal alone might be insufficient” – so “[i]t may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like.” ABA Model Rule 1.2 cmt. [10]’s explanation that it may be necessary for withdrawing lawyers to “give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like” constitutes the well-known “noisy withdrawal” standard. The Virginia Rules include that language in Virginia Rule 1.6 cmt. [9a].

ABA Model Rule 1.2 cmt. [10] then refers to ABA Model Rule 4.1. ABA Model Rule 4.1 cmt. [3] contains essentially the same language as ABA Model Rule 1.2 cmt. [10] (and Virginia Rule 1.6 cmt. [9a]): “[s]ometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like” (emphasis added). For some reason, ABA Model Rule 4.1 cmt. [3] uses the word “an” in contrast to ABA Model Rule 1.2 cmt. [10]’s more appropriate word “any”.

ABA Model Rule 4.1 is one of those rare ABA Model Rules under which silence violates the Rules. ABA Model Rule 4.1(b) states that “in the course of representing a client,” lawyers “shall not knowingly . . . fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by [ABA Model] Rule 1.6.” That Rule differs from Virginia Rule 4.1(b) in several ways. Virginia Rule 4.1 uses the term “disclose,” in contrast to ABA Model Rule 4.1(b)’s phrase “disclose” “to a third person.” That difference seems inconsequential, but there are two significant differences. First, Virginia Rule 4.1(b) states that lawyers may not knowingly fail to disclose “a fact” – in contrast to ABA Model Rule 4.1(b)’s reference to “a material fact.” Second, and perhaps more significantly, Virginia

Rule 4.1(b) does not contain the exception that appears in ABA Model Rule 4.1(b): “unless disclosure is prohibited by [ABA Model] Rule 1.6.” Thus, under Virginia Rule 4.1(b), lawyers may be required to disclose protected client confidential information even if that disclosure would otherwise be prohibited by Virginia Rule 1.6. Virginia obviously has a broader disclosure obligation in that setting.

### **Virginia Rule 1.2 Comment [11]**

Virginia Rule 1.2 cmt. [11] addresses lawyers’ duties when they represent clients acting as fiduciaries.

Virginia Rule 1.2 cmt. [11] notes that lawyers representing clients who are fiduciaries “may be charged with special obligations in dealing with a beneficiary.”

This presumably refers to lawyers’ arguable derivative fiduciary duty when dealing with a fiduciary client’s beneficiaries. Although the Virginia Rule Comment does not mention it, lawyers representing fiduciaries may find that the so-called “fiduciary exception” to the attorney-client privilege occasionally allows beneficiaries of the fiduciary client to access otherwise privileged communications between the lawyer and her fiduciary client.

**ABA Model Rule 1.2 cmt. [11]** contains the identical language.

### **Virginia Rule 1.2 Comment [12]**

Virginia Rule 1.2 cmt. [12] addresses lawyers’ duties when their clients’ wrongdoing involves third parties.

Virginia Rule 1.2 cmt. [12] explains that Virginia Rule 1.2(c)’s prohibition on lawyers counseling or assisting clients in conduct that the lawyers know to be criminal or

fraudulent “applies whether or not the defrauded party is a party to the transaction.” Virginia Rule 1.2 cmt. [12] next explains the meaning of that phrase, noting that a lawyer “should not participate in a sham transaction; for example, a transaction to effectuate criminal or fraudulent escape of tax liability” (emphasis added). That presumably means that the prohibition applies even though the IRS (which is being defrauded) is not a party to that transaction.

It is remarkable that the Virginia Rule Comment deliberately chose the word “should” in this context. As explained below, ABA Model Rule 1.2 cmt. [12] contains the obviously more appropriate word “must” in its similar sentence prohibiting lawyers’ participation in criminal or fraudulent client conduct.

Virginia Rule 1.2 cmt. [12] next states that Virginia Rule 1.2(c)’s prohibition “does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise.” This does not make much sense. A lawyer obviously may undertake a “criminal defense” independent of a “general retainer for legal services to a lawful enterprise.”

Virginia Rule 1.2 cmt. [12] then points to Virginia Rule 1.2(c)(2) in noting that “determining the validity or interpretation of a statute or a regulation may require a course of conduct involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.” That seems obvious. That sentence presumably adds some guidance for lawyers complying with black letter Virginia Rule 1.2(c)’s explicit assurance that lawyers “may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.”

Virginia Rule 1.2 cmt. [12] refers to Virginia Rule 3.4(d). That Virginia Rule indicates that lawyers “shall not . . . [k]nowingly disobey or advise a client to disregard a standing rule or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take steps, in good faith, to test the validity of such rule or ruling.” Presumably the term “good faith” goes to the non-frivolous nature of such a validity test under Virginia Rule 3.1.

ABA Model Rule 3.4(c) contains similar language: “[a] lawyer shall not . . . knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.”

**ABA Model Rule 1.2 cmt. [12]** contains the same concepts and essentially the same language as Virginia Rule 1.2 cmt. [12]. But there are several differences.

First, in contrast to Virginia Rule 1.2 cmt. [12]’s inexplicable statement that lawyers “should not participate in a sham transaction” (such as a tax avoidance scheme), ABA Model Rule 1.2 cmt. [12] understandably states that lawyers “must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability” (emphasis added).

Second, in contrast to Virginia Rule 1.2 cmt. [12], ABA Model Rule 1.2 cmt. [12] refers to ABA Model Rule 1.2(d) – which parallels Virginia Rule 1.2(c).

Third, in contrast to Virginia Rule 1.2 cmt. [12]’s reference to Virginia Rule 3.4(d), ABA Model Rule 1.2 cmt. [12] does not refer to parallel ABA Model Rule 3.4(c).

### **Virginia Rule 1.2 Comment [13]**

Virginia Rule 1.2 cmt. [13] addresses black letter Virginia Rule 1.2(c)(3)'s explanation of lawyers' permissible communications with their clients about conduct permissible under state law but impermissible under federal law.

Virginia Rule 1.2 cmt. [13] first bluntly states that black letter Virginia Rule 1.2(c)(3) “addresses the dilemma facing a lawyer whose client wishes to engage in conduct that is permitted by applicable state or other law but is prohibited by federal law.” Virginia Rule 1.2 cmt. [13] notes that a conflict “between state and federal law makes it particularly important to allow a lawyer to provide legal advice and assistance to a client seeking to engage in conduct permitted by state law.” Virginia Rule 1.2 cmt. [13] then reminds lawyers that they “shall also advise the client about related federal law and policy.” Virginia Rule 1.2 cmt. [13] concludes by noting that Virginia Rule 1.2(c)(3) applies “to any conflict between state and federal marijuana laws” – “but is not limited” to that situation.

**ABA Model Rule 1.2** does not contain a similar Comment.

### **ABA Model Rule 1.2 Comment [13]**

Virginia did not adopt ABA Model Rule 1.2 cmt. [13].

ABA Model Rule 1.2 cmt. [13] addresses lawyers' obligation if they know or reasonably should know that their clients expect assistance in some misconduct.

ABA Model Rule 1.2 cmt. [13] begins by bluntly stating that a “lawyer must consult with the client regarding the limitations on the lawyer’s conduct” – “if a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the [ABA Model] Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client’s instructions,” referring to ABA Model Rule 1.4(a)(5). The phrase

“comes to know” is a different formulation from the terms “know” or “knows” that the ABA Model Rules define in ABA Model Rule 1.0(f), and repeatedly use elsewhere.

ABA Model Rule 1.2 cmt. [13] thus requires lawyers in those circumstances to “consult with the client regarding the limitations on the lawyer’s conduct.” That requirement appears in black letter Virginia Rule 1.2(e), but using a different standard. Virginia Rule 1.2(e) applies only when the lawyer “knows” that the client expects such assistance, in contrast to ABA Model Rule 1.2 cmt. [13]’s standard: “comes to know or reasonably should know.”

Virginia Rule 1.12(e) also does not contain the other ABA Model Rule 1.2 cmt. [13] scenario – requiring such lawyer-client consultation: “if the lawyer intends to act contrary to the client’s instructions.”

These are two very different scenarios, and probably each deserves its own sentence. The first scenario involves lawyers who “come[ ] to know or reasonably should know” that their clients expect the lawyers to violate the ABA Model Rule by providing impermissible assistance. That type of “assistance” might involve assisting the clients’ wrongful conduct. But it might also be assistance that would help the client – but not constitute some wrongful conduct by the client. For instance, the client might ask the lawyer to communicate ex parte in a situation prohibited by ABA Model Rule 4.2. Or the client might ask for assistance in withholding from a tribunal directly adverse law that ABA Model Rule 3.3(a)(2) might otherwise require the lawyer to disclose.

The second scenario involves lawyers’ rather than clients’ conduct. The phrase “if the lawyer intends to act contrary to the clients’ instructions” presumably refers to situations where lawyers will not follow clients’ specific instructions. Of course that

scenario might involve lawyers' refusal to violate the ABA Model Rules. But it could also involve lawyers' refusal to engage in conduct that the lawyers would consider "repugnant or with which the lawyer has a fundamental disagreement" (thus otherwise justifying the lawyers' withdrawal from a representation under ABA Model Rule 1.16(b)(4)).

ABA Model Rule 1.2 cmt. [13] concludes with a reference to ABA Model Rule 1.4(a)(5). ABA Model Rule 1.4(a)(5) requires lawyers to "consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the [ABA Model] Rules of Professional Conduct or other law." Thus, that requirement to consult applies only if the lawyer "knows" of the client's expectation of unethical conduct (meaning "actual knowledge," per ABA Model Rule 1.0(f)). ABA Model Rule 1.2 cmt. [13] therefore incorrectly describes that black letter ABA Model Rule 1.4(a)(5) requirement – adding a "reasonably should know" standard that does not appear in black letter ABA Model Rule 1.4(a)(5).

# RULE 1.3

## Diligence

### Rule

#### Virginia Rule 1.3(a)

Virginia Rule 1.3(a) addresses a lawyers' basic diligence rule.

Virginia Rule 1.3(a) states the obvious point that lawyers “shall act with reasonable diligence and promptness in representing a client.” The term “diligence” presumably focuses on lawyers' skilled effort on their clients' behalf, while the term “promptness” presumably focuses on the expeditious timing of lawyers' handling of clients' matters.

**ABA Model Rule 1.3** contains the identical language.

#### Virginia Rule 1.3(b)

Virginia Rule 1.3(b) addresses lawyers' duty to complete a client representation in a matter, unless it is terminated.

Virginia Rule 1.3(b) prohibits lawyers from “intentionally fail[ing] to carry out a contract of employment entered into with a client for professional services.” But Virginia Rule 1.3(b) also notes that lawyers may withdraw “as permitted under [Virginia] Rule 1.16.” Virginia Rule 1.16(a) describes situations in which lawyers must withdraw from representation – which of course terminates the representation and ends the lawyers' obligation to carry out “a contract of employment.”

Virginia Rule 1.16(b) describes circumstances in which lawyers may withdraw from a representation. Those discretionary withdrawal circumstances are addressed in Virginia Rule 1.16(b)(7) - (8). This document addresses those circumstances in its Virginia Rule 1.16 analysis.

**ABA Model Rule 1.3** does not contain a similar provision, perhaps assuming that ABA Model Rule 1.16 itself provides the necessary guidance.

### **Virginia Rule 1.3(c)**

Virginia Rule 1.3(c) addresses lawyers' possible harm to their clients during a representation.

Virginia Rule 1.3(c) prohibits lawyers from "intentionally prejudice[ing] or damage[ing] a client during the representation – "except as required or permitted under [Virginia] Rule 1.6 and Rule 3.3." Virginia Rule 1.6 contains the Virginia Rules' basic confidentiality duty. Virginia Rule 1.6(b) describes scenarios in which lawyers may – but are not obligated to – disclose protected client confidential information. Virginia Rule 1.6(c) describes scenarios in which Virginia lawyers must disclose protected client confidential information. This document addresses all of those scenarios in its Virginia Rule 1.6 analysis.

Virginia Rule 3.3 addresses lawyers' duty of candor to tribunals. That Virginia Rule describes scenarios in which lawyers must disclose to tribunals protected client confidential information (and other information such as adverse case law). This document addresses all of those scenarios in its Virginia Rule 3.3 analysis.

It seems odd to cite Virginia Rule 1.6 and Virginia Rule 3.3 as involving intentional “prejudice or damage” to a client. Discussing protected client confidential information under those rules might damage clients, but not really amount to lawyers “intentionally” doing so. Such a disclosure serves some greater legal and even societal interest. One might think that Virginia Rule 1.3(c) emphasize the positive, perhaps with a phrase such as “except as required or permitted under Rule 1.6 and Rule 3.3 to protect other interests,” or words to that effect.

**ABA Model Rule 1.3** does not have a similar provision.

## Comment

### Virginia Rule 1.3 Comment [1]

Virginia Rule 1.3 cmt. [1] addresses the extent of and limits on lawyers' general duty to diligently represent their clients.

Virginia Rule 1.3 cmt. [1] first explains that lawyers "should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer."

The Virginia Rule Comment then states that lawyers "may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor." The word "may" sounds more discretionary than would seem appropriate. The phrase "should . . . ordinarily take" or "must take" would seem preferable.

Virginia Rule 1.3 cmt. [1] next explains that lawyers "should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." In contrast to the Virginia Rule Comment's phrase "should act," the ABA Model Rule Comment (discussed below) uses the phrase "must . . . act." The Virginia Rule Comment "should" standard seems preferable. This is because there are many other possible mandatory or discretionary limits on lawyers' pursuit of clients' matters. Virginia Rule 1.3 cmt. [1] itself mentions discretionary limits several sentences later.

The word "zeal" sometimes receives criticism, because some think that the word implies that lawyers should be unprofessional or uncivil. But that word or its variations appear elsewhere, and is not inconsistent with lawyers' acting with civility and courtesy while zealously representing their clients.

Virginia Rule 1.3 cmt. [1] then switches direction, noting that lawyers are "not bound to press for every advantage that might be realized for a client." As mentioned

above, this discretionary power is consistent with Virginia Rule 1.3 cmt. [1]'s use of the word "should" in its first sentence, rather than ABA Model Rule 1.3 cmt. [1]'s use of the word "must." The Virginia Rule Comment bluntly states that "[a] lawyer has professional discretion in determining the means by which a matter should be pursued" (referring to Virginia Rule 1.2) (emphasis added). Virginia Rule 1.2 addresses the allocation of authority between lawyers and their clients, and differs in many significant ways from ABA Model Rule 1.2. This document addresses all of those scenarios in its Virginia Rule 1.2 analysis.

Virginia Rule 1.3 cmt. [1]'s statement that "[a] lawyer has professional discretion" to "determine the means" seems too strong. As explained below, ABA Model Rule 1.3 cmt. [1] uses the more appropriate conditional phrase, "a lawyer may have" such discretion (emphasis added). Virginia Rule 1.3 cmt. [1]'s use of "has" seems to imply that lawyers may exercise sole discretion to determine the "means" by which they can pursue the client-selected objective. But Virginia Rule 1.2(a) requires lawyers to "consult with the client as to the means by which [the representation's "objectives"] are to be pursued." Virginia Rule 1.2 cmt. [1] acknowledges that "[b]oth lawyer and client have authority and responsibility in the objectives and means of representation." In focusing on "means," Virginia Rule 1.2 cmt. [1] states that lawyers "should assume responsibility for technical and legal tactical issues." So Virginia Rule 1.3 cmt. [1]'s blunt statement that the lawyer "has" discretion to determine the "means" is probably overstated.

Virginia Rule 1.3 cmt. [1] concludes with a warning that lawyers' work load "should be controlled so that each matter can be handled adequately." In another example of different standards adopted by the Virginia Rules and the ABA Model Rules, the Virginia

Rule Comment’s explanation that lawyers “should” control their workload contrasts with the parallel ABA Model Rule 1.3 cmt. [1]’s statement that lawyers “must” control their workload. The Virginia Rule Comment word choice seems preferable.

It seems odd that Virginia Rule 1.3 cmt. [1] explains that lawyers “should” control their workload so that they can handle their clients’ matters “adequately.” Virginia Rule 1.3’s title (“Diligence”) seems to define lawyers’ required level of effort as more than just “adequately.” One would think that Virginia Rule 1.3 cmt. [1] would use the word “diligently.” Another choice that might make more sense than “adequately” is the word “competently” – which appears in the parallel ABA Model Rule 1.3 cmt. [1] (discussed below), and is the title of Virginia Rule 1.2.

**ABA Model Rule 1.3 cmt. [1]** contains the same basic theme as Virginia Rule 1.3 cmt. [1], but differs from the Virginia Rule Comment in a number of ways.

First, in contrast to Virginia Rule 1.3 cmt. [1]’s statement that lawyers “should” act with “commitment and dedication,” ABA Model Rule 1.3 cmt. [1] states that lawyers “must” act in that way.

Second, in contrast to Virginia Rule 1.3 cmt. [1]’s statement that a lawyer “has” professional discretion in determining the means by which to accomplish the client’s objectives, ABA Model Rule 1.3 cmt. [1] states that lawyers “may have” such authority. As explained above, the ABA Model Rule “may have” phrase seems more appropriate and actually more consistent with the Virginia Rule 1.2 and Virginia Rule cmt. [1] approach.

Third, in contrast to Virginia Rule 1.3 cmt. [1], ABA Model Rule 1.3 cmt. [1] ends with a sentence not found in the Virginia Rules or Comments – reminding lawyers that

their “duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.”

The Virginia Rules and Comments have similar phrases articulating lawyers’ aspirational goal of acting with civility and courtesy. Among others, Virginia Rule 3.4 cmt. [7] and Virginia Rule 3.4 cmt. [8] describe such aspirational goals. The former contains the following similar language: “[t]he duty of lawyer to represent a client with zeal does not militate against his concurrent obligation to treat, with consideration, all persons involved in the legal process and to avoid the infliction of needless harm.”

And the Virginia Supreme Court – approved Principles of Professionalism for Virginia Lawyers also articulate those aspirational standards.

**ABA Model Rule 1.3 cmt. [2]** is similar to the last sentence in Virginia Rule 1.3 cmt. [1].

But in contrast to Virginia Rule 1.3 cmt. [1]’s statement that lawyers’ workload “should be controlled so that each matter can be handled adequately,” ABA Model Rule 1.3 cmt. [2] bluntly states that lawyers’ workload “must be controlled so that each matter can be handled competently.” It is ironic that the ABA Model Rule Comment uses the term “must” in this setting. As explained throughout this document, ABA Model Rules Comments frequently use the word “should” despite the parallel black letter ABA Model Rule’s description of mandatory action. The Virginia Rule Comment’s term “should” seems more appropriate. On the other hand, the ABA Model Rule Comment’s use of the term “competently” seems somewhat preferable to the Virginia Rule Comment’s use of the term “adequately.” Although the terms may be merely synonymous, the word

“adequately” seems to denote something that is just enough – barely meeting the requirements.

### **Virginia Rule 1.3 Comment [2]**

Unique Virginia Rule 1.3 cmt. [2] explains that lawyers’ diligent representation of clients can also include “a more collaborative, problem-solving approach” – which “is often preferable to an adversarial strategy in pursuing the client’s needs and interests.”

This focus on ADR is consistent with a theme running throughout the Virginia Rules. This emphasis on ADR appears in several other Virginia Rules and Comments. For instance, Virginia Rule 1.2 cmt. [1] contains a unique requirement that lawyers “shall advise the client about the advantages, disadvantages, and availability of dispute resolution processes that might be appropriate in pursuing these [client-selected] objectives.”

Virginia Rule 1.3 cmt. [2]’s phrase “needs and interests” seems odd. Virginia Rule 1.3 cmt. [1] uses the phrase “cause or endeavor.” The word “needs” seems to denote some underlying requirements rather than a representation’s client-selected goal. And the word “interests” seems disconnected to a representation’s client-selected goals (instead denoting a more general desire). The Virginia Rule 1.3 cmt. [1] phrase “cause or endeavor” seems to correctly focus on client-selected goals for a specific matter.

Virginia Rule 1.3 cmt. [2] concludes with assurance that “[t]he client can be represented zealously in either [an ADR or an adversarial] setting.”

**ABA Model Rule 1.2** does not contain a similar comment.

### **Virginia Rule 1.3 Comment [3]**

Virginia Rule 1.3 cmt. [3] addresses lawyers' duty to represent their client "with reasonable . . . promptness" (mentioned in black letter Virginia Rule 1.3(a)).

Virginia Rule 1.3 cmt. [3] first understandably recognizes that "[p]erhaps no professional shortcoming is more widely resented than procrastination" (although other shortcomings might compete for that designation).

The Virginia Rule Comment then notes that clients may be harmed in two ways by such lawyer procrastination. First, clients' substantive "interests often can be adversely affected by the passage of time or the change of conditions" (for example, "in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed"). Second, "[e]ven when the client's interests are not affected in substance, however, the reasonable delay can cause a client's needless anxiety and undermine confidence in the lawyer's trustworthiness."

The reference to lawyers' "trustworthiness" seems somewhat inapt. That term seems to focus on lawyers' honesty, not on their diligence or competence. The term "diligence" or "competence" might be more appropriate.

**ABA Model Rule 1.3 cmt. [3]** contains the identical language.

In contrast to the Virginia Rule 1.3 cmt. [3], ABA Model Rule 1.3 cmt. [3] also includes a reminder that "[a] lawyer's duty to act with reasonable promptness . . . does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client."

Virginia Rule 3.4 cmt. [8] contains a similar provision: "[a] lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court

proceedings, settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of the client.” ABA Model Rule 3.4 does not contain a Comment with similar language.

### **Virginia Rule 1.3 Comment [4]**

Virginia Rule 1.3 cmt. [4] addresses a critical issue that affects all lawyers’ duties – when an attorney-client relationship ends.

Virginia Rule 1.3 cmt [4] starts with the obvious principle that lawyers “should carry through to conclusion all matters undertaken for a client” – unless “the relationship is terminated as provided in [Virginia] Rule 1.16.” In this setting, the word “must” rather than “should” would seem more appropriate. ABA Model Rule 1.3 cmt. [4] also uses the term “should” (as discussed below).

Virginia Rule 1.3 cmt. [4] next provides several examples of the attorney-client relationship’s termination. First, if a lawyer’s “employment is limited to a specific matter,” the Virginia Rule Comment explains that “the relationship terminates when the matter has been resolved.” Second, “[i]f a lawyer has served a client over a substantial period in a variety of matters,” those clients “sometimes may assume that the lawyer will continue to serve on a continuing basis” – “unless the lawyer gives notice of withdrawal.” That would seem to require some affirmative lawyer action to end the relationship, in contrast to the relationship terminating on its own or through the completion of a specific matter defined in a non-recurring relationship, or through the passage of time. For instance, if a Virginia law firm is a client’s “go-to” firm every time a particular issue arises in Virginia, a small gap between one matter and the next matter presumably would not terminate what

amounts to a continuing but somewhat sporadic relationship between the client and the law firm. On the other hand, if a client turns to a Virginia law firm only rarely, there may not be such an arguable continuing relationship.

Virginia Rule 1.3 cmt. [4] then suggests that lawyers should clarify (“preferably in writing”) any “[d]oubt about whether a client-lawyer relationship still exists.” As explained throughout this document, the Virginia Rule Comments use several different phrases to describe the relationship between a lawyer and a client: “client – lawyer relationship;” “lawyer – client relationship;” “attorney – client relationship.” Presumably those terms are all synonymous.

Virginia Rule 1.3 cmt. [4] explains that lawyers “should” take such a step “so that the client will not mistakenly suppose the lawyer is looking after the client’s affairs when the lawyer has ceased to do so.” The Virginia Rule Comment then provides an example: “if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.”

The reference to the client having not “specifically instructed [her lawyer] concerning pursuit of an appeal” is an odd phrase. Certainly the client and the lawyer can agree at the outset of a representation, or at any later time during the representation, whether the lawyer will represent the client in pursuing an appeal. But there must be a meeting of the minds. The client cannot unilaterally “instruct” the lawyer to pursue an appeal if the representation agreement excludes that, or does not address it. In the latter situation, the lawyer presumably can decide not to handle the appeal, thus ignoring the

client's "instruction." This type of termination seems not to require some specific lawyer action – but instead would occur through the completion of a task or the passage of time.

The bottom line is that lawyers should always know if they have a current relationship with a client or whether their relationship has ended – thus entitling the now-former client to fewer rights under the ethics rules. And if there is any reasonable doubt about the relationship's status, lawyers are primarily responsible for clarifying that status.

Although knowing whether an ongoing attorney-client relationship exists plays a necessary role in determining lawyers' duties, perhaps an equally or even more important implication involves selecting the appropriate conflict of interest standard. Under Virginia Rule 1.7 (and the parallel ABA Model Rule 1.7), lawyers cannot represent a client adverse to another current client – even on matters totally unrelated to the lawyer's representation of that current client. In stark contrast, under Virginia Rule 1.9 (and the parallel ABA Model Rule 1.9), lawyers may in some circumstances represent a client adverse to a former client. In sum, lawyers generally may represent a client adverse to one of the lawyer's former clients unless: (1) the matter is the "same" or "substantially related" to the matter in which the lawyer formerly represented that client; or (2) the lawyer otherwise acquired confidential information that the lawyer could now use to the former client's disadvantage. Lawyers who are no longer explicitly representing a client (including not earning any fees for work for that client) generally (if not always) would prefer the Virginia Rule 1.9 former client standard – because it opens up opportunities for the lawyer to represent other clients (and earn fees from them).

Virginia Rule 1.3 cmt. [4]'s concluding suggestion seems especially inappropriate. The Virginia Rule Comment states that a lawyer who handled a losing proceeding and

who has “not been specifically instructed” about an appeal “should advise the client of the possibility of appeal before relinquishing responsibility for the matter” (emphasis added). The word “should” seems plainly incorrect. Lawyers “must” advise current clients about such a possibility under Virginia Rule 1.3 itself, as well as Virginia Rule 1.4 (requiring lawyers’ communications to their clients about such material matters). And even if that lawyer withdraws from such a representation, Virginia Rule 1.16(d) requires the lawyer to “take steps to the extent reasonably practicable to protect a client’s interests” – which undoubtedly would include providing the client such information about a possible appeal.

**ABA Model Rule 1.3 cmt. [4]** contains essentially the same language, but with several exceptions.

First, in the example about the lawyer who had unsuccessfully handled a judicial or administrative proceeding, the ABA Model Rule 1.3 cmt. [4] describes a scenario in which “the lawyer and the client have not agreed that the lawyer will handle the matter on appeal.” This contrasts with Virginia Rule 1.3 cmt. [4], which describes a scenario in which “[the lawyer] has not been specifically instructed concerning pursuit of an appeal.” The ABA Rule 1.3 cmt. [4] formulation thus properly focuses on a “meeting-of-the-minds agreement” about pursuing an appeal, in contrast to the Virginia Rule Comment’s formulation that would seem to give the client unilateral power to “instruct” the lawyer to handle the appeal. As explained above, that Virginia Rule Comment language seems inappropriate, and incorrect.

Second, in such a circumstance, ABA Model Rule 1.3 cmt. [4] explains that lawyers “must consult with the client” about the appellate possibilities (pointing to ABA Model Rule 1.4(a)(2) – which focuses on lawyers’ communications duties). This contrasts with

Virginia Rule 1.3 cmt. [4]’s guidance that lawyers in that setting “should advise the client about the possibility of appeal.” The ABA Model Rule Comment’s use of the word “must” is far preferable to the seemingly incorrect Virginia Rule Comment’s use of the word “should.”

Third, ABA Model Rule 1.3 cmt. [4] concludes with a sentence not found in the Virginia Rule 1.3 cmt. [4]: “[w]hether the lawyer is obligated to prosecute the appeal for the client depends on the scope of representation the lawyer has agreed to provide to the client,” referring to ABA Model Rule 1.2. As explained above, the ABA Model Rule correctly describes lawyers’ responsibility in the context of a possible appeal – in contrast to Virginia Rule 1.3 cmt. [4] language implying that clients can simply instruct their lawyer to pursue an appeal.

### **Virginia Rule 1.3 Comment [5]**

Virginia Rule 1.3 cmt. [5] addresses lawyers’ succession planning.

Virginia Rule 1.3 cmt. [5] indicates that lawyers “should plan for client protection” in the event of the lawyer’s death, disability, impairment, or incapacity.”

The Virginia Rule Comment then suggests details – noting that the plan “should be in writing,” and “should designate a responsible attorney” to protect the client’s interests in that situation. The plan should designate such a lawyer who is “capable of making, and who has agreed to make, arrangements for the protection of client interests in the event of the lawyer’s death, impairment or incapacity.”

Strangely, Virginia Rule 1.3 cmt. [5]’s first sentence discusses a situation “in the event of the lawyer’s death, disability, impairment, or incapacity” – while the second

sentence is a shorter list: “in the event of the lawyer’s death, impairment, or incapacity.”

It is unclear why the lawyer’s “disability” only made the first list and not the second list.

**ABA Model Rule 1.3 cmt. [5]** addresses the same basic issue, but differs in several ways from Virginia Rule 1.3 cmt. [5].

First, in contrast to Virginia Rule 1.3 cmt. [5]’s apparent application to all lawyers, ABA Model Rule 1.3 cmt. [5] is limited to “sole practitioner[s]”.

Second, ABA Model Rule 1.3 cmt. [5] describes a scenario in which sole practitioners “death or disability” which might result in “neglect of client matters.” Virginia Rule 1.3 cmt. [5] mentions any lawyer’s “death, disability, impairment or incapacity” (although one sentence later, the Virginia Rule Comment mentions a shorter list: “lawyer’s death, impairment or incapacity.”

Third, ABA Model Rule 1.3 cmt. [5] explains that a sole practitioner’s “duty of diligence may require” that the sole practitioner prepare such a plan. In contrast, the Virginia Rule Comment explains that all lawyers “should plan for client protection” in the described scenario.

Fourth, ABA Model Rule 1.3 cmt. [5] does not mention putting the plan in writing. In contrast, Virginia Rule 1.3 cmt. [5] indicates that “[t]he plan should be in writing.

Fifth, ABA Model Rule 1.3 cmt. [5] contains a specific list of provisions that such a plan should include: “designat[ing] another competent lawyer” to: (1) “review client files”; (2) “notify each client of the lawyer’s death or disability”; and (3) “determine whether there is a need for immediate protective action.” This contrasts with Virginia Rule 1.3 cmt. [5], which states simply that all lawyers’ plans “should designate a responsible attorney

capable of making, and who has agreed to make, arrangements for the protection of client interests in the event of the lawyer’s death, impairment, or incapacity”.

Sixth, ABA Model Rule 1.3 cmt. [5] mentions “Rule 28 of the American Bar Association Model Rules for Lawyer Disciplinary Enforcement” – which provides for “court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer.” In contrast, Virginia Rule 1.3 cmt. [5] does not mention that or any other source of guidance for lawyers planning for their “death, disability, impairment, or incapacity.”

# RULE 1.4

## Communication

### Rule

#### Virginia Rule 1.4(a)

Virginia Rule 1.4(a) addresses lawyers' basic duty to keep their clients informed.

Virginia Rule 1.4(a) contains the unsurprising requirement that lawyers “shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.” The first part of that sentence requires lawyers to reach out to their clients without being asked, while the second part of the sentence requires lawyers to provide their clients information upon request.

Significantly, Virginia Rule 1.4(a) (and parallel ABA Model Rule 1.4) on their face apply only to current clients – not former clients. It is understandable that lawyers' duty to convey material facts would ordinarily not last beyond the attorney-client relationship. Otherwise, lawyers might have a lingering duty to advise former clients of significant new legal developments, changes in the tax laws that might affect estate planning the lawyer had arranged for a now-former client, etc. But ABA LEO 483 (10/17/18) caused some controversy because it relied on ABA Model Rule 1.4's explicit language to disclaim any duty to alert a former client of a data breach that compromised that former client's confidential information the lawyer still possessed. At least one state (Maine) took the opposite position.

**ABA Rule 1.4(a)(3) and (4)** contain the identical language.

### **ABA Model Rule 1.4(a)(1)**

The Virginia Rules do not contain a provision similar to ABA Model Rule 1.4(a)(1). But presumably Virginia Rule 1.4(a)'s generic communication requirements include the specific mandate included in ABA Model Rule 1.4(a)(1).

Under ABA Model 1.4(a)(1), lawyers “shall . . . promptly inform the client of any decision or circumstance with respect to which the client’s informed consent...is required by these Rules.” The ABA Model Rule Comment refers to ABA Model Rule 1.0(e) for the definition of “informed consent.” The Virginia Rules Terminology section does not define “consent.” The Virginia Rules normally use the phrase “consent after consultation,” rather than using the ABA’s standard phrase “informed consent.” But presumably they mean essentially the same thing.

ABA Model 1.4(a)(1) does not list the ABA Model Rule’s numerous provisions requiring clients’ informed consent for their lawyers’ actions.

### **ABA Model Rule 1.4(a)(2)**

The Virginia Rules do not contain a provision similar to ABA Rule 1.4(a)(2). But presumably Virginia Rule 1.4(a)'s generic communication requirements include such consultation.

Virginia Rule 1.4 cmt. [5] (discussed below) also has similar concepts. But in contrast to ABA Rule 1.4(a)'s and ABA Model Rule 1.4 cmt. [5]'s focus on clients’ and lawyers’ communications about the “means” by which lawyers will accomplish the clients’ selected objectives, Virginia Rule 1.4 cmt. [5]'s requires communications about “the

objectives of the representations” – not the “means” by which the lawyer will accomplish the client’s objectives. This distinction between “objectives” and “means” also appears in Virginia Rule 1.2 and ABA Model Rule 1.2. This document addresses that distinction in its analysis of Virginia Rule 1.2.

ABA Model Rule 1.4(a)(2) requires that lawyers must “reasonably consult with the client about the means by which the client’s objectives are to be accomplished.” The distinction between client-selected “objectives” and largely lawyer-selected “means” appears in several ABA Model Rules. For instance, ABA Model 1.2(a) requires lawyer to “abide by a client’s decisions concerning the objectives of representation.” The same ABA Model Rule requires lawyers to “consult with the client as to the means by which they [the client-selected objectives] are to be pursued.”

Virginia Rule 1.2(a) contains the same basic references to clients’ objectives and the means by which lawyers pursue those objectives. The ABA Model Rules seem to take a more collaborative approach, in contrast to statements in Virginia Rule Comment. Virginia Rule 1.3 cmt. [1] states that “[a] lawyer has professional discretion in determining the means by which a matter should be pursued.” That seems inconsistent with statements in Virginia Rule 1.2 and Virginia Rule 1.3 (and also in the parallel ABA Model Rules) that require lawyers to “consult” with their clients about the means lawyers may use in pursuing the client-selected objectives.

### **ABA Model Rule 1.4(a)(5)**

Virginia Rule 1.4 does not have a provision similar to ABA Model Rule 1.4(a)(5). Instead, Virginia deals with this issue in a different rule – Virginia Rule 1.2(e). That

Virginia Rule contains essentially the same language, although in a slightly different formulation: “[w]hen a lawyer knows that a client expects assistance not permitted by the [Virginia] Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer’s conduct.”

ABA Model Rule 1.4(a)(5) addresses lawyers’ responsibility when clients expect impermissible assistance from their lawyers.

ABA Model Rule 1.4(a)(5) requires lawyers to “consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.” ABA Model Rule 1.4 does not contain any explanatory Comments.

Interestingly, another ABA Model Rule provision focuses on the same scenario, but uses a different standard. Under ABA Model Rule 1.2 cmt. [13], “[i]f a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the [ABA Model] Rules of Professional Conduct or other law . . . the lawyer must consult with the client regarding the limitations on the lawyer’s conduct.” Thus, contrary to ABA Model Rule 1.4(a)(5)’s “when the lawyer knows” standard, ABA Model Rule 1.2 cmt. [13] mandates such consultation “[i]f a lawyer comes to know or reasonably should know” of that client conduct. Those are two completely different standards. To make matters more ambiguous, ABA Model Rule 1.2 cmt. [13] ends with a reference to ABA Model Rule 1.4(a)(5) – even though former requires lawyer action when the latter would not – if the lawyer “reasonably should know” of a client’s improper expectation, but does not “know[]” of that improper client expectation.

Virginia deals with this issue in a different rule – Virginia Rule 1.2(e). This document addresses that Rule in its analysis of Virginia Rule 1.2.

### **Virginia Rule 1.4(b)**

Virginia Rule 1.4(b) addresses lawyers' duty to provide necessary explanations to their clients.

Virginia Rule 1.4(b) requires lawyers to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”

The term “matter” is interesting. Virginia Rule 1.4(a) seems to use it in the correct way – requiring lawyers to communicate with their clients about the status of a “matter.” That seems to follow the common usage of the term “matter” as a discrete task a lawyer undertakes for a client. Presumably that might be synonymous with “representation” if the lawyer is handling only one “matter” for a client. More commonly, a lawyer’s “representation” of a client includes several “matters.”

But Virginia Rule 1.4(b)'s phrase “explain a matter” seems inapt. Normally one does not “explain a matter.” Instead, one might “explain” the status or implications of a “matter,” the Virginia Rule 1.4(b) also uses the term “representation.” That Virginia Rule requires lawyers to “explain a matter” so the client can make decisions “regarding the representation.” It would seem more appropriate to use the phrase “regarding the matter.”

**ABA Model Rule 1.4(b)** contains the identical language.

ABA Model Rule 1.4(b) uses the same odd phrase “explain a matter,” and concludes with the same apparently inappropriate phrase “regarding the representation.”

### **Virginia Rule 1.4(c)**

Virginia Rule 1.4(c) addresses lawyers' duty to communicate with their clients about resolving a matter.

Virginia Rule 1.4(c) requires lawyers to “inform the client of the facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.”

Interestingly, Virginia Rule 1.4(c) uses the phrase “the matter.” Virginia Rule 1.4(a) and Virginia Rule 1.4(b) use the phrase “a matter.”

Virginia Rule 1.4(c) requires two lawyer communications to clients: (1) “facts pertinent to the matter;” and (2) “communications from another party that may significant affect settlement or resolution of the matter.” The first of these required communications presumably would be included in Virginia Rule 1.4(a)'s required communications. The second required communications (regarding “settlement or resolution of the matter”) is consistent with Virginia Rule 1.2(a)'s requirement that lawyers “abide by a client's decision . . . whether to accept an offer of settlement of a matter.”

As explained in the discussion of Virginia Rule 1.2, that Virginia Rule requirement uses a phrase not found in the ABA Model Rules: “after consultation with the lawyer.” That phrase seems unnecessary, because clients presumably can decide whether to settle a matter with or without consulting with their lawyer.

And the Virginia Rule 1.2(a) language also seems too narrow – it requires a lawyer to “abide by a client's decision . . . whether to accept an offer of settlement of a matter.” ABA Model Rule 1.2(a) uses a more logical and extensive phrase: “whether to settle a

matter.” The ABA Model Rule broader formulation thus includes clients’ offer to settle, not just their reaction to “the adversary’s offer of settlement.”

Virginia Rule 1.4(c)’s requirement that lawyers advise their client of settlement-related communications “from another party” is consistent with clients’ power to settle a matter even over the lawyer’s objection. But as explained below, the communication requirement is inconsistent with the strangely discretionary language in Virginia Rule 1.4 cmt. [5] – indicating that lawyers “should promptly inform the client” of a settlement offer in a civil controversy or proffered plea agreement in a criminal case (emphasis added). ABA Model Rule 1.4 cmt. [2] uses the more appropriate mandatory phrase “must promptly inform the client of” such developments. (emphasis added).”

## Comment

### Virginia Rule 1.4 Comment [1]

Virginia Rule 1.4 cmt. [1] addresses lawyers' duty to advise their clients of ADR possibilities.

Virginia Rule 1.4 cmt. [1] confirms that lawyers' "continuing duty to keep the client informed includes a duty to advise the client about the availability of dispute resolution processes that might be more appropriate to the client's goals than the initial process chosen." This ADR-focused duty is consistent with other Virginia Rule provisions and Comments. For instance, unique Virginia Rule 1.2 cmt. [1] bluntly requires that lawyers shall "advise the client about the advantages, disadvantages, and availability of dispute resolution processes that might be appropriate in pursuing these [client-selected] objectives." That duty does not appear in the ABA Model Rules, but presumably the ABA Model Rules' general communication and diligence duties normally would require such disclosure in some circumstances.

Virginia Rule 1.4 cmt. [1] concludes with a sentence not found in ABA Model Rule 1.4 cmt. [1], providing an example of lawyers' duty to keep clients informed of ADR possibilities: "information obtained through lawyer-to-lawyer negotiation may give rise to consideration of a process, such as mediation, where the parties themselves could be more directly involved in resolving the dispute."

ABA Model Rule 1.4 does not contain a similar provision.

### **ABA Model Rule 1.4 Comment [1]**

Virginia did not adopt a provision similar to ABA Model Rule 1.4 cmt. [1].

ABA Model Rule 1.4 cmt. [1] states the obvious: “[r]easonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.”

### **ABA Model Rule 1.4 Comment [2]**

Virginia did not adopt ABA Model Rule 1.4 cmt. [2].

ABA Model Rule 1.4 cmt. [2] is similar to but not identical to provisions in Virginia Rule 1.4 cmt. [5], and therefore is discussed below – in connection with that Virginia Rule Comment.

### **ABA Model Rule 1.4 Comment [3]**

Virginia did not adopt ABA Model Rule 1.4 cmt. [3].

ABA Model Rule 1.4 cmt. [3] is similar in some ways to Virginia Rule 1.4 cmt. [6], and is therefore discussed below in connection with that Virginia Rule Comment.

### **ABA Model Rule 1.4 Comment [4]**

Virginia did not adopt ABA Model Rule 1.4 cmt. [4].

ABA Model Rule 1.4 cmt. [4] addresses lawyers’ duty to respond to clients’ requests for information – as required in ABA Model Rule 1.4(a)(4). That response duty also appears in Virginia Rule 1.4(a).

ABA Model Rule 1.4 cmt. [4] first notes that lawyers’ “regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation.” The ABA Model Rule Comment then explains that “[w]hen a client makes a reasonable request for information,” lawyers must either: (1) promptly comply with the request; or (2) “if a prompt response is not feasible . . . the lawyer, or a member of the lawyer’s staff [must] acknowledge receipt of the request and advise the client when a response may be expected.”

Interestingly, ABA Model Rule 1.4 cmt. [4] only triggers lawyers’ duties when a client makes a “reasonable” request for information. It is unclear what lawyers must or should do if their clients make an unreasonable request for information. Presumably at some point lawyers would rely on either their discretion or point to their duty to withdraw from the representation under ABA Model Rule 1.16. For instance, clients’ unreasonable requests for information might allow (but not require) a lawyer’s withdrawal under ABA Model Rule 1.16(b)(6) – because the representation “has been rendered unreasonably difficult by the [annoying] client.” And at some point, clients’ unreasonably intrusive requests for information might require the lawyer’s withdrawal under ABA Model Rule 1.16(a)(1) because “a representation will result in violation of the rules of professional conduct or other law.”

ABA Model Rule 1.4 cmt. [4] concludes by inexplicably just repeating the same two points: “a lawyer should promptly respond to or acknowledge client communications.”

### **Virginia Rule 1.4 Comment [5]**

Virginia Rule 1.4 cmt. [5] addresses lawyers’ duty to communicate with clients.

Virginia Rule 1.4 cmt. [5] begins with an odd statement. The Virginia Rule Comment explains that clients “should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued” – but ends with the surprising phrase “to the extent the client is willing and able to do so.” As explained below, that strange phrase also appears in ABA Model Rule 1.4 cmt. [5]. If a client is “unwilling” to “participate intelligently” in the specified decisions, it is difficult to imagine how the lawyer can proceed. And if a client is “unable” to “participate intelligently” in the specified decisions, presumably the lawyer must proceed according to Virginia Rule 1.14 – which governs lawyers’ conduct when representing clients with “impairment.”

Virginia Rule 1.4 cmt. [5] then provides an example of lawyers’ communication duty that also seems wrong: “a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps that permit the client to make a decision regarding an offer from another party.” The word “should” denotes discretion – one would have thought that the Virginia Rule Comment would have used the word “must.”

The Virginia Rule Comment next describes another scenario that has a similar shortcoming: “[a] lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea agreement in a criminal case should promptly inform the client of its substance” – “unless prior discussions with the client have left it clear that the proposal will be unacceptable.”

Virginia Rule 1.4 cmt. [5] cites Virginia Rule 1.2(a). That Rule requires lawyers to: (1) “abide by a client’s decisions concerning the objectives of representation;” (2) “consult

with the client as to the means by which they [the client-selected objectives] are to be pursued;” (3) “abide by a client’s decision, after consultation with the lawyer, whether to accept an offer of settlement of a [civil] matter;” (4) “abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify [“[i]n a criminal case”].”

Thus, in contrast to Virginia Rule 1.2(a)’s requirement that lawyers “shall abide by the client’s decision” whether to accept a settlement offer in a civil matter, Virginia Rule 1.4 cmt. [5] only requires that lawyers “should promptly inform the client” of an adversary’s settlement offer or a “proffered plea agreement in a criminal case” (emphasis added). The word “must” (rather than “should”) would have made more sense, although the exception at the end of the sentence understandably might eliminate the mandatory communication requirement in that scenario.

But even that exception is a bit ambiguous. The phrase “unless prior discussions with the client have left it clear that the proposal will be unacceptable” seems too vague – it would have made more sense to have insisted that the client have given the lawyer clear direction. As explained below, ABA Model Rule 1.4 cmt. [2] uses a far better formulation.

Virginia Rule 1.4 cmt. [5] next seems to contradict the previous sentence. The Virginia Rule Comment explains that “[e]ven when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter.” The phrase “delegates authority” seems to describe a more specific client direction than the preceding sentence’s phrase “prior discussions with the client have left it clear.” The suggestion

that clients “should be kept advised of the status of the matter” would clearly seem to include a settlement offer from opposing counsel.

Virginia Rule 1.4 cmt. [5] next articulates an understandable principle, but then gives what seems like an inappropriate and incorrect example. The Virginia Rule Comment makes the common sense point that “[a]dequacy of communication depends in part on the kind of advice or assistance involved.” But the example seems to come to the wrong conclusion: “[i]n negotiations where there is time to explain a proposal, the lawyer should review all important provisions with the client before proceeding to an agreement.” That seems to imply that lawyers need not “review all important provisions with the client before proceeding to an agreement” – when there is no time to “explain a proposal.” When there is no time to explain the proposal, the lawyer presumably could never “proceed[ ] to an agreement.” Even the term “proceeding to an agreement” seems inapt. Lawyers do not “proceed[ ] to an agreement.” Instead, client proceed to an agreement, usually with lawyers’ assistance.

Virginia Rule 1.4 cmt. [5] next turns to the litigation context, with a more understandable set of guidelines. The Virginia Rule Comment explains that a lawyer “should explain the general strategy and prospects of success [in litigation] and ordinarily should consult the client on tactics that might injure or coerce others.” But “[o]n the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail.”

Virginia Rule 1.4 cmt. [5] concludes with a general statement that “[t]he guiding principle is that the lawyer should fulfill reasonable client expectations for information

consistent with the duty to act in the client’s best interests, and the client’s overall requirements as to the character of representation.”

**ABA Model Rule 1.4 cmt. [2]** addresses one of the scenarios that Virginia describes in Virginia Rule 1.4 cmt. [5].

ABA Model Rule 1.4 cmt. [2] confirms that lawyers must “promptly consult with and secure the client’s consent prior to taking action” if client action is required by any of the ABA Model Rules – “unless prior discussions with the client have resolved what action the client wants the lawyer to take.” As mentioned above, this is a much better formulation than the Virginia Rule 1.4 cmt. [5]’s phrase: “unless prior discussions with the client have left it clear that the proposal will be unacceptable.” ABA Model Rule 1.4 cmt. [2]’s language requires the client’s definite direction (“resolution”) rather than describing a situation in which discussions have “made it clear” – a much more subjective and ambiguous situation.

ABA Model Rule 1.4 cmt. [2] then describes the same scenario contained in Virginia Rule 1.5 cmt. [5] – but with a firmer description of client direction: “a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance” – “unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer” (referring to ABA Model Rule 1.2(a) – which requires lawyers “to abide by a client’s decisions concerning the objectives of representation,” and also requires lawyers to “abide by a client’s decision whether to settle a matter”).

ABA Model Rule 1.4 cmt. [2] guidance contrasts with Virginia Rule 1.4 cmt. [5]’s surprising and seemingly incorrect statement that “[a] lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea agreement in a criminal case should [not “must”] promptly inform the client of its substance” – “unless prior discussions with the client have left it clear that the proposal will be unacceptable.”

ABA Model Rule 1.4 cmt. [2] understandably requires such communication, unless the exception applies – in contrast to Virginia Rule 1.4 cmt. [5]’s discretionary “should” language absent the exception.

ABA Model Rule 1.4 cmt. [2]’s description of the client’s previous direction also seems more concrete than Virginia Rule 1.4 cmt. [5]’s description. ABA Model Rule 1.4 cmt. [2]’s exceptions include: (1) clients having “previously indicated that the proposal will be acceptable or unacceptable”; or (2) the clients having “authorized the lawyer to accept or to reject the offer.” This contrasts with Virginia Rule 1.4 cmt. [5]’s much looser description of “prior discussions with the client [that] have left it clear that the proposal will be unacceptable.” The ABA Model Rule approach makes more sense, because it requires explicit client direction.

**ABA Model Rule 1.4 cmt. [5]** contains language similar to that in Virginia Rule 1.4 cmt. [5], with the same inexplicable examples.

ABA Model Rule 1.4 cmt. [5]’s first sentence contains language identical to Virginia Rule 1.4 cmt. [5]’s first sentence – explaining that clients “should have sufficient information to participate intelligently” in representation-related decisions – “to the extent the client is willing and able to do so.” As explained above, lawyers whose clients are

unwilling or unable to “participate intelligently” in representation-related decisions must turn to other rules for guidance about what to do.

ABA Model Rule 1.4 cmt. [5] then provides the negotiation example that also appears in Virginia Rule 1.4 cmt. [5]. The ABA Model Rule Comment’s negotiation example contains the same strange exception: “when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement.” As explained above, in connection with the identical Virginia Rule Comment language, ABA Model Rule 1.4 cmt. [5]’s statement seems to imply that lawyers may “proceed[ ] to an agreement” without making such communications if there is no “time to explain” the proposal to the client. That seems plainly correct.

ABA Model Rule 1.4 cmt. [5] next contains language identical to that in Virginia Rule 1.4 cmt. [5] – understandably explaining that in a litigation context lawyers “should explain the general strategy and prospects of success.” Similarly, lawyers in that setting “ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others.” It is unclear whether this consultation requirement comes from normal litigation strategy or because the injury or coercion might involve improper tactics. A different communication requirement applies to other types of information: “a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail.”

ABA Model Rule 1.4 cmt. [5] concludes with a sentence that is not found in any Virginia Rule or Comment: “[i]n certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give

informed consent, as defined [ABA Model] Rule 1.0(e).” That obvious point seems somewhat out of place in this ABA Model Rule Comment.

### **Virginia Rule 1.4 Comment [6]**

Virginia Rule 1.4 cmt. [6] addresses scenarios where formal communications are not possible or required.

Virginia Rule 1.4 cmt. [6] first states that “[o]rdinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult.” But in other circumstances, “fully informing the client according to this standard may be impracticable.” The Virginia Rule Comment provides examples: “where the client is a child or suffers from mental disability” (referring to Virginia Rule 1.14). The term “mental disability” is a subset of the Virginia Rule 1.14 situations involving clients’ “diminished capacity.” The more generic term “diminished capacity” would be more appropriate.

ABA Model Rule 1.14 uses an even more politically correct term: “diminished capacity.”

Virginia Rule 1.4 cmt. [6] then addresses clients who are “an organization or group.” In that scenario, lawyers “ordinarily . . . should address communications to the appropriate officials of the organization,” because “it is often impossible or inappropriate to inform every one of its members about its legal affairs” (referring to Virginia Rule 1.13, which focuses on lawyers’ representation of corporations and other organizations). The Virginia Rule Comment then understandably explains that “[w]here many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.”

Virginia Rule 1.4 cmt. [6] concludes with a short sentence that carries potentially enormous implications, but is not explained: “[p]ractical exigency may also require a lawyer to act for a client without prior consultation.”

This fifteen-word sentence at the end of a Comment rather than in a black letter Rule opens up an intriguing concept – that lawyers may sometimes act without explicit client direction in certain situations. Virginia Rule 1.4 cmt. [6]’s statement is dramatically different from ABA Model Rule 1.4 [3]’s understandable and much more limited explanation that lawyers may sometimes act “without prior consultation” – “during a trial when an immediately decision must be made. It is frustrating and unfortunate that the Virginia Rules do not provide any guidance on this curious expansion of lawyer discretion – which is contrary to both lawyers’ general ethical duty and fiduciary duty to comply with their client’s direction.

**ABA Model Rule 1.4 cmt. [3]** contains general statements about lawyers’ communication duty, and one scenario that is addressed in Virginia Rule 1.4 cmt. [6].

After noting that lawyers are “require[d] to reasonably consult with the client about the means to be used to accomplish the client’s objectives,” ABA Model Rule 1.4 cmt. [3] notes that “[i]n some situations . . . this duty will require consultation prior to taking action.” The word “some” is odd. One would have thought that the ABA Model Rule would use a term like “ordinarily” or at least “most.” The concept of unilateral lawyer action without prior client consultation represents a tiny subset of situations.

ABA Model Rule 1.4 cmt. [3] then turns to “other circumstances, such as during a trial when an immediate decision must be made.” In that scenario, “the exigency of the situation may require the lawyer to act without prior consultation.” Thus, in contrast to

Virginia Rule 1.4 cmt. [6]’s dangling statement about lawyers acting without prior consultation, at least ABA Model Rule 1.4 cmt. [3] provides one example.

ABA Model Rule 1.4 cmt. [3] then understandably explains that “[i]n such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client’s behalf.” In other words, lawyers must later advise their clients of what steps they have taken if they acted without prior consultation with their clients.

ABA Model Rule 1.4 cmt. [3] concludes with a generic and common sense statement that lawyers must “keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.”

**ABA Model Rule 1.4 cmt. [6]** parallels Virginia Rule 1.4 cmt. [6] in addressing lawyers’ duty when dealing with a client who “is a child or suffers from diminished capacity” (referring to ABA Model Rule 1.14).

The generic term “diminished capacity” contrasts with the more specific and probably underinclusive phrase “mental disability” in Virginia Rule 1.4 cmt. [6].

ABA Model Rule 1.4 cmt. [6] concludes with language identical to that in Virginia Rule 1.4 cmt. [6] about lawyers’ communications with organizational and individual clients, and the acceptable “system of limited or occasional reporting” “[w]here many routine matters are involved.”

### **Virginia Rule 1.4 Comment [7]**

Virginia Rule 1.4 cmt. [7] addresses lawyers’ occasional discretion to withhold information from clients rather than their ordinary duty to communicate with clients.

Virginia Rule 1.4 cmt. [7] first explains that “[i]n some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication.” Thus, the Virginia Rule Comment explains that sometimes lawyers may delay providing information, to their clients – but presumably not withhold the information forever.

Virginia Rule 1.4 cmt. [7] provides an example that on its face seems inconsistent with the preceding sentence: “a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client.” At least on its face, that example describes the total withholding of the diagnosis, not just a delay in communicating the diagnosis.

Virginia Rule 1.4 cmt. [7] then makes the obvious point that lawyers “may not withhold information to serve the lawyer’s own interest or convenience.”

Virginia Rule 1.4 cmt. [7] concludes by noting that “[r]ules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client” – pointing to Virginia Rule 3.4(d) as “direct[ing] compliance with such rules or orders.” This reference presumably covers court-imposed protective orders, etc.

**ABA Model Rule 1.4 cmt. [7]** contains identical language about the possible delay of communications to a client, and the identical example which seems to allow the permanent withholding of a client’s psychiatric diagnosis.

After making the same statement as Virginia Rule 1.4 cmt. [7] in warning that lawyers “may not withhold information to serve the lawyer’s own interest or convenience,” ABA Model Rule 1.4 cmt. [7] adds another impermissible grounds for withholding

information: “or the interests or convenience of another person.” Virginia Rule 1.4 cmt. [7] does not contain that phrase.

Although lawyers are not likely to be confused by this sentence, it seems incorrect. Lawyers not only have discretion to withhold information from their clients “to serve . . . the interests or convenience of another person.” They often have a duty to do so, under ABA Model Rule 1.6. Presumably this ABA Model Rule 1.4 cmt. [7] describes the situation where the information the lawyer possesses is not covered by the lawyer’s confidentiality duty. It would have made sense to add a phrase such as the following to the end of that sentence: “unless required or permitted by these Rules.”

ABA Model Rule 1.4 cmt. [7] concludes with the identical language found in Virginia Rule 1.4 cmt. [7] about rules and court orders directing that information “not be disclosed to the client” (although referring to ABA Model Rule 3.4(c) rather than the similar Virginia Rule 3.4(d)).

# RULE 1.5

## Fees

### Rule

#### Virginia Rule 1.5(a)

Virginia Rule 1.5 addresses the elemental requirement of lawyers' fees, and the factors that determine the fees' compliance.

Virginia Rule 1.5 begins with a simple requirement that “[a] lawyer’s fee shall be reasonable.”

Virginia Rule 1.5 then explains that the factors “to be considered in determining the reasonableness of a fee includes” [thus acknowledging that there may be others]: (1) “the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly”; (2) if “apparent to the client,” the likelihood that the lawyer’s work on the matter “will preclude other employment by the lawyer”; (3) the fee for “similar legal services” “customarily charged in the locality”; (4) the “amount involved and the results obtained”; (5) the “time limitations” imposed “by the client or by the circumstances”; (6) the “nature and length of the professional relationship with the client”; (7) the lawyers’ “experience, reputation, and ability”; and (8) “whether the fee is fixed or contingent.”

Virginia Rule 1.5(a)’s list of factors raise several issues.

Virginia Rule 1.5(a)’s first factor focuses on the skill needed “to perform the legal service properly.” The word “properly” seems inapt. The Virginia Rules and their

accompanying Comments use the word “properly” (or the opposite word “improperly”) 22 times. Although some of those uses contain an element of skill, most of the uses of the term “properly” have more of a right–wrong implication. The word “competently” probably would have been more appropriate. Virginia Rule 1.3 is entitled “Competence.”

Virginia Rule 1.5(a)’s second factor focuses on lawyers’ inability to handle other matters, which is a pertinent factor when assessing a fee’s reasonableness. But for that factor to play a role, Virginia Rule 1.5(a) adds a condition: “if apparent to the client.” That seems like an odd condition. ABA Model Rule 1.5(a)(2) contains the same inexplicable language. Why would that matter? Whether the infringement on a lawyer’s ability to take on other work is “apparent to the client” should not affect a fee’s reasonableness. But Virginia Rule 1.5(a)(2)’s inclusion of that strange condition presumably will prompt lawyers to make such preclusion “apparent” to a would-be client.

Virginia Rule 1.5(a)’s fourth factor focuses on “the amount involved and the results obtained.” The “amount” presumably would be apparent before the representation begins (although of course it might change during the course of the representation). But the “results obtained” presumably would not be apparent until the representation ends. So presumably that factor would not affect the reasonableness of an hourly rate. Instead, the “results obtained” factor presumably affects arrangements that are amended, or contingent on such results.

Virginia Rule 1.5(a)’s sixth factor focuses on “the nature and length of the professional relationship with the client.” It is unclear whether a strong and long professional relationship justifies a larger fee, or would render a larger fee unreasonable because a lawyer’s relationship is otherwise lucrative.

**ABA Model Rule 1.5(a)** is similar to Virginia Rule 1.5(a).

But there are several differences.

First, in contrast to Virginia Rule 1.5(a)'s requirement that a fee be "reasonable," ABA Model Rule 1.5(a) starts with a negative: "[a] lawyer shall not make an agreement for, charge, or collect an unreasonable fee."

Second, in contrast to Virginia Rule 1.5(a)'s simple reference to a "fee" (presumably a fee charged to the client), ABA Model Rule 1.5(a) refers to three separate actions that lawyers must avoid: (1) "make an agreement for . . . an unreasonable fee"; (2) "charge . . . an unreasonable fee"; or (3) "collect an unreasonable fee."

Third, in contrast to Virginia Rule 1.5(a) (which does not address expenses), ABA Model Rule 1.5(a) prohibits lawyers from "mak[ing] an agreement for, charge, or collect . . . an unreasonable amount for expenses."

ABA Model Rule 1.5(a) contains the same eight factors as those listed in Virginia Rule 1.5(a).

Thus, ABA Model Rule 1.5(a)(1) uses the word "properly," rather than the more appropriate "competently." ABA Model Rule 1.5(a)(2) contains the same odd "if apparent to the client" condition on the effect of lawyers' inability to handle other matters. ABA Model Rule 1.5(a)(4) has the same temporal issues related to the phrase "results obtained" (which presumably will be apparent only when the representation ends). ABA Model Rule 1.5(a)(6) does not explain whether a strong and long professional relationship with the client justifies a higher fee or instead would call for a lower fee.

Interestingly, ABA Model Rule 1.5(a)'s list of "factors to be considered" only focuses on "the reasonableness of a fee," and does not address the "reasonableness" of "amount for expenses."

### **Virginia Rule 1.5(b)**

Virginia Rule 1.5(b) addresses lawyers' explanation of their fee.

Virginia Rule 1.5(b) requires lawyers to "adequately explain[ ]" their fee to the client.

Lawyers must communicate "the amount, basis or rate of the fee" – but only "[w]hen the lawyer has not regularly represented the client." Of course, the "amount" of a fee will not be known when a representation begins unless the lawyer will charge a fixed fee. Also in circumstances "[w]hen the lawyer has not regularly represented the client," lawyers must communicate the information "before or within a reasonable time after commencing the representation" – "preferably in writing."

Thus, under Virginia Rule 1.5(a), both new clients and regularly represented existing clients deserve an adequate explanation of a lawyer's fee. But only new or sporadically represented clients deserve (1) a more extensive, substantive explanation; (2) an explanation "preferably in writing"; and (3) an explanation before or shortly after the lawyer begins the representation.

**ABA Model Rule 1.5(b)** addresses the same disclosure and confirmation duty as Virginia Rule 1.5(b).

ABA Model Rule 1.5(b) matches the Virginia Rule's timing for regular clients – requiring the specified communication "before or within a reasonable time after

commencing the representation.” And like the Virginia Rule, ABA Model Rule 1.5(b) explains that the communication should “preferabl[y] [be] in writing.”

But ABA Model Rule 1.5(b) differs in several significant ways from Virginia Rule 1.5(b).

First, in contrast to Virginia Rule 1.5(b), ABA Model Rule 1.5(b) contains an additional communication requirement. Virginia Rule 1.5(b) requires lawyers to explain (to non-regular clients) “the amount, basis or rate of the fee.” In contrast, ABA Model Rule 1.5(b) lists as the first mandatory explanation: “[t]he scope of the representation.” That seems like an odd element for a rule focusing on fees. Of course lawyers must communicate to their clients “[t]he scope of the representation.” ABA Model Rule 1.2 would require such disclosure, as would ABA Model Rule 1.4. But adding that additional requirement in ABA Model Rule 1.5 seems superfluous.

Second, in contrast to Virginia Rule 1.5(b)’s list of required fee-related information (“the amount, basis or rate of the fee”), ABA Model Rule 1.5(b) has a narrower list: “the basis or rate of the fee.” Presumably the word “basis” would cover the “amount” in the circumstance where the lawyer could advise the client at the beginning of a representation what the “amount” of the fee will be.

Third, in contrast to the absence in Virginia Rule 1.5(b) of any reference or guidance on expenses, ABA Model Rule 1.5(b) essentially treats expenses the same as fees. Thus, lawyers must “communicate[ ] to the client preferably in writing” “the basis or rate of the . . . expenses for which the client will be responsible” – “before or within a reasonable time after commencing the representation. But ABA Model Rule 1.5(b)’s exception (“when the lawyer will charge a regularly represented client on the same basis

or rate”) seems to focus exclusively on fees rather than expenses. ABA Model Rule 1.5(b) concludes with another reference to expenses: “[a]ny changes in the basis or rate of . . . expenses shall also be communicated to the client.”

Fourth, in contrast to Virginia Rule 1.5(b), ABA Model Rule 1.5(b)’s communication duty has a narrower exception: “[e]xcept when the lawyer will charge a regularly represented client on the same basis or rate.” Thus, ABA Model Rule 1.5(b) focuses on earlier fee arrangements, not simply on the lawyers’ earlier representation of the clients. That makes more sense than Virginia Rule 1.5(b)’s exception.

Fifth, in contrast to Virginia Rule 1.5(b), ABA Model Rule 1.5(b) concludes with an additional, continuing duty: “[a]ny changes in the basis or rate of the fee or expense shall also be communicated to the client.” This should probably go without saying. Presumably Virginia Rule 1.4 (which focuses on lawyers’ communications duties) would require such information during a representation.

### **Virginia Rule 1.5(c)**

Virginia Rule 1.5(c) addresses contingent fees.

Virginia Rule 1.5(c) points to Virginia Rule 1.5(d) “or other law” as identifying scenarios in which lawyers may not charge a contingent fee. Those are discussed below.

Virginia Rule 1.5(c) requires that contingent fee agreements “shall state in writing” several components of such contingent fee agreements: (1) “the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal”; (2) “litigation and other expenses to be deducted from the recovery”; and (3) “whether such expenses are to be deducted before or after the contingent fee is calculated.”

Virginia Rule 1.5(c) concludes with a post-representation writing requirement: “[u]pon conclusion of a contingent fee matter,” the lawyer must provide the client with a “written statement” containing the following: (1) “the outcome of the matter”; (2) “if there is a recovery,” the “remittance to the client”; and (3) “the method of its [the “remittance to the client”] determination.”

**ABA Model Rule 1.5(c)** contains essentially the same language, but with several differences.

First, in contrast to Virginia Rule 1.5(c), ABA Model Rule 1.5(c) requires that contingent fee agreements be in writing “signed by the client.” This ABA Model Rule 1.5(c) requirement is consistent with the ABA Model Rules’ emphasis on disclosure and written client confirmation. For instance, ABA Model Rule 1.7 (the main current client conflicts rule) requires that “each affected client gives informed consent, confirmed in writing.” ABA Model Rule 1.7(b)(4). Virginia Rule 1.7(b)(4) requires only that “the consent from the client is memorialized in writing.”

Second, ABA Model Rule 1.5(c) also adds an additional piece of information that client-signed written contingent fee agreements must contain. The agreements “must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party.”

Virginia formerly required that clients generally remain “ultimately liable” for lawyer-advanced “court costs and expenses of litigation,” except for “indigent” clients (former Virginia Rule 1.8(e)). In 2019, Virginia amended Virginia Rule 1.8(e) to assure that “a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter. ABA Model Rule 1.8(e) has always indicated

that “the repayment of [lawyer-advanced “court costs and expenses”] may be contingent on the outcome of the matter.”

### **Virginia Rule 1.5(d)**

Virginia Rule 1.5(d) addresses scenarios in which lawyers may not charge a contingent fee.

Virginia Rule 1.5(d) lists two scenarios in which lawyers may not “enter an arrangement for, charge, or collect a contingent fee.” Interestingly, Virginia Rule 1.5(d) has a broader reach than Virginia Rule 1.5(a). As explained above, Virginia Rule 1.5(a) simply states that “[a] lawyer’s fee shall be reasonable,” without explaining exactly what actions lawyers may or may not undertake in connection with such a fee. As also explained above, this contrasts with ABA Model Rule 1.5(a), which prohibits lawyers from taking several steps related to an unreasonable fee: “make an agreement for, charge, or collect.” Virginia Rule 1.5(d) uses that same ABA Model Rule 1.5(a) list of possible impermissible steps: “enter into an agreement for, charge, or collect a contingent fee . . . .” Although presumably Virginia Rule 1.5(a) impliedly includes all of those possible impermissible actions, one might wonder why there is a mismatch between Virginia Rule 1.5(a)’s deliberate absence of those steps and the nearby Virginia Rule 1.5(d)’s deliberate inclusion of the ABA Model Rule list.

Virginia Rule 1.5(d) lists two scenarios in which contingent fees are unacceptable: (1) “in a domestic relations matter, except in rare instances”; (2) “representing a defendant in a criminal case.”

**ABA Model Rule 1.5(d)** also addresses situations in which lawyers may not charge a contingent fee.

ABA Model Rule 1.5(d) contains the same prohibition as Virginia Rule 1.5(d)(2) on charging a contingent fee “for representing a defendant in a criminal case.”

In contrast to Virginia Rule 1.5(d)’s general “domestic relations matter” contingent fee prohibition (with a vague reference to “rare instances”), ABA Model Rule 1.5(d)(1) describes more precisely the scenarios in which lawyers may not “enter into an arrangement for, charge or collect a contingent fee” “in a domestic relations matter”: when “the payment or amount” is: (1) “contingent upon the securing of a divorce”; or (2) “the payment or amount” is contingent “upon the amount of alimony or support, or property settlement in lieu thereof.”

As explained below, Virginia Rule 1.5 cmt. [6] provides a detailed description of those “rare instances” where lawyers may charge a contingent fee in domestic relations matters, which in essence impliedly matches black letter ABA Model Rule 1.5(d).

### **Virginia Rule 1.5(e)**

Virginia Rule 1.5(e) addresses fee splitting.

Virginia Rule 1.5(e) labels that as “[a] division of a fee between lawyers who are not in the same firm.”

Virginia Rule 1.5(e) lists several conditions for permissible fee splits: (1) “the client is advised of and consents to the participation of all the lawyers involved”; (2) “the terms” of the fee split “are disclosed to the client and the client consents thereto”; (3) the “total fee is reasonable”; and (4) the fee split “and the client’s consent is obtained in advance of the rendering of legal services, preferably in writing.”

As explained below, Virginia Rule 1.5(e) is notable as much for the absence of a proportionality or “joint responsibility” condition (which ABA Model Rule 1.5(e) contains)

than for its stated conditions. The absence of those requirements in Virginia Rule 1.5(e) essentially allows Virginia lawyers to split fees with another lawyer without taking “joint responsibility” for the matter – which can amount to a “pure referral fee.”

Under such a presumably permissible “pure referral fee” arrangement, a lawyer retained by a client may (with the client’s consent) share in part of the fee earned by another lawyer to whom the retained lawyer completely passes along responsibility for a matter. In other words, the referring lawyer will not earn a portion of the fee that “is in proportion to the services performed” by that lawyer (as required in ABA Model Rule 1.5(e)(1) – because the referring lawyer will not perform any services. Similarly, the referring lawyer will not assume “joint responsibility for the representation.” Presumably, Virginia (and other states taking the same approach) allow such “pure referral fees” to assure that highly complicated cases (involving personal injury or other similar cases normally handled on a contingent basis) will be handled by lawyers with the skill and experience required to competently represent the client. If the client initially retains a less skilled or experienced lawyer to handle such a significant matter, that lawyer might be tempted to keep the matter in order to earn a fee under the ABA Model Rule approach. Although it would be difficult to prove in most situations, such a selfish move might harm the client by depriving the client of a more skilled and experienced lawyer to handle that matter. But if the initially retained lawyer may share in a portion of a larger contingent fee earned as a result of the skilled lawyer’s expertise in representing the client in the matter, the initially retained lawyer is more likely to hand the matter off. And as long as the client consents to that arrangement, it is easy to argue that the ethics rule should not prohibit it.

**ABA Model Rule 1.5(e)** also addresses fee splitting.

Not surprisingly, ABA Model Rule 1.5(e)(3) contains the same “total fee as reasonable” condition contained in Virginia Rule 1.5(e)(3).

But the remainder of ABA Model Rule 1.5(e) is simpler than Virginia Rule 1.5(e), uses a different standard, and requires a different client approval.

ABA Model Rule 1.5(e)(1) explains that “the division of a fee between lawyers who are not in the same firm” is permissible only under four conditions.

First, the fee split must be “in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation.” The term “joint responsibility” does not have an obvious meaning. It could either mean that the two lawyers: (1) take day-to-day “responsibility” for the case; or (2) assume financial and/or ethical “responsibility” for malpractice or ethics violations. As explained below, ABA Model Rule 1.5 cmt. [7] takes the second approach, explaining that “[j]oint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership.”

Second, ABA Model Rule 1.5(e)(2) requires that “the client agrees to the arrangement, including the share each lawyer will receive.” That ABA Model Rule 1.5(e)(2) requirement is more explicit than Virginia Rule 1.5(e)(1)’s requirement that the clients must be “advised of and consent[ ] to the participation of all the lawyers involved.” Presumably Virginia Rule 1.5(e)(4)’s requirement that “the division of fees” be disclosed to and consented to by the client would necessarily include the “share each lawyer will receive” (the terminology used in ABA Model Rule 1.5(e)(2)).

Third, ABA Model Rule 1.5(e)(2) requires that “the [‘division of a fee’] agreement is confirmed in writing.” This contrasts with Virginia Rule 1.5(e)(4)’s statement that a fee-split agreement should “preferably [be] in writing.”

As explained above, ABA Model Rule 1.5(e)(3) predictably requires that the “total fee [must be] reasonable.”

### **Virginia Rule 1.5(f)**

Virginia Rule 1.5(f) addresses two scenarios that are not subject to Virginia Rule 1.5(e)’s conditions – thus presumably allowing lawyers to split fees without complying with Virginia Rule 1.5(e)’s limitations (other than the understandable continuing condition that “the total fee must be reasonable”).

First, Virginia Rule 1.5(f) explains that Virginia Rule 1.5(e) “does not prohibit or regulate the division of fees” “between attorneys who were previously associated in a law firm.” This scenario presumably allows a lawyer and her former law firm to decide among themselves how to split a fee that had previously been arranged when the lawyer was practicing at the firm. While it is understandable that withdrawing lawyers and their former firms should have freedom to decide among themselves how they will handle such a scenario, one would have thought that an ethics rule would impose a condition other than simply looking at whether “the total fee [is] reasonable.” For instance, suppose that a law firm agreed to a fixed fee to represent a client in a certain matter, which was being primarily handled by a lawyer who then decides to leave the law firm. If the client decides to leave the law firm with her, the client might be ill-served if the withdrawing lawyer and her former firm decided among themselves that the law firm would retain most of the fixed fee despite the withdrawing lawyer’s continuing responsibility for the client’s matter. That

client might justifiably worry that the withdrawing lawyer continuing to handle its matter would be less inclined to devote the necessary effort because that lawyer will receive only a small portion of the fixed fee. So even if the “total fee” is reasonable, the withdrawing lawyer faces the temptation to devote an improperly small amount of her efforts to that client. Presumably the withdrawing lawyer’s duty of “diligence” under Rule 1.3 would require her to devote the appropriate effort regardless of the fee-split arrangement with her previous firm.

Second, Virginia Rule 1.5(f) explains that Virginia Rule 1.5(e) “does not prohibit or regulate the division of fees” “between any successive attorneys in the same matter.” This scenario presumably involves two lawyers agreeing upon a fee split when one replaces the other in representing the client in a matter. In a fixed-fee situation, this arrangement has the same potential problem as the other arrangement (discussed below), but presumably also has the same “diligence” requirement assurance that the succeeding lawyer will meet his ethical obligations regardless of the fee-split arrangement.

**ABA Model Rule 1.5** does not contain a black letter rule addressing fee splits in these two scenarios or other scenarios not governed by ABA Model Rule 1.5(e).

But ABA Model Rule 1.5 cmt. [8] describes a scenario similar to the first Virginia Rule 1.5(f) scenario. In contrast to black letter Virginia Rule 1.5(f), ABA Model Rule 1.5 cmt. [8] does not address fee splits among successive lawyers. The ABA dealt with that issue in ABA LEO 487 (6/18/19).

## Comment

### ABA Model Rule 1.5 Comment [1]

Virginia did not adopt ABA Model Rule 1.5 cmt. [1].

ABA Model Rule 1.5 cmt. [1] addresses basic guidelines governing lawyers' fees.

ABA Model Rule 1.5 cmt. [1] begins with the obvious requirement (stated in the positive, as in Virginia Rule 1.5(a)) that lawyers must only “charge fees that are reasonable under the circumstances.”

Interestingly, ABA Model Rule 1.5 cmt. [1] only addresses lawyers' “charge” of a fee. That is only a subset of the steps listed in ABA Model Rule 1.5(a): “make an agreement for, charge, or collect” a fee. Presumably, the “reasonable” standard applies to all three of the ABA Model Rule 1.5(a) actions – but it is odd that ABA Model Rule 1.5 cmt. [1] would not simply contain the same list as the black letter ABA Model Rule 1.5(a).

ABA Model Rule 1.5 cmt. [1] next notes that the eight factors listed in ABA Model Rule 1.5(a) “are not exclusive,” and “nor will each factor be relevant in each instance.”

Turning to the different topic of “expenses,” ABA Model Rule 1.5 cmt. [1] explains that ABA Model Rule 1.5(a) also requires that “expenses for which the client will be charged must be reasonable.” Virginia Rule 1.5(a) does not address expenses. ABA Model Rule 1.5 cmt. [1] notes that lawyers “may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges.” But lawyers may seek such reimbursement under only two scenarios: (1) “by charging a reasonable amount to which the client has agreed in advance”; or (2) “by charging an amount that reasonably reflects the cost incurred by the lawyer.” The two possible scenarios governing lawyers' expense reimbursement

essentially prohibits lawyers from making a profit on those expenses, unless the client has agreed to that in advance and the amount represent a “reasonable” charge.

### **Virginia Rule 1.5 Comment [2]**

Virginia Rule 1.5 cmt. [2] addresses the difference between a fee arrangement when: (1) a lawyer “has regularly represented a client”; and (2) in a “new client-lawyer relationship.”

Virginia Rule 1.5 cmt. [2] first explains that in the former scenario, lawyers and clients “ordinarily will have evolved an understanding concerning the basis or rate of the fee.” But in the latter scenario “an understanding as to the amount, basis, or rate of the fee should be promptly established.”

Virginia Rule 1.5 cmt. [2] next assures lawyers that “[i]t is not necessary [in a “new client-lawyer relationship”] to recite all the factors that underlie the basis of the fee.” Instead, lawyers must explain “only those that are directly involved in its computation.” The Virginia Rule Comment then provides examples: “[i]t is sufficient . . . to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee.” That sentence seems confusing. A lawyer would not “state that the basic rate is an hourly charge or a fixed amount or an estimated amount.” Instead, the lawyer would “state” (1) that the fee will be “an hourly charge” (identifying “the basic rate”); or (2) that the fee will be “a fixed amount”; or (3) that the fee will be “an estimated amount” (identifying “the factors that may be taken into account in finally fixing the [fixed] fee”). Despite the confusing sentence structure, the meaning seems clear.

Virginia Rule 1.5 cmt. [2] then turns to the topic of memorializing the fee arrangement. The Virginia Rule Comment understandably acknowledges that “a written statement concerning the fee reduces the possibility of misunderstanding.”

Virginia Rule 1.5 cmt. [2] concludes by assuring that it may be sufficient “if the basis or rate of the fee is set forth” in “a simple letter, memorandum, receipt or a copy of the lawyer’s customary fee schedule.”

**ABA Model Rule 1.5 cmt. [2]** addresses the same duty of communication and memorialization of fee arrangements.

ABA Model Rule 1.5 cmt. [2] contains the same explanation as Virginia Rule 1.5 cmt. [2] about the difference between a long-standing client-lawyer relationship and a new relationship. The ABA Model Rule Comment also acknowledges that a written statement “reduces the possibility of misunderstanding.”

But there are several differences between ABA Model Rule 1.5 cmt. [2] and Virginia Rule 1.5 cmt. [2].

First, in contrast to Virginia Rule 1.5 cmt. [2]’s acknowledgement that there are some clients and lawyers in regular relationship who have “evolved an understanding” about fees, ABA Model Rule 1.5 cmt. [2] also explains that such clients and lawyers will also have “evolved an understanding concerning . . . the expenses for which the client will be responsible.”

Second, in contrast to Virginia Rule 1.5 cmt. [2] (which focuses exclusively on fees), ABA Model Rule 1.5 cmt. [2] states that “it is desirable to furnish the client with at least a simple memorandum . . . that states the general nature of the legal services to be provided.” As explained above, this reference to lawyers describing the scope of their

representation to their clients would seem more appropriate for ABA Model Rule 1.2 – rather than in a rule focusing on fees. But a reminder cannot hurt, and might help.

Third, in contrast to Virginia Rule 1.5 cmt. [2] (which does not anywhere deal with expenses), ABA Model Rule 1.5 cmt. [2] notes that “it is desirable to furnish the clients with at least a simple memorandum . . . that states . . . “whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation.”

### **ABA Model Rule 1.5 Comment [3]**

Virginia did not adopt ABA Model Rule 1.5 cmt. [3].

ABA Model Rule 1.5 cmt. [3] addresses general standards governing contingent fees.

ABA Model Rule 1.5 cmt. [3] first confirms that contingent fees “are subject to the [ABA Model Rule 1.5(a)] reasonableness standard.” This positive requirement differs grammatically (but not substantively) from the ABA Model Rule 1.5(a) negative approach – which states that a “lawyer shall not make an agreement for, charge, or collect an unreasonable fee.”

Determining the “reasonableness” of a contingent fee presents a fascinating concept. In some situations, a contingent fee clearly is not reasonable. For instance, a lawyer who knows that a simple e-mail to a government agency will automatically break a logjam and result in a client receiving a government check cannot charge a large percentage contingent fee. But what if there is uncertainty about the results of such an e-mail? Analyzing one representation at a time might not be appropriate. For instance, if only one out of every ten such e-mails to the government agency brings the desired

result, it would seem fair to consider all ten of those calls together when determining whether a successful call's contingent fee arrangement was reasonable or unreasonable. The same is true of traditional plaintiffs lawyers' automobile accident practice. In one representation, a defendant's insurance carrier might immediately pay the defendant's policy's limits. But in other cases, the plaintiff's lawyer might have to litigate for years to earn a recovery or a settlement. Just looking at one representation might create a misleading picture. Contingent fee lawyers sometimes recover nothing – and it seems fair to include those losses when examining one of the lawyer's successful contingent fee cases.

Unfortunately, ABA Model Rule 1.5 cmt. [3] does not provide any guidance on this complicated issue. That ABA Model Rule Comment seems to go in the wrong direction, because it mentions unidentified “factors” that “a lawyer must consider” “[i]n determining whether a particular contingent fee is reasonable” (emphasis added). As discussed above, looking only at a “particular” contingent fee's reasonableness might be inappropriate.

ABA Model Rule 1.5 cmt. [3] next explains that lawyers “must consider the factors that are relevant under the circumstances” when considering both: (1) “whether a particular contingent fee is reasonable”; or (2) “whether it is reasonable to charge any form of contingent fee.” That seems like an odd order of considerations – one would think that the lawyer would first “consider” whether a contingent fee is appropriate, and then “consider” the “particular contingent fee.” And the ABA Model Rule Comment provides no explanation about “the factors that are relevant under the circumstances.”

ABA Model Rule 1.5 cmt. [3] then warns that “[a]pplicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee.” Determining any applicable laws’ limitations should be easy.

ABA Model Rule 1.5 cmt. [3] concludes with another warning – that “[a]pplicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.” That final warning seems out of place in a Rule Comment dealing with contingent fees.

#### **Virginia Rule 1.5 Comment [4]**

Virginia Rule 1.5 cmt. [4] addresses fee arrangement logistics.

Virginia Rule 1.5 cmt. [4] first states that a lawyer “may require advance payment of a fee, but is obliged to return any unearned portion” (referring to Virginia Rule 1.16(d)). Virginia Rule 1.16(d) requires lawyers (upon termination of a representation) to “refund[ ] any advance payment of fee that has not been earned.”

Virginia Rule 1.5 cmt. [4] then recognizes that lawyers “may accept property in payment for services, such as an ownership interest in an enterprise.” But such an arrangement is permissible only if it “does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to [Virginia] Rule 1.8(j).”

Virginia Rule 1.8(g) prohibits lawyers from “acquir[ing] a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client.” The term “conducting for a client” seems like a strange way to describe a lawyer’s representation of a client in litigation, but the meaning is clear. There are two exceptions to this general prohibition. Lawyers may “(1) acquire a lien granted by law to secure the

lawyer's fee or expenses"; and (2) "contract with a client for a reasonable contingent fee in a civil case, unless prohibited by [Virginia] Rule 1.5." Virginia Rule 1.8(k) prohibits any lawyers "associated" with such a lawyer from entering into any such prohibited arrangement.

Virginia Model Rule 1.5 cmt. [4] concludes with a warning that "a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property."

Although Virginia Rule 1.5 cmt. [4] does not mention it, such arrangements involving client property might also trigger the special disclosure and confirmation requirements of Virginia Rule 1.8(a) – which governs lawyers' business transactions with their clients.

Those requirements include: a description of substantively "fair and reasonable" transaction that must be transmitted in writing to the client "in a manner which can be reasonably understood by the client" (Virginia Rule 1.8(a)(1)); the client's "reasonable opportunity to seek the advice of independent counsel in the transaction" (Virginia Rule 1.8(a)(2)); and written client consent (Virginia Rule 1.8(a)(3)). Although these Virginia Rule 1.8(a) requirements are not explicitly incorporated into Virginia Rule 1.5 in such a scenario, the "special scrutiny" referred to in Virginia Rule 1.5 cmt. [4] might include such requirements.

**ABA Model Rule 1.5 cmt. [4]** is essentially identical to Virginia Rule 1.5 cmt. [4].

In contrast to Virginia Rule 1.5 cmt. [4]'s final sentence warning that fees "paid in property" may be "subject to special scrutiny," ABA Model Rule 1.5 cmt. [4] notes that "a

fee paid in property instead of money may be subject to the requirements of [ABA Model] Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.” This presumably parallels the “special scrutiny” referred to in Virginia Rule 1.5 cmt. [4]’s concluding sentence.

### **Virginia Rule 1.5 Comment [5]**

Virginia Rule 1.5 cmt. [5] addresses limits on lawyers’ fee agreements.

Virginia Rule 1.5 cmt. [5] first warns lawyers that they may not enter into fee agreements that might “induce” them to “improperly . . . curtail services for the client or perform them in a way contrary to the client’s interest.” The Virginia Rule Comment provides an example of such a prohibited agreement: a lawyer who agrees to provide services only “up to a stated amount” – when it is “foreseeable” that the matter will require “more extensive services” (“unless the situation is adequately explained to the client”). Although it probably goes without saying, even an “adequately explained” limitation of this sort might violate the ethics rules if it would prevent the lawyer from providing a competent (Virginia Rule 1.1) and diligent (Virginia Rule 1.3) representation, among other things. Virginia Rule 1.5 cmt. [5] explains that if the lawyer entered into such improper agreements, “the client might have to bargain for further assistance in the midst of a proceeding or transaction.” In other words, lawyers may not “lowball” fee estimates or agreements, if it is “foreseeable” that they will have to seek additional fees based on the promised scope of services.

On the other hand, Virginia Rule 1.5 cmt. [5] next acknowledges that “it is proper to define the extent of services in light of the client’s ability to pay.”

Virginia Rule 1.5 cmt. [5] next bluntly warns that lawyers “should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.” Virginia Rule 1.5 cmt. [5] then suggests that lawyers “should offer the client alternative bases for the fee and explain their implications “when considering whether a contingent fee is consistent with the client’s best interest.”

Virginia Rule 1.5 cmt. [5] then includes another warning with language the ABA Model Rules include in ABA Model Rule 1.5 cmt. [3] – which Virginia did not adopt: “[a]pplicable law may impose limitations on contingent fees, such as a ceiling on the percentage.”

Virginia Rule 1.5 cmt. [5] concludes with the obvious point that fees “should not be imposed upon a client, but should be the result of an informed decision concerning reasonable alternatives.”

**ABA Model Rule 1.5 cmt. [5]** contains essentially the same language as Virginia Rule 1.5 cmt. [5] up to the obvious warning that lawyers should not use “wasteful procedures” to “exploit” an hourly rate fee arrangement.

In contrast to Virginia Rule 1.5 cmt. [5], ABA Model Rule 1.5 cmt. [5] does not contain the suggestion that lawyers “should offer the client alternative bases for the fee and explain their implications” when considering a contingent fee arrangement. ABA Model Rule 1.5 cmt. [5] likewise does not contain the common sense conclusory statement in Virginia Rule 1.5 cmt. [5] explaining that lawyers should not impose fees upon the client.

As explained above, ABA Model Rule 1.5 cmt. [5] does not contain Virginia Rule 1.5 cmt. [5]’s warning about applicable law imposing “limitations on contingent fees” – because that statement instead appears in ABA Model Rule 1.5 cmt. [3].

### **Virginia Rule 1.5 Comment [6]**

Virginia Rule 1.5 cmt. [6] addresses domestic relations contingent fees.

Virginia Rule 1.5 cmt. [6] lists those “rare instances” where contingent fees in domestic relations matters have “been previously considered appropriate.” Thus, Virginia Rule 1.5 cmt. [6] seems to incorporate (almost reluctantly) earlier legal ethics opinions or other guidance.

Virginia Rule 1.5 cmt. [6] lists five conditions (some of them very specific) under which lawyers may charge a contingent fee in domestic relations matters: (1) the contingent fee “is for the collection of, and is to be paid out of”: child or spousal support “accumulated arrearages”; an asset “not previously viewed or contemplated as a marital asset by the parties or the court”; or “a monetary award pursuant to equitable distribution or under a property settlement agreement”; (2) “the parties are divorced and reconciliation is not a realistic prospect”; (3) “the children of the marriage are or will soon achieve the age of maturity and the legal services rendered pursuant to the contingent fee arrangement are not likely to affect their relationship with the non-custodial parent”; (4) “the client is indigent or could not otherwise obtain adequate counsel on an hourly fee basis”; and (5) “the fee arrangement is fair and reasonable under the circumstances.”

Significantly, the penultimate factor ends with the word “and” rather than the word “or.” So presumably lawyers must satisfy all of the listed requirements before charging a contingent fee in a domestic relations matter. But the first of the requirements identifies

three separate scenarios that could not all be present at the same time (child or spousal support arrearages; a surprise asset; an equitable distribution or property settlement agreement monetary award). And that sub-list does not include the word “or.” So presumably any one of those Virginia Rule 1.5 cmt. [6] (a) scenarios would support a domestic relations contingent fee, as long as the other four requirements are met.

**ABA Model Rule 1.5 cmt. [6]** also addresses contingent fees in domestic relations matters.

ABA Model Rule 1.5 cmt. [6] begins by repeating black letter ABA Model Rule 1.5(d)’s prohibition on fees that are “contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained.” ABA Model Rule 1.5 cmt. [6] next simply states that the prohibition “does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due upon support, alimony or other financial orders because such contracts do not implicate the same policy concerns.”

ABA Model Rule 1.5 cmt. [6] does not provide the same type of detailed (and somewhat confusing) description of scenarios found in Virginia Rule 1.5 cmt. [6], in which lawyers may charge a contingent fee in a domestic relations matter.

### **Virginia Rule 1.5 Comment [7]**

Virginia Rule 1.5 cmt. [7] addresses fee splits (which the Virginia Rule Comment calls “[a] division of fee” – in contrast to black letter Virginia Rule 1.5(e)’s term “[a] division of a fee”).

Virginia Rule 1.5 cmt. [7] begins with a definition of such an arrangement, explaining that the term “refers to a single billing to a client covering the fee of two or more

lawyers who are not in the same firm.” In other words, the term does not involve co-counsel working on the same matter, each of whom bill separately. Instead, the term denotes one bill the lawyers send to a client they are all representing – and the payment of which they will then split among themselves.

Virginia Rule 1.5 cmt. [7] then explains the rationale for permitting such fee splitting – which “facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well.”

Virginia Rule 1.5 cmt. [7] concludes by noting that such a fee split arrangement most often is used “when the fee is contingent and the division is between a referring lawyer and a trial specialist.” The fact that fee splitting is “most often” used in a contingent fee arrangement should be obvious. In contingent fee arrangements, all of the lawyers working collectively on a matter normally earn a percentage of the judgment or settlement amount obtained for their jointly represented client. In other words, there is a single dollar amount those lawyers can share. But fee splitting can also occur among lawyers jointly representing the same client on a fixed fee basis. That scenario also involves multiple lawyers from different firms sharing a single amount of money. Such a situation differs from co-counsel each sending their own bills to the client that they jointly represent.

**ABA Model Rule 1.5 cmt. [7]** also addresses fee splits, but differs dramatically from Virginia Rule 1.5 cmt. [7] because black letter ABA Model Rule 1.5(e) differs dramatically from Virginia Rule 1.5(e).

ABA Model Rule 1.5 cmt. [7] contains the same introductory sentences as Virginia Rule 1.5 cmt. [7] – defining “[a] division of fee” arrangement. Like Virginia Rule 1.5 cmt.

[7], ABA Model Rule 1.5 cmt. [7] defines “[a] division of fee,” in contrast to black letter ABA Model Rule 1.5(e)’s use of the slightly different term “[a] division of a fee.”

ABA Model Rule 1.5 cmt. [7] first explains that such arrangements facilitate association of lawyers who can together represent the client well, and also notes that such arrangements are “most often” used “when the fee is contingent and the division is between a referring lawyer and a trial specialist.”

But in stark contrast to Virginia Rule 1.5(e) and Virginia Rule 1.5 cmt. [7], ABA Model Rule 1.5 cmt. [7] explains that such fee splits are permissible only if: (1) “the lawyers . . . divide a fee either on the basis of the proportion of services they render”; or (2) “if each lawyer assumes responsibility for the representation as a whole.” The first permissible fee-split arrangement (“on the basis of the proportion of services they render”) seems clear enough. If two lawyers in different firms represent the client, the lawyer who renders 60% of the services will receive 60% of the fee. As explained above, the second permissible arrangement is more subtle and potentially ambiguous. For some reason, ABA Model Rule 1.5 cmt. [7] defines that second permissible arrangement as involving “each lawyer assum[ing] responsibility for the representation as a whole.” That differs at least linguistically from black letter ABA Model Rule 1.5(e)(1), which describes an arrangement under which “each lawyer assumes joint responsibility for the representation.” Presumably they mean the same thing, but one wonders why ABA Model Rule 1.5 cmt. [7] uses the single word “responsibility” instead of the black letter phrase “joint responsibility.” And this mystery deepens three sentences later – because ABA Model Rule 1.5 cmt. [7] defines “[j]oint responsibility for the representation”, which is not the term the ABA Model Rule Comment just used.

As explained above, “joint responsibility” could conceivably mean either: (1) day-to-day responsibility for the representation; or (2) joint ethical and malpractice “responsibility” for the representation. The latter scenario involves one lawyer’s ethical responsibility for the other lawyer’s ethical violations (to the extent recognized by the ABA Model Rules) and, perhaps more importantly, financially responsible for the other lawyer’s malpractice. As explained below, ABA Model Rule 1.5 cmt. [7] has chosen the second option.

ABA Model Rule 1.5 cmt. [7] next predictably explains that, “the client must agree to the arrangement, including the share that each lawyer is to receive.” This disclosure requirement makes sense. For example, the client presumably would want to know whether the “trial specialist” referred to earlier in ABA Model Rule 1.5 cmt. [7] will receive a small or large percentage of an ultimate award or settlement amount – which will inform the client about whether the “trial specialist” is a mere “figure head” or instead will have the financial incentive to devote sufficient time and attention to the matter.

ABA Model Rule 1.5 cmt. [7] then confirms that any fee split “agreement must be confirmed in writing.” Reflecting ABA Model Rule 1.5 cmt. [7]’s earlier recognition that fee splits are “most often” used “when the fee is contingent,” ABA Model Rule 1.5 cmt. [7] then repeats the requirements included in ABA Model Rule 1.5(c) – which govern contingent fee agreements, not fee split agreements. These include the requirement that contingent fee agreements “must be in a writing signed by the client and must otherwise comply with” ABA Model Rule 1.5(c).

ABA Model Rule 1.5 cmt. [7] then defines “joint responsibility” “for the representation” – one of the two alternative permissible arrangements under ABA Model

Rule 1.5(e). As explained above, the other permissible arrangement involves the fee “division . . . in proportion to the services performed by each lawyer.” Significantly, ABA Model Rule 1.5 cmt. [7] clarifies the ABA Model Rules’ approach: “[j]oint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership.” That standard probably includes the lawyers sharing in the day-to-day handling of a case. But more importantly, such “responsibility” presumably includes possible ethical responsibility for another lawyer’s violations (under various ABA Model Rules) and almost certainly financial responsibility for another lawyer’s malpractice.

ABA Model Rule 1.5 cmt. [7] concludes with warning that “[a] lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter,” referring to ABA Model Rule 1.1 (which requires lawyers’ competence). ABA Model Rule 1.5 cmt. [7]’s use of the term “referring” is somewhat odd, because “referring” a case often if not usually describes a complete hand-off of a case to another lawyer – not an arrangement for co-counsel who will share a fee. But given the placement of that statement in ABA Model Rule 1.5 cmt. [7] discussing fee splits, the term “referring” presumably means the establishment of an arrangement that would justify a fee split. But of course either type of “referral” would be appropriate only if it was made to a competent lawyer.

Virginia Rule 1.5 cmt. [7] does not include that referral arrangement requirement, although it would clearly apply to Virginia lawyers arranging (with client consent) for one of the lawyers to earn a “pure” referral fee, or to lawyers setting up a compliant fee split arrangement under Virginia Rule 1.5(e).

### **ABA Model Rule 1.5 Comment [8]**

Virginia did not adopt ABA Model Rule 1.5 cmt. [8].

ABA Model Rule 1.5 cmt. [8] addresses arrangements not governed by ABA Model Rule 1.5(e)'s fee-split rules.

ABA Model Rule 1.5 cmt. [8] explains that ABA Model Rule 1.5(e)'s fee split requirements do “not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.” The term “division of fees” differs from ABA Model Rule 1.5(e)'s term “division of a fee” and ABA Model Rule 1.5 cmt. [7]'s term “division of fee.”

Black letter Virginia Rule 1.5(f) contains essentially the same language. Although the black letter Virginia Rule 1.5(f) does not contain the phrase “to be received in the future,” that scenario is implicit in Virginia Rule 1.5(f). If a firm had already received a fee before one of the lawyers who worked on the matter had left the firm, the client presumably would have no interest in or power to affect that withdrawal arrangement. So it would seem obvious that Virginia Rule 1.5(f) applies to lawyers continuing to work on a matter even though they are no longer associated in the same firm.

### **Virginia Rule 1.5 Comment [9]**

Virginia Rule 1.5 cmt. [9] addresses fee disputes.

Virginia Rule 1.5 cmt. [9] first suggests that lawyers “should conscientiously consider submitting” to any “procedure [that] has been established for a resolution of fee disputes, such as an arbitration or mediation procedure established by the bar.”

Virginia Rule 1.5 cmt. [9] then notes that “[l]aw may prescribe a procedure for determining a lawyer’s fee.” This type of law-prescribed procedure obviously differs from

the previous sentence's description of a bar-established procedure (which does not use the word "prescribe").

Virginia Rule 1.5 cmt. [9] provides two examples of such "prescribe[d]" procedures for "determining a lawyer's fee": (1) "in representation of an executor or administrator"; (2) "a class or a person entitled to a reasonable fee as part of the measure of damages."

Virginia Rule 1.5 cmt. [9] concludes with an awkwardly (at best) suggestion that lawyers seeking such a fee in those situations and lawyers "representing another party concerned with [such] a fee should comply with the [law's] prescribed procedure" (emphasis added).

As explained throughout this document, Virginia Rule Comments contain an odd mix of the words "should" and "must." Virginia Rule 1.5 cmt. [9] understandably suggests that lawyers "should" consider submitting to bar-established voluntary processes for resolving fee disputes. But merely suggesting that lawyers "should" comply with a legally-prescribed procedure is obviously wrong. Lawyers "must" comply with legally-prescribed procedures.

**ABA Model Rule 1.5 cmt. [9]** addresses the same fee issue – with an even more egregious use of the word "should."

Like Virginia Rule 1.5 cmt. [9], ABA Model Rule 1.5 cmt. [9] recognizes that there are several possible scenarios.

First, "[i]f a procedure has been established for a resolution of fee disputes, such as an arbitration or mediation procedure established by the bar." In that situation, ABA Model Rule 1.5 cmt. [9] takes the same position as Virginia Rule 1.5 cmt. [9] – that "when [such a procedure] is voluntary, the lawyer should conscientiously consider submitting to

it.” But in contrast to Virginia Rule 1.5 cmt. [9], ABA Model Rule 1.5 cmt. [9] then understandably recognizes that the lawyer “must comply with the procedure when it is mandatory.”

Second, ABA Model Rule 1.5 cmt. [9] describes a situation where “[l]aw may prescribe a procedure for determining a lawyer’s fee” (mentioning the same two examples as those described in Virginia Rule 1.5 cmt. [9]). ABA Model Rule 1.5 cmt. [9] concludes with the same erroneous suggestion found in Virginia Rule 1.5 cmt. [9]’s conclusion – explaining that “[t]he lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure” (emphasis added).

Thus, ABA Model Rule 1.5 cmt. [9] clearly distinguishes between a mandatory bar-established dispute resolution procedure (which they “must comply with”) and a voluntary bar-established procedure (which they “should conscientiously consider submitting to”). But just two sentences later, ABA Model Rule 1.5 cmt. [9] suggests only that lawyers “should comply” with a law-prescribed procedure for determining their fee.

# RULE 1.6

## Confidentiality of Information

### Rule

#### Virginia Rule 1.6(a)

Virginia Rule 1.6(a) addresses lawyers' confidentiality duty – defining the information covered by this key duty.

Under Virginia Rule 1.6(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 [Virginia Rule 1.6(b) and (c)].”

Virginia Rule 1.6(a) thus prohibits lawyers from “reveal[ing]” three types of “information”: (1) “information protected by the attorney-client privilege under applicable law;” (2) “other information gained in the professional relationship that the client has requested be held in inviolate;” and (3) information “gained in the professional relationship . . . the disclosure of which would be embarrassing or would be likely to be detrimental to the client.”

The word “reveal” presumably is synonymous with “disclose.” Virginia Rule 1.6(a) and ABA Model Rule 1.6(a) use forms of those two words interchangeably.

The Virginia Rule 1.6 approach essentially follows the old pre-1983 ABA Model Code of Professional Responsibility definition of protected client confidential information that lawyers could not disclose. In contrast, as explained below, ABA Model Rule 1.6(a) more broadly (and illogically) prevents lawyers from disclosing “information relating to the representation of a client.”

Virginia Rule 1.6(a) protects three types of information.

First, Virginia Rule 1.6 protects “information protected by the attorney-client privilege under applicable law.” That is an odd formulation, although the meaning probably is clear. The evidentiary attorney-client privilege protects communications, not “information.” Presumably Virginia Rule 1.6(a) protects from disclosure communications conveying information from clients to their lawyers, and legal advice from lawyer back to their clients.

The reference to privileged “information” (presumably applying to communications containing such information) is not prefaced with the phrase “gained in a professional relationship.” That seems strange, because of the three protected categories the one most likely to involve communications directly between a lawyer and her client are those that would deserve privilege protection.

The other two types of “information” identified in Virginia Rule 1.6(a) are on their face limited to information “gained in the professional relationship” (emphasis added). This limit seems to restrict the confidentiality duty to information lawyers acquire from their clients – rather than information gained from other sources “during” the professional

relationship or information gained either before or after the professional relationship. But as explained below, Virginia Rule 1.6 cmt. [3] seems to expand this black-letter Virginia Rule 1.6(a) limitation. Virginia Rule 1.6 cmt. [3] describes the ethics confidentiality duty (in contrast to the evidentiary attorney client privilege protection) as covering any information meeting the Virginia Rule 1.6(a) standard – “whatever its source.” That seems different from the Virginia Rule 1.6(a) phrase “information gained in the professional relationship” (emphasis added). The word “in” logically would only apply to communications between the client and the lawyer. But despite this arguably best reading of that word, Virginia Rule 1.6(a)’s protected client information clearly applies to information obtained from sources other than the client (as explained above). The phrase “gained during the professional relationship” would thus have made more sense. If that phrase would have seemed too expansive, it could also have included language such as: “and obtained from or relating to the client” or words to that effect.

Second, Virginia Rule 1.6 protects “other information gained in the professional relationship that the client has requested be held inviolate.” That concept certainly makes sense. Clients might have idiosyncratic worries about lawyers disclosing information that such lawyers gain “in” the professional relationship. For instance, a Dallas Cowboy fan living near Washington, D.C., might not want his lawyer to disclose his team preference. This confidentiality duty has a contractual element to it – lawyers must honor their clients’ direction unless it would trigger a Virginia Rule 1.16 discretionary or mandatory withdrawal.

But the term “inviolate” seems odd. Virginia Rules and their Comments use that word only three times (two of which appear in Virginia Rule 1.6 and its Comments). The

ABA Model Rules and its Comments do not use that word at all. Virginia Rule 1.6's title is "Confidentiality of Information." Everyone uses the term "confidential" when discussing lawyers' Virginia Rule 1.6 duty to their clients. The term "inviolate" seems too strong – given the bulk (at least linguistically) of Virginia Rule 1.6's terms that describe lawyers' discretion to or duty to disclose protected client confidences. One might wonder why Virginia Rule 1.6(a) contains the rarely-used word "inviolate" rather than the obvious choice: "confidential."

Third, Virginia Rule 1.6 protects "information gained in the professional relationship . . . the disclosure of which would be embarrassing or would be likely to be detrimental to the client." That common sense approach contrasts sharply with ABA Model Rule 1.6(a), discussed below, which protects from disclosure totally harmless information "relating to the representation of a client." Virginia Rule 1.6(a)'s approach also matches the common sense focus on whether disclosure will hurt the client. The disciplinary process presumably would also focus on any harm to that client's lawyers' disclosure would cause.

Interestingly, Virginia Rule 1.6(a) formulation prohibits such disclosure (absent consent or some other Virginia Rule provision) of information that "would be embarrassing" to the client, or "would be likely to be detrimental to the client" (emphasis added). That formulation comes from the old ABA Model Code of Professional Responsibilities. The "embarrassment" standard does not contain the phrase "would be likely to be" embarrassing. Presumably, this is an intentional distinction between the "embarrassment" standard and the "detrimental" standard. The "embarrassment" standard presumably focuses on emotional impact, while the "detrimental" standard presumably focuses more on a disclosure's legal rather than emotional detriment

(although presumably it could encompass all types of detriments). The lack of a “likely to” phrase preceding the “embarrassment” standard presumably requires lawyers to determine if the disclosure would immediately cause the embarrassment. In other words, lawyers would not predict whether embarrassment is likely to occur in the future. That makes sense. The “likely to” phrase preceding the “detrimental” standard presumably requires lawyers to look ahead and determine if the disclosure would at some point in the future prejudice the client.

Virginia Rule 1.6(a) contains four exceptions to the prohibition on lawyers’ disclosure of protected client confidential information.

First, the prohibition does not apply to lawyers’ disclosure of protected client confidential information if “the client consents after consultation” to that information’s disclosure. The Virginia Rules’ standard formulation for consent is: “consent after consultation.” This contrasts with the ABA Model Rules’ standard formulation: “informed consent.” Presumably those phrases are synonymous. The Virginia Rules Terminology defines “consultation” as “denot[ing] communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.”

ABA Model Rule 1.0(e) similarly defines “informed consent” as “denot[ing] the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” Thus, ABA Model Rule 1.0(e)’s language is essentially the same as the Virginia Rules Terminology language, but covers consultation with any person, not just with clients (a limitation the Virginia Rules Terminology definition contains).

Second, Virginia Rule 1.16(a)'s disclosure prohibition does not apply to “disclosures that are impliedly authorized in order to carry out the representation.” This “impliedly authorized” exception presumably applies to logistically required disclosures (allowing outsiders to collect trash in law offices, repair computer infrastructure, etc.) and perhaps to substantive disclosures (responding to discovery requests, etc.).

Under the Virginia Rules, the “impliedly authorized” exception is not as important as in the ABA Model Rules. This is because Virginia Rule 1.6(a) does not define as protected any confidential information “gained in the profession relationship” unless it meets one of the three listed categories – thus allowing the disclosure of protected client confidential information if the client has not requested that it remain confidential, the disclosure would not “embarrass[ ] or would be likely to be detrimental to the client.” As explained below, ABA Model Rule 1.6 takes a much broader view, and on its face prohibits disclosure even of completely harmless protected client confidential information. So some information whose disclosure would be permissible under the “impliedly authorized” standard would fall outside the Virginia Rule 1.6 protected trilogy anyway. That would not be true of the ABA Model Rule 1.6 approach, meaning that the “impliedly authorized” exception is much more important in the ABA Model Rule 1.6 context.

Third, Virginia Rule 1.6(a)'s disclosure prohibition does not apply to the scenarios described in Virginia Rule 1.6(b), which allow (but do not require) lawyers to disclose protected client confidential information.

Fourth, Virginia Rule 1.6(a)'s disclosure prohibition does not apply to the scenarios described in Virginia Rule 1.6(c), which require (rather than just allow) lawyers to disclose protected client confidential information.

**ABA Model Rule 1.6(a)** contains a dramatically different description of protected client confidential information from Virginia Rule 1.6(a).

Under ABA Model Rule 1.6(a), “[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized to carry out the representation or the disclosure is permitted by [ABA Model Rule 1.6(b)].

As discussed above, the word “reveal” is synonymous with the word “disclose.” ABA Model Rule 1.6(a) uses the terms synonymously, as do the ABA Model Rule 1.6 Comments.

In contrast to the Virginia Rule 1.6 standard (and the old ABA Model Code standard on which the Virginia standard is based), ABA Model Rule 1.6(a) thus generally protects from disclosure “information relating to the representation of a client.”

ABA Model Rule 1.6(a)’s phrase “information relating to the representation of a client” (emphasis added) differs somewhat from ABA Model Rule 1.8(b)’s phrase “information relating to representation of a client.” Presumably those terms are intended to be synonymous.

The “relating to” standard does not have a source limitation (such as a formulation covering information “gained in the professional relationship” – which is the Virginia formulation) or a temporal limit (such as a formulation covering information “gained during” the representation). ABA Model Rule 1.6 cmt. [3] (discussed below) emphasizes the breadth of ABA Model Rule 1.6(a)’s reach: “[t]he confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source” (emphasis added). That

would seem essentially limitless. But the ABA has given some hints of limits. For instance, in ABA LEO 431 (8/8/03), the ABA addressed lawyers' ABA Model Rule 8.3's duty to report certain misconduct by other lawyers. ABA LEO 431 (8/8/03) inexplicably states that "information gained by a lawyer about another lawyer is unlikely to be information protected by [ABA Model] Rule 1.6, for example, observation of or information about the affected lawyer's conduct in litigation or in the completion of transactions." That type of information would seem to clearly fall within the definition of information "relating to the representation" of the lawyer's client if the lawyer acted as the client's co-counsel or represented the adversary. Although ABA LEO 431 (8/8/03) suggests that lawyers "should" obtain their clients' consent before disclosing such information, it takes a surprisingly and seemingly inappropriately limited approach to ABA Model Rule 1.6(a)'s definition of protected client confidential information.

Significantly, ABA Model Rule 1.6's "relating to the representation of a client" scope seems both overinclusive and underinclusive.

First, ABA Model Rule 1.6(a)'s scope seems overinclusive because it includes information the disclosure of which would not harm the client. For instance, a lawyer might tell her husband that she is heading to Denver to take a deposition in the Smith case. That disclosure would violate ABA Model Rule 1.6(a)'s prohibition, even though it would not harm the client (except in very unusual circumstances). The disciplinary process presumably would not punish her for that disclosure if there was no damage to her client – so that ABA Model Rule 1.6(a) formulation normally is not used in the disciplinary process.

Second, ABA Model Rule 1.6(a)'s scope seems underinclusive because it would on its face not protect client information or communications not “relating to the representation of a client” – but which would harm the client if disclosed. For instance, the client’s use of the “n” word during a private conversation with his lawyer presumably would not be information “relating to the representation of a client” – even though it was “gained in the professional relationship” (which is the Virginia Rule 1.6(a) formulation). Perhaps ABA Model Rule 1.8(b)'s prohibition on lawyers’ “use” of information “relating to representation of a client to the disadvantage of the client” might prohibit such lawyer’s disclosure of his client’s racist reference. But such a disclosure presumably would not violate ABA Model Rule 1.6(a)'s disclosure prohibition.

ABA Model Rule 1.6(a) contains three exception to its disclosure prohibition, in contrast to Virginia Rule 1.6(a)'s four exceptions.

First, ABA Model Rule 1.6(a)'s disclosure prohibition does not apply to the disclosure of “information relating to the representation of a client” if the client gives “informed consent.” This is similar to Virginia Rule 1.6(a)'s exception for clients’ “consent [ ] after consultation.” It thus uses the standard ABA Model Rule formulation for such consent, rather than the Virginia Rules’ standard formulation for client consent.

Second, ABA Model Rule 1.6(a)'s disclosure prohibition does not apply if “the disclosure is impliedly authorized in order to carry out the representation.” That language is identical to that in Virginia Model Rule 1.6(a).

Third, ABA Model Rule 1.6(a)'s disclosure prohibition does not apply to disclosures “permitted by” ABA Model Rule 1.6(b). That ABA Model Rule 1.6 provision allows – but does not require – disclosure of protected client confidential information in seven specific

scenarios. Thus, the ABA Model Rule exceptions contrast with Virginia Rule 1.6(a)'s two exceptions: (1) allowing – but not requiring – lawyer disclosure (Virginia Rule 1.6(b)); and (2) requiring – rather than just allowing – disclosure (Virginia Rule 1.6(c)).

This ABA Model Rule limitation is understandable, because ABA Model Rule 1.6 does not require lawyers to disclose any ABA Model Rule 1.6(a) protected client confidential information. ABA Model Rule 3.3 occasionally requires such disclosure in a tribunal setting. But significantly, ABA Model Rule 1.6 does not require lawyers to disclose a client's intent to kill someone – even if the lawyer is convinced beyond doubt that the client will do so.

### **Virginia Rule 1.6(b)**

Virginia Rule 1.6(b) addresses exceptions to lawyers' confidentiality duty.

Virginia Rule 1.6(b) contains a list of seven exceptions to lawyers' confidentiality duty, under which lawyers “may reveal” (but are not required to reveal) protected client confidential information as defined in Virginia Rule 1.6(a).

All of the listed exceptions are limited to disclosure “[t]o the extent a lawyer reasonably believes necessary” (emphasis added).

As mentioned below, ABA Model Rule 1.6(b) uses the term “the lawyer” rather than “a lawyer” when limiting lawyers' disclosure of ABA Model Rule 1.6(a) protected client confidential information they believe “necessary” (emphasis added). Virginia Rule 1.6(b)'s formulation might recognize an objective standard, in contrast to ABA Model Rule 1.6(b)'s subjective standard. In other words, Virginia Rule 1.6(b)'s “a lawyer” presumably assesses what a “reasonable lawyer” would consider necessary – in contrast to the lawyer assessing possible disclosure. That would contrast with ABA Model Rule 1.6(b)'s

assessment only of what “the lawyer” considering the disclosure believes necessary. Both formulations would include a reasonableness standard. But it might be highly significant for the assessment to focus on what a hypothetical reasonable lawyer would believe necessary – rather than the lawyer actually deciding whether to disclose protected client confidential information. Unfortunately, Virginia Rule 1.6 does not include any Comments explaining whether Virginia Rule 1.6 intends to adopt an objective rather than subjective standard.

**ABA Model Rule 1.6(b)** contains a similar but not identical list of exceptions allowing but not requiring disclosure.

ABA Model Rule 1.6(b) also limits those disclosures “to the extent the lawyer reasonably believes necessary.”

### **Virginia Rule 1.6(b)(1)**

Virginia Rule 1.6(b)(1) addresses the first of Virginia Rule 1.6(b)’s seven exceptions.

Under Virginia Rule 1.6(b)(1), a lawyer may (but is not required to) disclose “[t]o the extent a lawyer reasonably believes necessary” Virginia Rule 1.6(a) protected client confidential information “to comply with law or a court order.”

Notably, Virginia Rule 1.6(b)(1) does not require disclosure “to comply with law or a court order.” Instead, it permits such disclosure. In essence, it provides a “safe harbor” that allows lawyers to avoid ethical sanctions for complying with law or a court order. The compulsion comes from substantive law. The ethics rules, ethics “common law” of legal ethics opinions, and case law assessing ethical responsibilities, etc. determine to what extent lawyers must resist a court order or even a law (such as challenging the law’s

applicability, constitutionality, etc.) For instance, some courts require lawyers to file an interlocutory appeal of a trial court's order requiring them to disclose privileged communications. Other courts do not require such interlocutory appeals.

Significantly, Virginia Rule 1.6(b)(1)'s "safe harbor" exception essentially eliminates the ethics duty of confidentiality component of a dispute about privilege issues in a tribunal or other judicial or semi-judicial setting. In other words, once a tribunal is involved, the issue becomes a purely evidentiary privilege or work product issue. Lawyers cannot resist discovery by pointing to their ethics confidentiality duty. Instead, lawyers resist discovery based on the attorney-client privilege, the work product doctrine, or some other legal evidentiary protection.

Virginia Rule 1.6(b)(1)'s "safe harbor" exception thus essentially causes the ethical issue to evaporate.

**ABA Model Rule 1.6(b)(6)** contains essentially the same language as Virginia Rule 1.6(b)(1).

In contrast to Virginia Rule 1.6(b)(1)'s use of the word "law," ABA Model Rule 1.6(b)(6) uses the phrase "other law." ABA Model Rule 1.6(b)(6)'s use of the term "other law" presumably recognizes that the ABA Model Rules themselves are "law." This is ironic, because the ABA Model Rules represent only a voluntary organization's suggested guidelines. But presumably a state adopting ABA Model Rule 1.6(b)(6)'s formulation could reasonably characterize its ethics rules as "law" – thus justifying its use of the phrase "other law."

### **Virginia Rule 1.6(b)(2)**

Virginia Rule 1.6(b)(2) addresses the second of Virginia Rule 1.6(b)'s seven exceptions. It contains (among other things) what amounts to several self-defense exceptions.

Under Virginia Rule 1.6(b)(2), a lawyer may (but is not required to) disclose Virginia Rule 1.6(a) protected client confidential information “[t]o the extent a lawyer reasonably believes necessary”: (1) “to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client;” (2) “to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved;” or (3) “to respond to allegations in any proceeding concerning the lawyer’s representation of the client.”

Such self-defense exceptions appear in every state’s ethics rules, but the formulation varies from state to state. Such self-defense exceptions generally include lawyers’ ability to defend themselves from client malpractice claims, from clients’ “ineffective assistance of counsel” claims, etc. Those states’ privilege laws also normally contain a parallel implied waiver doctrine that deprives clients of their power to assert privilege protection resisting their lawyers’ disclosure of such protected client confidential information. One exception has generated news lately, when some lawyers have disclosed protected client confidential information to defend themselves from bad client or even non-client reviews on the Internet, etc. The self-defense exception is narrower than apparent at first blush, but broader in other ways.

Significantly, Virginia Rule 1.6(b)(2)’s first scenario is not limited to lawyers’ defensive discretionary disclosure of Virginia Rule 1.6(a)’s protected client confidential

information. The scenario allows such disclosure “to establish a claim . . . on behalf of the lawyer in a controversy between the lawyer and the client.” The classic case involves lawyers’ disclosure reasonably necessary to collect their fee. Not surprisingly, ethics opinions and case law take differing positions on the extent to which lawyers seeking to collect their fee may disclose protected client confidential information. For instance, Virginia lawyers in all or most Virginia jurisdictions generally may disclose in pleadings or in open court that they are not being paid. But the DC Bar takes the position that such a disclosure would violate such lawyers’ confidentiality duty (which of course might apply to lawyers from Virginia or elsewhere who are governed by the DC ethics Rules). Bars and courts also take differing positions on lawyers’ related disclosure of protected client confidential information intended to help in the collection of such unpaid fees. For instance, most bars allow lawyers to disclose protected client confidential information to a collection agency seeking to assist the lawyer in collecting the unpaid fee, but prohibit lawyers from disclosing similar information to a credit bureau (which might permanently sully the delinquent client’s credit).

Virginia Rule 1.6(b)(2)’s first scenario does not necessarily arise only in a judicial setting, but requires a “controversy.” But the term “claim or defense” has a ring of judicial proceedings to it. For example, that first scenario presumably would not allow a lawyer to disclose protected client confidential information in response to a negative review on the Internet, etc. The second and third scenarios clearly involve a judicial setting.

On the other hand, the third scenario does not limit lawyers’ permitted disclosure of protected client confidential information to claims or defenses involving the client. In other words, the self-defense exception sometimes allows lawyers to disclose protected

client confidential information to defend themselves from third parties' (rather than their clients') allegations. This is a key exception to lawyers' strict confidentiality duty. It seems somewhat counterintuitive that lawyers may disclose protected client confidential information to defend themselves from third parties' attacks, even over the objection of the client.

Virginia Rule 1.6 cmt. [10] and [10a] (discussed below) provide guidance on this issue, and seem more expansive than black letter Virginia Rule 1.6(b)(2).

**ABA Model Rule 1.6(b)(5)** contains the identical language.

### **Virginia Rule 1.6(b)(3)**

Virginia Rule 1.6(b)(3) addresses the third of Virginia Rule 1.6(b)'s seven exceptions.

Under Virginia Rule 1.6(b)(3), a lawyer may (but is not required to) disclose Virginia Rule 1.6(a) protected client confidential information “[t]o the extent a lawyer reasonably believes necessary” – “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.”

Virginia Rule 1.6(b)(3) contains a “clearly establishes” standard not commonly used in the Virginia Rules. In a now-deleted rule, the term “clearly established” was equated with explicit clients’ stated intent, but it was unclear if that was the only way that information could be “clearly established.” The term clearly does not require actual lawyer knowledge, but seems to involve more than a negligence standard.

Virginia Rule 1.6(b)(3) contains a temporal limitation on the client misconduct – which the client must have perpetrated “in the course of the representation.” Thus, the

discretionary disclosure provision rule is backward-looking, applying to client fraud that has already occurred.

Virginia Rules Terminology defines “fraud” as “denot[ing] conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.” Presumably this Virginia Rule definition trumps any extrinsic common law or other law defining fraud. This contrasts with other Virginia Rule 1.6 provisions, such as Virginia Rule 1.6(c)(1) (discussed below) – which refers to clients’ criminal conduct. Of course, fraudulent conduct sometimes involves a crime, and sometimes does not.

Interestingly, ABA Model Rule 1.0(d) takes a totally different and presumably more appropriate approach – defining “fraud” as “denot[ing] conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.” Thus, the ABA Model Rule definition imports into the ABA Model Rules extrinsic law (although excluding constructive fraud or other varieties of fraud that do not require intent to deceive).

Virginia Rule 1.6(b)(3) covers only such client fraud on a third party “related to the subject matter of the representation.” This subject matter limitation thus excludes from at least this Virginia Rule’s discretionary disclosure of client fraud unrelated to “the subject matter of the representation.”

Significantly, Virginia Rule 1.6(b)(3) does not require that the client “used the lawyer’s services” in perpetrating the past fraud. As explained below, somewhat similar ABA Model Rule 1.6(b)(2) and (3) require that additional condition – although interestingly

they do not contain Virginia Rule 1.6(b)(3)'s condition that the client's fraud "relate[ ] to the subject matter of the representation."

**ABA Model Rule 1.6(b)(2) and (3)** contain a somewhat similar set of scenarios in which lawyers may (but are not required to) "reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary."

Under ABA Model Rule 1.6(b)(2), a lawyer may (but is not required to) disclose ABA Model Rule 1.6(a) protected client confidential information "to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services" (emphasis added). Thus, that provision is purely forward-looking, and allows lawyers to disclose ABA Model Rule 1.6(a) protected client confidential information to prevent such crimes or frauds.

Under ABA Model Rule 1.6(b)(3), a lawyer may (but is not required to) disclose "[t]o the extent a lawyer reasonably believes necessary" ABA Model Rule 1.6(a) protected client confidential information to "prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services" (emphasis added). Thus ABA Model Rule 1.6(b)(3) is both forward and backward looking.

There is a subtle difference between these two ABA Model Rule 1.6(b) provisions. ABA Model Rule 1.6(b)(2) allows lawyers to disclose protected client confidential information to prevent their clients from engaging in the misconduct described in that provision. ABA Model Rule 1.6(b)(3) addresses a scenario in which the client has already

committed the crime or fraud, and allows lawyers to disclose protected client confidential information “to prevent, mitigate or rectify” the substantial injury that is “reasonably certain” to result or has resulted” from that already-committed client criminal or fraudulent misconduct.

The term “crime” presumably imports extrinsic law into the ethics analysis. Both ABA Model Rule 1.6(b)(2) and (3) use the term “fraud.” As explained above, in contrast to Virginia Rule Terminology’s definition of “fraud” as “denot[ing] conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information,” ABA Model Rule 1.0(d) does not independently define fraud, but rather generally incorporates extrinsic law. ABA Model Rule 1.0(d) defines “fraud” as “denot[ing] conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.”

ABA Model Rule 1.6(b)(2) and (3)’s focus on clients’ commission of a future fraud or injury resulting from the client’s past or ongoing fraud use the phrase “reasonably certain” in analyzing those possibilities. That term is not defined, but presumably falls somewhere between “likely” and “certain.”

Both of those ABA Model Rule provisions are dramatically different from Virginia Rule 1.6(b)(3).

In contrast to Virginia Rule 1.6(b)(3), ABA Model Rule 1.6(2) and (3): (1) permit disclosure to “prevent” clients from committing crimes or frauds; (2) apply to crimes and frauds, not just to “fraud,” referred to in Virginia Rule 1.6(b)(3); (3) do not require lawyers to meet the “clearly establishes” knowledge standard (instead presumably applying the “reasonably believes necessary” standard both to the disclosure and to the evidence of

clients' crime or fraud; (4) apply even if the clients have not committed a crime or fraud "in the course of the representation," although the clients must have used the lawyers' services "in furtherance of" the crime or fraud, which presumably might occur after the representation has ended; (5) can apply to clients' crimes or frauds not "related to the subject matter of the representation" (which is a significant limitation in Virginia Rule 1.6(b)(3)); (6) allow disclosure of protected client confidential information only if clients' crime or fraud is "reasonably certain to result" (or, in ABA Model Rule 1.6(b)(3) "has resulted") in "substantial injury to the financial interests or property of another" (a higher standard than Virginia Rule 1.6(b)(3), which does not require any injury to anyone, other than perhaps an injury that is a prerequisite to a fraud claim); (7) require that the clients have used the lawyers' services "in furtherance of" the crime or fraud (a much closer connection to the lawyer than the Virginia Rule's phrase "related to the subject matter of the representation" – which does not necessarily involve clients using lawyers' services).

Thus, ABA Model Rule 1.6(b)(2) and (3) contain an additional condition not found in Virginia Rule 1.6(b)(3), but lack a condition found in that Virginia Rule.

Under both ABA Model Rule 1.6(b)(2) and (3), lawyers' discretion to disclose ABA Model Rule 1.6(a) protected client confidential information is conditioned on the client "using" or having "used" "the lawyer's services" "in furtherance" of the crime or fraud. That is a key condition. This contrasts with Virginia Rule 1.6(b)(3)'s requirement that the client's fraud "relate[ ] to the subject matter of the representation," but need not involve the client using "the lawyer's services" "in furtherance" of the client's "crime or fraud."

Of course, under ABA Model Rule 1.2(d), a lawyer cannot "counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent."

Lawyers engaging in such misconduct would also presumably violate a number of ABA Model Rule 8.4 provisions. Under ABA Model Rule 1.16(b)(3), a lawyer who learns that a client “has used [his] services to perpetrate a crime or fraud” may withdraw. If a lawyer learns during the pendency of a client’s use of his services to further a crime or fraud, the lawyer presumably can withdraw under ABA Model Rule 1.16(b)(4), because “the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent.” Other ABA Model Rules might also apply in such a setting.

Also in contrast to Virginia Rule 1.6(b)(3), ABA Model Rule 1.6(b)(2) and (3) do not require that the client’s criminal or fraudulent conduct “relate[ ] to the subject matter of the representation.” It is possible that such client misconduct would “relate[ ] to the subject matter of the representation” if the client has used, is using or intends to use the lawyer’s services in furtherance of a crime or fraud. However, that might not always be true. For instance, a lawyer might provide legal services about how the client may obtain a loan from a bank to buy an office building. The client might use those legal services to defraud the bank out of money in a scheme involving a fake business – not buying an office building. That sort of crime or fraud would satisfy ABA Model Rule 1.6(b)(2) or (3)’s “in furtherance of” standard, but would not seem to meet Virginia Rule 1.6(b)(3)’s “related to the subject matter of the representation” standard.

#### **Virginia Rule 1.6(b)(4)**

Virginia Rule 1.6(b)(4) addresses the fourth of Virginia Rule 1.6(b)’s seven exceptions.

Under Virginia Rule 1.6(b)(4), a lawyer may (but is not required to) disclose Virginia Rule 1.6(a) protected client confidential information “[t]o the extent a lawyer reasonably believes necessary” – “to protect a client’s interests in the event of the representing lawyer’s death, disability, incapacity or incompetence.”

This discretionary disclosure provision presumably applies to disclosure by a lawyer other than the lawyer who was representing the client when that representing lawyer suffers from the listed circumstances (“death, disability, incapacity or incompetence”). Of course, under best practices the representing lawyer would have arranged for clients’ consent for his or her replacement lawyer to make such necessary disclosures in the event of the representing lawyers’ inability to continue the representation because of the specified problems.

Virginia Rule 1.3 cmt. [5] suggests that “[a] lawyer should plan for client protection in the event of the lawyer’s death, disability, impairment, or incapacity.” That Virginia Rule Comment recommends that “[t]he plan should be in writing and should designate a responsible attorney, capable of making, and who has agreed to make, arrangements for the protection of client interests in the event of the lawyer’s death, impairment, or incapacity.”

Presumably a replacement lawyer who has properly created an attorney-client relationship with the client whose representing lawyer has suffered from one of the specified conditions may rely on Virginia Rule 1.6(a)’s “impliedly authorized” provision to make any such necessary disclosures. The Virginia Rules do not define the requirements of such a legitimate attorney-client relationship – their law does that. And even without the “impliedly authorized” discretion, such a replacement lawyer presumably could obtain

the clients' consent to make any disclosure "reasonably necessary to protect" their interests.

**ABA Model Rule 1.6** does not contain a similar provision. Perhaps the ABA Model Rules recognize that any replacement lawyer would rely on ABA Model Rule 1.6(a)'s "impliedly authorized" discretionary disclosure standard.

In contrast to Virginia Rule 1.2 cmt. [5], ABA Model Rule 1.3 cmt. [5] surprisingly limits its succession-planning suggestion to sole practitioners. ABA Model Rule 1.3 cmt. [5]'s different approach mentions mandatory rather than suggested steps: "[t]o prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that such sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action." Thus, ABA Model Rule 1.3 cmt. [5] involves a particular list of possible lawyers' unavailability to serve their clients, but more precise planning for that event. ABA Model Rule 1.3 cmt. [5] also points to Rule 28 of the American Bar Association Model Rules for Lawyer Disciplinary Enforcement – which "provid[es] for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer."

### **Virginia Rule 1.6(b)(5)**

Virginia Rule 1.6(b)(5) addresses the fifth of Virginia Rule 1.6(b)'s seven exceptions.

Virginia Rule 1.6(b)(5) allows (but does not require) a lawyer to disclose Virginia Rule 1.6(a) protected client confidential information “[t]o the extent a lawyer reasonably believes necessary” “sufficient to participate in law office management assistance program approved by the Virginia State Bar or other similar private program.”

It is unclear what entities Virginia Rule 1.6(b)(5) covers. It should be possible to determine which such entities the Virginia State Bar has “approved,” but the phrase “other similar private program[s]” creates ambiguity.

It is unclear whether Virginia Rule 1.6(b)(5) focuses on lawyers seeking such assistance, or providing such assistance. It seems likely that the Virginia Rule focuses on the latter. This is because the assistance program would be more effective if lawyers providing the assistance may tell those seeking the assistance of what the assisting lawyers do in their own practice.

This conclusion is reinforced by Virginia Rule 1.6(b)’s use of the word “sufficient.” Although the Virginia Rule does not define that term, presumably it allows an assisting lawyer to disclose to the lawyer seeking assistance “sufficient” information to provide meaningful assistance to the requesting lawyer.

But Virginia Rule 1.6(b)(5)’s use of the word “sufficient” seems odd in one sense. Presumably lawyers would not violate their Virginia Rule 1.6(a) confidentiality duty by disclosing information that was “insufficient” to allow them to participate in such programs.

Another reason to think that Virginia Rule 1.6(b)(5) covers the assisting lawyers rather than the lawyers seeking assistance is the latter’s presumed ability to rely on the more general Virginia Rule 1.6(a) “impliedly authorized in order to carry out the representation” exception. This sort of discretionary disclosure is designed to assist the

lawyer in adequately serving clients. So such disclosure presumably would also be permitted by Virginia Rule 1.6(a)'s "impliedly authorized" disclosure standard.

**ABA Model Rule 1.6** does not contain a similar provision.

### **Virginia Rule 1.6(b)(6)**

Virginia Rule 1.6(b)(6) addresses the sixth of Virginia Rule 1.6(b)'s seven exceptions.

Virginia Rule 1.6(b)(6) allows (but does not require) a lawyer to disclose Virginia Rule 1.6(a) protected client confidential information "[t]o the extent a lawyer reasonably believes necessary" "to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes." Presumably these and similar disclosures would satisfy Virginia Rule 1.6(a)'s "impliedly authorized in order to carry out the representation" standard.

Many lawyers probably would not even consider that they had a duty to avoid submitting Virginia Rule 1.6(a) protected client confidential information to a bank handling trust accounts, computer service that switches out servers, etc.

Virginia Rule 1.6(b)(6) contains two conditions for such permissible disclosure. The lawyer must: (1) "exercise[ ] due care in the selection of the agency," (2) "advise[ ] the agency that the information must be kept confidential," and (3) "reasonably believe[ ] that the information will be kept confidential." Those conditions make sense. Indeed, one would have thought that such logistically-required conditions would be generally included in Virginia Rule 1.6(a)'s "impliedly authorized" discretionary disclosure standard.

**ABA Model Rule 1.6** does not contain a similar provision.

But presumably lawyers could rely on ABA Model Rule 1.6(a)'s provision allowing lawyers to disclose ABA Model Rule 1.6(a) protected client confidential information “relating to the representation of a client” if “the disclosure is impliedly authorized in order to carry out the representation.”

### **Virginia Rule 1.6(b)(7)**

Virginia Rule 1.6(b)(7) addresses the seventh of Virginia Rule 1.6(b)'s seven exceptions.

Virginia Rule 1.6(b)(7) allows (but does not require) a lawyer to disclose Virginia Rule 1.6(a) protected client confidential information “[t]o the extent a lawyer reasonably believes necessary” “to prevent reasonably certain death or substantial bodily harm.”

The term “reasonably certain” is not defined. Presumably that standard falls somewhere between “likely” and “certain.”

The term “substantial bodily harm” is not defined. Perhaps significantly, the term presumably does not cover non-bodily harm – such as mental or emotional harm. Perhaps it is assumed that such mental or emotional harm will also constitute “bodily” harm.

Significantly, Virginia Rule 1.6(b)(7)'s discretionary disclosure provision contrasts sharply with Virginia Rule 1.6(c)(1)'s required disclosure of client criminal conduct “reasonably certain to result in death or substantially bodily harm to another” (discussed below).

Virginia Rule 1.6(b)(7)'s discretionary disclosure provision is broader than the mandatory disclosure provision in several ways.

First, it covers both clients' and nonclients' criminal conduct that creates such a risk. Thus, a lawyer who learns from her client that the client's husband intends to kill someone could point to this provision for discretion to disclose that information, but could not rely on the Virginia Rule 1.6(c)(1) required disclosure provision (which is limited to clients' intended future criminal acts).

Second, Virginia Rule 1.6(b)(7)'s discretionary disclosure provision does not require the client's intent "as stated by the client" (which is required under Virginia Rule 1.6(c)(1)). Thus, a lawyer could point to Virginia Rule 1.6(b)(7)'s discretionary disclosure provision if she believes that her client might commit such an egregious act, even if the client does not explicitly state an intention to do so.

Third, Virginia Rule 1.6(c)(7)'s discretionary disclosure provision does not require criminal conduct. Presumably most if not all of the actions that might result in another's death or substantial bodily harm would violate the criminal law, but some may not. For instance, the negligent release of some toxic chemical might not violate criminal law, but could endanger someone's life, etc.

Fourth, Virginia Rule 1.6(b)(7)'s discretionary disclosure provision is not limited to death or substantial bodily harm "to another" (as is Virginia Rule 1.6(c)(1)'s required disclosure provision). Thus, lawyers could point to Virginia Rule 1.6(b)(7)'s discretionary disclosure provision to report clients' intended actions that would cause the clients' "reasonably certain" suicide or substantial self-harm.

**ABA Model Rule 1.6(b)(1)** contains identical language.

Significantly, ABA Model Rule 1.6(b)(1) represents the ABA Model Rules' only reference to lawyers' disclosure of ABA Model Rule 1.6(a) protected client confidential

information to prevent clients' or others' murder or assault. This is because ABA Model Rule 1.6 never requires lawyers to disclose their clients' murderous intent, even if the lawyer is convinced beyond doubt that her client intends to kill someone. ABA Model Rule 3.3 sometimes requires disclosure, but that arises in the tribunal context.

#### **ABA Model Rule 1.6(b)(4)**

Virginia did not adopt ABA Model Rule 1.6(b)(4).

ABA Model Rule 1.6(b)(1) allows (but does not require) a lawyer to disclose ABA Model Rule 1.6(a) protected client confidential information “[t]o the extent a lawyer reasonably believes necessary” “to secure legal advice about the lawyer’s compliance with these [ABA Model] Rules.”

Virginia Rule 1.6(a) presumably would normally allow such disclosure under Virginia Rule 1.6(a)’s “impliedly authorized” disclosure discretionary provision. Unique Virginia Rule 1.6 cmt. [5a] (discussed below) addresses lawyers’ communications involving mentoring.

#### **ABA Model Rule 1.6(b)(7)**

Virginia did not adopt ABA Model Rule 1.6(b)(7).

ABA Model Rule 1.6(b)(7) addresses lawyers’ disclosure of protected client confidential information when changing employment.

ABA Model Rule 1.6(b)(7) allows (but does not require) a lawyer to disclose ABA Model Rule 1.6(a) protected client confidential information “[t]o the extent a lawyer reasonably believes necessary” “to detect and resolve conflicts of interest arising from”:

(1) “the lawyer’s change of employment”; or (2) “changes in the composition or ownership of a firm.”

ABA Model Rule 1.0(c) defines the word “firm,” and makes it clear that the term “firm” includes law departments “of a corporation or other organization.” ABA Model Rule 1.0 cmts. [2]-[4] provides additional guidance on that issue.

ABA Model Rule 1.6(b)(7)’s discretionary disclosure provision partially resolves a longstanding and undoubtedly awkward ABA Model Rule conundrum. Given ABA Model Rule 1.6(a)’s extraordinarily broad confidentiality definition, it would as a practical matter be almost impossible for a lawyer to interview for a job with another law firm. The hiring law firm could not disclose anything about its clients (even their identity), practice, cases, transactions, etc. – without those clients’ consent. The law firm could theoretically obtain clients’ standing consent to do so, but that might be difficult. Of course, the interviewing lawyer would have the same prohibition. And she would be much less likely to be in a position where she could seek all of her clients’ consent to make a disclosure. Among other things, that would alert the lawyer’s current firm about her possibly leaving the firm.

But of course such substantive interviews take place every day. The ABA issued several legal ethic opinions dodging the issue. For instance, ABA LEO 400 (1/24/96) warned “[j]ob-seeking lawyers [to] guard against the risk that in the course of the interviews to determine the compatibility of the lawyer with the opposing firm, or the discussions between the lawyer and the firm about the lawyer’s clients and business potential, the lawyer might inadvertently reveal ‘information relating to the representation’ in violation of [ABA] Rule 1.6” (emphasis added). That is almost humorous, because the purpose of such job-seeking lawyers’ interviews is to explore lawyers’ experience, client

relationships, etc. Years later, ABA LEO 455 (10/8/09) limply relied on the concept that the ABA Model Rules are “rules of reason” (citing ABA Model Rule Scope [14]). That is usually a somewhat lame last resort when there is no actual Rule allowing or prohibiting conduct. So the ABA’s adoption of ABA Model Rule 1.6(b)(7) moved in the direction of resolving the issue.

But significantly, ABA Model Rule 1.6(b)(7) allows a lawyer to disclose ABA Model Rule 1.6(a) protected client confidential information “[t]o the extent a lawyer reasonably believes necessary” “only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.”

The word “compromise” is not defined, and could be confusing. The word is rarely if ever used when assessing legal risks to attorney-client privilege protection. Courts normally if not exclusively use the word “waive” when assessing the danger of disclosure of privileged communication. It is unclear whether the word “compromise” describes something other than “waiver.”

ABA Model Rule 1.6(b)(7) does not mention other evidentiary protections, but presumably those are included in the generic phrase “or otherwise prejudice the client.”

Of course, the main “prejudice” could come from violation of the ethics confidentiality duty, which is much broader than the attorney-client privilege or similar evidentiary protections. That is the old ABA Model Code standard for protecting client confidences. ABA Model Rule 1.6(b)(7) might thus be seen as constituting the revenge of the ABA Model Code approach – because it explicitly rejects the overbroad current ABA Model Rule 1.6(b) view of protected client confidences.

But ABA Model Rule 1.6(b)(7) does not fully resolve the everyday hiring scenario's confidentiality implications. As explained below, ABA Model Rule 1.6 cmt. [13] and [14] limit the permissible disclosure to certain information, but do not on their face permit disclosure of ABA Model Rule 1.6(a) protected client confidential information about fees, collections, likely future business opportunities, etc. Those would normally be critical in the sort of job-switching interviews and considerations by both the lawyer and the law firm.

And perhaps even more surprisingly, ABA Model Rule 1.6(b)(7) does not address the everyday law firm conflicts checks that almost necessarily involve the disclosure of some ABA Model Rule 1.6(a) protected client confidential information. Perhaps those disclosures can be kept so abstract as to avoid violating ABA Model Rule 1.6, or made with existing clients' consent.

Although Virginia Rule 1.6 does not contain a similar provision, such information may not even be protected under Virginia Rule 1.6(a)'s narrower definition of protected client confidential information. For instance, clients' identity, the general subject matter of the representation, and perhaps other general information often would not fall within one of the three Virginia Rule 1.6(a) protected client confidential information categories. First, the attorney-client privilege normally does not protect such information, because that evidentiary protection normally is limited to clients' request for legal advice and lawyers providing of it. Second, clients might not ask that their identity or general information "be held inviolate." Third, disclosing clients' identity or the general subject matter of the representation often would not be "embarrassing or would be likely to be detrimental to the client." So the type of very general information required to identify

conflicts and clear such conflicts might not even deserve protection under Virginia Rule 1.6(a).

It seems much less likely that the disclosure of such conflicts-identifying and conflicts-clearing information would meet the “impliedly authorized” exception standard. That type of permissible disclosure normally involves lawyers representing existing clients, rather than allowing lawyers to clear conflicts so they can represent new clients.

### **Virginia Rule 1.6(c)**

Virginia Rule 1.6(c) addresses two situations which “[a] lawyer shall promptly reveal” Virginia Rule 1.6(a) protected client confidential information. As explained above, the term “reveal” presumably is synonymous with “disclose.”

Interestingly, Virginia Rule 1.6(c)’s mandatory disclosure obligation differs in two ways from Virginia Rule 1.6(b)’s discretionary disclosure situations.

First, Virginia Rule 1.6(c) requires lawyers to “promptly” reveal protected client confidential information in those two scenarios. Virginia Rule 1.6(b) does not contain a similar timing reference. Presumably this reflects the urgent and important societal purposes observed by Virginia Rule 1.6’s mandatory disclosure requirement.

Second, Virginia Rule 1.6(c) does not contain Virginia Rule 1.6(b)’s language (or concept) giving lawyers discretion to disclose Virginia Rule 1.6(a) protected client confidential information “[t]o the extent a lawyer reasonably believes necessary.” In other words, Virginia Rule 1.6(c) simply requires disclosure in certain limited circumstances, without giving the disclosing lawyers leeway.

**ABA Model Rule 1.6** does not contain a similar provision. This is because the ABA Model Rule 1.6 does not require lawyers’ disclosure of protected client confidential

information. Other ABA Model Rules (such as ABA Model Rule 3.3) occasionally require such disclosure.

### **Virginia Rule 1.6(c)(1)**

Virginia Rule 1.6(c)(1) requires (rather than just allows) a lawyer to “promptly reveal” a client’s intention (“as stated by the client”) to “commit a crime reasonably certain to result in (1) “death [of] . . . another,” (2) “substantially bodily harm to another,” (3) “substantial injury to the financial interests of another,” or (4) “substantial injury to the . . . property of another” – along with “the information necessary to prevent the crime.”

Before making such a disclosure, lawyers “shall, where feasible: (1) “advise the client of the possible legal consequences of the [criminal] action,” (2) “urge the client not to commit the crime,” and (3) “advise the client that the attorney must reveal the client’s criminal intention unless thereupon abandoned.”

Virginia Rule 1.6(c)(1)’s mandatory disclosure obligation also contains a reminder that if the client’s stated intent to commit a crime “involves perjury by the client, the attorney shall take appropriate remedial measures as required by Virginia Rule 3.3.” Virginia Rule 3.3 addresses lawyers’ tribunal-related disclosure obligations.

Virginia Rule 1.6(c)(1)’s mandatory disclosure requirement involves multiple issues.

First, on its face Virginia Rule 1.6(c)(1) requires disclosure, although as explained below, it seems very unlikely that a lawyer would ever be compelled to make such a disclosure, given the disclosure requirement’s numerous pre-conditions.

Second, Virginia Rule 1.6(c)(1) is entirely forward-looking. In other words, it requires disclosure of clients' intent to commit a future wrongdoing, not disclosure of a client's past wrongdoing.

Third, the term "substantial bodily harm" is not defined. Interestingly, that term on its face does not include mental or emotional harm – although presumably that might manifest itself in some bodily way. The word "substantially" distinguishes the disclosure-triggering type of harm from a practical joke, etc. – which might also constitute criminal assault.

Fourth, Virginia Rule 1.6(c)(1) similarly does not define the term "substantial injury" or the terms "financial interests or property." Presumably that phrase requires more than a *de minimis* injury to "another's" monetary resources or "another's" real or personal property.

Fifth, Virginia Rule 1.6(c)(1) requires disclosure of a client's intent to commit a criminal act will affect "another." Presumably a client's injury to "the financial interest or property" will always be that of "another." It is difficult to imagine a client intentionally injuring her own "potential interests or property" – although perhaps an impaired client might intend to do so. That situation presumably would be governed by Virginia Rule 1.14 (which addresses lawyers' dealings with impaired clients).

Thus, the Virginia Rule presumably would not require a lawyer to report a client's stated intent to kill himself or substantially injure himself. This contrasts with Virginia Rule 1.6(b)(7), which allows (but does not require) lawyers to disclose information "to prevent reasonably certain death or substantial bodily harm" – to anyone. This presumably

means that a lawyer whose client states an intent to kill or substantially harm herself has discretion to report that, but is not required to do so.

Sixth, Virginia Rule 1.6(c)(1)'s disclosure duty only arises if the clients' "intention" to commit such an egregious criminal act is "stated by the client." In other words, lawyers suspecting, or even completely convinced, that a client will commit such an egregious act has no duty to disclose such a client's intent. Presumably only clients stupid enough to tell their lawyers of such a criminal intent will trigger lawyers' Virginia Rule 1.6(c)(1) duty.

Seventh, even then, lawyers whose clients state an intent to commit such an egregious act must warn the clients that the lawyers will disclose the clients' criminal intent "unless thereupon abandoned."

That duty is preceding by the phrase "where feasible," which is not defined. Presumably the "where feasible" proviso would permit lawyers to disclose their clients' stated criminal intent if a client immediately runs off with a gun to commit a crime, etc. If there is any "feasible" way for the lawyer to talk the client out of following through with the client's stated criminal intent, the lawyer must do so. And presumably only stupid clients will decline to "abandon" their stated criminal intent upon learning that the lawyer will disclose it absent such abandonment. And once the client feigns abandonment of her intent, the lawyer's disclosure requirement evaporates. Lawyers might still have discretion to disclose such clients' intent under Virginia Rule 1.6(b)(7), which allows (but does not require) lawyers to disclose "such information to prevent reasonably certain death or substantial bodily harm."

Eighth, if stupid clients do not abandon their stated intent, lawyers must then "promptly reveal" the client's continuing intent. The word "promptly" is not defined.

Ninth, Virginia Rule 1.6(c)(1) similarly does not explain what information the lawyer is required to disclose – which is described simply as “information necessary to prevent the crime.”

Tenth, Virginia Rule 1.6(c)(1) does not explain to whom lawyers must report their clients’ stated intent to commit such an egregious crime.

**ABA Model Rule 1.6** does not contain a similar provision requiring lawyers to disclose protected client confidential information to prevent “reasonably certain death or substantial bodily harm.”

As explained above, ABA Model Rule 1.6(b)(1) allows (but does not require) a lawyer to disclose “[t]o the extent a lawyer reasonably believes necessary” ABA Model Rule 1.6(a) protected client confidential information “to prevent reasonably certain death or substantial bodily harm.”

As explained elsewhere, ABA Model Rule 3.3 sometimes requires disclosure in a tribunal setting. And ABA Model Rule 4.1(b) sometimes requires disclosure in tribunal and non-tribunal settings. But ABA Model Rule 1.6 does not contain any mandatory disclosure provisions. This seems counterintuitive, and probably would surprise non-lawyers. Through the ABA Model Rules, a lawyer would have no duty to disclose a client’s murderous intent to walk into the next room and kill his ex-wife – even if the lawyer is fully convinced that the client will do so in the next few minutes.

Other ABA Model Rule 1.6 provisions also focuses on clients’ future and past financial or property-related crimes or frauds.

ABA Model Rule 1.6(b)(2) (discussed above) allows (but does not require) a lawyer to disclose “[t]o the extent a lawyer reasonably believes necessary” ABA Model Rule

1.6(a) protected client confidential information “to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests of property of another and in furtherance of which the client has used or is using the lawyer’s services.” ABA Model Rule 1.6(b)(2)’s discretionary disclosure provision: (1) applies to clients’ “crime or fraud” (in contrast to Virginia Rule 1.6(c)(1)’s limitation to crimes); (2) is limited to clients’ future crimes or frauds “in furtherance of which the client has used or is using the lawyer’s services” (in contrast to Virginia Rule 1.6(c)(1), which does not have that condition).

ABA Model Rule 1.6(b)(3) (discussed above) allows (but does not require) a lawyer to disclose “[t]o the extent a lawyer reasonably believes necessary” ABA Model Rule 1.6(a) protected client confidential information “to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services.” ABA Model Rule 1.6(b)(3) contains many of the undefined terms and concepts implicated by Virginia Rule 1.6(c)(1)’s mandatory reporting provision.

### **Virginia Rule 1.6(c)(2)**

Virginia Rule 1.6(c)(2) requires (rather than just allows) a lawyer to “promptly reveal...information concerning the misconduct of another attorney” to “the appropriate professional authority” – citing Virginia Rule 8.3.

Virginia Rule 1.6(c)(2) explains that if such information “is protected under this [Virginia Rule 1.6], the attorney, after consultation, must obtain client consent.” Such a

consultation “should include full disclosure of all reasonably foreseeable consequences of both disclosure and non-disclosure to the client.”

That Virginia Rule is oddly stated. Although Virginia Rule 1.6(c)(2) states that lawyers possessing Virginia Rule 1.6(a) protected client confidential information “must obtain client consent” if disclosure is required under Virginia Rule 8.3, the Virginia Rule presumably means that lawyers may not disclose the information without client consent. In other words, lawyers are not obligated to obtain the client’s consent – the client can withhold the consent to the disclosure. The meaning should be obvious upon a moment’s reflection, but the provision could cause some confusion.

This document summarizes and analyzes Virginia Rule 1.6(c)(2) in its summary and analysis of Virginia Rule 8.3.

**ABA Model Rule 8.3** deals entirely with lawyers’ reporting duty. Virginia might be unique in addressing that duty in two entirely separate rules – Virginia Rule 1.6(c)(2) and Virginia Rule 8.3. It probably would be more clear if Virginia also followed the ABA Model Rules approach, and dealt with the reporting duty only in Virginia Rule 8.3. Of course, Virginia Rule 1.6 could refer to that Virginia Rule in a black letter provision or in a Comment. For instance, Virginia Rule 1.6(c)(1) reminds lawyers that in a tribunal setting they must comply with Virginia Rule 3.3.

### **Virginia Rule 1.6(d)**

Virginia Rule 1.6(d) requires lawyers to “make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information protected under this [Virginia] Rule.” This provision includes the type of intrusive

cyberattacks that have recently received substantial attention. The ethics rules formerly focused more on lawyers' inadvertent transmission, rather than others' intrusions.

**ABA Model Rule 1.6(c)** contains essentially the same provision.

In contrast to Virginia Rule 1.6(d)'s reference to "information protected under this Rule," ABA Model Rule 1.6(c) uses the broader ABA Model Rule definition of protected client confidential information: "information relating to the representation of a client."

## Comment

### Virginia Rule 1.6 Comment [1]

Virginia Rule 1.6 cmt. [1] addresses lawyers' role in society.

Virginia Rule 1.6 cmt. [1] first acknowledges that lawyers are “part of a judicial system charged with upholding the law.” The Virginia Rule Comment then recognizes that “[o]ne of the lawyer’s functions” is advising clients so that they “avoid any violation of the law.” Describing a “lawyer’s functions” is an odd use of that word. The word “role” would have seemed more appropriate.

**ABA Model Rule 1.6** does not contain a similar provision.

### ABA Model Rule 1.6 Comment [1]

Virginia did not adopt ABA Model Rule 1.6 cmt. [1].

ABA Model Rule 1.6 cmt. [1] addresses lawyers' confidentiality duties under ABA Model Rule 1.6 and other ABA Model Rules.

ABA Model Rule 1.6 cmt. [1] first notes that ABA Model Rule 1.6 “governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer’s representation of the client.” ABA Model Rule 1.6 cmt. [1]’s use of the term “disclosure” confirms that ABA Model Rule 1.6(a)’s term “reveal” is synonymous with “disclose.”

The phrase “during the lawyer’s representation of the client” confirms that ABA Model Rule 1.6 deals with lawyers' confidentiality duty to and possible disclosure of current clients' protected client confidential information.

ABA Model Rule 1.6 cmt. [1] next refers to other ABA Model Rules: ABA Model Rule 1.18 (“for the lawyer’s duties with respect to information provided to the lawyer by a prospective client”); ABA Model Rule 1.9(c)(2) (“for the lawyer’s duty not to reveal information relating to the lawyer’s prior representation of a former client”); ABA Model Rule 1.8(b) and [ABA Model Rule] 1.9(c)(1) (“for the lawyer’s duties with respect to the use of such information to the disadvantage of clients and former clients”).

Interestingly, ABA Model Rule 1.6 cmt. [1] uses both the term “disclosure” and “reveal.” One would have thought that this ABA Model Rule Comment would have used a consistent term for the same act.

### **Virginia Rule 1.6 Comment [2]**

Virginia Rule 1.6 cmt. [2] addresses another basis for and the rationale for a lawyer’s duty.

Virginia Rule 1.6 cmt. [2] first notes that “[t]he common law recognizes that the client’s confidences must be protected from disclosure.” Presumably this refers to lawyers’ fiduciary duties to their clients.

Virginia Rule 1.6 cmt. [2] then describes the rationale for “[t]he observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client.” As explained above, the rarely-used word “inviolate” (which also appears in Virginia Rule 1.6(a)’s prohibition on lawyers’ disclosure of “information gained in the professional relationship that the client has requested be held inviolate”) seems too stringent. Even if a client requests that his lawyer hold “inviolate” protected client confidential information, lawyers have several grounds for discretionary disclosure and several grounds for mandatory disclosure. So such information really would not be held “inviolate.”

Virginia Rule 1.6 cmt. [2] next turns to the rationale for both the common law and the ethics-based confidentiality duty. Virginia Rule 1.6 cmt. [2] explains that the confidentiality rule “not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.”

**ABA Model Rule 1.6** does not contain a similar Comment.

### **Virginia Rule 1.6 Comment [2a]**

Virginia Rule 1.6 cmt. [2a] addresses lawyers’ confidentiality duty’s beneficial societal role.

Virginia Rule 1.6 cmt. [2a] begins by noting that “[a]most without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct.” Several Virginia ethics Rules deal with the exceptional misbehaving clients in several places. For instance, Virginia Rule 1.2(e) prohibits lawyers’ involvement in clients’ improper conduct. Virginia Rule 1.6 itself allows lawyers and sometimes requires lawyers to disclose misbehaving clients’ past, ongoing, or future intended misconduct.

Virginia Rule 1.6 cmt. [2a] concludes with another optimistic view: “[b]ased upon experience, lawyers know that clients usually follow the advice given, and the law is upheld.” Like the “exception” mentioned in Virginia Rule 1.6 cmt. [2a]’s first sentence, the term “usually” and the Virginia Rule Comment’s second sentence acknowledges that some clients ignore lawyers’ advice or even use that advice to further their misbehavior.

**ABA Model Rule 1.6 cmt. [2]** contains essentially the same language in its last two sentences.

In contrast to Virginia Rule 1.6 cmt. [2a]’s statement that “lawyers know that clients usually follow the advice given” (emphasis added), ABA Model Rule 1.6 cmt. [2]’s concluding sentence states that “lawyers know that almost all clients follow the advice given.” The slightly different wording presumably is intended to be synonymous.

### **Virginia Rule 1.6 Comment [2b]**

Virginia Rule 1.6 cmt. [2b] also addresses the confidentiality duty’s rationale.

Virginia Rule 1.6 cmt. [2b] first notes as “[a] fundamental principle” that “the lawyer maintain confidentiality of information relating to the representation.” That Virginia Rule Comment uses the ABA Model Rule 1.6(a) formulation of the broad reach of protected client confidential information. As explained above, Virginia Rule 1.6(a) takes a much narrower view of protected client confidential information.

Virginia Rule 1.6 cmt. [2b] concludes by understandably noting that lawyers’ confidentiality duty encourages clients “to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.”

**ABA Model Rule 1.6 cmt. [2]** contains essentially the same language in its first several sentences.

In contrast to Virginia Rule 1.6 cmt. [2a], ABA Model Rule 1.6 cmt. [2] notes that lawyers’ confidentiality duty applies “in the absence of the client’s informed consent” – referring to ABA Model Rule 1.0(e) “for the definition of informed consent.”

ABA Model Rule 1.6 cmt. [2] also contains language identical in some ways and similar in other ways to Virginia Rule 1.6 cmt. [2], [2a], and [2b].

In contrast to those Virginia Rule 1.6 Comments, ABA Model Rule 1.6 cmt. [2] also notes that lawyers’ confidentiality duty “contributes to the trust that is the hallmark of the

client-lawyer relationship.” ABA Model Rule 1.6 cmt. [2] also explains that “[t]he lawyer needs this [factual] information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. This is similar to the themes articulated in the parallel Virginia Rule 1.6 cmt. [2], [2a] and [2b].

### **Virginia Rule 1.6 Comment [3]**

Virginia Rule 1.6 cmt. [3] addresses the difference between lawyers’ confidentiality duty and the evidentiary attorney-client privilege.

Virginia Rule 1.6 cmt. [3] first notes that “[t]he principle of confidentiality is given effect in two related bodies of law.”

Virginia Rule 1.6 cmt. [3] then mentions “the attorney-client privilege (which includes the work product doctrine) in the law of evidence.” The description of the work product doctrine is not accurate. That relatively new, and totally separate rules-based doctrine is not “included” in the ancient common law attorney-client privilege, and differs dramatically from the attorney-client privilege in many ways. Among many other things, the work product doctrine can protect documents created by non-lawyers, including persons who never hire a lawyer. On its face, the federal and the Virginia work product doctrine protect documents created by or for a party, or by or for a party’s representative. Unlike the attorney-client privilege, the work product doctrine can be overcome in certain circumstances. And in contrast to the fragile attorney-client privilege, work product generally can be shared with non-adverse third parties without waiving that more robust protection.

Virginia Rule 1.6 cmt. [3] then correctly states that the attorney-client privilege “applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client.”

This is an accurate statement. As explained above, in a tribunal-related discovery dispute lawyers’ ethics duty essentially evaporates and is replaced by the lawyers’ required assertion of evidentiary protections such as the attorney-client privilege or the work product doctrine. In other words, lawyers cannot resist discovery by pointing to their confidentiality duty. Once the tribunal rules on the discovery dispute, a lawyer losing the evidentiary protection assertion may rely on Virginia Rule 1.6(b)(1)’s “safe harbor” to disclose “such [Virginia Rule 1.6(a) protected client confidential] information to comply with law or a court order.” As also explained above, courts disagree about how much of a fight the lawyer must put up before complying with such a court order.

But Virginia Rule 1.6 cmt. [3]’s scenario describing the attorney-client privilege’s application in discovery represents only a tiny subset of normal discovery.

Perhaps it makes sense in an ethics rule focusing on lawyers’ confidentiality duty to mention situations in which lawyers themselves are called upon to assert attorney-client privilege, work product doctrine, or other evidentiary protections when someone seeks testimony or documents from the lawyers themselves. But in the vast majority of scenarios, lawyers must assert privilege or some other evidentiary protection to resist against discovery of their clients – not discovery of the lawyers themselves. In Virginia and all or nearly all states, courts usually limit the circumstances in which an adversary can depose a litigant’s trial lawyer (and sometimes even other lawyers representing the client in the litigation). Most courts prohibit such discovery (usually depositions) unless:

(1) the deposition seeks significant material information; (2) the information is not available from a source other than the lawyer; (3) the attorney-client privilege or some other evidentiary protection does not protect the communications sought in such a deposition. So it is very unlikely that lawyers would have to assert evidentiary protections in their own depositions.

Similarly, it is very unlikely that lawyers would be the subject of document requests, interrogatories, etc. Those types of discovery usually require lawyers to produce non-protected documents and non-protected information or communication – but the discovery requests nearly always go to the lawyer’s client rather than to the lawyer. Of course, in nearly all situations, documents or other information in lawyers’ possession is within the “control” of their clients – making them fair game for discovery. But somewhat oddly, most litigants and their lawyers seem to ignore this principle. Of course, the work product doctrine protection frequently covers lawyers’ files – even lawyers’ collection of intrinsically unprotected documents, case law, etc. But there could be pockets of documents in lawyers’ possession that would not deserve work product protection (such as historical documents created before anyone anticipated litigation) but might not be in the clients’ possession.

So Virginia Rule 1.6 cmt. [3]’s description of scenarios where adversaries seek discovery from lawyers covers a sliver of the situations where lawyers must assert privilege or other evidentiary protections – when representing their clients who are subject to such discovery efforts.

Virginia Rule 1.6 cmt. [3] also mentions “the rule of client-lawyer confidentiality established in professional ethics.”

Virginia Rule 1.6 cmt. [3] then explains that lawyers' confidentiality duty "applies in situations other than those where evidence is sought from the lawyer through compulsion of law" (emphasis added). That is an understatement. Lawyers' ethics confidentiality duty is not a defensive evidentiary protection, but instead applies to seal lawyers' lips at all times.

Virginia Rule 1.6 cmt. [3] next makes an important point that some lawyers seem not to understand: "[t]he [Virginia Rule 1.6] confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely to be detrimental to the client, whatever its source" (emphasis added). Although Virginia Rule 1.6 cmt. [3] erroneously states that the attorney-client privilege protects "information" (when it actually protects communications containing such information), the key part of that sentence is that the confidentiality duty applies to the specified information – "whatever its source." In other words, Virginia Rule 1.6(a) seems to protect information gained "during" the professional relationship rather than just "in" the professional relationship.

Virginia Rule 1.6 cmt. [3] concludes with a reminder that lawyers "may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law."

**ABA Model Rule 1.6 cmt. [3]** also addresses the relationship between lawyers' ethics confidentiality duties and evidentiary protections.

ABA Model Rule 1.6 cmt. [3] contains essentially the same language as Virginia Rule 1.6 cmt. [3]. But there are two significant differences.

First, in contrast to Virginia Rule 1.6 cmt. [3]'s erroneous statement that the attorney-client privilege “includes the work product doctrine,” ABA Model Rule 1.6 cmt. [3] correctly lists the work product doctrine as a separate protection, along with the attorney-client privilege and the ethics confidentiality duty.

Second, ABA Model Rule 1.6 cmt. [3] reflects ABA Model Rule 1.6(a)'s different description of protected client confidential information. As explained above, Virginia Rule 1.6 cmt. [3]'s penultimate sentence explains that Virginia Rule 1.6's confidentiality duty covers all confidential information defined in that Rule, “whatever its source.” ABA Model Rule 1.6 cmt. [3] closes its penultimate sentence with the same expansive term – “whatever its source.” But not surprisingly, that sentence contains the protected ABA Model Rule 1.6(a)'s expansive phrase: “all information relating to the representation.”

### **Virginia Rule 1.6 Comment [3a]**

Virginia Rule 1.6 cmt. [3a] addresses in-house lawyers' confidentiality duty.

Virginia Rule 1.6 cmt. [3a] explains that the ethics confidentiality duty “appl[ies] to a lawyer who represents an organization of which the lawyer is an employee.” This obviously refers to in-house lawyers, who are covered by the same ethics confidentiality duty as outside lawyers.

**ABA Model Rule 1.6** does not contain a similar provision.

But the ABA Model Rules implicitly recognize in other places that the ethics rules apply to in-house lawyers. For instance, ABA Model Rule 1.0 cmt. [3] confirms that “[w]ith respect to the law department of an organization, including the government, there is

ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct” (although acknowledging that there might be some confusion about the identity of the “client” in those settings).

#### **Virginia Rule 1.6 Comment [4]**

Virginia Rule 1.6 cmt. [4] addresses government lawyers’ confidentiality duty.

Virginia Rule 1.6 cmt. [4] warns that lawyers’ ethics confidentiality duty “applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.” It should go without saying that government lawyers must comply with all of the applicable ethics rules, including the mandatory and discretionary confidentiality disclosure provisions.

**ABA Model Rule 1.6** does not contain a similar provision.

But ABA Model Rule 1.0 cmt. [3] confirms that government lawyers are considered a “firm” when organized in a government department, and several other governmental settings (although the ABA Model Rules apply differently in those settings from in the context of private sector lawyers).

#### **ABA Model Rule 1.6 Comment [4]**

Virginia did not adopt ABA Model Rule 1.6 cmt. [4].

ABA Model Rule 1.6 cmt. [4] addresses the prohibition on lawyers’ disclosure of information that might implicate protected client confidential information.

ABA Model Rule 1.6 cmt. [4] first warns that the prohibition on revealing ABA Model Rule 1.6(a) protected client confidential information “also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead

to the discovery of such information by a third person.” This principle of course applies in every setting. But perhaps ABA Model Rule 1.6 cmt. [4] intends to focus on lawyers’ involvement in the increasingly common type of listserves in which lawyers participate in communications about topics with other lawyers not in the same firm.

ABA Model Rule 1.6 cmt. [4] then explains that such lawyers’ “use of a hypothetical to discuss issues related to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved” (emphasis added). The word “listener” seems inapt generally, and almost humorous in today’s world. Lawyers in the past may have spoken to each other and listened to each other, but they now overwhelmingly communicate electronically. So usually no one is speaking and no one is listening. That is almost surely why ABA Model Rule 1.18(a)’s use of “discusses” was replaced with the word “consults” – which denotes both oral and electronic communications rather than oral “discussions.” In ABA Model Rule 1.6 cmt. [4], the term “third person” would be much more appropriate than “listener.”

For example, a lawyer participating in listserves or similar settings presumably could ethically pose a hypothetical such as: “I am representing a powerful individual accused of misconduct with an intern – does anyone know the applicable law?” But that lawyer presumably could not ask a more pointed hypothetical, such as: “I am representing a United States President accused of misconduct with a White House intern – has anyone ever faced a similar situation?”

One might think that lawyers would be smart enough to communicate hypotheticals that do not carry such a risk, but ABA Model Rule 1.6 cmt. [4]’s serves as a useful reminder.

Although Virginia Rule 1.6 does not contain a similar provision, Virginia Rule 1.6 cmt. [5a] deals with essentially the same scenario (as explained below).

### **Virginia Rule 1.6 Comment [5]**

Virginia Rule 1.6 cmt. [5] addresses Virginia Rule 1.6(a)'s "impliedly authorized" exception.

Virginia Rule 1.6 cmt. [5] first explains that lawyers are "impliedly authorized to make disclosures about a client when appropriate in carrying out the representation." But there is a limitation: "except to the extent that the client's instructions or special circumstances limit that authority." Virginia Rule 1.6 cmt. [5] provides two examples of such permissible impliedly authorized disclosures: "a lawyer may disclose information: (1) "by admitting a fact that cannot properly be disputed"; or (2) "in negotiation by making a disclosure that facilitates a satisfactory conclusion."

These examples seem inappropriate in helping lawyers understand the contours of the "impliedly authorized" exception to their confidentiality duty. It is difficult to imagine any lawyer "disclos[ing] information by admitting a fact that cannot properly be disputed" without seeking the client's review and explicit or at least implicit consent to such a litigation – related and possibly significant disclosure. Adversaries seek such admissions to gain an advantage in the litigation, and lawyers must very carefully to avoid admitting any fact that would prejudice their client in that litigation. The same might be true in negotiation settings – although perhaps not quite as obvious as in the litigation context. Lawyers representing clients in negotiations would presumably also obtain the clients' consent to disclose ABA Model Rule 1.6(a) protected client confidential information.

So these example of disclosures that might be “impliedly authorized” are poor choices. Better examples might include lawyers mentioning clients’ identities and addresses when sending them hand-delivered packages, seeking the assistance of outside services to install or repair the law firm’s servers or other computer infrastructure, relying on a moving company to move client-identifying boxes of documents to storage, etc.

**ABA Model Rule 1.6 cmt. [5]** contains essentially the same language.

In contrast to Virginia Rule 1.6 cmt. [5], ABA Model Rule 1.6 cmt. [5] also mentions permissible intra-firm disclosure, which the Virginia Rules address in Virginia Rule 1.6 cmt. [6] (discussed below).

### **Virginia Rule 1.6 Comment [5a]**

Virginia Rule 1.6 cmt. [5a] addresses lawyers’ communications with lawyers other than their law firm colleagues – presumably in listserve and mentoring contexts.

Unique Virginia Rule 1.6 cmt. [5a] first contends that lawyers “frequently need to consult with colleagues or other attorneys in order to competently represent their clients’ interests.” That certainly is true for lawyers associated in the same law firm, or cooperating in jointly representing the same client. As discussed below, Virginia Rule 1.6 cmt. [6] adopts the common-sense approach that unless the client has instructed “that particular information be confined to specified lawyers” in the law firm, lawyers may otherwise share Virginia Rule 1.6(a) protected client confidential information with their law firm colleagues.

So presumably Virginia Rule cmt. [5a] addresses lawyers’ communications with lawyers other than their law firm colleagues. But it is not at all clear that lawyers

“frequently need to consult with . . . other attorneys in order to competently represent their clients’ interests.” For instance, mentoring communications do not help clients, although they undeniably assist the legal profession in training lawyers and fostering laudable professionalism and civility.

Virginia Rule 1.6 cmt. [5a] then switches direction – warning that “[a]n overly strict reading of the duty to protect client information would render it difficult for lawyers to consult with each other, which is an important means of continuing professional education and development” (emphasis added). This is an understandable concept, but difficult to justify. To the extent that lawyers are serving their clients by reaching out to others in listserves or other similar communications, they can point to various ethics provisions in justifying such limited disclosures (such as Virginia Rule 1.6(a)’s implied authorization exceptions). But to the extent to which such lawyers are helping themselves by developing their own expertise, it is far more difficult for them to justify such disclosure.

Virginia Rule 1.6 cmt. [5a] understandably next warns that before engaging in such consultation, lawyers “should exercise great care” to avoid the risk of privilege or other evidentiary protection waiver. Such lawyers “should endeavor when possible” to engage in such consultation “in strictly hypothetical or abstract terms,” and “should take reasonable steps” to make sure that the other lawyer with whom the lawyer consults does not have a conflict. This provision confirms that Virginia Rule 1.6 cmt. [5a] describes communications with lawyers not in the same firm.

It is not clear that either side of such consultation communications can check for conflicts without violating their respective confidentiality duties. Virginia Rule 1.6 does not contain an exception allowing disclosure of Virginia Rule 1.6(a) protected client

confidential information to identify and clear conflicts. And ABA Model Rule 1.6(b)(7)'s conflicts-clearing disclosure exception allows such disclosure only “to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm” (neither of which apply in the type of communications envisioned by Virginia Rule 1.6 cmt. [5a]).

Virginia Rule 1.6 cmt. [5a] then explains that the lawyer “from whom advice is sought must be careful to protect the confidentiality of the information given by the attorney seeking advice and must not use such information for the advantage of the lawyer or a third party.” This warning highlights the risks of such communications, despite Virginia Rule 1.6 cmt. [5a]'s laudable goal. It is difficult to imagine that lawyers reaching out for such assistance and lawyers providing such assistance enter into formal contractual arrangements under which the latter agrees not to “use such information for the advantage of the lawyer or a third party.” The lawyer seeking such advice obviously intends to use the advice to her client’s advantage (and presumably for her own advantage – or else she would not have reached out to obtain the advice). But the lawyer responding to the request really cannot help but “use” such information if it would help his client. Although it is difficult to imagine Virginia lawyers purposely “poisoning the well” by widely circulating (or even specifically targeting a particular lawyer with) information that the receiving lawyer must hold as confidential and may not use, there is always a chance for mischief.

Both the requesting lawyer and the responding lawyer have several issues to confront. Must the former obtain clients’ consent before communicating in such a

situation? How does the latter assure that he is not prejudicing his own current or future clients by responding to such requests?

Still, the absence of case law or ethics opinions describing such communications that have gone wrong probably means that this worthwhile type of peer-to-peer communications is working well.

**ABA Model Rule 1.6** does not contain a similar provision, which presumably covers listserves, mentoring and similar scenarios in which lawyers reach out to other lawyers outside their firm in an effort to competently represent their clients or to help themselves.

### **Virginia Rule 1.6 Comment [5b]**

Virginia Rule 1.6 cmt. [5b] addresses lawyers' confidentiality duties when dealing with an impaired client.

Virginia Rule 1.6 cmt. [5b] explains that lawyers' compliance with Virginia Rule 1.6(a)'s confidentiality duty "might include fulfilling duties under [Virginia] Rule 1.14, regarding a client with an impairment." This presumably applies to Virginia Rule 1.14(b)'s implied authorization to disclose certain information under Virginia Rule 1.6(a).

Virginia Rule 1.14 provides welcome detailed guidance for lawyers representing clients whose "capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or some other reason." Virginia Rule 1.14(b) explicitly indicates that in certain extreme situations lawyers "may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client." Virginia

Rule 1.14 cmt. [8] provides further guidance, including the possibility that lawyers “may seek guidance from an appropriate diagnostician.”

**ABA Model Rule 1.6** does not contain a similar provision.

ABA Model Rule 1.14 is more explicit than Virginia Rule 1.14 in explaining lawyers’ discretion to disclose impaired clients’ ABA Model Rule 1.6(a) protected client confidential information. For instance, ABA Model Rule 1.14 cmt. [8] explains that “[w]hen taking protective action pursuant to [ABA Model Rule 1.14(b)], the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary.”

### **Virginia Rule 1.6 Comment [5c]**

Virginia Rule 1.6 cmt. [5c] addresses lawyers’ dealings with outside agencies.

Virginia Rule 1.6 cmt. [5c] explains that lawyers’ compliance with Virginia Rule 1.6(b)(5) “might require a written confidentiality agreement with the outside agency to which the lawyer discloses information.” This might be a typo. That understandable warning seems more applicable to discretionary disclosure under Virginia Rule 1.6(b)(6) (describing information disclosed to “an outside agency” necessary for “office management purposes”) rather than to Virginia Rule 1.6(b)(5) (which refers to disclosure “sufficient to participate in a law office management assistance program”).

The phrase “might require” seems a bit too tentative. The phrase “normally would require” seems more accurate, given lawyers’ strong Virginia Rule 1.6 confidentiality duty.

**ABA Model Rule 1.6** does not contain a similar comment.

### **Virginia Rule 1.6 Comment [6]**

Virginia Rule 1.6 cmt. [6] addresses intra-firm communications.

Virginia Rule 1.6 cmt. [6] explains that lawyers may disclose Virginia Rule 1.6(a) protected client confidential information within a law firm “in the course of the firm’s practice” – “unless the client has instructed that particular information be confined to specified lawyers.” That type of client instruction (either initiated by the client or invited by the law firm) certainly includes the type of screening mechanisms used when lawyers hire individually disqualified lateral lawyers.

Presumably such client information might also include other situations where clients feel uncomfortable with certain lawyers in a law firm receiving their Virginia Rule 1.6(a) protected client confidential information. For example, a client might not want a lawyer to learn his protected client confidential information if that lawyer is married to or has a romantic relationship with the client’s adversary, attends the same health club as the adversary, etc. A client might understandably have the same thoughts about another lawyer who is the client’s relative, and to whom the client might understandably want to keep confidential personally embarrassing information. Even if the client trusts all the lawyers in the law firm not to intentionally or unintentionally disclose client confidences, the client might not want to risk some accidental disclosure.

**ABA Model Rule 1.6 [5]** contains the identical language in its concluding sentence.

### **Virginia Rule 1.6 Comment [6a]**

Virginia Rule 1.6 cmt. [6a] addresses a unique insurance scenario.

Virginia Rule 1.6 cmt. [6a] requires lawyers “involved in insurance defense work” to obtain clients’ “specific consent” to disclose certain Virginia Rule 1.6(a) protected client confidences to insurance companies’ auditing firms, citing Virginia LEO 1723 (9/29/99).

Virginia Rule 1.6 cmt. [6a] parallels other states’ worry that insurance company auditors were interfering with insurance defense lawyers’ relationship with their clients (the insureds). Virginia and those other states were most concerned about insurance companies relying on such auditors’ examinations to discourage or even prohibit those lawyers from undertaking the type of legal services that the insureds probably needed – but which the insurance companies thought were too expensive. So the states required the clients (the insureds) to consent to such disclosures to the auditors – thus presumably forestalling such micromanaging of the lawyers’ work.

**ABA Model Rule 1.6** does not contain a similar Comment.

### **Virginia Rule 1.6 Comment [6b]**

Virginia Rule 1.6 cmt. [6b] also addresses the rationale for Virginia Rule 1.6’s confidentiality duty – although it appears under the inappropriate sub-heading “Disclosure Adverse to Client.”

Virginia Rule 1.6 cmt. [6b] first warns that “[t]he public is better protected” if clients are encouraged to engage in “full and open communication” with their lawyers. In part, this public benefit comes from emphasizing lawyer confidentiality, and limiting lawyers’ discretion or duty to disclose client confidences. Without those prohibitions, clients might be inhibited “from revealing facts which would enable the lawyer to counsel against a wrongful course of action.” In other words, increasing those situations where lawyers

may or must disclose client confidences will reduce clients' comfort in disclosing important facts to their lawyers that the lawyers need to guide their clients in a lawful direction.

**ABA Model Rule 1.6 cmt. [6]** contains the same theme as Virginia Rule 1.6 cmt. [6b]. But that ABA Model Rule Comment is closer in substance to Virginia Rule 1.6 cmt. [8a]. So this document will summarize and analyze ABA Model Rule 1.6 cmt. [6] following Virginia Rule 1.6 cmt. [8a].

### **Virginia Rule 1.6 Comment [7]**

Virginia Rule cmt. [7] simply states “[s]everal situations must be distinguished.” It is unclear why Virginia Rule 1.6 cmt. [7] doesn’t itself describe those distinguishable situations.

**ABA Model Rule 1.6** does not contain a similar introductory Comment.

### **Virginia Rule 1.6 Comment [7a]**

Virginia Rule 1.6 cmt. [7a] addresses several prohibitions on lawyers’ misconduct.

Virginia Rule 1.6 cmt. [7a] first reminds lawyers that they “may not counsel or assist a client in conduct that is criminal or fraudulent,” (referring to Virginia Rule 1.2(c)), and may not “use false evidence” (referring to Virginia Rule 3.3(a)(4)).

Although Virginia Rule 1.6 cmt. [7a] presumably is meant as a shorthand reference to other Virginia Rules, the summaries leave out an important element of both prohibitions. Virginia Rule 1.2(c)’s prohibition applies to “conduct that the lawyer knows is criminal or fraudulent” (emphasis added). Similarly, Virginia Rule 3.3(a)(4) prohibits lawyers from “knowingly . . . offer[ing] evidence that the lawyer knows to be false” (emphases added) – and requires lawyers to “take reasonable remedial measures” “[i]f a

lawyer has offered material evidence and comes to know of its falsity” (emphasis added). So Virginia Rule 1.6 cmt. [7a] repeatedly and confusingly omits that knowledge requirement.

Virginia Rule 1.6 cmt. [7a] concludes by noting that Virginia Rule 3.3(a)(4)’s “duty [“not to use false evidence”] is essentially a special instance of the duty prescribed in [Virginia] Rule 1.2(c) to avoid assisting a client in criminal or fraudulent conduct.” That seems obvious.

**ABA Model Rule 1.6** does not contain a similar provision, although Virginia Rule 1.6 cmt. [7a] refers to black letter Virginia Rules that match the parallel ABA Model Rules.

### **Virginia Rule 1.6 Comment [7b]**

Virginia Rule 1.6 cmt. [7b] addresses lawyers’ innocent involvement in client misconduct.

Virginia Rule 1.6 cmt. [7b] acknowledges that lawyers “may have been innocently involved in past conduct by the client that was criminal or fraudulent.” That would not have violated Virginia Rule 1.2(c), because those lawyers would not have known “that the conduct is of that character.” This accurate analysis is ironic, because the preceding Virginia Rule Comment (Virginia Rule 1.6 cmt. [7a]) does not mention that knowledge requirement.

Virginia Rule 1.6 cmt. [7b] correctly notes that lawyers might not have committed an ethics violation as of that point. But of course lawyers finding themselves in that situation must stop advising their clients in a way that might assist the clients in continuing the criminal or fraudulent conduct. And those lawyers might also have discretion or even

an obligation to disclose protected client confidential information under Virginia Rule 1.6(b) or (c).

**ABA Model Rule 1.6** does not contain a similar Comment.

### **Virginia Rule 1.6 Comment [7c]**

Virginia Rule 1.6 cmt. [7c] addresses mandatory rather than discretionary disclosure scenarios in Virginia Rule 1.6(c).

The order of this discussion is somewhat odd – because the black letter mandatory disclosure provisions appear in Virginia Rule 1.6 – after the discretionary disclosure scenarios of Virginia Rule 1.6(b). In other words, Virginia Rule 1.6’s Comments first address the black letter Virginia Rule 1.6(c)’s provisions requiring rather than allowing disclosure of protected client confidential information – before addressing black letter Virginia Rule 1.6’s provisions permitting but not requiring such disclosure (the reverse of the black letter treatment of those two very different concepts).

In any event, Virginia Rule 1.6 cmt. [7c] first explains that under Virginia Rule 1.6(c)(1) lawyers must disclose clients’ intent to commit a crime that “is reasonably certain to result in death or substantial bodily harm to another or substantial injury to the financial interests or property of another.”

Virginia Rule 1.6 cmt. [7c] then warns that “[c]aution is warranted as it is very difficult for a lawyer to ‘know’ when proposed criminal conduct will actually be carried out, for the client may have a change of mind.” Virginia Rule 1.6 cmt. [7c]’s acknowledgement that it is very difficult for a lawyer to ‘know’ “when a client intends to engage in such criminal misconduct seems odd. Virginia Rule 1.6(c)(1) makes it explicitly clear that

clients' criminal intent must be "stated by the client." ABA Model Rule 1.6 does not require such explicit client acknowledgement of criminal intent.

This focus on the difficulty of lawyers "knowing" if their clients will actually engage in the described crime seems irrelevant. On its face, Virginia Rule 1.6(c)(1) requires that lawyers "shall promptly reveal . . . the intention of a client, as stated by the client" to engage in the described crimes. That black letter Virginia Rule then explains that lawyers must try to talk their clients out of engaging in the crime, but ends that analysis with the same basic concept.

Thus, Virginia Rule 1.6(c)(1) seems to have nothing to do with the lawyer's knowledge. Instead, lawyers "shall promptly reveal" their client's stated intent to commit the described crime if they are unsuccessful in talking the client out of it. It doesn't matter if "it is very difficult for a lawyer to "know" if their client will commit a crime – because that knowledge requirement is not part of the lawyer's analysis under black letter Virginia Rule 1.6(c)(1). If the client abandons her "criminal intention," the lawyer's disclosure duty evaporates. Because Virginia Rule 1.6(c)(1) triggers lawyers' disclosure obligations only if the a client's criminal intent is "stated by the client," presumably the client must similarly articulate her intent's abandonment. In other words, the lawyer presumably does not have to divine whether the client has abandoned the criminal intent without stating the abandonment. If the client does not state an abandonment of the intent, the lawyer's duty requires disclosure.

As explained above, presumably only stupid or irrationally angry clients are likely to explicitly state to their lawyers that they intend to commit the described crime. And clients would have to be even more stupid or irrationally angry for them not to abandon

the intent when confronted with the lawyer's threat of disclosure absent such abandonment. And of course clients still planning to engage in the intended criminal conduct might be lying to the lawyer about the abandonment. Those clients would then either engage in the criminal conduct anyway or fire the lawyer (or both).

Virginia Rule 1.6(c)(1) contrasts with the ABA Model Rules provision, by requiring (not just allowing) lawyers to disclose their clients' stated intent to commit a crime (not a "crime or fraud," as in the ABA Model Rule 1.6(b)(2)) that is "reasonably certain to result in substantial injury to the financial interests or property of another"—even if the client will not use the lawyer's services in "furtherance of" the crime or fraud, as required in ABA Model Rule 1.6(b)(2) and (3). One would have thought that the Virginia Rules would include a Comment discussing this mandatory disclosure obligation that differs so dramatically from the ABA Model Rules discretionary disclosure provision.

Virginia Rule 1.6 cmt. [7c] concludes by explaining that lawyers must look to Virginia Rule 3.3(a)(4) rather than Virginia Rule 1.6(c)(1) "[i]f the client's intended crime is perjury." This repeats black letter Virginia Rule 1.6(c)(1)'s direction.

The analysis facing lawyers whose clients intend to commit perjury is more complicated in Virginia than in the ABA Model Rules or in most other states. This is because Virginia Rule 1.6(c)(1) requires rather than just allows lawyers to disclose their clients' intent ("as stated by the client") to commit certain crimes, including crimes "reasonably certain to result in . . . substantial injury to the financial interests or property of another." Such intended future crimes might include perjury. The Virginia Rules deal with such tribunal-related future crimes in Virginia Rule 3.3, not in Virginia Rule 1.6. So

clients' stated intent to commit perjury does not trigger the mandatory reporting requirement under Rule 1.6(c)(1) – instead implicating Virginia Rule 3.3.

**ABA Model Rule 1.6 cmt. [7]** addresses lawyers' discretionary disclosure. As explained elsewhere, ABA Model Rule 1.6 does not require disclosure in any scenario – although ABA Model Rule 3.3 requires disclosure in certain tribunal-related contexts, and ABA Model Rule 4.1(b) sometimes might require disclosure of ABA Model Rule 1.6(a) protected client confidential information.

ABA Model Rule 1.6 cmt. [7] provides an extensive discussion of ABA Model Rule 1.6(b)(2)'s discretionary disclosure provision, which allows (but does not require) lawyers to disclose to the extent necessary ABA Model Rule 1.6(a) protected client confidential information to prevent clients from committing a crime or a fraud (defined in ABA Model Rule 1.0(d) that is “reasonably certain to result in a substantial injury to the financial or property interests of another,” and “in furtherance of which the client has used or is using the lawyer’s services.” As explained above, Virginia Rule 1.6 cmt. [7c] only provides a cursory mention of that scenario.

ABA Model Rule 1.6 cmt. [7] explains that ABA Model Rule 1.6(b)(2) “is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud” (referring to ABA Model Rule 1.10(d)'s definition of “fraud”). ABA Model Rule 1.0(d) defines “fraud” as “denot[ing] conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.” As explained above, the Virginia Terminology definition of “fraud” does not refer to extrinsic law, but instead explains that the term “fraud” “denotes” conduct “having

a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.”

ABA Model Rule 1.6 cmt. [7] next explains that ABA Model Rule 1.6(b)(2) requires disclosure of such clients’ crimes or fraud only under two conditions: (1) they are “reasonably certain to result in substantial injury to the financial or property interest of another”; and (2) “the client has used or is using the lawyer’s services” “in furtherance” of the crime or fraud.

ABA Model Rule 1.6 cmt. [7] bluntly states that “[s]uch a serious abuse of the client-lawyer relationship by the client forfeits the protection of this [ABA Model Rule 1.6].” But ABA Model Rule 1.6 cmt. [7] then notes that “[t]he client can, of course, prevent such disclosure by refraining from the wrongful conduct.” Interestingly, this mention of clients refraining from wrongful conduct contrasts with Virginia Rule 1.6 cmt. [8]’s odd suggestion (discussed below) that “[w]here practical, the lawyer should seek to persuade the client to take appropriate action” (emphasis added). The ABA Comment makes more sense.

ABA Model Rule 1.6 cmt. [7] next indicates that ABA Model Rule 1.6(b)(2) “does not require the lawyer to reveal the client’s misconduct.” This contrasts with Virginia Rule 1.6(c)’s description of scenarios where lawyers must – rather than just may – disclose ABA Model Rule 1.6(a) protected client confidential information.

ABA Model Rule 1.6 cmt. [7] then reminds lawyers that they “may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent” – referring to ABA Model Rule 1.2(d). ABA Model Rule 1.2(d) explains that “[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.”

ABA Model Rule 1.6 cmt. [7] concludes with references to ABA Model Rule 1.16 and ABA Model Rule 1.13(c). Those are discussed below, because they match the differences in Virginia Rule 1.6 cmt. [9] and Virginia Rule 1.6 cmt. [9b].

### **Virginia Rule 1.6 Comment [8]**

Virginia Rule 1.6 cmt. [8] addresses factors that lawyers consider when determining whether to exercise their discretion under Virginia Rule 1.6(b) to disclose Virginia Rule 1.6(a) protected client confidential information.

Virginia Rule 1.6 cmt. [8] lists factors that lawyers should weigh when considering disclosure under Virginia Rule 1.6(b)'s discretionary disclosure standard. As explained above, the order of the Virginia Rule 1.6 Comments does not match the order of disclosure addressed in Virginia Rule 1.6. Black letter Virginia Rule 1.6 first addresses discretionary disclosure, then mandatory disclosure. The Virginia Rule 1.6 Comments use the reverse order.

Virginia Rule 1.6 cmt. [8]'s factors include: (1) “the nature of the lawyer’s relationship with the client and with those who might be injured by the client”; (2) “the nature of the client’s intended conduct”; (3) “the lawyer’s own involvement in the transaction”; and (4) “factors that may extenuate the conduct in question.” It is unclear why lawyers’ Virginia Rule 1.6(b) discretion to disclose Virginia Rule 1.6(a) protected client confidential information would vary depending on “the nature of the lawyer’s relationship with the client.”

Virginia Rule 1.6 cmt. [8] next understandably explains that “[w]here practical, the lawyer should seek to persuade the client to take appropriate action” (emphasis added). That seems odd. In the pertinent Virginia Rule 1.6(b) provisions (presumably Virginia

Rule 1.6(b)(3) and Virginia Rule 1.6(b)(7)), the lawyer presumably would try to prevent the client from acting, not persuade the client to take action. ABA Model Rule 1.6 cmt. [7] recognizes this concept by noting that “[t]he client can, of course, prevent such disclosure by refraining from the wrongful conduct” (emphasis added).

Virginia Rule 1.6 cmt. [8] concludes with a reminder that a lawyer’s “disclosure adverse to the client’s interest should be no greater than the lawyer reasonably believes necessary to the purpose.” That limitation appears in Virginia Rule 1.6(b)’s discretionary disclosure provision. Notably, it does not appear in Virginia Rule 1.6(c)’s mandatory disclosure provision.

Interestingly, Virginia Rule 1.6 cmt. [8]’s last sentence refers to disclosure “adverse to the client’s interest.” The Virginia Rule 1.6 cmt. [8] subheading refers to “Disclosure Adverse to Client” – not adverse to the client’s “interest.” And elsewhere, the Virginia Rules and Comments frequently use the word “interests” in the plural rather than “interest” in the singular.

### **ABA Model Rule 1.6 Comment [17]**

Virginia did not adopt ABA Model Rule 1.6 cmt. [17].

ABA Model Rule 1.6 cmt. [17] addresses essentially the same situations as Virginia Rule 1.6 cmt. [8]. For instance, ABA Model Rule 1.6 cmt. [17] explains that “the lawyer may consider such factors as the nature of the lawyer’s relationship with the client and with those who might be injured by the client, the lawyer’s own involvement in the transaction and factors that may extenuate the conduct in question.” As explained above, it is not clear why lawyers’ discretion to disclose ABA Model Rule 1.6(a) protected client

confidential information would vary according to “the nature of the lawyer’s relationship with the client.”

But there are several differences between ABA Model Rule 1.6 cmt. [17] and Virginia Rule 1.6 cmt. [8].

First, in contrast to Virginia Rule 1.6 cmt. [8], ABA Model Rule Comment 1.6 cmt. [17] assures lawyers that “a lawyer’s decision not to disclose as permitted by [ABA Model Rule 1.16(b)] does not violate this Rule.” Virginia presumably would take the same approach. By definition, lawyers who do not exercise their discretion to disclose ABA Model Rule 1.6(a) protected client confidential information have not violated any ABA Model Rule – because they have discretion to do so or not do so. But ABA Model Rule 1.6 cmt. [17]’s assurance provides some comfort to lawyers in high-stakes situations.

Second, ABA Model Rule 1.6 cmt. [17] then warns that “[d]isclosure may be required, however, by other Rules.” ABA Model Rule 1.6 cmt. [17] concludes with a list of rules that “require disclosure only if such disclosure would be permitted by [ABA Model Rule 1.6] paragraph (b): ABA Model Rules 1.2(d), 4.1(b), 8.1 and 8.3.

ABA Rule 1.6 cmt. [17] then mentions ABA Model Rule 3.3 – noting that ABA Model Rule 3.3(c) “on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by [ABA Model Rule 1.6].”

But ABA Model Rule 3.3(a) and (b) describes situations when lawyers might be required to make such disclosures. ABA Model Rule Model 3.3(a) addresses lawyers’ own statements to a tribunal, lawyers’ duty to disclose adverse fact to a tribunal, and the prohibition on lawyers’ offering knowingly false evidence to a tribunal. ABA Model Rule 3.3(b) requires lawyers to “take reasonable remedial measures, including, if necessary,

disclosure to the tribunal” if a lawyer “who represents a client in an adjudicative proceeding . . . knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.” ABA Model Rule 3.3(c) explains that those mandatory disclosure duties “continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by [ABA Model] Rule 1.6.”

Virginia Rule 3.3(a)(4) requires lawyers learning that they have offered false material evidence to “take reasonable remedial measures.” Although Virginia Rule 3.3 does not contain the phrase “including, if necessary, disclosure to the tribunal” (which ABA Model Rule 3.3(a)(3) contains), Virginia Rule 3.3(a)(4) almost certainly requires such disclosure as a last resort. Virginia Rule 3.3(d) essentially matches ABA Model Rule 3.3(b), but requires such lawyers to “promptly reveal the fraud to the tribunal” (in contrast to ABA Model Rule 3.3(b)’s requirement that such lawyers “take reasonable remedial measures, including, if necessary, disclosure to the tribunal”). Virginia Rule 3.3(e) follows ABA Model Rule 3.3(c) in explaining that those mandatory disclosure duties “continue until the conclusion of the proceeding, and apply even if compliance requires disclosure of information protected by [Virginia] Rule 1.6.”

There is a difference between lawyers’ disclosure of information: (1) “protected by” Virginia Rule 1.6(a); (2) identified in Virginia Rule 1.6(b) as within the lawyer’s discretion to disclose (and, for that matter, information protected by Virginia Rule 1.6(a) but which lawyers must disclose under Virginia Rule 1.6(c)). In other words, all of that information receives Virginia Rule 1.6(a) protection, but a subset of that falls within

lawyers' discretion to disclose under Virginia Rule 1.6(b) and a smaller subset falls within lawyers' required disclosure under Virginia Rule 1.6(c).

### **ABA Model Rule 1.6 Comment [16]**

Virginia did not adopt ABA Model Rule 1.6 cmt. [16].

ABA Model Rule 1.6 cmt. [16] addresses limits on otherwise permitted ABA Model Rule 1.6(b) disclosures.

ABA Model Rule 1.6 cmt. [16] provides general guidance about lawyers' exercise of their discretion under ABA Model Rule 1.6(b) to disclose protected client confidential information.

First, ABA Model Rule 1.6 cmt. [16] unsurprisingly “permits disclosure only to the extent the lawyer reasonably believes that disclosure is necessary to accomplish one of the purposes specified.”

Similar to Virginia Rule 1.6 cmt. [8]'s suggestion that “[w]here practical, the lawyer should seek to persuade the client to take appropriate action,” ABA Model Rule 1.6 cmt. [16] next suggests that lawyers “should first seek to persuade the client to take suitable action to obviate the need for disclosure.” Those suggestions seem inapt. In both ABA Model Rule 1.6(b) and Virginia Rule 1.6(b) scenarios, lawyers should try to convince their clients to forego actions (which might trigger the lawyers' disclosure discretion), not take them. ABA Model Rule 1.6 cmt. [8] seems to take the right approach – that after the client has already acted “the client no longer has the option of preventing disclosure by refraining from the wrongful conduct.” Thus, ABA Model Rule 1.6 cmt. [8] seems to properly focus on the client's inability to take steps eliminating the lawyer's discretion to make ABA Model Rule 1.6(b) disclosures.

If that fails, ABA Model Rule 1.6 cmt. [16] then states that “the disclosure should be no greater than the lawyer reasonably believes necessary to accomplish the purpose.” Oddly, ABA Model Rule 1.6 cmt. [16] uses essentially the identical words just two sentences apart. ABA Model Rule 1.6 cmt. [16] then explains that “[i]f the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

Virginia Rule 1.6 cmt. [10] (discussed below) contains this concept.

### **Virginia Rule 1.6 Comment [8a]**

Virginia Rule 1.6 cmt. [8a] addresses lawyers’ discretion to reveal “such [Virginia Rule 1.6(a) protected client confidential] information to prevent reasonably certain death or substantial bodily harm” under Virginia Rule 1.6(b)(7).

Virginia Rule 1.6 cmt. [8a] first “recognizes the overriding value of life and physical integrity.” Because of this “overriding value,” Virginia Rule 1.6(b)(7) “permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm.”

It seems odd that Virginia Rule 1.6 cmt. [8a] emphasizes the “overriding value of life and physical integrity” in explaining that Virginia Rule 1.6 (b)(7) only permits – but does not require – disclosure of acts that might cause someone’s “reasonably certain death or substantial bodily harm.” As explained above, under Virginia Rule 1.6(c)(1), lawyers must disclose their clients’ stated intent to commit a criminal act “reasonably certain to cause death or substantial bodily harm.” But under Virginia Rule 1.6(b)(7), lawyers only have discretion to disclose clients’ or non-clients’ action that might cause

“reasonably certain death or substantial bodily harm” (whether that action is criminal or not). This separate discretionary provision presumably also covers clients’ intent to commit such egregious misconduct even if not “stated by the client” (which is the Virginia Rule 1.6(c)(1) trigger for that Virginia Rule’s mandatory disclosure requirement.)

Virginia Rule 1.6 cmt. [8a] concludes by helpfully explaining that “[s]uch harm [presumably either “death” or “substantial bodily harm”] is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat.”

**ABA Model Rule 1.6 cmt. [6]** addresses ABA Model Rule 1.6(b)(1)’s discretionary disclosure “to the extent the lawyer reasonably believes necessary . . . to prevent reasonably certain death or substantial bodily harm.”

ABA Model Rule 1.6 cmt. [6] contains similar language about the public interest favoring confidentiality, but the equally important public interest favoring “the overriding value of life and physical integrity.”

Similar to Virginia Rule 1.6 cmt. [8a], ABA Model Rule 1.6 cmt. [6] then explains what the term “reasonably certain” means: “[s]uch harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat.”

That is an odd pairing. The latter situation’s definition includes the former. But the “suffered imminently” subset provides a good reminder that lawyers must act in such extreme situations. ABA Model Rule 1.6 cmt. [6] provides an example not found in the

Virginia Rules or a Virginia Rule Comment – “a lawyer who knows that a client has accidentally discharged toxic waste into a town’s water supply” that creates a “present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease” “may reveal this information to the authorities” – “if the lawyer’s disclosure is necessary to eliminate the threat or reduce the number of victims.” Virginia Rule 1.6’s Comments do not contain a similar example.

Given this dire scenario, one might wonder why ABA Model Rule 1.6 does not require disclosure, rather than just permit disclosure.

### **Virginia Rule 1.6 Comment [9]**

Virginia Rule 1.6 cmt. [9] addresses lawyers’ duties when clients use their lawyers’ services in criminal or fraudulent conduct.

Virginia Rule 1.6 cmt. [9] requires that lawyers “must withdraw” under Virginia Rule 1.16(a)(1) if their services “will be used by the client in materially furthering a course of criminal or fraudulent conduct.”

Virginia Rule 1.16(a)(1) is more generic, requiring lawyers’ withdrawal if “the representation will result in violation of the [Virginia] Rules of Professional Conduct or other law.” Virginia Rule 1.16 cmt. [2] states that “[a] lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the [Virginia] Rules of Professional Conduct or other law” (emphasis added). The addition of “ordinarily” in Virginia Rule 1.16 cmt. [2] seems to offer discretion, in contrast to Virginia Rule 1.6 cmt. [9]’s mandatory withdrawal requirement. And Virginia Rule 1.16 cmt. [2] does not have the materiality standard found in Virginia Rule 1.6 cmt. [9].

Virginia Rule 1.6 cmt. [9]’s reliance on Virginia Rule 1.16(a)(1) for requiring withdrawal seems misplaced. The Virginia Rule Comment describes a scenario in which the client has not yet used the lawyer’s services “in materially furthering a course of criminal or fraudulent conduct.” In that situation, Virginia Rule 1.16(b)(1) seems a better fit than Virginia Rule 1.16(a)(1). Virginia Rule 1.16(b)(2) explains that “a lawyer may withdraw from representing a client . . . if . . . the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is illegal or unjust.” In other words, such lawyers are not required to withdraw, but may withdraw – presumably after refusing to assist the client in such misconduct.

Virginia Rule 1.6 cmt. [9]’s reference to “a course of criminal or fraudulent conduct” also seems inapt (emphasis added). If lawyers must withdraw (which does not seem correct), it would seem that they would be obligated to withdraw if the client used the lawyer’s services to conduct even one “criminal or fraudulent” act – not just if the client engages in a “course of criminal or fraudulent conduct.”

**ABA Model Rule 1.6 cmt. [7]** also addresses lawyers’ withdrawal in these circumstances.

ABA Model Rule 1.6 cmt. [7]’s penultimate sentence simply refers to ABA Model Rule 1.16 “with respect to the lawyer’s obligation or right to withdraw from the representation of the client in such circumstances.”

ABA Model Rule 1.6 cmt. [7] inexplicably fails to mention ABA Model Rule 1.2 which covers this issue. As ABA Model Rule 1.2 cmt. [10] explains, “[t]he lawyer must . . . withdraw from the representation of the client” when the lawyer has assisted the client

“in conduct the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent.”

### **Virginia Rule 1.6 Comment [9a]**

Virginia Rule 1.6 cmt. [9a] addresses lawyers’ post-withdrawal duties and discretion.

Virginia Rule 1.6 cmt. [9a] first warns that after withdrawal lawyers must refrain “from making disclosure of the client’s confidences,” except as “otherwise provided in [Virginia] Rule 1.6.” After lawyers withdraw, their confidentiality duty is governed by Virginia Rule 1.9, not Virginia Rule 1.6. Although the latter’s disclosure provision (Virginia Rule 1.9(b)(1)) refers back to Virginia Rule 1.6, it would have seemed more appropriate to apply the former-client confidentiality rule when discussing former clients’ protected client confidential information.

Virginia Rule 1.6 cmt. [9a] next notes that “[n]either this [Virginia] Rule [1.6] nor [Virginia] Rule 1.8(b), nor [Virginia] Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation or the like.”

Interestingly, Virginia Rule 1.6 cmt. [9a]’s provision (often called the “noisy withdrawal” provision) only indicates that Virginia Rule 1.16(d) does not prevent withdrawing lawyers from being their withdrawal noisy. This contrasts with ABA Model Rule 1.2 cmt. [10] and ABA Model Rule 4.1 cmt. [3], both of which warn that “[i]t may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation, or the like” (emphasis added).

### **Virginia Rule 1.6 Comment [9b]**

Virginia Rule 1.6 cmt. [9b] addresses lawyers' duties when representing organizations.

Virginia Rule 1.6 cmt. [9b] first acknowledges that “[w]here the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization.” Thus, “[w]here necessary to guide conduct in connection with this [Virginia Rule 1.6], the lawyer may make inquiry within the organization as indicated in [Virginia] Rule 1.13(b).”

Virginia Rule 1.13(b) describes lawyers' duties when the lawyer “knows” that a corporate client's employee is engaged in or intends to engage in specified wrongdoing, and notes that the lawyer may have a duty to “report up” to higher corporate management. Significantly, Virginia Rule 1.13(b) and this Virginia Rule 1.6 cmt. [9b] address lawyers' possible “reporting up” within the organization, not “reporting out” of the organization.

**ABA Model Rule 1.6 cmt. [7]** mentions ABA Model Rule 1.13(c), “which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.” That reference refers to such lawyers “reporting out” of the organization, rather than “reporting up” within the organization.

### **ABA Model Rule 1.6 Comment [8]**

Virginia did not adopt ABA Model Rule 1.6 cmt. [8].

ABA Model Rule 1.6 cmt. [8] addresses “the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated” under ABA Model Rule 1.6(b)(3).

ABA Model Rule 1.6 cmt. [8] first notes that in such a situation “the client no longer has the option of preventing disclosure by refraining from the wrongful conduct.” But ABA Model Rule 1.6 cmt. [8] acknowledges that “there will be situations in which the loss suffered by the affected person can be prevented, rectified, or mitigated.” That language is similar to ABA Model Rule 1.2 cmt. [10]’s “noisy withdrawal” provision (discussed above).

ABA Model Rule 1.6 cmt. [8] concludes by assuring that ABA Model Rule 1.6(b)(3) “does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.” That certainly makes sense.

There is no similar Virginia Rule provision, because the Virginia Rules do not have a parallel to ABA Model Rule 1.6(b)(3) – allowing lawyers to disclose Virginia Rule 1.6(a) protected client confidential information to “mitigate or rectify” substantial financial or property-related client crimes or frauds “in furtherance of which the client has used the lawyer’s services.” To be sure, Virginia Rule 1.6(b)(3) allows – but does not require – disclosure of 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.” Of course, such disclosure could be intended to rectify or mitigate the impact of some client misconduct that has already occurred. And Virginia Rule 1.6(c)(1)’s mandatory disclosure obligation requires disclosure if the client states the intent to commit a sufficiently egregious financial or property-related crime (even if it does not involve using the lawyer’s services).

### **ABA Model Rule 1.6 Comment [9]**

Virginia did not adopt ABA Model Rule 1.6 cmt. [9].

ABA Model Rule 1.6 cmt. [9] addresses lawyers' discretion under ABA Model Rule 1.6(b)(4) to disclose ABA Model Rule 1.6(a) protected client confidential information when obtaining advice about compliance with the ethics rules.

ABA Model Rule 1.6 cmt. [9] begins by assuring that “[a] lawyer’s confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer’s personal responsibility to comply with these [ABA Model] Rules.” The ABA Model Rule Comment then notes that “[i]n most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation.”

ABA Model Rule 1.6 cmt. [9] concludes by explaining that ABA Model Rule 1.6(b)(4) “permits such disclosure” “[e]ven when the disclosure is not impliedly authorized” – “because of the importance of a lawyer’s compliance with the [ABA Model] Rules of Professional Conduct.”

Black letter Virginia Rule 1.6 does not contain this exception, so there is no parallel Virginia Rule 1.6 Comment. Presumably Virginia lawyers can rely on Virginia Rule 1.6(a)’s “impliedly authorized” standard to disclose such information.

### **Virginia Rule 1.6 Comment [10]**

Virginia Rule 1.6 cmt. [10] addresses Virginia Rule 1.6(b)(2)’s self-defense exceptions.

Significantly, Virginia Rule 1.6 cmt. [10] first implicitly explains that Virginia Rule 1.6(b)(2) allows disclosure when non-clients (or presumably the Bar) allege a lawyer’s misconduct – either “complicity of the lawyer in a client’s conduct or other misconduct of the lawyer involving representation of the client.” It might seem counterintuitive that

lawyers may rely on this self-defense confidentiality exception when non-clients or a Bar disciplinary entity asserts “a legal claim or disciplinary charge” against the lawyer.

Such defensive use makes sense if clients or former clients attack lawyers, but the self-defense exception clearly applies even when non-clients do so. Thus, lawyers defending themselves in such scenarios may disclose Virginia Rule 1.6(a) protected client information “to the extent the lawyer” “reasonably believes” necessary, even if the client insists that they not disclose it, begs them not to disclose it, etc.

Virginia Rule 1.6 cmt. [10] then turns to timing, explaining that “[t]he lawyer’s right to respond arises when an assertion of such complicity has been made.”

Virginia Rule 1.6 cmt. [10] explains that the self-defense exception allowing disclosure of Virginia Rule 1.6(a) protected client confidential information if a third party alleges the lawyer’s “complicity” in some wrongdoing “does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion.” It is difficult to imagine the logistics of such scenarios. Virginia Rule 1.6 cmt. [10] apparently permits lawyers to meet with an accuser or a Bar disciplinary official without the client’s presence – and disclose Virginia Rule 1.6(a) protected client confidential information. And this explanation of such somewhat surprisingly permissible disclosure seems to put the cart before the horse. One would think that Virginia Rule 1.6 cmt. [10] would first have mentioned lawyers’ notice to their client and request that the client “respond appropriately.” But Virginia Rule 1.6 cmt. [10] mentions that second in the appropriate lawyer reaction (discussed below).

Virginia Rule 1.6 cmt. [10] next explains that “[w]here practicable and not prejudicial to the lawyer’s ability to establish the defense, the lawyer should advise the client of the third party’s assertion against the lawyer and request that the client respond appropriately.” As explained above, one would have thought that lawyers would first take this step, and only then communicate directly with the accuser (which Virginia Rule 1.6 cmt. [10] mentions first, as discussed above). Thus, Virginia Rule 1.6 cmt. [10] implicitly acknowledges that lawyers do not need clients’ consent to make such disclosures.

Virginia Rule 1.6 cmt. [10] then understandably reminds lawyers that such self-defense disclosure “should be no greater than the lawyer reasonably believes is necessary to vindicate innocence,” and that “the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.”

Thus, Virginia Rule 1.6 cmt. [10] focuses both on content restrictions and logistics. In other word, lawyers relying on this discretionary self-defense disclosure provision must seek to disclose the protected client confidential information only in camera or under seal, pursuant to a “lawyers eyes only” or other protective order, etc.

**ABA Model Rule 1.6 cmt. [10]** contains similar language. Several ABA Model Rule 1.6 cmt. [10] sentences are identical to Virginia Rule 1.6 cmt. [5]’s sentences. Virginia Rule 1.6 cmt. [10a] contains some of the same sentences.

## **Virginia Rule 1.6 Comment [10a]**

Virginia Rule 1.6 cmt. [10a] also addresses lawyers' defensive and offensive disclosures. Some Virginia Rule 1.6 cmt. [10a] language matches language in ABA Model Rule 1.6 cmt. [10].

Virginia Rule 1.6 cmt. [10a] contains an odd combination of scenarios allowing lawyers' defensive disclosure and offensive disclosure of Virginia Rule 1.6(a) protected client confidential information.

First, Virginia Rule 1.6 cmt. [10a] addresses lawyers' defensive disclosures. The Virginia Rule Comment begins by assuring that "[i]f the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge." Virginia Rule 1.6 cmt. [10a] then describes the breadth of the possible scenarios that trigger the self-defense exception: "[s]uch a charge can arise in a civil, criminal or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or in a wrong alleged by a third person" (providing an example: "a person claiming to have been defrauded by the lawyer and client acting together"). These examples thus highlight Virginia Rule 1.6(b)(2)'s remarkably broad self-defense exception.

Second, Virginia Rule 1.6 cmt. [10a] also includes language about lawyers' discretion to disclose Virginia Rule 1.6(a) protected client confidences affirmatively rather than defensively – which would seem to belong in a separate Comment, given the very separate considerations. Virginia Rule 1.6 cmt. [10a] begins with an example rather than a general rule – explaining that "[a] lawyer entitled to a fee is permitted by [Virginia Rule 1.6(b)(2)] to prove the services rendered in an action to collect it." Virginia Rule 1.6 cmt.

[10a] then explains this approach’s rationale: “[t]his aspect of [Virginia Rule 1.6(b)(2)] expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.”

Virginia Rule 1.6 cmt. [10a] concludes with a warning that lawyers “must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.” This essentially repeats the concluding sentence in Virginia Rule 1.6 cmt. [10], focusing both on content restrictions and logistical arrangements.

**ABA Model Rule 1.6 cmt. [11]** contains the identical example about lawyers using information to collect a fee, and the rationale for that approach.

### **Virginia Rule 1.6 Comment [11]**

Virginia Rule 1.6 cmt. [11] addresses lawyers’ duty to assert evidentiary protections.

Virginia Rule 1.6 cmt. [11] first reminds lawyers that they must invoke the attorney-client privilege when applicable if “called as a witness to give testimony concerning a client, absent waiver by the client.” Of course, lawyers must assert any evidentiary protection such as the attorney-client privilege or the work product doctrine in many other scenarios. It is quite rare for lawyers themselves to be “called as a witness to give testimony concerning a client.” As in most states, Virginia courts normally prohibit discovery of lawyers unless: (1) the information the lawyer possesses is critical; (2) the information is not protected by the attorney-client privilege or some other evidentiary

protection; and (3) there is no alternative source of such critical information on which the adversary can rely.

Lawyers instead normally face attorney client-privilege and work product issues when producing client documents, defending client or third-party witness depositions, etc. Lawyers must always remember their duty to assert all evidentiary protections against disclosure of protected client confidential information – not just in the exceedingly rare scenario described in Virginia Rule 1.6 cmt. [11].

Virginia Rule 1.6 cmt. [11] next mentions lawyers' requirement to "comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client" (emphasis added). The phrase "give information about the client" seems awkward. The word "disclose" or "reveal" would have been more consistent with Virginia Rule 1.6's (and ABA Model Rule 1.6's) terminology use.

Interestingly, Virginia Rule 1.6 cmt. [11] does not refer to Virginia Rule 1.6(b)(1), which allows – but does not require – lawyers to disclose "such information to comply with law or a court order." As explained above, Virginia Rule 1.6(b)(1) essentially provides a safe harbor from ethics discipline for lawyers who are obligated by law or a court order to disclose protected client confidential information.

Although not citing a Virginia Rule 1.6 provision, Virginia Rule 1.6 cmt. [11] then refers to Virginia 3.4(d) as an exception to lawyers' duty to comply with court orders. But Virginia Rule 3.4(d) is not an exception to lawyers' general duty to comply with a court order or with some other legal obligation to disclose Virginia Rule 1.6(a) protected client confidential information. Instead, Virginia Rule 3.4(d) states that lawyers may not "[k]nowingly disobey or advise the client to disregard a . . . ruling of a tribunal" – but also

recognizes that “the lawyer may take steps, in good faith, to test the validity of such . . . ruling.” It seems possible that such an ethically permissible “test” could be made to an otherwise “final” court order, but of course it would be more logical to think of a challenge rendering the order non-final until the challenge has been addressed by some other court. So it is somewhat confusing for Virginia Rule 1.6 cmt. [11] to begin its explanation that lawyers must comply with “final orders of a court” (emphasis added) requiring disclosure of Virginia Rule 1.6(a) protected client confidential information with the phrase “[e]xcept as permitted by [Virginia] Rule 3.4(d).” But lawyers presumably will understand the meaning of that phrase, recognizing: (1) their freedom to challenge court orders requiring such disclosures; (2) their ultimate duty to comply with a court order if they are unsuccessful in challenging it; and (3) their Virginia Rule 1.6(b)(1) ethical “safe harbor” when doing so. In other words, lawyers know that they may challenge court orders or other legal obligations requiring them to disclose Virginia Rule 1.6(a) protected client confidential information – but in a game of chicken, they must ultimately blink.

Black letter Virginia Rule 1.6(b)(1) seems to allow lawyers to ignore such court orders or law by placing the scenario in Virginia Rule 1.6(b)’s discretionary disclosure list, rather than in Virginia Rule 1.6(c)’s mandatory disclosure list. But both under the Virginia Rules and the ABA Model Rules, this seemingly discretionary right to disclose protected client confidential information required by court order or law properly should be seen as a safe harbor – allowing lawyers to comply with court orders or law without violating their confidentiality duty.

### **ABA Model Rule 1.6 Comment [15]**

Virginia did not adopt ABA Model Rule 1.6 cmt. [15].

ABA Model Rule 1.6 cmt. [15] addresses lawyers' obligation or discretion in the face of court orders or law requiring disclosure of ABA Model Rule 1.6(a) protected client confidential information.

ABA Model Rule 1.6 cmt. [15] first recognizes that “[a] lawyer may be ordered to reveal information relating to the representation of a client by court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure.” ABA Model Rule 1.6 cmt. [15] requires that lawyers facing that scenario must (absent informed client consent to the contrary) assert “all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law.”

In contrast to Virginia Rule 1.6 cmt. [15], ABA Model Rule 1.6 cmt. [15] also contains an additional sentence not found in Virginia Rule 1.6 cmt. [11]. That sentence requires lawyers to “consult with the client about the possibility of appeal (“in the event of an adverse ruling”) to the extent required by [ABA Model] Rule 1.4.” ABA Model Rule 1.4 requires lawyers to communicate material facts to their clients and consult with them in specified circumstances.

ABA Model Rule 1.6 cmt. [15] concludes with an assurance that ABA Model Rule 1.6(b)(6) “permits the lawyer to comply with the court’s order” – unless the lawyer seeks “review” of such orders. That presumably means that after an unsuccessful review, lawyers must ultimately comply with a court order or other legal obligation to disclose ABA Model Rule 1.6(a) protected client confidential information. And under ABA Model Rule 1.6(b)(6)’s “safe harbor” provision, they may do so without violating their confidentiality duty.

## **Virginia Rule 1.6 Comment [12]**

Virginia Rule 1.6 cmt. [12] addresses other possible sources of lawyers' disclosure duty.

Virginia Rule 1.6 cmt. [12] first points to several Virginia Rules that permit or require lawyers to disclose protected client confidential information – referring to Virginia Rules 2.3, 3.3 and 4.1. Virginia Rule 2.3 addresses lawyers' evaluations intended for disclosure to third persons. Presumably that type of disclosure would be contractual rather ethics-driven. Virginia Rule 3.3 addresses lawyers' disclosure duties to tribunals, and sometimes requires disclosure to correct some earlier false evidence, to avoid assisting clients' wrongful acts or in an *ex parte* setting. Virginia Rule 4.1(b) requires disclosure if failing to disclose a fact would assist "a criminal or fraudulent act by a client."

Virginia Rule 1.6 cmt. [12] next explains that "other provisions of law" might require or allow a lawyer to "give information about a client." As with Virginia Rule 1.6 cmt. [11], the phrase "give information about a client" seems inappropriately colloquial.

Virginia Rule 1.6 cmt. [12] then acknowledges that "[w]hether another provision of law supersedes [Virginia] Rule 1.6 is a matter of interpretation beyond the scope of these [Virginia] Rules," but then states that "a presumption should exist against such a supersession." This provision presumably means that lawyers must resolve all doubts in favor of resisting disclosure of Virginia Rule 1.6(a) protected client confidential information. Lawyers thus must assert any evidentiary protections at every stage of the discovery process, may challenge court orders or some other legal obligation requiring disclosure of such information, and may seek other judicial review of such orders. But ultimately they must comply with a court order or other legal obligation to make such

disclosure. In doing so, lawyers may rely on Virginia Rule 1.6(a)(b)(1)'s "safe harbor" provision.

**ABA Model Rule 1.6 cmt. [12]** contains language similar to that in Virginia Rule 1.6 cmt. [12].

But there are several differences between ABA Model Rule 1.6 cmt. [12] and Virginia Rule 1.6 cmt. [12].

First, in contrast to Virginia Rule 1.6 cmt. [12], ABA Model Rule 1.6 cmt. [12] does not cite other ABA Model Rules that may require or permit such disclosure of protected client confidential information.

Second, in contrast to Virginia Rule 1.6 cmt. [12], ABA Model Rule 1.6 cmt. [12] does not recognize a presumption against other law superseding ABA Model Rule 1.6's confidentiality duty.

Third, in contrast to Virginia Rule 1.6 cmt. [12], ABA Model Rule 1.6 cmt. [12] reminds lawyers that they "must discuss the matter with the client to the extent required by [ABA Model] Rule 1.4" if disclosure of information "appears to be required by other law." ABA Model Rule 1.4(a)(3) requires (among other things) that lawyers "shall . . . keep the client reasonably informed about the status of the matter" on which the lawyer represents the client.

ABA Model Rule 1.6 cmt. [12] concludes with an assurance that that ABA Model Rule 1.6(b)(6) "permits the lawyer to make such disclosures as are necessary to comply with the law" – if "the other law supersedes this [ABA Model Rule 1.6] and requires disclosure." ABA Model Rule 1.6(b)(6) is the "safe harbor" provision that is parallel to Virginia Rule 1.6(b)(1).

## **Virginia Rule 1.6 Comment [13]**

Virginia Rule 1.6 cmts. [13] addresses the unique Virginia Rule 1.6(c)(2) provision requiring lawyers to disclose protected client confidential information about other lawyers' sufficiently egregious professional misconduct.

This document summarizes and analyzes more fully Virginia Rule 1.6 cmt. [13] in its summary and analysis of Virginia Rule 8.3.

Inexplicably, Virginia Rule 1.6 cmt. [13] does not explicitly refer to Virginia Rule 8.3, the main Virginia Rule that deals extensively with such reporting of other lawyers' misconduct.

Virginia Rule 1.6 cmt. [13] first explains that “[s]elf-regulation of the legal profession occasionally places attorneys in awkward positions with respect to their obligations to clients and to the profession.” As in other similar references, acknowledging that lawyers' situation is “awkward” does not help much with the analysis.

Virginia Rule 1.6 cmt. [13] then essentially repeats black letter Virginia Rule 1.6(c)(2)'s requirement that lawyers possessing “information indicating that another attorney has violated “the Virginia Rules” which they “learned during the course of representing a client and protected as a confidence or secret under [Virginia] Rule 1.6 must “request the permission of the client to disclose the information necessary to report the misconduct to disciplinary authorities.” Virginia Rule 1.6 cmt. [13]'s language contains a more sensible and logical explanation than black letter Virginia Rule 1.6(c)(2)'s language – that in such a situation, “the attorney, after consultation, must obtain client consent.” Virginia Rule 1.6 cmt. [13] makes it clear that black letter Virginia Rule 1.6(c)(2) does not actually require lawyers to obtain the client's consent to such disclosure – but

instead means that lawyers must seek their client's consent and may not make such disclosure without their client's consent.

It is important to remember that Virginia Rule 1.6(c)(2) and Virginia Rule 8.3(d) applies only to the Virginia-specific range of information protected by Virginia Rule 1.6(a). Unlike ABA Model Rule 1.6(a)'s broad definition of protected client confidential information as "information relating to the representation of a client," Virginia Rule 1.6(a) defines such protected client confidential information as: (1) information protected by the attorney-client privilege; (2) information "gained in the professional relationship that the client has requested be held inviolate;" and (3) "information gained in the professional relationship . . . the disclosure of which would be embarrassing or would be likely to be detrimental to the client." This narrower definition presumably excludes from such protection significant information about other lawyers' ethics violations. Such information may fall under the ABA Model Rule definition of "information relating to the representation of a client," but such information: (1) presumably would not be protected by the attorney-client privilege (which covers clients' request for legal advice and lawyers' responsive advice); (2) might not be information the client has asked "be held inviolate" (unless the client doesn't want to harm the other lawyer or has some other reason to hesitate in reporting the other lawyer's ethics violation); and (3) probably would not be information the disclosure of which "would be embarrassing or would be likely to be detrimental to the client" (absent the earlier mentioned factors). So the Virginia Rule 1.6 and Virginia Rule 8.3 provisions probably do not include broad range of information lawyers gain about other lawyers' ethics violations.

The ABA Model Rules understandably deal exclusively with such scenarios in ABA Model Rule 8.3, as do most if not all other states.

### **Virginia Rule 1.6 Comment [14]**

Virginia Rule 1.6 cmt. [14] also addresses lawyers' occasional duty to report other lawyers' misconduct.

This document summarizes and analyzes more fully Virginia Rule 1.6 cmt. [14] in its summary and analysis of Virginia Rule 8.3.

Virginia Rule 1.6 cmt. [14] first explains that lawyers must “promptly” disclose other lawyers' misconduct in those circumstances, but assures that “a lawyer does not violate [Virginia Rule 1.6(c)(2)] by delaying in reporting attorney misconduct for a minimum period of time necessary to protect a client's interests.” Virginia Rule 1.6 cmt. [14] provides an example: “a lawyer might choose to postpone reporting attorney misconduct until the end of litigation when reporting during litigation might harm the client's interests.”

Such forbearance might avoid a costly and distracting sideshow. It might also avoid an adversary's allegation that the reporting lawyer violated Virginia Rule 3.4(i) by “[p]resent[ing] . . . disciplinary charges [against the lawyer whose misconduct was reported] solely to obtain an advantage in a civil matter.”

Because ABA Model Rule 1.6 does not address such disclosure of other lawyers' misconduct (instead understandably and logically dealing exclusively with that situation in ABA Model Rule 8.3), the ABA Model Rule 1.6 Comments do not contain a similar provision. ABA Model Rule 1.6 cmt. [13] addresses lawyers' limited discretion under ABA Model Rule 1.6(b)(7) to disclose ABA Model Rule 1.6(a) protected client confidential

information “to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm.”

### **ABA Model Rule 1.6 Comment [13]**

Virginia did not adopt ABA Model Rule 1.6 cmt. [13].

Virginia 1.6 and its Comments do not address this scenario, because Virginia does not have a black letter confidentiality exception for these situations. Virginia Rule 1.6(a), like the pre-1983 ABA Model Code, does not protect disclosure of protected client confidential information unless the information is protected by the attorney-client privilege, unless the client has asked that the information “be held inviolate,” or unless the disclosure would “be embarrassing or would be likely to be detrimental to the client.” Thus, if conflict-related disclosures involve basic conflicts-clearing information, such disclosure might be permitted under Virginia Rule 1.6, but not under ABA Model Rule 1.6. Other Virginia Rules might also apply to allow such disclosure. Significantly, such conflicts-clearing disclosure presumably would not fall under Virginia Rule 1.6(a)’s “impliedly authorized” exception – because that is limited to disclosures “in order to carry out the representation.” There might be a tiny sliver of justification under that provision if the hiring law firm needed certain expertise in order to represent a client – and was exploring the hiring of a lawyer with such expertise.

ABA Model Rule 1.6(b)(7) allows such disclosure “only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.” The word “compromise” is undefined and might be confusing. As explained above in connection with black letter ABA Model Rule 1.6(b)(7), courts normally address whether the attorney-client privilege protection has been “waived.” It is unclear whether

“compromise” is synonymous with “waive,” or if it includes some other type of deterioration of that evidentiary protection.

ABA Model Rule 1.6 cmt. [13] first points to ABA Model Rule 1.6(b)(7) – which “recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice.” ABA Model Rule 1.6 cmt. [13] refers to ABA Model Rule 1.17 cmt. [7] for guidance in these three identified situations.

As mentioned throughout this document, the ABA Model Rules’ (and the Virginia Rules’) failure to define “associated” could cause confusion. That term plays a key role in several issues, such as imputation of an individual lawyer’s disqualification under ABA Model Rule 1.12 (and Virginia Rule 1.12). For instance, ABA Model Rule 1.6 cmt. [13]’s reference to “a lawyer . . . considering an association with another firm” might implicate the mismatch between “associated” lawyers and lawyers who constitute a “firm.” ABA Model Rule 1.0 [2] explains that “[t]he terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm.” In other words, not all associated lawyers constitute a “firm.” Perhaps more importantly, presumably not all lawyers in the firm are “associated” with that firm. If they were, the ABA Model Rules (and the Virginia Rules) presumably would not carefully use both terms – such as ABA Model Rule 1.10(a)’s phrase “[w]hile lawyers are associated in a firm.” If all lawyers in a firm were automatically “associated” with each other, presumably that ABA Model Rule (and other ABA Model Rules and Virginia Rules) would have used the much more simple formulation: “lawyers in a firm.”

ABA Model Rule 1.6 cmt. [13] next explains the limited temporal nature of such permissible conflicts-related disclosure of ABA Model Rule 1.6(a) protected client confidential information. Thus, ABA Model Rule 1.6 cmt. [13] permits such limited disclosure “only once substantive discussions regarding the new relationships have occurred.”

ABA Model Rule 1.6 cmt. [13] then turns to content – warning that “[a]ny such [limited information] disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated.” ABA Model Rule 1.6 cmt. [13]’s content limitation seems unrealistic. Lawyers seeking employment, law firms considering employing them, and law firms considering a merger normally would exchange much more information than that. Perhaps most obviously, in all of those settings the negotiating parties presumably would want to know historic fee income and a potential future fee income, the client’s payment history, information about billing rates for clients, income from client relationships, predictions of client actions (such is the likelihood that a client will move with a lawyer to a new firm, etc.).

ABA Model Rule 1.6 cmt. [13] then doubles down on that limitation – explaining that “[e]ven this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship.” Because a lawyer or law firm representing a client in a miniscule matter faces the same conflicts implications as if they were representing that client in a million-dollar matter, this restriction seems to prohibit (absent client consent) disclosure of the matter’s historic or possible future billings (among many other things).

ABA Model Rule 1.6 cmt. [13] then repeats black letter ABA Model Rule 1.6(b)(7)'s permission to disclose such information “only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.”

ABA Model Rule 1.6 cmt. [13] provides some obvious examples of information that could not be disclosed in those scenarios, because the disclosure would harm the client: (1) “the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced”; (2) “that a person has consulted a lawyer about the possibility of divorce before the person’s intentions are known to the person’s spouse”; and (3) “that a person has consulted a lawyer about a criminal investigation that has not yet led to a public charge.” Even this type of publicly-available information would deserve ABA Model Rule 1.6(a)'s protection, but its disclosure presumably would not “prejudice the client” because others already possess it.

ABA Model Rule 1.6 cmt. [13] explains that under such circumstances, ABA Model Rule 1.6(a) “prohibits disclosure unless the client or former client gives informed consent.” The reference to a “former client” granting consent seems odd. ABA Model Rule 1.9 governs lawyers’ confidentiality duty to former clients. To be sure, ABA Model Rule 1.9(c)(2) tacitly points back to ABA Model Rule 1.6. But one would think that ABA Model Rule 1.6 cmt. [13] would have at least started with the appropriate Rule: ABA Model Rule 1.9.

ABA Model Rule 1.6 cmt. [13] concludes with a reminder that lawyers’ “fiduciary duty to the lawyer’s firm may also govern a lawyer’s conduct when exploring an association with another firm and is beyond the scope of these [ABA Model] Rules.” That sentence obviously refers to lawyers who are considering or planning to leave their law

firm. States disagree about whether such lawyers may advise their clients about those plans before advising their law firm.

Virginia is one of only a few states that deals with that scenario in a separate Rule (Virginia Rule 5.8). Virginia Rule 5.8 essentially requires lawyers wishing to leave their law firm to: (1) refrain from unilaterally advising clients for whom they are primarily responsible that they are leaving, before trying to cooperate with their current law firm in preparing a joint notification; (2) avoid any misleading statements about themselves or about their current law firm in either an agreed-upon joint notification or in a unilateral notification to the clients (if the lawyer and the firm cannot agree on a joint notification); (3) provide to such clients a choice of remaining a law firm client, moving their matters to the withdrawing lawyer, or choosing some other law firm to represent them. Virginia Rule 5.8 does not provide useful guidance about lawyers' and law firms' duties between a lawyer's announced decision to leave and her actual departure date (which could be an important issue, given law firms' increasingly common imposition of a notification period requiring lawyers to stay at the firm for a certain period of time after announcing their departure).

#### **ABA Model Rule 1.6 Comment [14]**

Virginia did not adopt ABA Model Rule 1.6 cmt. [14]. This is not surprising, because Virginia did not adopt any black letter Virginia Rule 1.6 provisions addressing lawyers' discretionary disclosure of protected client confidential information when changing jobs, hiring lawyers, considering mergers, buying or selling law firms etc.

ABA Model Rule 1.6 cmt. [14] contains a potentially confusing mismatch of two concepts.

First, ABA Model Rule 1.6 cmt. [14] addresses the responsibilities of the lawyers who receive protected client confidential information under ABA Model Rule 1.6(b)(7). Most ABA Model Rule 1.6 provisions focus on the lawyers who disclose such information, not the lawyers who receive it.

ABA Model Rule 1.6 cmt. [14] warns that “[a]ny information disclosed pursuant to [ABA Model Rule 1.6(b)(7)] may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest.” That sentence could have more clearly explained that the limitation applies to lawyers receiving rather than disclosing the information. This limitation raises several issues.

The substantive use restriction seems unrealistic. As explained above (in connection with ABA Model Rule 1.6 cmt. [13]), lawyers and law firms in such situations undoubtedly seek additional information and use it for other purposes. For instance, a law firm considering hiring a lawyer or considering merging with another law firm obviously “will use” the information to make business decisions about whether the hiring or the merger makes sense financially.

The phrase “further disclose” is undefined. Such “further” disclosure would presumably not be governed by ABA Model Rule 1.6, because it would not be information “relating to representation of a client” by the lawyer representing that client. Presumably the use and further disclosure would be governed by some contractual duty of the receiving lawyer. The “further” disclosure presumably would not include disclosure within the receiving lawyer’s law firm, which is generally permissible under ABA Model Rule 1.6 cmt. [5]. But what other disclosure would the receiving lawyer make? If the “further disclosure” involves the receiving lawyer disclosing it to other third-parties, that is quite a

large exception to contractual and ethics rules obligations binding the receiving lawyer, and puts in jeopardy the confidentiality duty of the lawyer providing that information.

Oddly, ABA Model Rule 1.6 cmt. [14] then explains that ABA Model Rule 1.6(b)(7) “does not restrict the use of information acquired by means independent of any disclosure pursuant to” that ABA Model Rule. That should seem obvious. But perhaps that sentence assures those recipients of such information who have done their own research can freely use that research in any way they wish (unless otherwise contractually restricted) just because the lawyer finding such information is also the recipient of the same information from the disclosing lawyer. In other words, the advising lawyer’s disclosure of information to the recipient only prevents the recipient from using or further disclosing the information if the recipient had not independently gained that information through other means.

Second, ABA Model Rule 1.6 cmt. [14] then shifts direction, and describes a scenario that is completely separate from the first two sentences in ABA Model Rule 1.6 cmt. [14], is almost certainly unnecessary, and probably does not belong in this ABA Model Rule Comment.

ABA Model Rule 1.6 cmt. [14] assures that ABA Model Rule 1.6(b)(7) “does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized.” The phrase “does not affect” seems inapt. It is unclear how discretionary disclosure under ABA Model Rule 1.6(b)(7) would “affect the disclosure of information within a law firm when the disclosure is otherwise authorized.” Black letter ABA Model Rule 1.6(b)(7) allows disclosure – thus presumably allowing disclosure “within a law firm.” Perhaps the phrase “does not affect” was meant to mean “does not prohibit.” But that would not make sense either – because ABA Model Rule 1.6 cmt. [14] describes a

scenario “when the disclosure is otherwise authorized.” If the disclosure is “otherwise authorized,” presumably it is “impliedly authorized” under ABA Model Rule 1.6(a).

ABA Model Rule 1.6 cmt. [14] then refers to ABA Model Rule 1.6 cmt. [5]. ABA Model Rule 1.6 cmt. [5] focuses on such intra-firm disclosure, which is permissible “unless the client has instructed that particular information be confined to specified lawyers.” But that sentence explicitly limits the intra-firm disclosures to those “in the course of the firm’s practice” and also explicitly limits the disclosure of “information relating to a client of the firm.” Those two conditions would seem to exclude such intra-firm disclosure relating to hiring new lawyers, merging with another law firm, or selling a law practice. Those disclosures are not made “in the course of the firm’s practice” (unless the word “practice” is given a wide meaning). And more importantly, those disclosures do not involve “information relating to a client of the firm.” Instead, they would involve information about clients that the firm does not then represent. In other words, it would be some other lawyer’s or other law firm’s protected client confidential information. The lawyers in the firm who are disclosing their clients’ information outside the firm can rely on ABA Model Rule 1.6 cmt. [5], but that is not the disclosure describe in ABA Model Rule 1.6 cmt. [14].

ABA Model Rule 1.6 cmt. [14] concludes with examples of disclosures not “affect[ed]” by ABA Model Rule 1.6(b)(7): “such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.”

That example does not make much sense – ABA Model Rule 1.6(b)(7) allows the disclosure of information only “to detect and resolve conflicts of interest” – a very different scenario from those deciding whether to “undertak[e] a new representation.”

All in all, ABA Model Rule 1.6 cmt. [14] is among the most confusing ABA Model Rule Comments.

### **Virginia Rule 1.6 Comment [18]**

Virginia Rule 1.6 cmt. [18] addresses lawyers' post-representation confidentiality duty.

Virginia Rule 1.6 cmt. [18] succinctly reminds lawyers that their "duty of confidentiality continues after the client-lawyer relationship has terminated."

As explained elsewhere, the Virginia Rules and their Comments use various presumably synonymous terms when describing a relationship between a client and a lawyer: "client-lawyer relationship"; "lawyer-client relationship"; "attorney-client relationship"; "client-attorney relationship."

Virginia Rule 1.6 cmt. [18] does not mention it, but lawyers' post-representation confidentiality duty is governed by Virginia Rule 1.9(c). Virginia Rule 1.9(c) prohibits lawyers from disclosing a former client's protected client confidential information "except as [Virginia] Rule 1.6 or Rule 3.3 would permit or require with respect to a [current] client." Virginia Rule 1.9(c)(2). Virginia Rule 1.9(c) also prohibits lawyers from "us[ing] a former clients' protected client confidential information relating to or gained in the course of the representation to the disadvantage of the former client." There are two exceptions to such use: (1) "except as [Virginia] Rule 1.6 or Rule 3.3 would permit or require with respect to a [current] client;" or (2) "except . . . when the information has become generally known."

**ABA Model Rule 1.6 cmt. [20]** contains identical language.

In contrast to Virginia Rule 1.6 cmt. [20], ABA Model Rule 1.6 cmt. [20] also explicitly refers to ABA Model Rule 1.9(c)(2) and (c)(1).

### **Virginia Rule 1.6 Comment [19]**

Virginia Rule 1.6 cmt. [19] addresses lawyers' duty to take reasonable steps to protect their clients' protected client confidential information.

Virginia Rule 1.6 cmt. [19] first explains that Virginia Rule 1.6 "requires a lawyer to act reasonably to safeguard information protected under this [Virginia Rule 1.6] against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision." This presumably covers non-lawyer colleagues. Under Virginia Rule 5.3(a) and (b), lawyers must "make reasonable efforts" to assure that such non-lawyer subordinates act in a way that is "compatible with the professional obligations of the lawyer." This duty also covers non-employers assisting in a representation – such as consultants, experts, etc.

Virginia Rule 1.6 cmt. [19] also refers to other Virginia Rules: Virginia Rule 1.1 and 5.1. Virginia Rule 1.1 requires lawyers' competent handling of a client representation. Virginia Rule 5.1 requires supervising lawyers to take reasonable steps assuring that subordinate lawyers comply with the Virginia ethics rules.

Virginia Rule 1.6 cmt. [19] next assures lawyers that any improper access or disclosure "does not constitute a violation [of Virginia Rule 1.6] . . . if the lawyer has made reasonable efforts to prevent the access or disclosure." Virginia Rule 1.6 cmt. [19] lists several factors "to be considered in determining the reasonableness of the lawyer's efforts" (although explicitly indicating that there might be others). The factors include (1)

“the sensitivity of the information;” (2) “the likelihood of disclosure if additional safeguards are not employed;” (3) “the employment or engagement of persons competent with technology;” (4) “the cost of employing additional safeguards;” (5) “the difficulty of implementing the safeguards;” and (6) “the extent to which the safeguards adversely affect the lawyer’s ability to represent clients.” Virginia Rule 1.6 cmt. [19] also provides an example of the last factor: “by making a device or important piece of software excessively difficult to use”).

**ABA Model Rule 1.6 cmt. [18]** contains essentially the same language as Virginia Rule 1.6 cmt. [19].

Among other things, ABA Model Rule 1.6 cmt. [18] includes the same list of factors under which lawyers’ measure to safeguard their clients’ information will be protected.

But there are several differences.

First, in contrast to Virginia Rule 1.6 cmt. [19]’s requirement that lawyers “act reasonably to safeguard information” (emphasis added), ABA Model Rule 1.6 cmt. [18] requires a lawyer “to act competently to safeguard information” (emphasis added). In that usage, those terms presumably are intended to be synonymous.

Second, ABA Model Rule 1.6 cmt. [18] also contains a significant provision not found in Virginia Rule 1.6 cmt. [18]: “[a] client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule.” This sentence presumably addresses clients’ outside counsel guidelines or other requirements that their lawyers either: (1) impose security measures that are tighter than required by ABA Model Rule 1.6; or (2) “forgo security measures” that ABA Model Rule 1.6 requires. Of course,

lawyers must satisfy ABA Model Rule 1.6's minimal confidentiality duties. But clients might insist on greater confidentiality duties or relieve lawyers of their obligation to satisfy the minimal duties. Lawyers and clients presumably can negotiate about either one of those arrangements.

ABA Model Rule 1.6 cmt. [18] then understandably acknowledges that it “is beyond the scope of these Rules” “[w]hether a lawyer may be required to take additional steps to safeguard a client’s information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information.”

ABA Model Rule 1.6 cmt. [18] concludes with a reference to ABA Model Rule 5.3 cmts. [3]-[4], which require lawyers to take reasonable steps to assure that third parties assisting the lawyers (not in the lawyer’s firm) act in a way that is “compatible” with lawyers’ ethics rules.

### **Virginia Rule 1.6 Comment [19a]**

Virginia Rule 1.6 cmt. [19a] also addresses lawyers’ duties when dealing with technology.

For some reason, Virginia Rule 1.6 contains a separate Rule Comment (Virginia Rule 1.6 cmt. [19a]) containing a warning included as one sentence in ABA Model Rule 1.6 cmt. [18] – explaining that “[w]hether a lawyer may be required to take additional steps to safeguard a client’s information in order to comply with other laws, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of this [Virginia] Rule.”

**ABA Model Rule 1.6 cmt. [18]** contains the identical language.

### **ABA Model Rule 1.6 Comment [19]**

Virginia did not adopt ABA Model Rule 1.6 cmt. [19].

ABA Model Rule 1.6 cmt. [19] also addresses lawyers' confidentiality duty when using technology – focusing on transmission rather than storage, preservation, etc.

ABA Model Rule 1.6 cmt. [19] contains essentially the same guidance as Virginia Rule 1.6 cmt. [19] and ABA Model Rule 1.18 [18], but in situations where lawyers are “transmitting a communication that includes information relating to the representation of a client.” Not surprisingly, ABA Model Rule 1.6 cmt. [19] then repeats ABA Model Rule 1.6 cmt. [18]’s previous guidance.

Interestingly, ABA Model Rule 1.6 cmt. [19] contains an assurance not contained in ABA Model Rule 1.6 cmt. [18]: “[t]his duty [to “take reasonable precautions to prevent the information from coming into the hands of unintended recipients”] does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy.”

The term “information . . . coming into the hands of unintended recipients” seems oddly colloquial. The terms “disclosed to” or even “revealed to” would seem more appropriate.

ABA Model Rule 1.6 cmt. [19] next warns that “[s]pecial circumstances . . . may warrant special precautions.” ABA Model Rule 1.6 cmt. [19]’s list of factors includes one factor that is also contained in ABA Model Rule 1.6 cmt. [18], and one that is not: “the extent to which the privacy of the communication is protected by law or by a confidentiality agreement.”

ABA Model Rule 1.6 cmt. [19] then acknowledges that “[a] client may require the lawyer to implement special security measures not required by this [ABA Model Rule 1.6], or may give informed consent to the use of a means of communication that would otherwise be prohibited by this [ABA Model] Rule.” This essentially matches the same client discretion (which of course is negotiable with the lawyer) contained in ABA Model Rule 1.6 cmt. [18].

Also like ABA Model Rule 1.6 cmt. [18], ABA Model Rule 1.6 cmt. [19] warns it “is beyond the scope of these Rules” “[w]hether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy.”

Virginia Rule 1.6 does not contain a separate Comment addressing transmission scenarios.

### **Virginia Rule 1.6 Comment [20]**

Virginia Rule 1.6 cmt. [20] provides additional confidentiality guidance not found in the ABA Model Rules or Comments.

Virginia Rule 1.6 cmt. [20] addresses lawyers’ efforts to protect client confidential information.

Virginia Rule 1.6 cmt. [20] first assures that “a lawyer is not subject to discipline under this [Virginia Rule 1.6] if the lawyer has made reasonable efforts to protect electronic data.” Virginia Rule 1.6 cmt. [20] then provides a list of bad events to which this general principle apparently applies: “even if there is a data breach, cyber-attack or other incident resulting in the loss, destruction, misdelivery or theft of confidential client information.”

Virginia Rule 1.6 cmt. [20] then provides an additional assurance, bluntly noting that “[p]erfect online security and data protection is not attainable,” and acknowledging that “[e]ven large businesses and government organizations with sophisticated data security systems have suffered data breaches.” But Virginia Rule 1.6 cmt. [20] then warns that “[n]evertheless, security and data breaches have become so prevalent that some security measures must be reasonably expected of all businesses, including lawyers and law firms.”

Virginia Rule 1.6 cmt. [20] then explains that “[l]awyers have an ethical obligation to implement reasonable information security practices to protect the confidentiality of client data.” Virginia Rule 1.6 cmt. [20] indicates that “[w]hat is ‘reasonable’ will be determined in part by the size of the firm.”

Virginia Rule 1.6 cmt. [20] next thankfully assures lawyers that compliance with Virginia Rule 1.6 does not require lawyers “to have all the required technology competencies” – lawyers “can and more likely must turn to the expertise of staff or an outside technology professional.”

Virginia Rule 1.6 cmt. [20] concludes with a warning that “[b]ecause threats and technology both change, lawyers should periodically review both [threats and technology] and enhance their security as needed; steps that are reasonable measures when adopted may become outdated as well.”

**ABA Model Rule 1.6** does not contain such a detailed Comment.

### **Virginia Rule 1.6 Comment [21]**

Virginia Rule 1.6 cmt. [21] provides additional guidance about technology use.

Virginia Rule 1.6 cmt. [21] advises that “law firms should keep abreast on an ongoing basis of reasonable methods for protecting client confidential information,” “[b]ecause of evolving technology, and associated evolving risks.”

Virginia Rule 1.6 cmt. [21] next describes several specific measures: (1) “[p]eriodic staff security training and evaluation programs;” (2) adoption of policies addressing “departing employee’s future access to” the firm’s data; (3) adopting procedures “addressing security measures for access of third parties to stored information”; (4) assuring backup and storage of firm data; (5) taking steps to erase such data from “computing devices before they are transferred, sold, or reused”; (6) emphasizing “[t]he use of strong passwords or other authentication measures to log on to [the law firm’s] network”; (7) using “hardware and/or software measures to prevent, detect and respond to malicious software and activity.”

**ABA Model Rule 1.6** does not contain such a detailed Comment.

# RULE 1.7

## Conflict of Interest: General Rule

### Rule

#### Virginia Rule 1.7

Virginia Rule 1.7 contains the Virginia Rules' core current-client conflict rule.

Virginia Rule 1.9 contains the Virginia Rules' core former (rather than current) client conflict rule.

**ABA Model Rule 1.7** is entitled "Conflict of Interest: Current Clients." ABA Model Rule 1.7 contains the ABA Model Rules' core current-client conflict rule.

As with the Virginia Rules, ABA Model Rule 1.9 contains the ABA Model Rules' core former (rather than current) client conflict rule.

#### Virginia Rule 1.7(a)

Virginia Rule 1.7(a) states that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interests."

But Virginia Rule 1.7(a) also contains an exception: "[e]xcept as provided in" Virginia Rule 1.7(a)(b) – which describes the possibility of such representation despite "a concurrent conflict of interest," with clients' informed consent.

The phrase “concurrent conflict of interest” is strange. That rarely-used adjective appears nowhere else in the Virginia Rules. It also seems unnecessary. Lawyers must deal with conflicts of interests regardless of the adjective describing them. In other words, Virginia Rule 1.7(a) would have had the same effect on lawyers’ duties without using the adjective “concurrent.”

**ABA Model Rule 1.7(a)** contains identical language.

As with Virginia Rule 1.7(a), ABA Model Rule 1.7(a)’s use of the “concurrent” seems odd – the ABA Model Rules do not use that word anywhere else.

### **Virginia Rule 1.7(a)(1)**

Virginia Rule 1.7(a)(1) addresses the Virginia Rules’ basic current-client conflict rule.

Virginia Rule 1.7(a)(1) recognizes “[a] concurrent conflict of interest if . . . the representation of one client will be directly adverse to another client.” Under Virginia Rule 1.7(a)’s introductory section, a lawyer shall not represent the “client” first mentioned in Virginia Rule 1.7(a)(1) “[e]xcept as provided in” Virginia Rule 1.7(b) – the consent provision, discussed below.

Virginia Rule 1.7(a)(1) contains several words that raise sometimes subtle issues.

First, Virginia Rule 1.7(a)(1) uses the word “representation.” That word presumably denotes a legal “representation.” Subtle issues arise if the lawyer will provide other services to a client, such as lobbying, business advice, etc. Virginia did not adopt ABA Model Rule 5.7, which addresses certain types of non-legal services called “law-related services.” Those may or may not trigger ABA Model Rule 1.7 conflicts implications. Of course Virginia lawyers might provide the same type of law-related services to their clients

(along with or separately from legal representational services) – without the benefit of ABA Model Rule 5.7’s guidance.

Second, Virginia Rule 1.7(a)(1) uses the word “client” – twice. The first reference to “client” denotes the client who has retained the lawyer to represent the matter “directly adverse” to “another client” (Virginia Rule 1.7(a)(1)’s second use of the word “client”).

Virginia Rule 1.7(a)(1)’s first use of the word “client” is self-evident. But it contrasts with Virginia Rule 1.9(a)’s odd use of the word “person” rather than “client” in describing essentially the same scenario as Virginia Rule 1.7(a)(1) – although that representation would be adverse to a former client rather than a current client. Neither Virginia Rule 1.7 nor Virginia Rule 1.9 explain why those two rules use different words (“client” and “person”) to denote essentially the same attorney-client relationship.

Virginia Rule 1.7(a)(1)’s term “another client” used at the end of that provision refers to the lawyer’s other client against whom the lawyer has been asked to represent a client. The term “another client” denotes another current client (although Virginia Rule 1.7(a)(1) does not use the word “current” – perhaps that is why the rarely-used adjective “concurrent” appears in Virginia Rule 1.7(a)’s introductory provision).

Lawyers analyzing their Virginia Rule 1.7(a)(1) conflict-related duties and prohibitions sometimes must determine if the “another client” against whom they wish to represent a current client is instead a former client. As mentioned above (and discussed in depth in this document’s summary and analysis of Virginia Rule 1.9), the lawyers may represent a client in matters adverse to former clients in certain circumstances – in stark contrast to Virginia Rule 1.7(a)’s essentially *per se* prohibition on lawyers representing a client adverse to another current client (even on matters unrelated to the lawyer’s current

representation of that other client). Virginia Rule 1.7 cmt. [4] addresses that critical issue – whether the adversary in a lawyer’s proposed representation is a current client or a former client. That is discussed below.

Third, Virginia Rule 1.7(a)(1) uses the term “directly adverse.” The adjective “directly” presumably is intended to describe adversity that is more pointed than indirect adversity.

Virginia Rule 1.7(a)(1)’s use of the term “directly adverse” highlights the varying descriptions of adversity that appear in different Virginia Rules. Virginia Rule 1.9(a) prevents lawyers from representing a client (actually, a “person” – as discussed above) in the matter in which that client’s “interests are materially adverse to the interests of the former client” (absent consent). So Virginia Rule 1.9(a) contains the adjective “materially” rather than “directly.”

Those presumably carefully selected adjectives seem to focus on two different attributes. Adversity can be direct without being material, and can be material without being direct. For instance, a lawyer’s representation of a client against another client in a \$100 dispute is direct, but not material. A lawyer’s representation of a client in a matter that does not directly involve another client but which ultimately may cost that other client \$100,000,000 (by establishing a new cause of action that could be used against that other client) is presumably material, but not direct. As explained elsewhere, the latter type of adversity might or might not be legal adversity, and thus might or might not be covered by the Virginia Rules’ conflicts provisions.

Virginia Rule 1.7(a)(1)’s use of the term “directly adverse” leaves out a concept found elsewhere in the Virginia Rules. For instance, Virginia Rule 1.9(a) prohibits (absent

consent) a lawyer from representing a client matter in which that client’s “interests are materially adverse to the interests of the former client” (emphases added). In other words, Virginia Rule 1.9(a) does not address adversity to a former client, but instead adversity to “the interests of” the former client. Presumably a representation can be adverse to “the interests” of the former client without being adverse to the former client herself. Otherwise, Virginia Rule 1.9(a) presumably would not have included the dual references to “interests.” This reference to “interests” also appears in other Virginia conflicts rules, which this document addresses in the pertinent summaries and analyses.

Unfortunately, Virginia Rule 1.7 does not address different types of adversity (adversity, direct adversity, material adversity) or difference between adversity to other client (a former client) an adversity to or “interests.” In fact, Virginia Rule 1.7 cmt. [6] makes things even more confusing (as discussed below).

**ABA Model Rule 1.7(a)(1)** contains the identical language.

### **Virginia Rule 1.7(a)(2)**

Virginia Rule 1.7(a)(2) addresses a more subtle but constantly present conflict possibility often called a “material limitation” conflict.

Virginia Rule 1.7(a)(2) explains that lawyers face a “concurrent” conflict if “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person, or by a personal interest of the lawyer.”

Thus, unlike Virginia Rule 1.7(a)(1), the “material limitation” conflict scenario does not involve the binary directly adverse or not-directly adverse analysis that appears in Virginia Rule 1.7(a)(1). Unlike the “yes” or “no” Virginia Rule 1.7(a)(1) situation, the

“material limitation” conflict arises only if there is a “significant risk” (not an insignificant risk) that the lawyer’s “representation” (meaning his or her judgment) will be “materially limited” (not just immaterially limited) by a number of other possible interests.

Of course, the lawyer’s responsibility “to another client” is partially addressed in Virginia Rule 1.7(a)(1). But the lawyer might have responsibilities to “another client” that does not involve direct adversity. For instance, the lawyer might have confidentiality duties from having learned information from one client that is useful against another client, but which the lawyer cannot use because of her confidentiality duty. Another scenario might involve a lawyer representing two clients against the same common adversary. If that adversary could not pay for both of those two clients’ possible judgment against the common adversary, the lawyer representing both of the clients might have such a “material limitation” conflict.

The lawyer’s responsibilities to “a former client” might involve direct adversity – but that is covered by Virginia Rule 1.9. However, such responsibilities to a former client include a confidentiality duty.

A lawyer’s responsibilities to a “third person” might involve the lawyer’s contractual or other duties to a non-client, or to a family member, etc.

A lawyer’s “personal interest” might involve the lawyer’s desire to be paid, financial considerations, strong personal interests or dislikes, etc.

So a Virginia Rule 1.7(a)(2) type of “material limitation” conflicts could arise from an infinite number of lawyers’ responsibilities or personal interest.

Some wise lawyers call this Virginia Rule 1.7(a)(2) (and the identical ABA Model Rule 1.7(a)(2)) conflict a “rheostat conflict” – referring to a type of light switch dimmer that

can continuously lighten or darken a room – in contrast, to a normal light switch with either an “on” or “off” setting. Thus, Virginia Rule 1.7(a)(1) is similar to an “on or off” light switch – because the representation of one client will either “be directly adverse to another client” or it will not. This is not to say that a “direct adversity” is easy to assess. Defining the “client” and “adversity” can be challenging.

But in contrast, a so-called “material limitation” conflict depends on the degree of impairment the lawyer faces when representing a client – because of the lawyer’s other “responsibilities” or “personal interest.” If the impairment is immaterial, there is no Virginia Rule 1.7(a)(2) conflict. But lawyers face such a conflict if “there is significant risk” that the representation of “one or more clients” will be “materially limited” by the lawyer’s “responsibilities to another client, a former client or a third person, or by a personal interest.” Like a rheostat light switch, those responsibilities or interests at some point along a continuing spectrum become material enough to create a conflict that must be addressed.

**ABA Model Rule 1.7(a)(2)** contains the identical language.

### **Virginia Rule 1.7(b)**

Virginia Rule 1.7(b) addresses the steps lawyers may sometimes take to represent clients despite a “concurrent conflict of interest.”

Virginia Rule 1.7(b) explains that “[n]otwithstanding the existence of a concurrent conflict of interest under [Virginia Rule 1.7(a)],” a lawyer may represent a client under five conditions. Some of those conditions are substantive, and some logistical. Those are all discussed below.

Virginia Rule 1.7(b)'s introductory provision describes the first of those five conditions: "If each affected client consents after consultation." As explained below, ABA Model Rule 1.7(b) contains that consent provision in a separate numbered sub-provision.

Virginia Rule 1.7(b)'s phrase "each affected client" implicates a somewhat counter-intuitive but key component of lawyers' ethical ability to represent a client against another current client with consent.

Critically, lawyers must recognize their obligation to obtain all affected clients' informed consent. For instance, Acme might ask a lawyer to represent it adverse to Baker – one of the lawyer's other current clients. The lawyer obviously must obtain Baker's consent, because the lawyer wishes to be adverse to her client Baker. It is less obvious but equally important for the lawyer to obtain Acme's consent to represent it in one matter while simultaneously representing its adversary Baker in an unrelated matter.

This is because Acme client has the right to worry that its lawyer will "pull punches" in representing it in a matter adverse to Baker – because that lawyer might worry about offending or even being fired by Baker (whom the lawyer is representing in an unrelated matter). So both clients must consent to that arrangement. Even if Baker has given the lawyer a prospective consent (discussed below) to represent it in the type of matter Acme has asked the lawyer to handle, the lawyer still must advise Acme that the lawyer represents Baker on unrelated matters – and seek Acme's consent to such an arrangement.

The wording might not be significant, but in such a situation the lawyer does not need (and therefore should not ask for) Acme's "consent" to continue representing Baker (whom the lawyer is already representing on unrelated matters). Acme does not have

the right to veto the lawyer’s continued representation of Baker. Instead, the lawyer must obtain Acme’s informed consent to the arrangement in which the lawyer will represent Acme adverse to Baker – while simultaneously representing Baker on an unrelated matter.

Thus, Virginia Rule 1.7(a)’s term “each affected client” conveys the important principle that lawyers must obtain both clients’ consents “after consultation” with each of them.

Virginia Rule 1.7(b)’s term “consents after consultation” is the standard Virginia Rules formulation for a required consent. The Virginia Rules formulation contrasts with the standard ABA Model Rule formulation: “informed consent.” Those terms presumably are intended to be synonymous. Virginia Rules Terminology defines “consult” and “consultation” as “denot[ing] communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.” ABA Model Rule 1.0(e) defines “informed consent” as “denot[ing] the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” Those two definitions of lawyers’ obligation to explain conflicts-related information to clients essentially say the same thing.

**ABA Model Rule 1.7(b)** also addresses steps lawyers may sometimes take to represent clients despite a “concurrent conflict of interest.”

ABA Model Rule 1.7(b) contains language identical to Virginia Rule 1.7(b)’s language.

In contrast to Virginia Rule 1.7(b), ABA Model Rule 1.7(b) does not contain the phrase “if each affected client consents after consultation.” However, ABA Model Rule 1.7(b)(4) contains a similar condition – that “each affected client gives informed consent, confirmed in writing.”

### **Virginia Rule 1.7(b)(1)**

Virginia Rule 1.7(b)(a) addresses the second condition under which lawyers can undertake a representation despite a conflict of interest: “the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.”

Of course, the “reasonably believes” standard is an objective rather than subjective standard. Virginia Rule 1.7 cmt. [19] (discussed below), uses a similar “disinterested lawyer” standard in determining whether a lawyer may properly ask for consent that would allow the lawyer to undertake a representation.

Virginia Rule 1.1 addresses the “competence” requirement, and Virginia Rule 1.3 addresses the “diligence” standard.

Not surprisingly, lawyers usually believe that they can meet that standard. But in some situations they face a Virginia Rule 1.7(a)(2) “material limitation” conflict - discussed above and below.

**ABA Model Rule 1.7(b)(1)** contains the identical language.

As in the Virginia Rules, ABA Model Rule 1.1 addresses the “competence” requirement and ABA Model Rule 1.3 addresses the “diligence” requirement.

### **Virginia Rule 1.7(b)(2)**

Virginia Rule 1.7(b)(2) describes the third condition under which lawyers may undertake a representation despite a conflict of interest: “the representation is not prohibited by law.” This provision thus incorporates external substantive law into the ethics conflicts analysis.

**ABA Model Rule 1.7(b)(2)** contains the identical language.

### **Virginia Rule 1.7(b)(3)**

Virginia Rule 1.7(b)(3) describes the fourth condition under which lawyers may undertake a representation despite a conflict of interest: “the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.”

In essence, Virginia Rule 1.7(b)(3) prohibits lawyers - even with consents - from representing opposite sides in the same “proceeding before a tribunal.”

Although the condition uses the term “lawyer” in the singular, Virginia Rule 1.10’s imputation effect generally applies the condition to all lawyers associated in a firm.

Virginia Rule 1.7(b)(3) uses several words that deserve attention.

First, Virginia Rule 1.7(b)(3) uses the word “claim.” That term is not defined, but presumably includes a claim or a third party claim.

Second, Virginia Rule 1.7(b)(3) uses the word “litigation.” That term likewise is not defined, but presumably both denotes traditional civil litigation.

Third, Virginia Rule 1.7(b)(3) uses the word “proceeding.” Virginia Rule 1.7(b)(3) does not define that term. Virginia Rule 3.3 cmt. [14] describes various proceedings, in the context of lawyers’ duties in ex parte proceedings. That Virginia Rule Comment

explains that “[f]or purposes of [Virginia Rule 3.3], ex parte proceedings do not include grand jury proceedings or proceedings which are non-adversarial, including various administrative proceedings in which a party chooses not to appear.” This Virginia Rule Comment makes the obvious point that the word “proceeding” includes adversarial administrative proceedings.

Fourth, Virginia Rule 1.7(b)(3) uses the word “tribunal.” The Virginia Terminology section does not contain a definition of “tribunals” (as does the ABA Model Rules, discussed below). Elsewhere, Virginia Rules and Comments provide at least some hints of that word’s meaning. Virginia Rule 1.6 cmt. [11] contains the phrase “a court or other tribunal.” That phrase implies that the word “tribunal” includes entities other than courts. Virginia Rule 3.3 cmt. [14] contains the phrase “a particular tribunal (including an administrative tribunal)” Virginia Rule 5.5 cmt. [9] contains the phrase “a tribunal or an administrative agency.” Virginia Rule 5.6(b) contains the phrase “a tribunal or a governmental entity.” That use would seem to have the same approach. But in contrast, Virginia Rule 8.5(b)(1) twice contains the phrase “court, agency, or other tribunal.” That usage seems to indicate that the term “tribunal” includes agencies. Virginia Rule 8.5 cmt. [10] contains the phrase “a court, tribunal, public body, or administrative agency.” That seems to indicate that the word “tribunal” does not include agencies.

It seems that “tribunals” clearly includes traditional courts. The term presumably also includes administrative agencies when they act in a certain adjudicative way (but not when they act in a rules-making or other nonadjudicative way). In other words, sometimes agencies can be tribunals, and sometimes they are not tribunals.

This ambiguity is frustrating, and potentially confusing.

**ABA Model Rule 1.7(b)(3)** contains the identical language.

In contrast to the Virginia Rules, ABA Model Rule 1.0(m) defines the word “tribunal.” The word “denotes a court, an arbitrator and a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity.” ABA Model Rule 1.0(m) then explains that the last three entities “act[ ] in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party’s interests in a particular matter.”

#### **Virginia Rule 1.7(a)(4)**

Virginia Rule 1.7(b)(4) addresses the fifth condition under in which a lawyer may undertake a representation despite a conflict of interest. “[t]he consent from the client is memorialized in writing.”

The use of singular is somewhat odd, because Virginia 1.7(b) requires that “each affected client consents after consultation.” It should go without saying that Virginia Rule 1.7(b)(4)’s consent requirement covers situations when more than one client’s consent must be “memorialized in writing.”

This standard is explained more fully in Virginia Rule 1.7 cmt. [20] (below). The Virginia Rule standard for consents differs from the ABA Model Rules’ requirement that such consents be “confirmed in writing.”

ABA Model Rule 1.7 cmt. [20] addresses the “confirmed in writing” requirement.

**ABA Model Rule 1.7(b)(4)** requires that “each affected client gives informed consent confirmed in writing.”

This confirmation requirement differs from the standard Virginia Rule requirement that clients' consents be "memorialized in writing."

## Comment

### Virginia Rule 1.7 Comment [1]

Virginia Rule 1.7 cmt. [1] addresses lawyers' duty to address and deal with conflicts before undertaking a representation.

Virginia Rule 1.7 cmt. [1] begins by making an obvious point: “[I]oyalty and independent judgment are essential elements in the lawyer’s relationship to a client.”

Virginia Rule Comment 1.7 cmt. [1] warns that “[a]n impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined.” That seems overbroad, because client consents may allow a lawyer to undertake such a representation. In other words, the presence of a conflict before a representation begins does not make the representation nonconsentable. Of course, Virginia Rule 1.7 does describe circumstances where consent is not available, thus rendering the representation nonconsentable.

ABA Model Rule 1.7 cmt. [3] (discussed below) contains a similar sentence, but instead of mentioning an “impermissible conflicts” like Virginia Rule 1.7 cmt. [2]’s sentence, the ABA Model Rule Comment refers generically to conflicts which exist before representation is undertaken – but which may be cured with the proper consents.

**ABA Model Rule 1.7 cmt. [1]** also addresses general conflicts principals and refers to the other ABA Model Rules addressing conflicts.

ABA Model Rule 1.7 cmt. [1] begins with the same general statement contained in Virginia Rule 1.7 cmt. [1]. ABA Model Rule 1.7 cmt. [1] then warns that “[c]oncurrent conflicts of interest can arise from the lawyer’s responsibilities to another client, a former

client or a third person or from the lawyer’s own interests.” That clearly refers to the ABA Model Rule 1.7(a)(2) “material limitation” conflict.

ABA Model Rule 1.7 cmt. [1] then refers to other ABA Model Rules with more specific provisions addressing certain types of conflicts: ABA Model Rule 1.8(a) (a grab bag of various conflicts situations); ABA Model Rule 1.9 (addressing former client conflicts); ABA Model Rule 1.18 (addressing prospective client conflicts).

ABA Model Rule 1.7 cmt. [1] concludes with references to the definitions of “informed consent” and “confirmed in writing,” which appear in ABA Model Rule 1.0(e) and (b).

### **ABA Model Rule 1.7 Comment [2]**

Virginia did not adopt ABA Model Rule 1.7 cmt. [2].

ABA Model Rule 1.7 cmt. [2] addresses the process lawyers undertake when analyzing conflicts and obtaining consents.

ABA Model Rule 1.7 cmt. [2] describes a four-step process lawyers must undertake in resolving conflicts: (1) identifying the “clients;” (2) determining whether the lawyer faces a conflict; (3) assessing whether the conflict is consentable; and (4) if so, consulting with their clients and seeking their consents, “confirmed in writing.” ABA Model Rule 1.7 cmt. [2] then reminds lawyers that they need consents from both clients affected under ABA Model Rule 1.7(a)(1), and “one or more clients whose representations might be materially limited” under ABA Model Rule 1.7(a)(2).

### **Virginia Rule 1.7 Comment [3]**

Virginia Rule 1.7 cmt. [3] addresses lawyers' conflict identification, analysis and clearance process.

Virginia Rule 1.7 cmt. [3] explains that lawyers should “adopt reasonable procedures” to identify and analyze conflicts, “appropriate for the size and type of firm and practice.” Not surprisingly, lawyers should adopt such “reasonable procedures” to “determine in both litigation and non-litigation matters the parties and issues involved and to determine whether there are actual or potential conflicts of interest.”

The phrase “potential conflicts of interest” is interesting – because the ethics rules do not seem to require lawyers to take any steps if they identify “potential conflicts of interest.” Lawyers certainly may prophylactically take some steps in that setting, such as seeking clients' prospective consent (if that is possible in Virginia – a matter discussed below). And lawyers identifying “potential conflicts of interest” might be more careful to monitor those situations to determine if an actual conflict ever arises. But the ethics rules generally require lawyers to take some step only when an “actual” conflict exists.

**ABA Model Rule 1.7 cmt. [3]** also addresses lawyers' conflict identification, analysis and clearance process.

As noted above, ABA Model Rule 1.7 cmt. [3] begins with the scenario addressed in Virginia Rule 1.7 cmt. [1] – a conflict that exists “before representation is undertaken.” In contrast to Virginia Rule 1.7 cmt. [1]'s blunt and overly broad warning that in that situation “the representation should be declined,” ABA Model Rule 1.7 cmt. [3] correctly recognizes an exception: “unless the lawyer obtains the informed consent of each client under the conditions of [ABA Model Rule 1.7(b)].”

ABA Model Rule 1.7 cmt. [3] then includes the phrase also found in Virginia Rule 1.7 cmt. [1]: which states that “a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved.” In contrast to Virginia Rule 1.7 cmt. [3], ABA Model Rule 1.7 cmt. [3] does not contain the additional phrase “and to determine whether there are actual or potential conflicts of interest.” The significance of a “potential conflict of interest” is discussed above.

ABA Model Rule 1.7 cmt. [3] refers to an ABA Model Rule 5.1 Comment, without specifying which one. ABA Model Rule 5.1 addresses supervising lawyers’ responsibilities. ABA Model Rule 5.1 cmt. [2] requires lawyers with “managerial authority within a firm” to make reasonable efforts to establish internal policies and procedures” designed to assure that the firm complies with the ethics rules. ABA Model Rule 5.1 cmt. [2] then provides an example: “policies and procedures include those designed to detect and resolve conflicts of interest.”

In contrast to Virginia Rule 1.7 cmt. [3], ABA Model Rule 1.7 cmt. [3] also contains a sentence warning that “[i]gnorance caused by a failure to institute such [conflicts identification] procedures will not excuse a lawyer’s violation of this Rule.” Presumably the term “this Rule” refers to ABA Model 1.7, rather than ABA Model Rule 5.1.

It makes sense that ignorance is no excuse. This is because ABA Model Rule 1.7 and Virginia Rule 1.7 are essentially no-fault provisions. They do not require that lawyers know that a representation of a client is “directly adverse” to another client. The same is true of ABA Model Rule 1.9(a) and Virginia Rule 1.9(a). Those knowledge-free prohibitions contrast with other ABA Model Rules and Virginia Rules that recognize an

ethics violation only if the lawyers acts “knowingly.” For instance, ABA Model Rule 1.9(b) (and Virginia Rule 1.9(b) prohibit lawyers from “knowingly” representing a client adverse to one of the lawyer’s former firm’s clients, under certain conditions. Similarly, ABA Model Rule 1.10(a) prohibits lawyers from “knowingly” representing a client if one of the lawyer’s law firm colleagues could not do so (the imputed disqualification standard).

ABA Model Rule 1.7 cmt. [3] concludes with a reference to an unspecified ABA Model Rule 1.3 Comment and the ABA Model Rule Scope section for determining “whether a client-lawyer relationship exists or, having once been established, is continuing.”

ABA Model Rule Scope [17] explains that “for purposes of determining the lawyer’s authority and responsibility, principles of substantive law external to these [ABA Model] Rules determine whether a client-lawyer relationship exists.” That language appears in the fourth (unnumbered) Virginia Scope paragraph.

ABA Model Rule 1.3 cmt. [4] addresses termination of an attorney-client relationship, including the factors that assist in such a determination. ABA Model Rule 1.3 cmt. [4] explains that “[i]f a lawyer’s employment is limited to a specific matter, the relationship terminates when the matter has been resolved.” In contrast, [i]f a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal.” ABA Model Rule 1.3 cmt. [4] then warn that “[d]oubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferable in writing, so that the client will not mistakenly suppose the lawyer is looking after the client’s affairs when the lawyer has ceased to do so.”

Virginia Rule 1.3 cmt. [4] contains the identical language, which provides helpful guidance and a useful warning. As explained below, Virginia Rule 1.7 cmt. [4] refers to Virginia Rule Scope and to an unidentified Comment to Virginia Rule 1.3 (presumably Virginia Rule 1.3 cmt. [4]).

### **Virginia Rule 1.7 Comment [4]**

Virginia Rule 1.7 cmt. [4] addresses lawyers' required actions if they identify conflicts after a representation begins.

Virginia Rule 1.7 cmt. [4] first explains that lawyers "should withdraw from the representation" if a conflict "arises after representation has been undertaken" (referring to Virginia Rule 1.16). Virginia Rule 1.16(a)(1) requires lawyers' withdrawal if "the representation will result in violation of the [Virginia] Rules of Professional Conduct or other law." Presumably the Virginia Rules "violation" would involve a Virginia Rule 1.7(a) conflict.

Like the statement in Virginia Rule 1.7 cmt. [1] that lawyers "should" not undertake a representation if there is any conflict, this similar guidance in Virginia Rule 1.7 cmt. [4] seems too blunt. Lawyers may continue such a representation despite the conflict if they can satisfy the Virginia Rule 1.7(b) standards – including clients' consents. And if they cannot satisfy that standard, they must withdraw. So the word "should" is improper – because the lawyer either need not withdraw, or must withdraw. There is no "should." Because clients' informed consent might allow the lawyer to continue such a representation, one would have thought that Virginia Rule 1.7 cmt. [4] would mention that possibility.

Virginia Rule 1.7 cmt. [4] points to Virginia Rule 1.9 to determine whether a lawyer who has withdrawn because of a conflict has arisen after the representation has begun may “continue to represent any of the clients.” Presumably the reference to Virginia Rule 1.9 focuses on lawyers’ permissible adversity to a former client with that former client’s consent and also the continuing client’s consent. The so-called “hot potato” doctrine generally prohibits lawyers from successfully seeking application of the far more favorable Virginia Rule 1.9 former-client conflict standard after withdrawing from a representation – if the lawyer was motivated by the desire to immediately represent another client adverse to the now-former client. In other words, under the largely court-created “hot potato” rule, the dropped client will be treated for conflict purposes as still a current client of the firm. This means that Virginia Rule 1.7(a)’s essentially *per se* prohibition would apply rather than the more favorable Virginia Rule 1.9 former client conflicts standard.

Virginia Rule 1.7 cmt. [4] concludes with a sentence contained in ABA Model Rule 1.7 cmt. [3] (discussed above), which points to Virginia Rule 1.3 and the Virginia Rule Scope for guidance in determining both “whether a client lawyer relationship exists or, having once been established, is continuing.”

Under Virginia Rule 1.3 cmt. [4], “[i]f a lawyer’s employment is limited to a specific matter, the relationship terminates when the matter has been resolved.” In contrast, “[i]f a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyers gives notice of withdrawal.” Virginia Rule 1.3 cmt. [4] warns that “[d]oubt about whether a client-lawyer relationship still exists should be clarified by the lawyer,

preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so."

**ABA Model Rule 1.7 cmt. [4]** also addresses lawyers' conflicts analysis during rather than before a representation.

ABA Model Rule 1.7 cmt. [4] indicates that lawyers "ordinarily must withdraw" if a conflict arises during a representation. But in contrast to Virginia Rule 1.7 cmt. [4], ABA Model Rule 1.7 cmt. [4] properly provides an obvious exception – "unless the lawyer has obtained the informed consent of the client" under ABA Model Rule 1.7(b).

In contrast to Virginia Rule 1.7 cmt. [4], ABA Model Rule 1.7 cmt. [4] points specifically to ABA Model Rule 1.9 cmts. [5] and [29] in explaining that "whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client." As explained above, Virginia Rule 1.7 cmt. [4] is less specific.

### **ABA Model Rule 1.7 Comment [5]**

Virginia did not adopt ABA Model Rule 1.7 cmt. [5], which often is called the "thrust upon" rule. It is unclear whether Virginia would recognize the "thrust upon" conflicts rule. Virginia's explicit decision not to adopt ABA Model Rule 1.7 cmt. [5] may indicate that Virginia would not do so.

ABA Model Rule 1.7 cmt. [5] first explains that conflicts may arise "in the midst of a representation," based on "[u]nforeseen developments, such as": (1) "changes in corporate and other organizational affiliations;" or (2) "the addition or realignment of parties in litigation."

Thus, ABA Model Rule 1.7 cmt. [5]’s “thrust upon” rule provides two examples.

First, “changes in corporate or other organizational affiliations” represent the classic scenario, because it realigns parties’ litigation or transactional matters in the absence of lawyers’ action. ABA Model Rule 1.7 cmt. [5] provides an example: “when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter.” In this scenario, the lawyer representing a client adverse to a company confronts an obvious conflict when another client of the lawyer or her firm buys that defendant company. The lawyer continuing in the representation now finds herself adverse to a client’s subsidiary or division.

Second, the “addition or realignment of parties in litigation” phrase presumably refers to a party adding additional plaintiffs or defendants, filing counterclaims or crossclaims against each other, etc. For instance, a lawyer representing a plaintiff will face a conflict if the defendant files a third-party claim against one of the lawyer’s other clients. If that third-party claim becomes an integral part of the original litigation, the plaintiff’s lawyer must somehow address the resulting “thrust upon” conflict.

Such “thrust upon” scenarios differ from scenarios in which the lawyer takes some action that creates the conflict. For instance, a law firm that hires a lawyer who is then representing the defendant in such a scenario creates a conflict – but of the law firm’s own making. Law firm mergers sometimes create this type of conflict, when the merger partners are representing adversaries of other merger partners’ clients. In the most acute situation, law firm merger partners might already be representing direct litigation adversaries in the same matter. The “thrust upon” rule does not apply in such circumstances.

ABA Model Rule 1.7 cmt. [5] next indicates that “[d]epending on the circumstances,” lawyers in that situation “may have the option to withdraw from one of the representations in order to avoid the conflict.”

Normally, a court-created approach frequently called the “hot potato” rule prevents lawyers from withdrawing from a representation to cure a conflict. That “hot potato” rule essentially prohibits lawyers from unilaterally turning a current client into a former client – in order to obtain the more favorable ABA Model Rule 1.9 former client conflicts analysis rather than the unforgiving ABA Model Rule 1.7 current client conflicts analysis. The former generally allows lawyers to take matters adverse to former clients unless it is in the same or a “substantially related” matter in which the lawyer formerly represented a client. In other words, ABA Model Rule 1.9’s former-client conflicts rule takes a far more forgiving approach to lawyers’ adversity to their former clients. The existing client would justifiably expect the lawyer to continue and ultimate complete that representation. The latter ABA Model Rule 1.7 standard prevents lawyers from representing current clients on any matter, even unrelated to the matter on which the lawyer is representing the client.

The so-called “thrust upon” doctrine is an exception to the “hot potato” rule. It sometimes allows lawyers to withdraw from a representation to cure a conflict.

On its face, ABA Model Rule 1.7 cmt. [5]’s so-called “thrust upon” rule does not allow lawyers to continue representing both clients involved in the situation. Instead, it indicates that such lawyers “may” have the option to withdraw from one of the representations to eliminate the conflict. In the example provided in ABA Model Rule 1.7 cmt. [5], a lawyer representing a client adverse to a company that is purchased in the midst of the representation by another client the lawyer is representing in an unrelated

matter presumably would drop the latter client (which has just purchased the lawyer's current adversary). That would allow the lawyer to continue representing the client in the matter adverse to the now-former client's newly-purchased subsidiary. That is the only option that would make sense, because the normal conflicts principle absent the "thrust upon" rule would require the lawyer to withdraw from the representation of the client the lawyer is representing in a matter that is adverse to some unrelated third party until that third party was purchased by the lawyer's other client.

Some states' ethics rules allow lawyers in such a "thrust upon" situation to continue representing both clients. In the ABA Model Rule 1.7 cmt. [5] example, those states would allow the lawyer to continue representing the client adverse to the newly-purchased entity, as well as continuing to represent the entity's purchaser (in unrelated matters). Lawyers presumably would prefer that approach. Of course, such lawyers might be fired by the angry or disgruntled client against whose new subsidiary the lawyer is now adverse.

### **Virginia Rule 1.7 Comment [6]**

Virginia Rule 1.7 cmt. [6] addresses the rationale for Virginia Rule 1.7(a)(1)'s "direct adversity" conflict rule.

Virginia Rule 1.7 cmt. [6] first explains that because of lawyers' duty of "loyalty to a client," "[a]s a general proposition" lawyers may not undertake representations "directly adverse" to a client without consent, even if the lawyer represents that client on a "wholly unrelated" matter. Virginia Rule 1.7 cmt. [6]'s introductory phrase "[a]s a general proposition" is far too loose. As explained below, ABA Model Rule 1.7 cmt. [6] properly uses the blunt word "prohibits" in describing that scenario.

Virginia Rule 1.7 cmt. [6] then changes direction – assuring that “simultaneous representation in unrelated matters of clients whose interest are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients” (emphasis added)

Virginia Rule 1.7 cmt. [6] uses the wrong term in explaining this scenario. Conflicts of interest arise when a lawyer is “legally” adverse to a current client (or a former client, under the different Virginia Rule 1.9 analysis). Virginia Rule 1.7 cmt. [6]’s phrase “generally adverse” is irrelevant to this analysis. That phrase focuses on the intensity of the adversity, not whether the adversity is legal adversity (in which case the lawyer has a conflict, however intense the legal adversity).

As explained below, ABA Model Rule 1.7 cmt. [6] correctly uses the phrase “economically adverse” rather than the erroneous phrase “generally adverse.” ABA Model Rule 1.7 cmt. [6]’s phrase distinguishes economic adversity (which does not by itself create a conflict) from legal adversity (which does).

**ABA Model Rule 1.7 cmt. [6]** also addresses “direct adversity” conflicts.

In contrast to Virginia Rule 1.7 cmt. [6], ABA Model Rule 1.7 cmt. [6] provides a more thorough explanation of why both affected clients must consent in common current-client conflict scenarios, and also describes a type of adversity not explicitly identified in the Virginia Rules or Comments.

In contrast to the Virginia Rule 1.7 cmt. [6]’s introductory phrase “[a]s a general proposition,” ABA Model Rule 1.7 cmt. [6] correctly notes that ABA Model Rule 1.7 “prohibits” lawyers from representing one client directly adverse to another current client without the appropriate consents (and presumably without meeting the other conditions

for such a representation). As ABA Model Rule 1.7 cmt. [6] explains, “absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated.”

ABA Model Rule 1.7 cmt. [6] then makes the obvious point that the client “as to whom the representation is directly adverse is likely to feel betrayed,” and that the “resulting damage to the client-lawyer relationship is likely to impair the lawyer’s ability to represent the client effectively” (presumably in the unrelated matters).

In contrast to Virginia Rule 1.7 cmt. [6], ABA Model Rule 1.7 cmt. [6] next explains the less obvious effect on the client whom the lawyer is representing adverse to another unrelated client: “the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client’s case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer’s interest in retaining the current client.” This so-called “punch pulling” concept underlies the requirement that lawyers obtain the informed consent of the client the lawyer is representing in a matter adverse to another client. The lawyer’s requirement to obtain the consent of the client against whom the lawyer is being adverse is self-evident. One might initially think that the lawyer need not obtain a similar consent from the client that the lawyer is representing in that matter (adverse to the other client). After all, the lawyer has obtained the other client’s consent to be adverse to it. But the client the lawyer is representing in the matter adverse to the other client has the right to know that across the court room or the negotiation table is another of the lawyer’s clients – and that the lawyer may therefore be reluctant to zealously represent the client in the matter adverse to that other client (even if that other client has consented to such adversity). Having that

knowledge, the client understandably might choose another lawyer who does not have that possible limitations on his or her diligence. So under either ABA Model Rule 1.7(a)(1) or ABA Model Rule 1.7(a)(2) (the so-called “material limitation” conflict, discussed above and below) the lawyer must obtain both clients’ informed consents. The same would of course be true under the Virginia Rules, although Virginia Rule 1.7 cmt. [6] does not provide a clear explanation for that somewhat counter-intuitive requirement.

ABA Model Rule 1.7 cmt. [6] then provides an example of a “directly adverse conflict” (under ABA Model Rule 1.7(a)(1)): – “when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit.” Virginia Rule 1.7 cmt. [6] does not contain this example.

The latter part of that ABA Model Rule 1.7 cmt. [6] sentence is interesting, because it describes a situation in which a lawyer faces a conflict in cross-examining another witness (presumably a fact witness, but perhaps an expert witness) “when the testimony will be damaging to the client who is represented in the lawsuit.” This seems to imply that the questioning lawyer would not face a conflict if the client being cross-examined by the lawyer does not have damaging testimony. One might think that the very act of cross-examination is sufficiently adverse to trigger an ABA Model Rule 1.7(a) conflict. It is unclear whether ABA Model Rule 1.7 cmt. [6] provides an extreme example of obvious adversity, or instead limits the conflict dilemma to a situation in which a lawyer representing a client will cross-examine another client whose testimony will harm the lawyer’s client rather than be neutral or assist the lawyer’s litigation client’s case. Of

course, presumably in the latter situations it would be easy for the lawyer to obtain that other client's consent to the cross-examination.

ABA Model Rule 1.7 cmt. [6] also contrasts in other ways from Virginia Rule 1.7 cmt. [6]. Virginia Rule 1.7 cmt. [6]'s last sentence explains that "simultaneous representation" of clients in "unrelated matters" "does not require consent of the respective clients," – if the interests "are only generally adverse" (emphasis added). Virginia Rule 1.7 cmt. [6] provides an example: "such as competing economic enterprises." The similar sentence in ABA Model Rule 1.7 cmt. [6] describes a scenario in which lawyers are representing "competing economic enterprises" in "unrelated litigation." Significantly, ABA Model Rule 1.7 cmt. [6] describes the two clients as "only economically adverse" (emphasis added). This phrase distinguishes the adversity from legal adversity, which would create a conflict. As explained above, Virginia Rule 1.7 cmt. [6] uses the incorrect phrase "only generally adverse." That phrase focuses on the degree of adversity, not its character. ABA Model Rule 1.7 cmt. [6]'s scenario describes a situation where there is no legal adversity, and therefore no conflict.

Virginia Rule 1.7 cmt. [6] does not contain the "unrelated litigation" proviso, although the phrase "unrelated matters" appears earlier in Virginia Rule 1.7 cmt. [6]'s last sentence. Also, that last Virginia Rule 1.7 cmt. [6]'s sentence explains that such simultaneous representation in unrelated matters "does not require consent of the respective clients" (emphasis added). ABA Model Rule 1.7 cmt. [6]'s last sentence is more measured – stating that such a simultaneous representation "does not ordinarily constitute a conflict of interest" and "thus may not require consent of the respective clients" (emphasis added).

### **ABA Model Rule 1.7 Comment [7]**

Virginia did not adopt ABA Model Rule 1.7 cmt. [7].

ABA Model Rule 1.7 cmt. [7] explains that “[d]irectly adverse conflicts can also arise in transactional matters.” The ABA Model Rule Comment then provides an example: “if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by a lawyer, not in the same transaction but in another, unrelated matter.” A lawyer in that position “could not undertake the representation without the informed consent of each client.”

Of course, that reflects the general conflicts rule articulated in ABA Model Rule 1.7(a)(1) and the parallel Virginia Rule 1.7(a)(1). Neither of those rules is limited to litigation contexts. Legal adversity can arise even in the friendliest setting, such as transactions in which the counterparties are best lifetime friends totally committed to working out a fair deal with minimum negotiation. That scenario still involves legal adversity. ABA Model Rule 1.7 cmt. [28] (discussed below) addresses the remote possibility of consents allowing the same lawyer to represent both sides of such a friendly transaction.

### **Virginia Rule 1.7 Comment [8]**

Virginia Rule 1.7 cmt. [8] addresses Virginia Rule 1.7(a)(2)’s so-called “material limitation” conflict, described above.

Virginia Rule 1.7 cmt. [8] first explains that there is such a “material limitation” conflict when the lawyer “cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer’s other responsibilities or interests.” Such a

“material limitation” conflict “in effect forecloses alternatives that would otherwise be available to the client.”

Virginia Rule 1.7 cmt. [8] correctly describes a scenario implicating Virginia Rule 1.7(a)(2) “material limitation” conflict. But unfortunately for lawyers looking for clear guidance, Virginia Rule 1.7 cmt. [8] describes only a subset of such conflicted representation. Virginia Rule 1.7 cmt. [8] describes a scenario “when a lawyer cannot” fully represent the client because the conflict “forecloses” certain alternatives. But Virginia Rule 1.7(a)(2) applies in broader circumstances – when there is a significant risk of such a material limitation (emphasis added). In other words, Virginia Rule 1.7(a)(2) recognizes a conflict when there is a risk of what Virginia Rule 1.7 cmt. [8]’s scenario describes. As explained below, ABA Model Rule 1.7 cmt. [8] correctly notes this “significant risk” standard.

This type of scenario could arise if a lawyer representing a client seeking recovery for some injury or other loss identifies several potential defendants who might be liable for the client’s injury or loss. The lawyer faces a conflict if one of those potential defendants is a client on unrelated matters. The lawyer could not proceed against that possible defendant without its consent, so the lawyer’s judgment would likely to be materially affected by that inability to sue that potential defendant.

An almost endless series of scenarios can trigger a Virginia Rule 1.7(a)(2) “material limitation” conflict. For instance, it might be information-based. A lawyer who represents a highway company which has contracted with the state to build a limited-access road may have advance non-public knowledge about where this state is likely to direct where the interchanges will be located. That lawyer presumably would face a

“material limitation” conflict preventing her from representing the home builder hoping to develop a large community near one of the interchanges. The lawyer obviously cannot disclose the interchanges’ likely location, and under Virginia Rule 1.8(b) she cannot “use information relating to representation of [the state] for the advantage of . . . a third person” such as the developer). But even her body language might give away the interchanges’ possible location. And she might go overboard in steering the developer away from a likely interchange location so she is not accused of having misused the state’s information.

Or the lawyer’s “personal interest” might trigger a “material limitation.” A lawyer presumably could not represent a personal injury plaintiff in a slip and fall lawsuit against a restaurant in which the lawyer has a material ownership interest. The lawyer’s “personal interest” might be ideological, religious, or emotional. A devoutly religious lawyer could have trouble representing a Satanic cult. A committed pro-life lawyer might not be able to represent an abortion clinic accused of selling fetal body parts using secret price list. So Virginia Rule 1.7(a)(2) “material limitation” conflicts might arise at any time, and in nearly any situation.

Virginia Rule 1.7 cmt. [8] next acknowledges that the representation is not prohibited if only “[a] possible conflict” exists. Instead, “[t]he critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer’s independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.” Virginia Rule 1.7 cmt. [8] then provides examples of situations in which “a lawyer can never adequately provide joint representation”: “in certain matters relating to divorce,

annulment or separation – specifically, child custody, child support, visitation, spousal support and maintenance or division of property” (emphasis added).

That seems like an odd reference, for two reasons.

First, Virginia Rule 1.7 cmt. [8] presumably refers to simultaneous representations, not joint representations. In the former situation, a lawyer represents multiple clients on related matters. In the latter situation, lawyers represent multiple clients on the same matter. Joint representations involve other very complicated loyalty and (especially) confidentiality issues. Virginia Rule 1.7 addresses joint representations in Virginia Rule 1.7 cmts. [29] – [35] (labeled “Special Considerations in Common Representation”), not in the more generic Virginia Rule 1.7 Comments labeled “Loyalty to a Client” (Virginia Rule 1.7 cmts. [1] – [8]). Both that heading and Virginia Rule 1.7 cmt. [8]’s first sentence uses the phrase “a client” in the singular. So it is strange and inappropriate for Virginia Rule 1.7 cmt. [8] to address joint representations.

Second, it should go with saying that “a lawyer can never adequately provide joint representation” in the listed family law matters. It is difficult to imagine a less likely scenario for a permissible joint representation (other than perhaps black letter Virginia Rule 1.7(b)(3)’s scenario where the same lawyer simultaneously represents a claimant and the defendant). So those family law examples are essentially useless – because every lawyer will know that. Virginia Rule Comments are more helpful when they provide less obvious examples.

**ABA Model Rule 1.7 cmt. [8]** also addresses “material limitation” conflicts under ABA Model Rule 1.7(a)(2).

Although ABA Model Rule 1.7 cmt. [8] contains some of the same language contained in Virginia Rule 1.7 cmt. [8], there are significant differences.

First, in contrast to Virginia Rule 1.7 cmt. [8], ABA Model Rule 1.7 cmt. [8] begins with the phrase “[e]ven where there is no direct adverseness.” This is helpful, because it distinguishes ABA Model Rule 1.7(a)(2)’s “material limitation” conflict (addressed in the ABA Model Comment) from the more obvious ABA Model Rule 1.7(a)(1) “directly adverse” conflict.

Second, in contrast to Virginia Rule 1.7 cmt. [8], ABA Model Rule 1.7 cmt. [8] provides a “material limitation” example that does not appear in Virginia Rule 1.7 cmt. [8]. That example also seems out of place, because it also involves a joint representation: “a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer’s ability to recommend or advocate all possible positions that each might take because of the lawyer’s duty of loyalty to the others.” That scenario seems to describe a joint representation, which involves complicated loyalty and confidentiality issues that are addressed in later ABA Model Rule Comments – ABA Model Rule 1.7 cmt. [29] - [33].

Third, in contrast to Virginia Rule 1.7 cmt. [8], ABA Model Rule 1.7 cmt. [8] assures that “[t]he mere possibility of subsequent harm does not itself require disclosure and consent.” Thus, ABA Model Rule 1.7 cmt. [8] correctly identifies the “critical questions” in its concluding sentence – which contains language identical to Virginia Rule 1.7 cmt. [8]’s fourth sentence: “[t]he critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer’s independent

profession judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.”

Fourth, in contrast to Virginia Rule 1.7 cmt. [8]’s description of Virginia Rule 1.7(a)(2)’s “material limitation” conflict (when a lawyer’s loyalty “is” impaired and the lawyer “cannot” consider certain options because those have been “foreclose[d]”), ABA Model Rule 1.7 cmt. [8] correctly uses a more nuanced standard contained in both ABA Model Rule 1.7(a)(2) and in Virginia Rule 1.7(a)(2): “if there is a significant risk that a lawyer’s ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer’s other responsibilities or interests.” In other words, ABA Model Rule 1.7(a)(2) properly focuses on a possible “significant risk” of a “material limitation” – rather than the existence of such a “material limitation.”

### **Virginia Rule 1.7 Comment [9]**

Virginia Rule 1.7 cmt. [9] addresses the situation in which courts might deal with conflicts of interest – presumably in a disqualification motion setting.

Virginia Rule 1.7 cmt. [9] first explains that lawyers “undertaking the representation” are primarily responsible for “[r]esolving questions of conflict of interest.” That seems obvious.

Virginia Rule 1.7 cmt. [9] then acknowledges that courts may “raise the question” about conflicts when “there is reason to infer that the lawyer has neglected the responsibility” (presumably the responsibility to resolve any conflicts). The Virginia Rule Comment then indicates that “inquiry by the court is generally required when a lawyer

represents multiple defendants” in criminal cases. This is not surprising, given the constitutional issues involved in that context.

Virginia Rule 1.7 cmt. [9] next acknowledges that “opposing counsel may properly raise the question” of a lawyer’s possible conflict “[w]here the conflict is such as clearly to call in question the fair or efficient administration of justice.”

Virginia Rule 1.7 cmt. [9] concludes by warning that “[s]uch an objection [by opposing counsel] should be viewed with caution, however, for it can be misused as a technique of harassment.” This warning about tactical misuse of a conflicts allegation obviously implicates disqualification motions filed to gain some advantage in litigation. It might also implicate standing to file such disqualification motions.

This warning parallels the Virginia Scope section’s seventh paragraph, which warns that “the purpose of the [Virginia] Rules can be subverted when they are invoked by opposing parties as procedural weapons.” Thus, “[t]he fact that a [Virginia] Rule is a just basis for a lawyer’s self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the [Virginia] Rule.” ABA Model Rule Scope [20] contains identical language.

### **ABA Model Rule 1.7 Comment [9]**

Virginia did not adopt ABA Model Rule 1.7 cmt. [9].

ABA Model Rule 1.7 cmt. [9] addresses a completely different topic from Virginia Rule 1.7 cmt. [9].

ABA Model Rule 1.7 cmt. [9] addresses “material limitation” conflicts, explaining that such a conflict may be triggered by lawyers’ “responsibilities to former clients under

[ABA Model] Rule 1.9 or by lawyers' responsibilities to other persons, such as fiduciary duties arising from a lawyers' service as trustee, executor or corporate director." Those responsibilities presumably come from statutory or common law, and might limit options by a lawyer that she otherwise could undertake on her client's behalf.

### **Virginia Model Rule 1.7 Comment [10]**

Virginia Rule 1.7 cmt. [10] addresses lawyers' "business or personal interests" adversely affecting the representations of their clients (emphasis added).

This is a strange phrase. Lawyer's "business" interests are certainly "personal." Perhaps Virginia Rule 1.7 cmt. [10]'s use of the word "personal" was meant to include non-business or non-financial interests. As explained below, ABA Model Rule 1.7 cmt. [10] uses the more generic phrase "lawyer's own interests."

Virginia Rule 1.7 cmt. [10] warns lawyers that they may not allow such "business or personal interest" to "affect representation of a client." Virginia Rule 1.7 cmt. [10] provides three examples.

First, lawyers' "need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee." (citing Virginia Rules 1.1 and 1.5). That example seems inapt. A lawyer undertaking a matter "that cannot be handled competently" would violate Virginia Rule 1.1. A lawyer who undertook a representation not "at a reasonable fee" would violate Virginia Rule 1.5. So those situations would involve other ethics violations ab initio, rather than trigger a "material limitation" on an otherwise appropriate representation.

Second, "a lawyer may not refer clients to an enterprise in which the lawyer has an undisclosed interest." That prohibition also seems inapt. Although such conduct might

violate other ethics rules (such as Virginia Rule 8.4(c)'s prohibition on “conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer’s fitness to practice law”), it might or might not affect the lawyer’s representation. For instance, a lawyer referring a client to a court reporting company in which the lawyer has an “undisclosed interest” might result in shoddy transcripts. But a lawyer referring a client to a bank or a restaurant in which the lawyer had an “undisclosed interest” presumably would have little or no effect on the representation.

Third, lawyers’ “romantic or other intimate personal relationship can also adversely affect representation of a client.” As of December 2020, the Virginia Rules do not contain a black letter Rule provision or Comment addressing sexual relationships between lawyers and their clients. Instead, a Virginia Legal Ethics Opinion warns that such relationships might create ethics issues. This contrasts with ABA Model Rule 1.8(j) – which prohibits lawyers from “sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.” ABA Model Rule 1.8 cmt. [17] – [19] provides guidance about this prohibition.

ABA Model Rule 1.7 cmt. [12] (discussed below) essentially repeats ABA Model Rule 1.8(j)'s prohibition on lawyers’ “engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship (referring to ABA Model Rule 1.8(j)).

**ABA Model Rule 1.7 cmt. [10]** addresses lawyers’ personal interests.

ABA Model Rule 1.7 cmt. [10] begins by understandably warning that “[t]he lawyer’s own interests should not be permitted to have an adverse effect on representation of a client.” Thus, the first sentence uses the phrase “own interests” –

which differs from Virginia Rule 1.7 cmt. [10]’s introductory phrase “business or personal interests.” The phrases are probably intended to be synonymous – with the Virginia Rule Comment’s phrase equating to the ABA Model Rule Comment’s “own.”

In contrast to Virginia Rule 1.7 cmt. [10], the ABA Model Rule 1.7 cmt. [10] does not contain Virginia Rule 1.7 cmt. [10]’s first example – addressing the lawyer’s “need for income.”

ABA Model Rule 1.7 cmt. [10] likewise does not include Virginia Rule 1.7 cmt. [10]’s third example, which focuses on lawyers’ “romantic or other intimate personal relationships.” To date, Virginia has addressed those situations only in a legal ethics opinion. Virginia LEO 1853 (12/29/04) (warning about such relationships, but declining to adopt a per se prohibition).

ABA Model Rule 1.7 cmt. [12] (discussed below) separately indicates that lawyers are “prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship” (referring to ABA Model Rule 1.8(j)).

ABA Model Rule 1.7 cmt. [10] provides two examples of lawyers’ possible disabling personal interests which are not found in Virginia Rule 1.7 cmt. [10].

First, ABA Model Rule 1.7 cmt. [10] indicates that “it may be difficult or impossible for the lawyer to give a client detached advice” if “the probity of a lawyer’s own conduct in a transaction is in serious question.” This significant scenario is a paradigmatic example of a “material limitation” conflict – and the wisdom of describing it as a “rheostat” conflict. For instance, a lawyer who makes a serious mistake in a transactional setting

may begin to worry so much about his own liability that his judgment on behalf of the client will be materially affected.

Like so many other “material limitation” scenarios, there is a spectrum. Lawyers would not face that dilemma if a client mildly criticizes a lawyer’s choice of wording, but presumably would face a conflict if the client condemns the lawyer for overlooking the need for an indemnity provision in a transaction document, etc. Presumably the same consideration would apply to lawyers’ conduct in litigation. A client’s mild criticism of her lawyer’s deposition questioning presumably would not put “the probity of a lawyer’s own conduct . . . in serious question.” In contrast, the client’s harsh criticism and threat to sue her lawyer for malpractice in most if not all situations would make it “difficult or impossible for the lawyer to give a client detached advice” because “the probity of a lawyer’s own conduct . . . is in serious question.” At some point along that spectrum, such lawyers face a disabling “personal interest” conflict.

Second, ABA Model Rule 1.7 cmt. [10] indicates that lawyers’ “discussions concerning possible employment with an opponent of the lawyer’s client, or with a law firm representing the opponent . . . could materially limit the lawyer’s representation of the client.” In this scenario, the lawyer applying for a job with the law firm representing an ongoing transactional or litigation adversary might be tempted to “pull punches” on her client’s behalf – to avoid angering the lawyers who are deciding whether or not to hire her.

Third, ABA Model Rule 1.7 cmt. [10] warns that lawyer’s “may not” (the term “must not” would seem more appropriate) “allow related business interests to affect representation” – such as “by referring clients to an enterprise in which the lawyer has an

undisclosed financial interest” (similar to one of the examples in the Virginia Rule’s Comment). This third example includes a reference to ABA Model Rule 1.8, and also includes a reference to ABA Model Rule 1.10’s imputed disqualification effect (“noting that personal interest conflicts under [ABA Model] Rule 1.7 ordinarily are not imputed to other lawyers in a law firm”).

Virginia Rule 1.7 cmt. [10] does not mention those issues in its discussion of that type of personal interest. It is worth noting that on its face Virginia Rule 1.10 does ordinarily impute to other law firm colleagues a lawyer’s Virginia Rule 1.7 personal interest conflict. As discussed more fully in this documents’ summary and analysis of Virginia Rule 1.10, the Virginia Supreme Court declined to change Virginia’s unusual if not unique imputation of lawyers’ personal interest prohibition to all associated law firm colleagues.

### **ABA Model Rule 1.7 Comment [11]**

Virginia did not adopt ABA Model Rule 1.7 cmt. [11]. As discussed below, Virginia deals with this situation in Virginia Rule 1.8(i).

ABA Model Rule 1.7 cmt. [11] addresses conflicts “[w]hen lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage.” Significantly, ABA Model Rule 1.7 cmt. [11] thus only focuses on lawyers “related by blood or marriage” – in contrast to Virginia Rule 1.8(i), which also covers a lawyer “who is intimately involved with another lawyer.”

ABA Model Rule 1.7 cmt. [11] first explains that in that situation “there may be a significant risk” that: (1) “client confidences will be revealed,” and (2) that “the lawyers’ family relationship will interfere with both loyalty and independent professional judgment.” The ABA Model Rule Comment indicates that as a result, “each client is entitled to know

of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation.” Unless “each client gives informed consent” after such disclosure, “a lawyer related to another lawyer, e.g. as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party.”

ABA Model Rule 1.7 cmt. [11] concludes with a reminder that “disqualification arising from a close family relationship is personal,” and therefore not “ordinarily” imputed to the disqualified lawyer’s associated law firm colleagues under ABA Model Rule 1.10.

The Virginia Rules deal with this scenario in black letter Virginia Rule 1.8(i). Virginia Rule 1.8(i) indicates that except “upon consent by the client after consultation,” a lawyer “related to another lawyer as parent, child, sibling or spouse, or who is intimately involved with another lawyer” may not represent a client in representations “directly adverse to a person whom the lawyer knows is represented by the other lawyer.” Thus, Virginia Rule 1.8(i) covers “[a] lawyer related to another lawyer as parent, child, sibling or spouse, or who is intimately involved with another lawyer.” Virginia Rule 1.8 cmt. [12] indicates that prohibition “applies to related lawyers who are in different firms.” Lawyers facing that type of conflict who are in the same firm “are governed by [Virginia] Rules 1.7, 1.9 and 1.10.”

Virginia Rule 1.8 cmt. [12] explains that the prohibition in this situation “is personal and is not imputed to members of firms with whom the lawyers are associated.”

### **ABA Model Rule 1.7 Comment [12]**

Virginia did not adopt ABA Model Rule 1.7 cmt. [12].

ABA Model Rule 1.7 cmt. [12] addresses lawyers' sexual relationships with their clients.

ABA Model Rule 1.7 cmt. [12] bluntly prohibits lawyers from “engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship,” referring to ABA Model Rule 1.8(j). The plural “relationships” seems wrong – it should either be in the singular, or the phrase “a client” should instead be “clients” in the plural.

ABA Model Rule 1.7 cmt. [12] also parallels ABA Model Rule 1.8(j)'s seemingly inapt prohibition. Black letter ABA Model Rule 1.8(j) and ABA Model Rule 1.7 cmt. [12] does not prohibit a lawyer's representation of the person with whom the lawyer is sexually intimate, but instead prohibits the sexual relationship. That phrase or prohibition oddly focuses on the personal relationship, rather than the professional relationship.

As explained above, Virginia deals with lawyers' “romantic or other intimate personal relationship” in Virginia Rule 1.7 cmt. [10]. That provision acknowledges that lawyer's “intimate personal relationship can also adversely affect representation of a client.” But it does not prohibit such relationships. Virginia LEO 1853 (12/29/04) warns about such relationships, but does not adopt a per se prohibition.

### **Virginia Rule 1.7 Comment [13]**

Virginia Rule 1.7 cmt. [13] addresses lawyers being paid by a non-client to represent a client.

Virginia Rule 1.7 cmt. [13] first explains that lawyers “may be paid from a source other than the client if the client is informed of that fact and consents and the arrangement does not compromise the lawyer’s duty of loyalty to the client.”

Virginia Rule 1.7 cmt. [13] refers to Virginia Rule 1.8(f) – which provides black-letter Rule guidance about that scenario. Virginia Rule 1.8(f) prohibits lawyers from “accept[ing] compensation for representing a client from one other than the client unless:” (1) “the client consents after consultation;” (2) “there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship;” and (3) “information relating to representation of a client is protected as required by [Virginia] Rule 1.6.” Virginia Rule 1.8 cmt. [11] provides further guidance.

Virginia Rule 1.7 cmt. [13] does not contain a phrase found in ABA Model Rule 1.7 cmt. [13] (discussed below), which appears directly after the reference to “a source other than the client”: “including a co-client.” So ABA Model Rule 1.7 cmt. [13] implicitly indicates that a co-client’s payment of the lawyer’s bills triggers the considerations articulated in ABA Model Rule 1.7 cmt. [13]. The better reading of the Virginia Rule 1.7 cmt. [13] language would lead to the same result, but that is not as clear.

Virginia Rule 1.7 cmt. [13] allows such an arrangement if the client provides informed consent “and the arrangement does not compromise the lawyer’s duty of loyalty to the client” (referring to Virginia Rule 1.8(f)).

Virginia Rule 1.7 cmt. [13] provides two examples. First, an insurer is “required to provide special counsel for the insured” in situations where the insurer and insured have “conflicting interests in a matter arising from a liability insurance agreement.” That arrangement “should assure the special counsel’s professional independence.” Second,

a corporation may pay for “separate legal representation of the directors or employees” in a “controversy in which they have conflicting interests,” as long as “the clients consent after consultation and the arrangement ensures the lawyer’s professional independence.”

**ABA Model Rule 1.7 cmt. [13]** also addresses lawyers being paid by a non-client to represent a client.

ABA Model Rule 1.7 cmt. [13] contains provisions similar to those in Virginia Rule 1.7 cmt. [13] – focusing on lawyers’ obligation to advise the client that the lawyer is being paid by a non-client, and to avoid any compromise of the lawyer’s duties to the client.

ABA Model Rule 1.7 cmt. [13] differs from Virginia Rule 1.7 cmt. [13] in three ways.

First, in contrast to Virginia Rule 1.7 cmt. [13], ABA Model Rule 1.7 cmt. [13], includes payments from “a co-client” in the analysis of lawyers’ duties when being paid by a non-client. Perhaps that scenario is implied in Virginia Rule 1.7 cmt. [13].

Second, in contrast to the Virginia Rule 1.7 cmt. [13], ABA Model Rule 1.7 cmt. [13] does not include the examples of an insurer’s obligation to provide “special counsel for the insured” in certain circumstances, and corporations’ providing of “separate legal representation of the directors or employees” in certain circumstances.

Third, in contrast to Virginia Rule 1.7 cmt. [13], ABA Model Rule 1.7 cmt. [13] explains that lawyers being paid by a non-client must comply with ABA Model Rule 1.7(b) – describing lawyers’ required actions before undertaking a representation “[i]f acceptance of the payment from any other source presents a significant risk that the lawyer’s representation of the client will be materially limited by the lawyer’s own interest in accommodating the person paying the lawyer’s fee or by the lawyer’s responsibilities

to a payor who is also a co-client.” As explained above, ABA Model Rule 1.7(b) has four conditions under which lawyers may represent a client despite a conflict.

ABA Model Rule 1.7 cmt. [13] concludes with an explanation that lawyers in that situation must “determin[e] whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.” Of course, clients must also consent in that scenario.

### **ABA Model Rule 1.7 Comment [14]**

Virginia did not adopt ABA Model Rule 1.7 cmt. [14]. Instead, Virginia addresses non-consentable conflicts in Virginia Rule 1.7 cmt. [19], discussed below.

ABA Model Rule 1.7 cmt. [14] addresses nonconsentable conflicts.

ABA Model Rule 1.7 cmt. [14] warns that although “[o]rdinarily, clients may consent to representation notwithstanding a conflict, “some conflicts are nonconsentable.” In that situation, “the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client’s consent” – which “must be resolved as to each client” if the lawyer “is representing more than one client.”

The phrase “is representing” seems inapt. That describes a scenario in which the lawyer has already undertaken a representation. To be sure, conflicts can arise at that stage. But a discussion of non-consentable conflicts would seem more appropriate in a setting where the lawyer has not yet begun a representation.

This warning presumably covers non-consentable arrangements such as the specific ABA Model Rule 1.7(b)(3) example of a lawyer simultaneously asserting a claim on behalf of one client and defending it on behalf of another client. It also presumably

covers other non-consentable conflicts in which lawyers would not think that they could adequately represent clients even with consent.

### **ABA Model Rule 1.7 Comment [15]**

Virginia did not adopt ABA Model Rule 1.7 cmt. [15].

ABA Model Rule 1.7 cmt. [15] also addresses unconsentable conflicts.

ABA Model Rule 1.7 cmt. [15] begins by noting that “[c]onsentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest.” ABA Model Rule 1.7 cmt. [15] then warns that a “representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation” (referring to ABA Model Rule 1.1 and 1.3). ABA Model Rule 1.1 addresses lawyers’ duty of competence, and ABA Model Rule 1.3 addresses lawyers’ duty of diligence.

The objective “cannot reasonably conclude” standard is essentially synonymous with the “disinterested lawyer” standard included in Virginia Rule 1.7 cmt. [19], discussed below.

### **ABA Model Rule 1.7 Comment [16]**

Virginia did not adopt ABA Model Rule 1.7 cmt. [16].

ABA Model Rule 1.7 cmt. [16] addresses “conflicts that are nonconsentable because the representation is prohibited by applicable law.”

ABA Model Rule 1.7 cmt. [16] provides several examples: state substantive law prohibiting the same lawyer from representing “more than one defendant in a capital

case;” federal criminal statutes prohibiting “certain representations by a former government lawyer;” and “decisional law in some states [that] limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.”

The first two scenarios involve substantive prohibitions on the representation. The third scenario involves the client’s inability to provide the required consent.

### **ABA Model Rule 1.7 Comment [17]**

Virginia did not adopt ABA Model Rule 1.7 cmt. [17].

ABA Model Rule 1.7 cmt. [17] addresses nonconsentable conflicts under ABA Model Rule 1.7(b)(3).

ABA Model Rule 1.7 cmt. [17] prohibits lawyers’ “assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.” ABA Model Rule 1.7 cmt. [17] explains that the nonconsentable prohibition is based on “the institutional interest in vigorous development of each client’s position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal.”

ABA Model Rule 1.7 cmt. [17] does not provide any examples of such scenarios, it understandably explains that examining “the context of the proceeding” determines whether “clients are aligned directly against each other within the meaning of this paragraph.”

ABA Model Rule 1.7 cmt. [17] next notes that mediations are not proceedings before a “tribunal” (as that term is defined in ABA Model Rule 1.0(m)). This presumably means that lawyers may represent multiple parties in such mediations – subject of course

to all of the other conflicts rules (“direct adversity” as well as “material limitation”), and the remainder of the ABA Model Rules.

ABA Model Rule 1.7 cmt. [17] concludes with a warning that such multiple mediation representations nevertheless “may be precluded” by [ABA Model Rule] 1.7(b)(1).” ABA Model Rule 1.7(b)(1) explains that lawyers may undertake a representation despite a conflict if (among other things) “the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.”

### **ABA Model Rule 1.7 Comment [18]**

Virginia did not adopt ABA Model Rule 1.7 cmt. [18].

ABA Model Rule 1.7 cmt. [18] addresses “informed consent.”

ABA Model Rule 1.7 cmt. [18] refers to ABA Model Rule 1.0(e)’s definition of “informed consent,” and explains that such informed consent “requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client.”

ABA Model Rule 1.7 cmt. [18] then understandably notes that the necessary disclosure to the clients depends on the “nature of the conflict and the nature of the risks involved.”

ABA Model Rule 1.7 cmt. [18] concludes with an explanation that lawyers representing “multiple clients in a single matter” must inform those clients of “the implications of the common representation, including possible effects on loyalty,

confidentiality and the attorney-client privilege and the advantages and risks involved” (referring to ABA Model Rule 1.7 cmts. [30] and [31] discussed below).

### **Virginia Rule 1.7 Comment [19]**

Virginia Rule 1.7 cmt. [19] addresses nonconsentable conflicts.

Virginia Rule 1.7 cmt. [19] begins by recognizing that “[a] client may consent to a representation notwithstanding a conflict.”

Virginia Rule 1.7 cmt. [19] contains a phrase not found in the ABA Model Rules or Comments, warning that “when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client’s consent.” This objective standard is similar to the requirement in Virginia Rule 1.7(b)(1) and in ABA Model Rule 1.7(b)(1) that lawyers can proceed with a representation even if there is a conflict only if (among other things) “the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.” The phrase “lawyer reasonably believes” essentially adopts a “reasonable lawyer” standard that seems synonymous with “a disinterested lawyer” standard.

But Virginia Rule 1.7 cmt. [19] seems to apply a broader objective standard than ABA Model Rule 1.7(b)(1). The latter focuses on “the lawyer” assessing conflict. Virginia Rule 1.7 cmt. [19] focuses on “a disinterested lawyer.” That presumably applies a more abstract objective standard than the ABA Model Rule approach.

Virginia Rule 1.7 cmt. [19]’s guidance is also similar to ABA Model Rule 1.7 cmt. [15]’s provision preventing lawyers from undertaking a representation (or presumably from seeking a consent to undertake such a representation) “if in the circumstances the

lawyer cannot reasonable conclude that the lawyer will be able to provide competent and diligent representation.”

Similar to ABA Model Rule 1.7 cmt. [14], Virginia Rule 1.7 cmt. [19] next explains that “[w]hen more than one client is involved, the question of conflict must be resolved as to each client.”

Virginia Rule 1.7 cmt. [19] then changes direction – focusing on confidentiality issues. The Virginia Rule Comment warns that “there may be circumstances where it is impossible to make the disclosure necessary to obtain consent.” Virginia Rule 1.7 cmt. [19] provides an example: “when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision.” For example, a client wishing to keep her representation by the lawyer secret might not consent to the lawyer’s disclosure to a would-be client of that representation. That is especially possible in situations involving domestic relations, bankruptcy, criminal law, etc. – where even the fact of retaining a lawyer discloses something about the representation.

Significantly, Virginia Rule 1.7 cmt. [19] next reminds lawyers that their “obligations regarding conflicts of interest are not present solely at the onset of the attorney-client relationship; rather, such obligations are ongoing such that a change in circumstances may require a lawyer to obtain new consent from a client after additional, adequate disclosure regarding that change in circumstance.”

The word “onset” is almost surely incorrect – the term probably should be “outset.” Although the terms are similar, the term “onset” usually refers to some adverse event.

Such a “change in circumstances” presumably could involve extrinsic factors or even the representation itself. As examples of the former, parties might be added to litigation, discovery might begin to focus on several other sources of information, etc. The latter could involve a more subtle situation. For instance, a lawyer’s large corporate client relying on a lawyer to handle transaction with a supplier might consent to the lawyer’s partner representing that supplier on a small unrelated real estate matter. But if that supplier retains the lawyer’s partner to handle a much larger matter, the corporate client might begin to worry that its lawyer will be tempted to “pull punches” to avoid angering his firm’s increasingly lucrative supplier client.

**ABA Model Rule 1.7 cmt. [19]** addresses situations where a lawyer cannot undertake a representation because the required consents are unavailable.

ABA Model Rule 1.7 cmt. [19] contains language identical to that in Virginia Rule 1.7 cmt. [19] describing a client’s “refus[al] to consent to the disclosure necessary to permit the other client to make an informed decision” – which prevents the lawyer from seeking the consent and therefore undertaking the representation.

ABA Model Rule 1.7 cmt. [19] then changes direction – noting that “[i]n some cases the alternative to common representation can be that each party may have to obtain separate representation.” This is an odd explanation. In every or nearly every case, the alternative to “a common representation” is that each client retains its own lawyer. In that circumstance, lawyers must disclose possible additional costs “along with the benefits of securing separate representation” that affected clients may consider “in determining whether common representation is in the client’s interest.” That sentence seems out of place. ABA Model Rule 1.7 cmt. [19] generally addresses scenarios where consent is

unavailable because it is impossible to make the disclosure necessary to obtain such a consent. ABA Model Rule 1.7 deals with common representations in later Comments (ABA Model Rule 1.7 cmts. [29] – [33]).

### **Virginia Rule 1.7 Comment [20]**

Virginia Rule 1.7 cmt. [20] addresses consents' memorialization.

Virginia Rule 1.7 cmt. [20] requires that clients' consent "be memorialized in writing." Virginia Rule 1.7 cmt. [20] suggests that "[p]referably, the attorney should present the memorialization to the client for signature or acknowledgement," but assures that "any writing will satisfy this requirement, including, but not limited to, an attorney's notes or memorandum, and such writing need not be signed by, reviewed with, or delivered to the client."

**ABA Model Rule 1.7 cmt. [20]** also addresses consents' memorialization.

ABA Model Rule 1.7 cmt. [20] takes a different, more demanding approach than Virginia Rule 1.7 cmt. [20] – "requir[ing] the lawyer to obtain the informed consent of the client, confirmed in writing."

ABA Model Rule 1.7 cmt. [20] then explains that such writing "may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent" – referring to ABA Model Rule 1.10(b) (which defines "confirmed in writing") and ABA Model Rule 1.10(n) (which defines "writing").

ABA Model Rule 1.7 cmt. [20] next warns that lawyers must "obtain or transmit" such writing "within a reasonable time thereafter" if it is not feasible to do so "at the time the client gives informed consent." ABA Model Rule 1.7 cmt. [20] also reminds lawyers that the writing requirement "does not supplant the need in most cases for the lawyer to

talk with the client” –explaining to the client “the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives” (emphasis added). The lawyer must also “afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns.”

The word “talk” seems somewhat archaic. Few lawyers and clients now “talk” to each, rather than exchange e-mails or texts. In fact, ABA Model Rule 1.18 replaced the word “discusses” with the word “consults” – presumably to focus more on electronic communications instead of real-time oral communications. In ABA Model Rule 1.7 cmt. [20], one would think that the word “consult” would be more appropriate.

ABA Model Rule 1.7 cmt. [20] concludes with an explanation that the writing requirement is intended to “impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.”

### **ABA Model Rule 1.7 Comment [21]**

Virginia did not adopt ABA Model Rule 1.7 cmt. [21].

ABA Model Rule 1.7 cmt. [21] addresses clients’ revocation of consents.

ABA Model Rule 1.7 cmt. [21] first notes that a client “may revoke the consent,” and “terminate the lawyer’s representation at any time.” But ABA Model Rule 1.7 cmt. [21] then explains that whether such consent revocation “precludes the lawyer from continuing to represent other clients” depends on various factors. In other words, a client’s revocation of her consent does not automatically require the lawyer’s withdrawal.

ABA Model Rule 1.7 cmt. [21] describes several factors, including: (1) “the nature of the conflict”; (2) “whether the client revoked consent because of a material change in

circumstances”; (3) “the reasonable expectations of the other client”; and (4) “whether material detriment to the other clients or the lawyer would result.” That sentence seems to contain a mismatch of singular and plural references to the non-working client. ABA Model Rule 1.7 cmt. [21] thus essentially prevents clients in most circumstances from demanding that the lawyer discontinue a representation to which the client had earlier consented – by revoking a consent upon which the lawyer has relied in undertaking the representation of another client (normally adverse to the client giving the consent).

Most states explain that in that circumstance normal contract reliance principles apply. For instance, a lawyer who has undertaken a lengthy representation adverse to a client who has granted consent to the representation normally will not be forced to withdraw (or be disqualified) if the client revokes the consent upon which the lawyer and her other client have relied. One can imagine the prejudice and disruption if a client revokes such consent on the eve of a trial in adverse litigation to which the client had consented years earlier. On the other hand, a client who has granted such a consent presumably can revoke the consent and require the lawyer’s withdrawal from such an adverse representation if the client’s revocation takes place a few hours after the original consent and before the lawyer has taken any material acts on behalf of the other client in the adverse representation.

### **ABA Model Rule 1.7 Comment [22]**

Virginia did not adopt ABA Model Rule 1.7 cmt. [22].

ABA Model Rule 1.7 cmt. [22] addresses the highly significant issue of prospective consents.

Interestingly, neither the Virginia Rule's Comments nor any Virginia legal ethics opinion seem to deal with prospective consents. It is unclear whether Virginia's decision not to adopt ABA Model Rule 1.7 cmt. [22]'s prospective consent provision means that Virginia would not recognize such prospective consents. No state seems to have adopted a *per se* prohibition on such consents.

ABA Model Rule 1.7 cmt. [22] begins by understandably noting that “[w]hether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of [ABA Model Rule 1.7(b)].” As explained above, ABA Model Rule 1.7(b)(2) and (3) describes *per se* nonconsentable situations, and ABA Rule 1.7(b)(4) contains the requirement of logistical “informed consent, confirmed in writing.” So that leaves ABA Model Rule 1.7(b)(1)'s requirement that “the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.” But even that is not a good fit. A lawyer might well believe that she “will be able to provide competent and diligent representation to each affected client” when relying on a prospective consent to take a matter adverse to a client. Presumably the word “reasonably” imposes an objective rather than subjective standard on that analysis.

ABA Model Rule 1.7 cmt. [22] thus does not *per se* prohibit such prospective consents, but warns that their effectiveness will depend on whether the client “reasonably understands the material risks that the waiver entails.” ABA Model Rule 1.7 cmt. [22] repeatedly uses both the word “waiver” and the word “consent.” Although the words presumably are meant to be synonymous, the ABA Model Rules generally use the latter term rather than the former. That choice makes sense. Waivers can occur through

inaction, while consents normally require affirmative agreement – which is appropriate in the ethics context.

Not surprisingly, “[t]he more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding.”

ABA Model Rule 1.7 cmt. [22] next contrasts a client’s: (1) prospective consent “to a particular type of conflict with which the client is already familiar” (which “ordinarily will be effective with regard to that type of conflict”); with (2) a client’s prospective consent that “is general and open-ended” (which “ordinarily will be ineffective”), “because it is not reasonably likely that the client will have understood the material risks involved.”

ABA Model Rule 1.7 cmt. [22] also recognizes such factors as: (1) whether the client is an “experienced user of the legal services involved and is reasonably informed regarding the risk that the conflict will arise”; (2) whether “the client is independently represented by other counsel in giving consent”; and (3) whether “the consent is limited to future conflicts unrelated to the subject of the representation.” In those situations, a prospective consent is more likely to be effective.

ABA Model Rule 1.7 cmt. [22] concludes by warning that “advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under [ABA Model Rule 1.7] paragraph (b).” ABA Model Rule 1.7(b) contains four conditions for lawyers’ representations in a situation where the lawyer faces a conflict: (1) “the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client”; (2) “the representation is

not prohibited by law”; (3) “the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal”; and (4) “each affected client gives informed consent, confirmed in writing.”

All in all, ABA Model Rules 1.7 cmt. [22] recognizes that lawyers may seek and obtain prospective consents from clients, but they are not guaranteed to be enforceable. Bars and courts judge such prospective consents at two times: (1) when a client grants the prospective consent; and (2) when the lawyer seeks to rely on it.

### **Virginia Rule 1.7 Comment [23]**

Virginia Rule 1.7 cmt. [23] addresses litigation conflicts.

Virginia Rule 1.7 cmt. [23] first bluntly states that Virginia Rule 1.7(a)(1) “prohibits representation of opposing parties in litigation.” Virginia Rule 1.7 cmt. [23] then mentions litigation-related representations that present a more subtle conflicts analysis: “[s]imultaneous representation of parties whose interest in litigation may conflict, such a co-plaintiffs or co-defendants” (which are “governed by” Virginia Rule 1.7(a)(2)’s “material limitation” standard).

This reference makes sense. For example, lawyers might think that there would be no conflict impediment to representing multiple plaintiffs against the same defendant. After all, those clients all have a common adversary. But even that seemingly acceptable arrangement might create a “material limitation” conflict if the defendant could not afford to pay all of the possible judgments against it. And apart from that fairly obvious “limited fund” scenario, representing multiple plaintiffs against the same defendant could face more day-to-day conflicts. The lawyer will have to decide which plaintiff’s trial will be

scheduled to go first, which client will have the benefit of a leading expert in the pertinent field (who may not want to work with all of the plaintiffs), etc.

Virginia Rule 1.7 cmt. [23] then turns to even more subtle types of adversity, recognizing several scenarios in which “[a]n impermissible conflict may exist: (1) a “substantial discrepancy in the parties’ testimony”; (2) “incompatibility in positions in relation to an opposing party”; or (3) “the fact that there are substantially different possibilities of settlement of the claims or liabilities in question.” Virginia Rule 1.7 cmt. [23] notes that “[s]uch conflicts can arise in criminal cases as well as civil.”

Turning to the criminal context, Virginia Rule 1.7 cmt. [23] warns that the possibility of such conflicts “in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant.”

Virginia Rule 1.7 cmt. [23] concludes by describing a scenario where lawyers may jointly represent multiple clients: “[o]n the other hand, common representation of persons having similar interest is proper if the risk of adverse effect is minimal and the requirements of [Virginia Rule 1.7] paragraph (b) are met.”

**ABA Model Rule 1.7 cmt. [23]** contains essentially the same language as Virginia Rule 1.7 cmt. [23].

ABA Model Rule 1.7 cmt. [23] begins with the same blunt statement contained in Virginia Rule 1.7 cmt. [23] – noting that ABA Model 1.7(b)(3) “prohibits representation of opposing parties in the same litigation, regardless of the clients’ consent.” As explained above, that language in ABA Model Rule 1.7(b)(3) is inconsistent with a sentence in ABA Model Rule 1.0 cmt. [2], which inexplicably refers to an unidentified ABA Model Rule

which states that “the same lawyer should not represent opposing parties in litigation” (emphasis added).

### **Virginia Rule 1.7 Comment [23a]**

Virginia Rule 1.7 cmt. [23a] addresses situations in which lawyers may represent a client in a matter adverse to another client.

Virginia Rule 1.7 cmt. [23a] starts with the surprising blanket statement that “[o]rdinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated.” But Virginia Rule 1.7 cmt. [23a] then addresses lawyers’ permissible representations “as advocate against a client” on matters unrelated to the lawyers’ representation of the client – as long as the clients consent.

Virginia Rule 1.7 cmt. [23a] provides several examples.

First, “a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer’s relationship with the enterprise or conduct of the suit and if both clients consent upon consultation.”

As explained above, both clients must consent to that arrangement. The client against whom the lawyer is representing an adversary is the obvious candidate for informed consent. But the client the lawyer represents in that scenario also must consent, because that client understandably could worry that the lawyer will “pull punches” in the representation, rather than offend the adversary that the lawyer represents in unrelated matters.

The word “enterprise” is odd. Virginia Rule 1.13 addresses lawyers’ representation of “an organization” – frequently a corporation. One would have thought that Virginia Rule 1.7 cmt. [23a] would have used the same term rather than introducing a new undefined term, “enterprise.” The description of the hypothetical “enterprise” having “diverse operations” might also generate some confusion. It is unclear whether Virginia Rule 1.7 cmt. [23a]’s inclusion of that factor limits the example’s guidance to organizations with such “diverse operations” – or whether that was simply a factual detail that does not affect the analysis.

Second, “government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party.” That scenario seems odd, because presumably such “government lawyers” are employed by the government, perhaps even by the governmental unit described in the Virginia Rule Comment. One would think that for employment or other related reasons, such government lawyers could not take representations adverse to their own ultimate employer.

The Virginia Rule 1.7 cmt. [23a] explains that the “propriety” of such “concurrent representations can depend on the nature of the litigation.” It is unclear whether this common sense explanation provides general advice, or instead focuses on the previous sentence’s description of the government lawyer scenario. That ambiguity is not resolved by the next sentence – which could arise (but is not likely to arise) in a government lawyer setting: “[a] suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.” Presumably, lawyers could not handle the first type of suit against another government agency, but could handle the

latter type of matter. It is unfortunate that Virginia Rule 1.7 cmt. [23a] does not provide any additional guidance.

ABA Model Rule 1.7 does not contain a similar provision.

### **Virginia Rule 1.7 Comment [24]**

Virginia Rule 1.7 cmt. [24] addresses what is often called “positional adversity.”

Virginia Rule 1.7 cmt. [24] first explains that lawyers may represent different clients “having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be materially limited.” Virginia Rule 1.7 cmt. [24] provides an example: “it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.”

This approach mirrors the older ABA Model Rule approach, which focused on the setting of lawyers’ positional conflicts – rather than on the conflict’s materiality. As explained below, current ABA Model Rule 1.7 cmt. [24] takes the more modern ABA Model Rule approach. But Virginia Rule 1.7 cmt. [24]’s use of the term “ordinarily” does not describe any *per se* approach.

**ABA Model Rule 1.7 cmt. [24]** also addresses “positional adversity.”

ABA Model Rule 1.7 cmt. [24] provides a more extensive discussion than Virginia Rule 1.7 cmt. [24] of “positional adversity.”

Like Virginia Rule 1.7 cmt. [24], ABA Model Rule 1.7 cmt. [24] acknowledges that “[o]rdinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients,” subject to the material limitation conflict rule (ABA Model Rule 1.7(a)(2)), discussed above.

ABA Model Rule 1.7 cmt. [24] next assures that “[t]he mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest.” In other words, there is no per se prohibition on lawyers advocating on behalf of a client for precedent that might harm another client in an unrelated setting.

ABA Model Rule 1.7 cmt. [24] then provides an example of an impermissible “material limitation” conflict: “when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client.” ABA Model Rule 1.7 cmt. [24] lists various factors “relevant in determining whether the clients need to be advised of the risk” of such a material limitation conflict, including: (1) “where the cases are pending”; (2) “whether the issue is substantive or procedural”; (3) “the temporal relationship between the matters”; (4) “the significance of the issue to the immediate and long-term interests of the clients involved”; and (5) “the clients’ reasonable expectations in retaining the lawyer.” If there is such a “material limitation” conflict, the lawyer “must refuse one of the representations or withdraw from one or both matters” –absent the affected clients’ informed consent. And of course even with consent, lawyers might have been unable to accept a representation because of a nonconsentable ABA Model Rule 1.7(a)(2) “material limitation” conflict.

### **ABA Model Rule 1.7 Comment [25]**

Virginia did not adopt ABA Model Rule 1.7 cmt. [25].

ABA Model Rule 1.7 cmt. [25] addresses class action scenarios.

ABA Model Rule 1.7 cmt. [25] first explains that, for conflicts purposes, “unnamed members of [a plaintiff or defendant] class are ordinarily not considered to be clients of the lawyer.”

ABA Model Rule 1.7 cmt. [25] provides two examples. First, “the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter.” The words “to get the consent” seems too informal. But the point is clear – a class-representing lawyer may represent another client adverse to an unnamed class member without her consent.

Second, “a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.” In other words, a lawyer can oppose the class action without the consent of unnamed class members whom the lawyer represents in unrelated matters.

### **Virginia Rule 1.7 Comment [26]**

Virginia Rule 1.7 cmt. [26] addresses non-litigation conflicts.

Virginia Rule 1.7 cmt. [26] lists several factors “in determining whether there is a potential conflict” in transactional settings: (1) “the duration and intimacy of the lawyer’s relationship with the client or clients involved”; (2) “the functions being performed by the lawyer”; (3) “the likelihood that actual conflict will arise”; and (4) “the likely prejudice to the client from the conflict if it does arise.”

As explained elsewhere, the phrase “potential conflict” is unhelpful. There is a “potential conflict” every time that a lawyer represents a client. Virginia Rule 1.7 applies to actual conflicts.

Virginia Rule 1.7 cmt. [26] concludes with an explanation that “[t]he question is often one of proximity and degree.” That sounds erudite and helpful, but really does not give any useful guidance. Presumably the “proximity” reference focuses on the attorney-client relationship, and the “degree” reference focuses on the adversity’s intensity.

**ABA Model Rule 1.7 cmt. [26]** also addresses non-litigation conflict.

ABA Model Rule 1.7 cmt. [26] refers to ABA Model Rule 1.7 cmt. [7] “[f]or a discussion of directly adverse conflicts in transactional matters.” ABA Model Rule 1.7 cmt. [26] contains essentially the same list of factors as Virginia Rule 1.7 cmt. [26] for determining “whether there is a significant potential for material limitation” as that found in Virginia Rule 1.7 cmt. [26]. ABA Model Rule 1.7 cmt. [26]’s phrase “significant potential for material limitation” is more helpful than Virginia Rule 1.7 cmt. [26]’s phrase “potential conflict.”

ABA Model Rule 1.7 cmt. [26] concludes with the same unhelpful reference to “proximity and degree” contained in Virginia Rule 1.7 cmt. [26] –referring to ABA Model Rule 1.7 cmt. [8] (discussed above).

### **Virginia Rule 1.7 cmt. [27]**

Virginia Rule 1.7 cmt. [27] addresses negotiation-related conflicts.

Virginia Rule 1.7 cmt. [27] describes two transaction scenarios: (1) “a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other”; but (2) “common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.”

It is unclear whether Virginia Rule 1.7 cmt. [27] allows or automatically disallows lawyers to represent opposite sides of a negotiation. Several older Virginia legal ethics opinions permitted lawyers to represent such transactional counterparties. Virginia LEO 1216 (5/8/89); Virginia LEO 1149 (12/19/88). Several states take a different position, and it is unclear whether Virginia would take the same approach now.

Lawyers sometimes contend that they are “mere scriveners,” rather than advocates representing multiple transactional counterparties. That is not only dangerous from a malpractice and conflicts standpoint, it may be impermissible in most settings. It seems theoretically possible that in a fairly simple transactional setting, a lawyer might write up the basic terms of arrangement that two of her sophisticated clients had negotiated on their own (without the lawyer representing either one in the negotiation). But that would seem to be a rare possibility.

### **ABA Model Rule 1.7 Comment [28]**

The ABA Model Rules’ discussion of transaction scenarios appears in ABA Model Rule 1.7 cmt. [28], not ABA Model Rule 1.7 cmt. [27].

ABA Model Rule 1.7 cmt. [28] contains the same language found in Virginia Rule 1.7 cmt. [27], acknowledging the possibility that a lawyer may represent multiple parties to a negotiation” who are “generally aligned in interest,” but warning that such a common representation would not be permissible where negotiation parties’ “interests are fundamentally antagonistic to each other.”

ABA Model Rule 1.7 cmt. [28] also contains examples: “a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, [1] in helping to organize a business in which two or

more clients are entrepreneurs, [2] working out the financial reorganization of an enterprise in which two or more clients have an interest or [3] arranging a property distribution in settlement of an estate.” ABA Model Rule 1.7 cmt. [28] explains the lawyer playing that role “seeks to resolve potentially adverse interests by developing the parties’ mutual interests.”

It is unclear exactly what that means. But those examples seem inapt. Even if the various clients in those scenarios are friendly, their interests undoubtedly are adverse. Thus, ABA Model Rule 1.7 cmt. [28] seems to address multiple representations involving adverse interests, but not clients directly across the transactional table from one another. But presumably those situations involve mild rather than acute antagonism among clients. Of course, such a lawyer might also face an ABA Model Rule 1.7(a)(2) “material limitation” conflict.

ABA Model Rule 1.7 cmt. [28] concludes by acknowledging that clients “may prefer that the lawyer act for all of them” in the described scenario, thus “avoiding the possibility” of separate representations that would involve “additional cost, complication or even litigation.”

This is a remarkable statement. If a lawyer acting for joint clients in such scenarios might avoid “litigation,” those clients’ interests seem undeniably adverse. It is difficult to imagine that a lawyer can represent multiple clients who might litigate against each other in the absence of that one lawyer’s representation of all of them. That role seems more like a mediator than a lawyer faced with advocacy duties on behalf of each of the jointly represented clients.

### **Virginia Rule 1.7 Comment [28]**

Virginia Rule 1.7 cmt. [28] addresses conflicts that may “arise in estate planning and estate administration.”

Virginia Rule 1.7 cmt. [28] first explains that depending on the circumstances; a conflict of interest “may arise” if a lawyer “may be called upon to prepare wills for several family members, such as husband and wife.”

Virginia Rule 1.7 cmt. [28] concludes with a warning that such a lawyer “should make clear his relationship to the parties involved.” The “relationship” which a lawyer in this setting (or any other setting) should “make clear” to one or more clients obviously should include both the loyalty component and what could be called the information-flow component. The former focuses on possible adversity between joint estate-planning and estate-administration clients. The latter is more subtle, because it focuses on what information that the lawyer obtains from one client will not be shared with the other jointly represented estate-planning and estate-administration clients.

### **ABA Model Rule 1.7 Comment [27]**

The ABA Model Rules deal with estate planning and administration conflicts in ABA Model Rule 1.7 cmt. [27], not ABA Model Rule 1.7 cmt. [28].

In addition to essentially paralleling Virginia Rule 1.7 cmt. [28]’s substance, ABA Model Rule 1.7 cmt. [27] also warns that: “[i]n estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries.” Virginia Rule 1.7 cmt. [28] understandably does not contain that language. Virginia substantive law presumably supplies the answer in Virginia.

ABA Model Rule 1.7 cmt. [27] concludes with the same useful guidance as Virginia Rule 1.7 cmt. [28]: “the lawyer should make clear the lawyer’s relationship to the parties involved.”

### **Virginia Rule 1.7 Comment [29]**

Virginia Rule 1.7 cmt. [29] addresses joint representations.

Virginia Rule 1.7 cmt. [29] uses the phrase “Common Representation,” which presumably is synonymous with joint representation.

Virginia Rule 1.7 cmt. [29] begins with an what lawyers should consider when deciding “whether to represent multiple clients in the same matter.” That is the definition of a joint representation. It contrasts with separate representations on different matters.

Virginia Rule 1.7 cmt. [29] then reminds lawyers that when considering such a joint representation, they “should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment, and recrimination.”

This Virginia Rule 1.7 cmt. [29] prediction seems inapt, for two reasons. First, describing a situation in which a common representation “fails” (and a word that also appears in the next sentence) normally would seem to describe the lawyer’s failure to meet the client’s selected “objectives of representation” (under Virginia Rule 1.2(a)). In other words, a common representation’s “failure” would seem to describe substantive failure rather than an ethical roadblock. Second, it seems inappropriate to mention the possibility that “potentially adverse interests cannot be reconciled.” There are always “potentially adverse interests.” Lawyers must only reconcile actual adverse interests, not “potentially” adverse interests.

Virginia Rule 1.7 cmt. [29] next warns that “[o]rdinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails.” Virginia Rule 1.7 cmt. [29] then additionally warns that “in some situations, the risk of failure is so great that multiple representation is plainly impossible.” Presumably the term “multiple representation” is the same as “common representation” – namely, joint representation. Virginia Rule 1.7 cmt. [29] provides an example: “a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated.” That presumably foretells the type of prohibited joint representation of a claimant and its adversary that is prohibited by black letter Virginia Rule 1.7(b)(3). And such contentious negotiations presumably would involve either a directly adverse conflict described in Virginia Rule 1.7(1), a “material limitation” type of conflict described in Virginia Rule 1.7(a)(2), or both. In either of those scenarios, such adversity at some point would become non-consentable under Virginia Rule 1.7(b)’s conditions.

Virginia Rule 1.7 cmt. [29] then notes that lawyers cannot jointly represent clients if it is “unlikely that [such lawyers’] impartiality can be maintained” during the joint representation, “because the lawyer is required to be impartial between commonly represented clients.” Virginia Rule 1.7 cmt. [29] warns that “the possibility that the client’s [sic] interests can be adequately served by common representation is not very good” if “the relationship between the parties has already assumed antagonism.” This is an awkward sentence both linguistically and substantively. It seems strange to say that parties’ relationship “has already assumed antagonism” (emphasis added). And if antagonism has already developed between the parties, it would seem that “the

possibility” that the lawyer may continue representing both parties is essentially zero – instead of “not very good.”

Virginia Rule 1.7 cmt. [29] concludes with listing other relevant factors: (1) “whether the lawyer subsequently will represent both parties on a continuing basis;” and (2) “whether the situation involves creating or terminating a relationship between the parties.” It is understandable that the latter factor might go to the severity of the adversity. But it is unclear why the former scenario is a relevant factor. Whether the lawyer “subsequently will represent both parties on a continuing basis” depends on whether the parties decide to invite the lawyer to do so.

**ABA Model Rule 1.7 cmt. [29]** contains the identical language (although in contrast to Virginia Rule 1.7 cmt. [29]’s improper use of the singular “client’s” in the penultimate sentence, ABA Model Rule 1.7 cmt. [29] properly uses the plural possessive “clients”).

Thus, ABA Model Rule 1.7 cmt. [29] has all of Virginia Rule 1.7 cmt. [29]’s questionable aspects. The ABA Model Rule Comment uses the presumably synonymous but actually confusing terms “common” and “multiple” when referring to joint representations. It also mentions the possibility of a common representation “failing” – which seems to focus on its merits rather than a conflict arising). ABA Model Rule 1.7 cmt. [29] also contains the odd phrase about a relationship “has already assumed antagonism,” and does not explain how in that circumstance the lawyer could ever continue representing joint clients. Like Virginia Rule 1.7 cmt. [29], ABA Model Rule 1.7 cmt. [29] contains the unrealistically [wild?] warning that “the possibility that the clients’ interests can be adequately served by common representation is not very good” if “the

relationship between the parties has already assumed antagonism.” In that scenario, the possibility of continuing a joint representation would seem virtually impossible – not just “not very good.”

### **Virginia Rule 1.7 Comment [30]**

Virginia Rule 1.7 cmt. [30] addresses representations’ attorney-client privilege implications.

Virginia Rule 1.7 cmt. [30] first notes that “[a] particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege.” Virginia Rule 1.7 cmt. [30] explains that the “prevailing rule [“w]ith regard to the attorney-client privilege”] is that, as between commonly represented clients, the privilege does not attach.” This means that “if litigation eventuates between the clients,” it “must be assumed that...the privilege will not protect any such communications.”

This is a potentially confusing explanation. If jointly represented clients become adversaries, their communications with their joint lawyer remain privileged as to the world. But generally all of the joint clients who are now adversaries can access (upon request, and certainly through discovery) all of the joint lawyer’s communications with either of the jointly represented clients – even if the joint client seeking the communications was not present during those communications. In other words, one of the joint clients cannot assert privilege protection preventing the other joint client from such access. In that sense “the privilege will not protect any such communications.” But as to the world, those communications remain privileged. Of course, that privilege might be waived if one of the

joint clients publicly discloses (in court or some other setting) otherwise privileged communications in the dispute among them.

Virginia Rule 1.7 cmt. [30] concludes with a warning that “the clients should be so advised” of this impact.

Virginia Rule 1.7 cmt. [30] generally states the general privilege law correctly. Joint clients who become litigation adversaries generally may obtain discovery and use in the litigation communications between the other joint clients and the lawyer who jointly represented the clients – even if the client seeking and using the communication was not present at the time. Although Virginia Rule 1.7 cmt. [30] understandably does not provide an extensive discussion of the evidentiary attorney-client privilege, the law generally requires joint clients’ unanimous consent to waive the evidentiary attorney-client privilege protection that covers their joint communications with their common lawyer. In contrast, joint clients generally may unilaterally waive the privilege that otherwise protects their own communications with the common lawyer (as long as those do not involve the other joint client).

Courts have occasionally struggled with a scenario that would seem to arise periodically. As Virginia Rule 1.7 cmt. [30] recognizes, joint clients who are now adversaries can access and therefore use otherwise privileged communications in their dispute. But how does a court protect disclosure of those privileged communications to the world if one of the joint clients uses those communications in open court? That risk obviously can give one of the former jointly represented clients some leverage in seeking to resolve a dispute with the other former jointly represented clients. Courts might find

some logistical way to avoid such wavier implications – such as in camera view of document, closing the courtroom at certain times, etc.

It is also worth noting the interplay between lawyers' confidentiality duty and lawyers' duty to assert the evidentiary attorney-client privilege or work product doctrine. Lawyers' confidentiality duty triggers their duty to assert any evidentiary protection. But the confidentiality duty essentially evaporates once a discovery dispute arises in a tribunal. Courts then deal with the evidentiary protections – rather than the lawyers' confidentiality protection. Under Virginia Rule 1.6(b)(1), lawyers are relieved of their confidentiality duty when ordered to disclose information “to comply with law or a court order.” In other words, lawyers cannot resist discovery by pointing to their ethics confidentiality duty. If so, discovery would never be available. Although Virginia Rule 1.6(b)(1) and ABA Model Rule 1.6(b)(6) articulate this as a “safe harbor,” allowing lawyers to disclose protected client confidential information, it essentially becomes a required disclosure (although lawyers might have a duty to contest such a court order through interlocutory appeal or some other process).

**ABA Model Rule 1.7 cmt. [30]** contains the identical language.

### **Virginia Rule 1.7 Comment [31]**

Virginia Rule 1.7 cmt. [31] addresses the very complicated topic of “information flow” between joint clients.

Joint representations implicate both loyalty issues and confidentiality issues. The latter reflects the tension between client confidentiality and lawyers' duty of disclosure to all of their clients.

Virginia Rule 1.7 cmt. [31] first notes that “continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation.” This might be called a “keep secrets” approach, in which lawyer does not share with all of the jointly represented clients what the lawyer learns from one of them.

Virginia Rule 1.7 cmt. [31] explains that such a joint representation’s inadequacy in that situation rests on the basic principle that “the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect the client’s interests and the right to expect that the lawyer will use that information to that client’s benefit” (referring to Virginia Rule 1.4, which requires lawyers’ communication of material facts to their clients). This sentence would seem to per se prohibit a “keep secrets” approach. It would also seem to require lawyers to always share any information with all of their joint clients that they learn from any one of the joint clients.

Virginia Rule 1.7 cmt. [31] then follows up by explaining that a lawyer jointly representing clients “should, at the outset of the common representation and as part of the process of obtaining each client’s informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other.”

The first half of that sentence would seem to require a lawyer jointly representing clients to take (and tell their joint clients that they are taking) a “no secrets” approach under which the lawyer will automatically disclose to all jointly represented clients whatever the lawyer learns from one of them related to the joint matter. But the second

half of the second sentence does not explicitly indicate that the lawyer will make such a disclosure before the required withdrawal – instead seeming to imply that the lawyer must withdraw without making such a disclosure. Of course, that is the key issue. The lawyer must withdraw – but does she do so before or after disclosing to the other client information that she learned from the client who asked her not to disclose it?

A typical scenario would be easy to predict. A client would undoubtedly forget (or would never have appreciated the significance of) a lawyer’s “no secrets” warning that the lawyer gave when the representation began. During the representation, the client would disclose information to the lawyer – and would not be sophisticated enough to have prefaced the disclosure with a statement such as “I’m about to tell you something that I don’t want disclosed to my jointly represented client, so stop me now if you think you have to do that.” After the client discloses the potentially harmful information to the lawyer, the lawyer would explain the earlier “no secrets” warning (or a “no secrets” provision in the retainer agreement). That would then trigger the client’s plea that the lawyer not disclose the just-conveyed confidential information to the other joint client.

This is an awkward and difficult situation. As explained below, the pertinent ABA Model Rule 1.7 cmt. [31] does not make much sense, and is inconsistent with an ABA legal ethics opinion.

The “information flow” bottom line is that lawyers’ confidentiality duty seems to trump their communication duty if one joint client gives the lawyer information that is not to be shared with the other client. Courts and bars take differing positions on how lawyers should reconcile those two competing interests.

Virginia Rule 1.7 cmt. [31] then takes a slightly different approach, explaining that in some circumstances joint clients can agree to a “keep secrets” approach: “[i]n limited circumstances, it may be appropriate for the lawyer to proceed with a representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential.” Virginia Rule 1.7 cmt. [31] provides an example: “[f]or example, the lawyer may reasonably conclude that failure to disclose one client’s trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.” This seems like a fairly easy scenario, unless a lawyer in that setting would face Virginia Rule 1.7(a)(2) “material limitation” conflict that would prevent the lawyer from representing the client given that secrecy obligation.

A far more likely scenario involves a joint client (such as a husband in a husband-wife estate planning joint representation) confiding in the joint lawyer that he had a mistress that he had to provide for, or an illegitimate child from years earlier, etc. It is unrealistic to think that husband and wife could “agree to keep that information confidential with the informed consent of both clients.” It is difficult to imagine even raising the issue without disclosing the harmful facts.

**ABA Model Rule 1.7 cmt. [31]** contains the identical language.

Interestingly, the ABA has taken the position that lawyers must withdraw from a joint representation when one client asks the lawyer not to share information with the other joint clients – without first sharing that information. ABA LEO 450 (4/9/08) said exactly that. And that ABA LEO also inexplicably indicated that the type of informed prospective consent to disclosure of such information suggested by ABA Model Rule 1.7

cmt. [31] by definition cannot be effective – because the client providing the prospective consent does not know what information will be covered by such a prospective consent.

This is one of the most confusing and internally inconsistent areas of the ABA Model Rules. It is unclear what position Virginia would take in a similar scenario.

### **Virginia Rule 1.7 Comment [32]**

Virginia Rule 1.7 cmt. [32] addresses lawyers' responsibilities when arranging for a joint representation.

Virginia Rule 1.7 cmt. [32] first explains that “when seeking to establish or adjust a relationship between clients [presumably a joint representation], the lawyer should make clear that the lawyer’s role is not that of partisanship normally expected in other circumstances.” Presumably this means that lawyers arranging for joint representation will act in a less zealous way than they normally would if they represented only one client.

One might wonder why the “lawyers role” would not involve the “partisanship normally expected in other circumstances.” Lawyers obviously can represent multiple clients zealously.

Virginia Rule 1.7 cmt. [32] then warns that in that setting, lawyers should “make clear . . . that the clients may be required to assume greater responsibility for decisions than when each client is separately represented.” That apparently means that a lawyer jointly representing clients would expect the clients to agree on a common action related to the matter, which the lawyer would then pursue. But joint clients might look to their lawyer for the kind of responsibility that a sole client would also expect the lawyer to assume.

Virginia Rule 1.7 cmt. [32] concludes with an explanation that lawyers “should . . . fully explain [] to the clients at the outset of the representation” “[a]ny limitations on the scope of the representation made necessary as a result of the common representation.” Virginia Rule 1.7 cmt. [32] cites Virginia Rule 1.2(b), which allows lawyers to “limit the objectives of the representation if the client consents after consultation.” Although the Virginia Rule Comment does not provide any examples or further guidance, perhaps an example would be a lawyer who begins to jointly represent clients after advising them that the lawyer cannot advise either client about his legal rights *vis a vis* the other.

**ABA Model Rule 1.7 cmt. [32]** contains identical language, although it refers to ABA Model Rule 1.2(c) – which is similar to Virginia Rule 1.2(b). In contrast to Virginia Rule 1.2(b)’s explanation that lawyers “may limit the objectives of the representation if the client consents after consultation,” ABA Model Rule 1.2(c) states that lawyers “may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.”

### **Virginia Rule 1.7 Comment [33]**

Virginia Rule 1.7 cmt. [33] addresses clients’ rights.

Virginia Rule 1.7 cmt. [33] first acknowledges the limitations addressed in the earlier Virginia Rule Comments, but then explains that subject to those limitations “each client in the common representation has the right”: (1) “to loyal and diligent representation”; (2) “to . . . the protection of [Virginia] Rule 1.9 concerning the obligations to a former client” (presumably after that representation ends); and (3) “to discharge the lawyer as stated in [Virginia] Rule 1.16.”

It is unclear what would happen if one joint client terminated the representation, while the other joint client or clients did not. Presumably that would not automatically require the lawyer's withdrawal from representing the other joint clients – as long as the representation would not be impermissibly adverse to the now-former client. For instance, a lawyer may represent a group of investors who are interested in purchasing a parcel of land. One of the clients might decide to abandon the proposed course of action, and terminate his representation by the lawyer. The lawyer presumably would be able to continue representing all of the other still-interested clients.

**ABA Model Rule 1.7 cmt. [33]** contains the identical language.

#### **ABA Model Rule 1.7 Comment [34]**

Virginia did not adopt ABA Model Rule 1.7 cmt. [34].

ABA Model Rule 1.7 cmt. [34] addresses lawyers' representation of corporate client affiliates.

ABA Model Rule 1.7 cmt. [34] first explains that lawyers representing “a corporation or other organization” does not automatically “represent any constituent or affiliated organization, such as a parent or subsidiary.” ABA Model Rule 1.7 cmt. [34] refers to ABA Model Rule 1.13(a), which explains that a lawyer retained by an organization “represents the organization actions through its duly authorized constituents.” However, ABA Model Rule 1.0 cmt. [3] acknowledges, even in the case of in-house lawyers, “it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed.”

Virginia Rule 1.10 cmt. [1a] contains identical language. As in all attorney-client relationships, lawyers should always make it crystal clear whom they represent. And perhaps even more importantly, they should also make it crystal clear whom they do not represent.

ABA Model Rule 1.7 cmt. [34] next states that “the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter.” But the ABA Model Rule Comment then starts to list exceptions that introduce uncertainty into that conflicts analysis: (1) “unless the circumstances are such that the affiliate should also be considered a client of the lawyer” (without providing any guidance for making that analysis); (2) unless “there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client’s affiliates” (presumably referring to the retainer letter or a client’s outside counsel guidelines); or (3) unless “the lawyer’s obligations to either the organizational client or the new client are likely to limit materially the lawyer’s representation of the other client.”

The phrase “new client” seems inapt. That denotes a temporal element that is unnecessary and perhaps inaccurate. The phrase “other client” would be far more appropriate.

The last exception does not explicitly refer to the “material limitation” – type conflict under ABA Model Rule 1.7(a)(2), but presumably includes such conflicts.

Absent the type of “clear understanding” referred to in the second exception, many if not most courts apply a “default” rule that assesses whether the corporation or other organization the lawyer represents is “operationally integrated” with the corporate affiliate

the lawyer wishes to take a matter adverse to. GSI Commerce Solutions, Inc. v. Babycenter, L.L.C., 618 F.3d 204 (2<sup>nd</sup> Cir. 2010).

### **Virginia Rule 1.7 Comment [35]**

Virginia Rule 1.7 cmt. [35] addresses lawyers who are also members of a corporate client's or other organization's board of directors. In other words, a scenario in which a lawyer represents a corporation and also serves on its board of directors.

Virginia Rule 1.7 cmt. [35] first advises such lawyers that they should “determine whether the responsibilities of the two roles may conflict.” The Virginia Rule Comment warns that lawyers in that situation “may be called on to advise the corporation in matters involving actions of the directors” – which presumably would involve such a conflict between the two roles.

Virginia Rule 1.7 cmt. [35] then lists “considerations,” which also presumably focus on whether the two roles will conflict: (1) “the frequency with which such situations may arise;” (2) “the potential intensity of the conflict;” (3) “the effect of the lawyer's resignation from the board;” and (4) “the possibility of the corporation's obtaining legal advice from another lawyer in such situations.” All of these considerations presumably determine whether the lawyer may simultaneously play both roles.

Virginia Rule 1.7 cmt. [35] concludes by advising that a lawyer should not serve as a director if there is a “material risk that the dual role will compromise the lawyer's independence and professional judgment.”

This is an unfortunately confusing Virginia Rule Comment. The second sentence describes a scenario where the lawyer may be asked to advise the corporate client “in matters involving actions of the directors.” That presumably involves the type of conflict

between the two roles mentioned in the Virginia Rule Comment's first sentence. But Virginia Rule 1.7 cmt. [35]'s third sentence does not explain the significance of the various factors. The first factor focuses on "the frequency with which such situations may arise." But the only "situation" identified in Virginia Rule 1.7 cmt. [35] is in the preceding sentence – which is one situation (not plural situations).

That and the other factors seem to ignore the second sentence's description of that one scenario where the lawyer is giving advice to the corporation in matters involving "actions of the directors" – and instead addresses Virginia Rule 1.7 cmt. [35]'s first sentence, suggesting that lawyers should determine from the start whether their simultaneously serving as lawyer and director "may conflict."

**ABA Model Rule 1.7 cmt. [35]** contains the identical language.

But ABA Model Rule 1.7 cmt. [35] differs from Virginia Rule 1.7 cmt. [35] in two ways.

First, in contrast to Virginia Rule 1.7 cmt. [35], ABA Model Rule 1.7 cmt. [35] also adds another possibility if there is such a material risk: the lawyer "should cease to act as the corporation's lawyer when conflicts of interest arise."

Second, in contrast ABA Model Rule 1.7 cmt. [35] also concludes with an additional sentence not found in the Virginia Rule Comment. That sentence explains that a lawyer both representing a corporation and serving on its board "should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the lawyer's 'capacity of a director' might not deserve attorney-client privilege protection." That warning properly describes the risk to privilege protection, but seems too limited. The privilege does not protect communications with

a lawyer acting “in a capacity of director” whether the communication occurs “at board meetings” or outside “board meetings.”

The sentence similarly indicates that such a lawyer should also warn other board members that in some circumstances “conflict of interest considerations might require the lawyer’s recusal as a director or might require the lawyer and the lawyer’s firm to decline representation of the corporation in a matter.”

# RULE 1.8

## Conflict of Interest: Prohibited Transactions

ABA Model Rule 1.8 is entitled “Conflict of Interest: Current Clients: Specific Rules”.

### Rule

#### Virginia Rule 1.8(a)

Virginia Rule 1.8(a) addresses lawyers who: (1) “enter into a business transaction with a client;” or (2) “knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client.” Virginia Rule 1.8(a) contains four several substantive and logistical requirements (discussed below).

**ABA Model Rule 1.8(a)** contains the identical language.

#### Virginia Rule 1.8(a)(1)

Virginia Rule 1.8(a)(1) contains a substantive and a logistical requirement.

First, Virginia Rule 1.8(a)(1) prohibits such “business transaction[s] with a client” or similar arrangement unless “the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client.” This prohibition establishes an objective standard by which such business arrangements will be judged.

Second, Virginia Rule 1.8(a)(1) prohibits such arrangements unless “the transaction and terms on which the lawyer acquires the interest . . . are fully disclosed

and transmitted in writing to the client in a manner which can be reasonably understood by the client.”

**ABA Model Rule 1.8(a)(1)** contains the identical language.

### **Virginia Rule 1.8(a)(2)**

Virginia Rule 1.8(a)(2) contains a third requirement: “the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction.”

**ABA Model Rule 1.8(a)(2)** contains the identical language.

In contrast to Virginia Rule 1.8(a)(2), ABA Model Rule 1.8(a)(2) adds another provision to this condition: “the client is advised in writing of the desirability of seeking” an independent lawyer’s advice, as well as being given a “reasonable opportunity” to do so.

### **Virginia Rule 1.8(a)(3)**

Virginia 1.8(a)(3) contains a fourth requirement: “the client consents in writing thereto.”

**ABA Model Rule 1.8(a)(3)** similarly also addresses the client consent requirement – but uses a different formulation from Virginia Rule 1.8(a)(3)’s formulation. ABA Model Rule 1.8(a)(3) differs from Virginia Rule 1.8(a)(3) in both the logistical and the content requirements.

ABA Model Rule 1.8(a)(3) requires that the client “gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer’s role

in the transaction, including whether the lawyer is representing the client in the transaction.”

The absence of this specific disclosure obligation in Virginia Rule 1.8(a)(3) seems odd, given the importance of the lawyer’s possible representation of the client in the transaction itself. Perhaps the Virginia Rule covers that additional disclosure in its more general Virginia Rule 1.8(a)(1) obligation that the lawyer “fully disclose[]” the “transaction and terms.”

### **Virginia Rule 1.8(b)**

Virginia Rule 1.8(b) addresses lawyers’ “use” of protected client confidential information. It seems strange that lawyers’ “use” of such client confidential information does not appear in Virginia Rule 1.6 – which governs disclosure of protected client confidential information. The former ABA Model Code core confidentiality provision addressed both disclosure and use in the same provision.

Virginia Rule 1.8(b) covers lawyers’ use of “information protected under Rule 1.6.” Virginia Rule 1.6(a) prohibits lawyers from disclosing (the Virginia Rule uses the synonymous term “reveal”): (1) information “protected by the attorney-client privilege;” (2) “other information gained in the professional relationship that the client has requested be held inviolate;” or (3) such information “gained in the professional relationship . . . the disclosure of which would be embarrassing or would be likely to be detrimental to the client.”

Virginia Rule 1.8(b) prohibits lawyers from using “information protected under Rule 1.6” for three improper purposes – unless the client “consents after consultation”, or

“except as permitted or required by [Virginia] Rule 1.6 or Rule 3.3.” Virginia Rule 1.6 is Virginia’s core confidentiality rule. Virginia Rule 3.3 addresses lawyers’ duties when communicating or presenting evidence in a tribunal setting.

First, lawyers cannot use such information “for the advantage of the lawyer.” Second, lawyers cannot use such information “for the advantage . . . of a third person.” Third, lawyers cannot use such information “to the disadvantage of the client.” This broad prohibition on lawyers’ “use” of information matches the old pre-1983 ABA Model Code of Professional Responsibility prohibition—which itself comes from general agency law.

Interestingly, the “use” prohibition does not match Virginia Rule 1.6’s rule governing lawyers’ disclosure (not “use”) of protected client confidential information. Virginia Rule 1.6 prohibits disclosure of such information (absent client consent, implied authorization, or some other Virginia Rule 1.6 or other rule requirement or discretion) of: (1) privileged communications; (2) information the client has asked to be kept confidential; or (3) information “the disclosure of which would be embarrassing or would likely to be detrimental to the client.” Thus, lawyers may disclose other non-protected information gained in the attorney-client relationship, even if its disclosure would give the lawyer some advantage or give some third party an advantage. Presumably the Virginia Rule 1.8(b) prohibition on lawyers’ “use” of protected client confidential information for such purposes includes disclosure for that purpose. But Virginia Rule 1.8(b) does not make that clear. And if Virginia lawyers disclose such information as allowed in Virginia Rule 1.6 without the intent to have the information “used” to the “disadvantage of the client,” presumably the lawyer could not be punished for that.

Virginia Rule 1.8(b) concludes with an acknowledgement that other Virginia Rules either permit or require “use [of] information protected by [Virginia] Rule 1.6.” Virginia Rule 1.8(b) mentions Virginia Rule 1.6 and Virginia Rule 3.3. The former is the core Virginia confidentiality rule. It contains several provisions requiring or permitting disclosure of protected client information. Presumably Virginia Rule 1.8(a)’s recognition of Virginia Rule 1.6’s application equates such disclosure and such use. Virginia Rule 3.3 addresses lawyers’ duty of candor toward tribunals. It also contains several provisions requiring disclosure of client confidences.

Interestingly, Virginia Rule 1.8(b) does not include several rules mentioned in parallel in ABA Model Rule 1.8 cmt. [5] – which that provision points to as sometimes permitting or requiring use of client confidential information. Specifically, ABA Model Rule 1.8 cmt. [5] mentions ABA Model Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3. ABA Model Rule 1.8 cmt. [5] wisely refers to those Rules with a “See” – following a phrase which makes sense in this situation: “except as permitted or required by these [ABA Model] Rules.” Thus, ABA Model Rule 1.8 cmt. [5] wisely refers generally to other ABA Model Rule provisions permitting or requiring use rather than trying to identify all of them.

It is unfortunate that Virginia Rule 1.8(b) does not take the same approach. Presumably Virginia Rule 1.8(b)’s specific reference to just two Virginia Rules does not mean to exclude lawyers’ permissive disclosure under Virginia Rule 1.2(d), or required disclosure under Virginia Rule 4.1(b), Rule 8.1 or Virginia Rule 8.3.”

Both the Virginia Rules and the ABA Model Rules have a strange mismatch of disclosure and use. Virginia Rule 1.6 allows disclosure of protected client confidential information as long as it does not disadvantage the client (or either involve the disclosure

of privileged communications or violate the client’s request to keep the information confidential). So as long as it does not disadvantage the client, a Virginia lawyer can disclose protected client confidential information. But under Virginia Rule 1.8(b), the lawyer cannot “use” such information to help herself or some third party.

In contrast, ABA Model Rule 1.6 does not allow lawyers to disclose any protected client confidential information (absent consent or some other Rule’s application) – even if the disclosure would not disadvantage the client. But the ABA Model Rules allow clients to “use” such information to help themselves or to help some third party, as long as it would not disadvantage the client.

**ABA Model Rule 1.8(b)** also addresses lawyers’ “use” of protected client confidential information.

Under ABA Model Rule 1.8(b), “[a] lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these [ABA Model] Rules.”

ABA Model Rule 1.8(b) thus uses the phrase “information relating to representation of a client,” which matches the broad ABA Model Rule 1.6(a) range of such client protected information.

There are several significant differences between ABA Model Rule 1.8(b) and Virginia Rule 1.8(b).

First, and most significantly, in contrast to Virginia Rule 1.8(b), ABA Model Rule 1.8(b) prohibits (absent clients’ “informed consent” or “as permitted or required by these [ABA Model] Rules”) only one type of lawyers’ “use” of protected information: “to the

disadvantage of the client.” The broader three-part prohibition in Virginia Rule 1.8(b) comes from the old ABA Model Code formulation – which prohibited lawyers from using protected client confidential information: (1) for their own advantage; (2) for the advantage of a third person; or (3) ”to the disadvantage of the client.” Theoretically, under ABA Model Rule 1.8(b)’s formulation lawyers could use protected client confidential information to help themselves or to assist another client or some other third party. One could imagine a lawyer learning from a client about a valuable piece of land that will soon come on the market. Of course, the lawyer could not use that protected client confidential information to the “disadvantage of the client” by buying the land herself, or advising some other third party about the upcoming availability. But if the client explicitly disclaims any interest in buying the land, a lawyer governed by ABA Model Rule 1.8(b) presumably could purchase the land herself or tip off a third party. Those steps presumably would be prohibited under the Virginia Rule 1.8(b) formulation.

Second, ABA Model Rule 1.8(b) has an equally interesting but different mismatch with Virginia Rule 1.8(b). As explained above, Virginia Rule 1.6 allows lawyers to disclose information “gained in the professional relationship” – unless that would harm the client (or if the information is privileged, or if the client has asked it to be kept secret). But Virginia Rule 1.8(b) sometimes prohibits lawyers from the “use” of such information even if the “use” would not harm the client. ABA Model Rule 1.6 prohibits lawyers from disclosing protected client confidential information even if the disclosure would not harm the client. But ABA Model Rule 1.8(b) does not prohibit lawyers from the “use” of such information to help themselves or to help some third party.

## **Virginia Rule 1.8(c)**

Virginia Rule 1.8(c) addresses lawyers' solicitation or acceptance of gifts and preparation of gift-related transactional documents.

First, Virginia Rule 1.8(c) addresses lawyers' solicitation of client gifts.

Under Virginia Rule 1.8(c), "[a] lawyer shall not solicit, for himself or a person related to the lawyer, any substantial gift from a client including a testamentary gift." The phrase "for himself or a person related to the lawyer" is awkward because "the lawyer" is "himself." A more appropriate gender-neutral wording might have used the plural throughout the sentence.

The Virginia Terminology section defined "substantial" as denoting "when used in reference to degree or extent denotes a material matter of clear and weighty importance." That definition does not seem appropriate when defining a gift's size. So there is no clear Virginia Rule 1.8(c) guidance on how large a gift must be to trigger the "substantial gift" prohibition.

Virginia Rule 1.8(c)'s prohibition clearly applies when the soliciting lawyer seeks some tangible gift for "himself" or one of his relatives (defined below). But it might be harder to assess the ethical propriety of a lawyer's solicitation that might involve the lawyer receiving something of intangible or reputational value. For instance, a lawyer might solicit a client's gift to their joint college to build a dormitory named in the lawyer's honor. Is that "a substantial gift" for the lawyer? It certainly provides some reputational benefit, even though the money does not go directly to the lawyer. What about a gift to the college solicited by the lawyer, to be used for construction of a building named in the lawyer's parents' honor?

Second, Virginia Rule 1.8(c) addresses lawyers' acceptance of client gifts. Virginia Rule 1.8(c) explains that "[a] lawyer shall not accept any such gift if solicited at his request by a third party." This provision does not go to a gift's solicitation, but rather its acceptance. The prohibition on lawyers accepting the benefit of a third party's action that the lawyer himself could not undertake mirrors Virginia Rule 8.4(a)'s explanation that "[i]t is professional misconduct for a lawyer to . . . violate or attempt to violate" [the Virginia Rules] through the acts of another."

Third, Virginia Rule 1.8(c) addresses another aspect of the gift prohibition – document preparation. Virginia Rule 1.8(c) prohibits lawyers from "prepar[ing] an instrument giving the lawyer or a person related to the lawyer any substantial client gift from a client" – "unless the lawyer or other recipient of the gift is related to the client."

In other words, lawyers cannot solicit a substantial gift for themselves or for their family members, and cannot prepare documents under which they receive such substantial gifts from anyone – other than one of their family members. For example, a lawyer can solicit and prepare the documents under which the lawyer inherits money from a parent, or under which the lawyer's child receives such a bequest from the lawyer's parent, etc. But the lawyer could not solicit or prepare any documents under which the lawyer or anyone in her family receives a substantial gift from a friend, a neighbor, or even a life-long mentor who is like "another mother" to the lawyer.

The lawyer may accept such a substantial gift if the lawyer does not prepare the necessary documentation—but may not accept such a gift if it was solicited "at his request by a third party."

Virginia Rule 1.8(c) concludes with a definition of persons “related to a lawyer” who can be the recipient of a substantial client gift: “a spouse, child, grandchild, parent, or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.” The direct relational terms seem clear. But it might be difficult to determine the prohibition’s application to an “individual with whom the lawyer or the client maintains a close, familiar relationship.”

**ABA Model Rule 1.8(c)** contains essentially the same prohibitions as Virginia Rule 1.8(c). But there are some differences.

First, ABA Model Rule 1.8(c) includes the phrase “on behalf of a client” in describing the prohibition on lawyers’ preparation of documents under which the lawyer or a family member would receive a substantial gift from someone other than the lawyer’s relative. Virginia Rule 1.8(c) does not contain that phrase – although presumably lawyers necessarily prepare such an instrument “on behalf of a client.”

Second, ABA Model Rule 1.8(c) does not contain the prohibition on lawyers’ acceptance of a substantial gift if it was “solicited by a third party” at the lawyer’s request. Presumably such improper conduct would be covered by other ABA Model Rules, such as ABA Model Rule 8.4(a)’s prohibition on lawyers’ violation of the Rules “through the acts of another”, among other Rules).

Third, ABA Model Rule 1.8(c) list of “related persons” includes “grandparents”, which are not included in Virginia Rule 1.8(c)’s definition.

### **Virginia Rule 1.8(d)**

Virginia Rule 1.8(d) addresses lawyers' acquisition of "literary or media rights to a portrayal or account based in substantial part on information relating to the representation."

Virginia Rule 1.8(d) prohibits lawyers from "mak[ing] or negotiat[ing]" such an acquisition agreement "[p]rior to the conclusion of all aspects of a matter giving rise to the representation." It is unclear what the term "all aspects of a matter giving rise to the representation" means. Presumably someone could identify the beginning of a representation and a conclusion of a representation. But presumably "all aspects of a matter giving rise to the representation" could begin before the representation, and could continue after the representation. ABA Model Rule 1.8(d)'s reference to "the conclusion of representation" provides a more helpful definite time.

As explained below, Virginia Rule 1.8 cmt. [9] uses an odd, more limited phrase: "concerning the conduct of the representation."

**ABA Model Rule 1.8(d)** contains essentially the identical language as Virginia Rule 1.8(d).

In contrast to Virginia Rule 1.8(d)'s "prior to the conclusion of all aspects of a matter giving rise to the representation," ABA Model Rule 1.8(d) contains a simpler formulation "[p]rior to the conclusion of representation of a client."

### **Virginia Rule 1.8(e)**

Virginia Rule 1.8(e) addresses lawyers' providing of "financial assistance to a client in connection with pending or contemplated litigation."

Virginia Rule 1.8(e) prohibits such financial assistance, with two exceptions.

First, under Virginia Rule 1.8(e)(1) “a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter.” Virginia added the contingency phrase in February, 2019. Previously, lawyers could advance such litigation costs and expenses, but the client remained ultimately liable for them.

Second, under Virginia Rule 1.8(e)(2), lawyers may “pay court costs and expenses of litigation” on behalf of an “indigent client.”

Significantly, such “court costs and expenses of litigation” do not include clients’ living expenses, etc. In other words, lawyers cannot advance clients’ expenses other than court- and litigation-related expenses, even if they expect to ultimately recover a large amount in settlement or at trial. Presumably it is tempting to do so, especially for an indigent client, or a client who has otherwise fallen on hard times because of an accident that triggered the litigation the lawyer expects to result in a large settlement or award. But lawyers may point such a client in the direction of a bank or other lender who might loan such living expenses.

**ABA Model Rule 1.8(e)** also addresses lawyers’ financial assistance to clients, but differs dramatically from Virginia Rule 1.8(e) after 2020 presumably pandemic-induced ABA Model Rule changes.

ABA Model Rule 1.8(e) begins with a general rule: “[a] lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation.” But ABA Model Rule 1.8(e) then contains several exceptions, two of which match Virginia Rule 1.8(e)’s exceptions and one of which does not.

First, under ABA Model Rule 1.8(e), “[a] lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter.” This matches Virginia’s post-2019 Virginia Rule 1.8(e)(1).

Second, under ABA Model Rule 1.8(e)(2), “[a] lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.” This matches Virginia Rule 1.8(e)(2).

Third, ABA Model Rule 1.8(e)(3) allows for the first time certain lawyers representing indigent clients to “provide modest gifts” for specified purposes.

ABA Model Rule 1.8(e)(3) specifies the lawyers who may provide the specified “modest gifts”: (1) “a lawyer representing an indigent client pro bono”; (2) “a lawyer representing an indigent client pro bono through a nonprofit legal services . . . organization”; (3) “a lawyer representing an indigent client pro bono through a . . . public interest organization”; (4) “a lawyer representing an indigent client pro bono through a law school clinical . . . program”; (5) “a lawyer representing an indigent client pro bono through a law school . . . pro bono program.” Thus, ABA Model Rule 1.8(e)(3) only applies when clients are indigent and lawyers are acting pro bono.

ABA Model Rule 1.8(e)(3) next describes what financial assistance such lawyers may provide to such clients: “[m]odest gifts to the client for food, rent, transportation, medicine and other basic living expenses.”

ABA Model Rule 1.8(e)(3) then includes several prohibitions that apply in such settings.

ABA Model Rule 1.8(e)(3)(i) indicates that such lawyers “may not promise, assure or imply the availability of such gifts prior to retention.” In other words, ABA Model Rule

1.8(e)(3)(i) essentially requires lawyers to surprise their indigent clients with “modest gifts.” That seems like a strange restriction. It would be understandable if lawyers might be tempted to “promise, assure or imply the availability of such gifts” in order to obtain paying client work. But because ABA Model Rule 1.8(e)(3) only applies to lawyers who will be working without compensation, it is unclear why lawyers may not potentially advertise the availability of such “modest gifts” in order to attract such needy pro bono clients. There is nothing in it for the lawyers, other than perhaps increased prestige for assisting such indigent clients.

ABA Model Rule 1.8(e)(3)(i) includes a similar definition once an indigent client has retained such a pro bono lawyer – who thereafter “may not promise, assure or imply the availability of such gifts . . . as an inducement to continue the client-lawyer relationship after retention.” That also seems odd – for the reason mentioned above, and for another reason: Clients (whether indigent or not) obviously are savvy enough to realize that a pro bono lawyer who has provided such “modest gifts” after being retained are more likely than other lawyers to continue making such “modest gifts.”

ABA Model Rule 1.8(e)(3) also contains a prohibition focusing on possible reimbursement for the “modest gifts” lawyers provide to indigent clients. Under ABA Model Rule 1.8(e)(3)(ii), such lawyers “may not seek or accept reimbursement from the client, a relative of the client, or anyone affiliated with the client.” Thus, such pro bono lawyers must forego any chance of reimbursement. It is unclear why such reimbursement would be impermissible. Perhaps ABA Model Rule 1.8(e)(3)(ii)’s prohibition is based on a concern over such lawyers’ possible ABA Model Rule 1.7(a)(2)’s “material limitation” conflict – because their desire to accept reimbursement might materially affect their pro

bono representation. This seems like an unlikely possibility – given the lawyers’ decision to represent such indigent clients pro bono (thus without anticipating any reimbursement for their fees). It is unclear what the phrase “affiliated with the client” means. As explained throughout this document, ABA Model Rules frequently use the undefined and potentially confusing word “associated” in addressing relationships among lawyers and even among lawyers and non-lawyers. Several ABA Model Rules define (often differently) family and other intimate personal relationships. It is unclear whether ABA Model Rule 1.8(e)(3)(ii)’s word “affiliated” applies to any of those relationships.

ABA Model Rule 1.8(e)(3)(iii) contains a third prohibition. Under ABA Model Rule 1.8(e)(3)(iii), such lawyers “may not publicize or advertise a willingness to provide such gifts to prospective clients.” This prohibition parallels ABA Model Rule 1.8(e)(3)(i)’s prohibition, but presumably focuses on more impersonal marketing rather than intimate promises, assurances, implications, etc. As explained above, it is unclear why ABA Model Rule 1.8(e)(3)(iii) prohibits such publication or advertisement – because lawyers will, by definition, be acting pro bono in such settings. Lawyers have no financial incentive for attracting more pro bono clients by publicizing or advertising their willingness to provide such modest gifts.

The word “prospective” seems inapt in this setting. ABA Model Rule 1.18(a) defines as “a prospective client” “[a] person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter.” In other words, a “prospective” client (indigent or not) has already begun a dialogue with the lawyer about a possible representation. In that one-on-one setting, one would think that ABA Model Rule 1.8(e)(3)(i) would apply. ABA Model Rule 1.8(e)(3)(iii)’s words “publicize” and

“advertise” would seem to apply before such a dialogue begins. If ABA Model Rule 1.8(e)(3)(iii) was meant to focus on typical advertisements for publications directed at the clients, the word “prospective” would be unnecessary.

Interestingly, the ABA House of Delegates’ on August 3-4, 2020 Resolution indicates that the term “financial assistance” was replaced with the term “gifts.” That seems strange, because ABA Model Rule 1.8(e)’s introductory sentence indicates that ABA Model Rule 1.8(e)(3)’s “modest gifts” constitute “financial assistance to a client.”

ABA Model Rule 1.8(e) also includes an assurance that presumably applies to any of the scenarios in which lawyers may “provide financial assistance to a client in connection with pending or contemplated litigation.” Under this 2020 provision, “[f]inancial assistance under this [ABA Model Rule 1.8(e)] may be provided even if the representation is eligible for fees under a fee-shifting statute.” This provision essentially renders irrelevant the possibility that the lawyers may be eligible to recover their fees.

As explained above, presumably ABA Model Rule 1.8(e)(3)’s “modest gifts” count as such “financial assistance” for purposes of applying this provision – although the ABA House of Delegates’ 2020 adoption apparently chose the word “gifts” instead of the term “financial assistance.”

### **Virginia Rule 1.8(f)**

Virginia Rule 1.8(f) addresses lawyers’ “accept[ing] compensation for representing a client from one other than the client.”

Virginia Rule 1.8(f) prohibits such an arrangement, unless: (1) “the client consents after consultation;” (2) “there is no interference with the lawyer’s independence of

professional judgment or with the client-lawyer relationship”; and (3) “information relating to representation of a client is protected as required by [Virginia] Rule 1.6.”

Scenarios involving non-clients’ payment of lawyers to represent the client might include a corporation paying for a lawyer to represent one of its executives, an insurance company paying a lawyer to represent its insureds, a parent paying a lawyer to represent an adult child in her divorce proceedings, etc.

The term “information relating to representation of a client” mimics ABA Model Rule 1.6(a)’s broad formulation of protected client confidential information. Significantly, Virginia Rule 1.8(f) (and Virginia Rule 1.8(b)) use this broader “information relating to representation of a client” standard, in contrast to Virginia Rule 1.6(a)’s narrower definition of protected client confidential information. But unlike Virginia Rule 1.8(b)’s definition of that term, Virginia Rule 1.8(f)(3) explicitly refers to Virginia Rule 1.6 – thus presumably adopting Virginia’s unique view of protected client confidential information, which is narrower than the ABA Model Rule 1.6(a) approach.

**ABA Model Rule 1.8(f)** is identical to Virginia Rule 1.8(f), except that it uses the standard ABA Model Rule formulation phrase “informed consent,” rather than the Virginia Rule standard Rule formulation “consents after consultation.”

### **Virginia Rule 1.8(g)**

Virginia Rule 1.8(g) addresses so-called “aggregate” settlements.

Virginia Rule 1.8(g) states that lawyers representing “two or more clients shall not participate in making an aggregate settlement” in several settings: (1) “claims of . . . the clients;” (2) “claims . . . against the clients;” (3) “in a criminal case an aggregated

agreement as to guilty . . . pleas;” or (4) “in a criminal case an aggregated agreement as to . . . nolo contender pleas.”

The Virginia Rule 1.8(g) contains an explicit and specific exception: “unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.”

Virginia Rule 1.8(g) uses variations of the word “participate” twice, giving them two entirely different meanings. First, Virginia Rule 1.8(g) uses the word “participate” in describing the prohibition on lawyers’ involvement in improper aggregate settlements. Second, Virginia Rule 1.8(g) uses the word “participation” to describe clients’ involvement in an aggregate settlement.

An “aggregate settlement” involves civil or criminal settlements/arrangements in which the settlement is contingent on every client’s approval. For example, a defendant’s offer to pay \$10,000 to any of a plaintiff lawyer’s ten clients who wants it would not be an “aggregate settlement” – because each client controls his or her own settlement decision. But a defendant’s offer to pay \$100,000 to settle all of the claims asserted by a plaintiff lawyer’s ten clients would be an “aggregate settlement” if the offer was contingent on all ten clients agreeing to the settlement. In the latter scenario, each of the ten clients has a “veto power” over the settlement – so the “aggregate settlement” rule requires that each of the ten clients knows what the other nine clients will receive in the settlement.

The “aggregate settlement” rule has caused great consternation in mass tort and similar settings. The phrase “shall not participate in making an aggregate settlement” presumably covers both the lawyer offering and the lawyer agreeing to such an aggregate settlement. If a defendant’s lawyer offers an improper aggregate settlement that the

plaintiffs' lawyer accepts, both lawyers have "participated" in an improper aggregate settlement.

Perhaps the key issue is whether the term "participation" in the disclosure obligation means each client's general involvement in the settlement – or instead means the exact dollar amount or other benefit that each client will receive (or an analogous detail in the criminal context). There is no Virginia Rule 1.8 Comment providing any guidance on that issue. As explained below, ABA Model Rule 1.8 cmt. [13] clearly takes the latter approach—requiring disclosure of "what the other clients will receive or pay." This would seem to prohibit lawyers from negotiating and clients from consenting to a settlement in which there is a process that will later determine each client's payment.

Academics and practicing lawyers have sometimes criticized this level of required detail, arguing that multiple clients' agreement to such a later process should satisfy the aggregate settlement rule.

**ABA Model Rule 1.8(g)** contains language identical to Virginia Rule 1.8(g)'s language, except that each client's consent must be "in a writing signed by the client."

### **Virginia Rule 1.8(h)**

Virginia Rule 1.8(h) addresses lawyers "mak[ing] an agreement prospectively limiting the lawyer's liability to a client for malpractice."

Virginia Rule 1.8(h) prohibits such agreements, with one exception: "except that a lawyer may make such an agreement with a client of which the lawyer is an employee as long as the client is independently represented in making the agreement." Thus, the Virginia Rule 1.8(h) allows only in-house lawyers to make such a prospective malpractice

liability limitation agreement, and only if the organizational client is separately represented.

**ABA Model Rule 1.8(h)(1)** also prohibits lawyers from prospectively limiting their malpractice liability—unless their clients are “independently represented in making the agreement.”

The ABA Model Rule 1.8(h)(1) prohibition is not as broad as Virginia Rule 1.8(h)’s prohibition, because it allows any lawyers to enter into such prospective malpractice liability limitations as long as those clients are independently represented. In other words, the freedom to enter into such agreements is not limited to in-house lawyers who are employed by the client. But in all situations, the client must be separately represented in agreeing to a prospective malpractice liability limitation agreement.

### **ABA Model Rule 1.8(h)(2)**

Virginia did not adopt a provision similar to ABA Model Rule 1.8(h)(2).

ABA Model Rule 1.8(h)(2) prohibits lawyers from “sett[ing] a claim or potential claim for [malpractice] liability with an unrepresented client or former client” – “unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.”

ABA Model Rule 1.8(h)(2) thus allows a lawyer to settle actual or potential malpractice claims by clients or former clients – even if they are not independently represented in connection with the settlement. But a lawyer may settle such claims only if he advises his current or former clients in writing of the “desirability” of seeking such an

independent lawyer's advice, and gives them "a reasonable opportunity" to do so (presumably within a certain period of time).

Significantly, ABA Model Rule 1.8(h)(2) does not require that the client actually obtain such an independent lawyer's advice. Instead, the lawyer need only advise the client (or former client) of the "desirability" of seeking such independent advice, and give such clients or former clients "a reasonable opportunity" to do so. But lawyers settling with clients or former clients who have not had an opportunity to receive an independent lawyer's advice risks that client or former client later challenging the settlement. Lawyers act as fiduciaries, so any arrangement such as a settlement of clients' or former clients' claims against them might raise special scrutiny or even a presumption that the arrangement was fraudulent.

It is worth mentioning two other issues that might arise in this scenario. First, ABA Model Rule 1.4's communication duty presumably requires lawyers to disclose their own malpractice to their clients. ABA LEO 481 (4/17/18) confirmed this communication obligation. Second, clients accusing their lawyer of malpractice (and even demanding a settlement, based on the malpractice), might nevertheless want the lawyer to continue representing the client – perhaps at a reduced fee. Lawyers in that situation might face an ABA Model Rule 1.7(a)(2) "material limitation" conflict. ABA Model Rule 1.7(a)(2) recognizes a conflict (which may or may not be consentable) "if there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer." A lawyer either threatened with malpractice or sued for malpractice might find it impossible to continue representing the complaining client, because the lawyer would be understandably worried about exacerbating a malpractice claim,

triggering “a significant risk that the representation” would be “materially limited” by the “personal interest of the lawyer.”

The Virginia Rules do not contain a similar provision. It is therefore unclear under what conditions Virginia lawyers may settle actual or potential malpractice claims by clients or former clients.

### **Virginia Rule 1.8(i)**

Virginia Rule 1.8(i) addresses related lawyers representing opposing clients.

Under Virginia Rule 1.8(i), “[a] lawyer related to another lawyer as parent, child, sibling or spouse, or who is intimately involved with another lawyer, shall not represent a client in a representation directly adverse to a person whom the lawyer knows is represented by the other lawyer.”

Virginia Rule 1.8(i) contains an exception: “except upon consent by the client after consultation regarding the relationship.”

The phrase “directly adverse” is one variation of the Virginia Rules’ description of adversity that triggers Virginia Rule consequences. Virginia Rule 1.7(a)(1) also contains the term “directly adverse.” Virginia Rule 1.9(a) (which deals with adversity to former clients) contains the term “materially adverse to the interests of the former client,” which includes both a different degree of adversity and refers to adversity to the former client’s “interests” rather than to the former client himself. Virginia Rule 1.9(b)(1) (which deals with lawyers’ adversity to a former client of their former firm) contains the phrase “interests are materially adverse to “the firm’s client.” Virginia Rule 1.10(b) (addressing law firms’ adversity to a client formerly represented by one of his lawyers who has now left the firm)

contains the phrase “interests materially adverse to those of [the former colleague’s] client.”

**ABA Model Rule 1.8** and its Comments do not address this family conflict scenario.

The ABA Model Rules deal with this situation in ABA Model Rule 1.7 cmt. [11]. ABA Model Rule 1.7 cmt. [11] applies to lawyers “representing different clients in the same matter or in substantially related matters.” This is a broader application than Virginia Rule 1.8(i), which applies only to directly adverse representations (obviously in the same matter).

ABA Model Rule 1.7 cmt. [11] explains the purpose of the prohibition: when such lawyers “are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer’s family relationship will interfere with both loyalty and independent professional judgment.” In other words, there are both confidentiality concerns and loyalty concerns. For this reason, “each client is entitled to know the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation.” The prohibition applies to “a lawyer related to another lawyer” – providing as examples: “a parent, child, sibling or spouse.” This is narrower than the Virginia Rule 1.8(i) list, which explicitly also applies to a lawyer “who is intimately involved with another lawyer.” Although ABA Model Rule 1.7 cmt. [11] precedes its list with an “e.g.,” it begins with a reference to lawyers who are “closely related by blood or marriage,” and thus presumably would not extend to lawyers who are not related or married to each other, but instead are “intimately involved” with each other. The narrower ABA Model Rule definition of such relationships triggering the prohibition

seems too restrictive. All of the risks described in ABA Model Rule 1.7 cmt. [11] would also seem to exist if the lawyers representing adversaries have the type of relationship described in Virginia Rule 1.8(i): “intimately involved with another lawyer.”

As in other contexts, the ABA Model Rule 1.7 cmt. [11] uses the ABA Model Rule standard formulation “informed consent,” in contrast to the standard Virginia Rule formulation “consent by the client after consultation.” ABA Model Rule 1.7 cmt. [11] concludes by assuring that the “disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated” (citing ABA Model Rule 1.10). As explained below, Virginia Rule 1.8 uses a different formulation.

### **Virginia Rule 1.8(j)**

Virginia Rule 1.8(j) addresses lawyers’ interest in a litigated cause of action.

Virginia Rule 1.8(j) prohibits lawyers from “acquir[ing] a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client.” There are two exceptions: (1) lawyers may “acquire a lien granted by law to secure the lawyer’s fee or expenses; and (2) lawyers may “contract with a client for a reasonable contingent fee in a civil case,” unless prohibited by [Virginia] Rule 1.5.”

Virginia Rule 1.8(j)’s reference to “a lien granted by law to secure the lawyer’s fee or expenses” refers to a lien on a future judgment – often called a “charging” lien. That type lien differs from what is frequently called a “retaining” lien, under which lawyers may retain the file a lawyer creates while representing a client – until the client pays the lawyer.

Some bars permit such a “retaining” lien, but Virginia Rule 1.16(e) does not (as discussed in this document’s summary and analysis of Virginia Rule 1.16(e)).

Not surprisingly, Virginia Rule 1.8(j)(2) mentions permissible contingent fee arrangements “in a civil case.” Virginia Rule 1.5(d)(2) prohibits such contingent fees “for representing a defendant in a criminal case.” Virginia Rule 1.8(j)(2) also implicitly acknowledges that Virginia Rule 1.5 prohibits some contingent fees even “in a civil case.” Virginia Rule 1.5(d)(1) explains that contingent fees are prohibited “in a domestic relations matter” except “in rare instances.”

**ABA Model Rule 1.8(i)** contains identical language, although it does not contain the reference to the prohibition on certain contingent fees under ABA Model Rule 1.5(d). Of course, it should go without saying that lawyers may not acquire a proprietary interest in a cause of action or subject of litigation if another ABA Model Rule would prohibit that.

### **ABA Model Rule 1.8(j)**

ABA Model Rule 1.8(j) addresses lawyers’ sexual relations with clients.

ABA Model Rule 1.8(j) prohibits lawyers from “sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.” In other words, lawyers may begin an attorney-client relationship with a sexual partner, but not vice versa.

The Virginia Rules do not contain a similar provision. Virginia has addressed the situation in a legal ethics opinion. Virginia LEO 1853 (12/29/09) (declining to adopt a *per se* ban on client-lawyer sexual relationships, but warning that initiating a sexual

relationship with a client during the course of a representation will almost always be unethical for various reasons).

### **Virginia Rule 1.8(k)**

Virginia Rule 1.8(k) addresses imputation of Virginia Rule 1.8's prohibition on individual lawyers' actions.

Virginia Rule 1.8(k) explains that “[w]hile lawyers are associated in a firm, none of them shall knowingly enter into a transaction or perform any activity when one of them practicing alone would be prohibited from doing so” by every Virginia Rule 1.8 provision – except Virginia Rule 1.8(i)'s prohibition absent client consent on a lawyer representing a client “in a representation directly adverse to a person” the lawyer knows is represented by one of the lawyer's defined relatives or intimate partners.

**ABA Model Rule 1.8(k)** also addresses imputation of an individual lawyer's prohibition on certain actions to an individually prohibited lawyer's associated law firm colleagues.

ABA Model Rule 1.8(k) explains that “[w]hile lawyers are associated in a firm, a prohibition [in all of ABA Model Rule 1.8's paragraphs except ABA Model Rule 1.8(j)'s sexual relations prohibition] that applies to any of them shall apply to all of them.”

ABA Model Rule 1.8(k) articulates the same basic imputation approach as Virginia Rule 1.8(k), but without Virginia Rule 1.8(k)'s odd reference to lawyers “practicing alone.”

ABA Model Rule 1.8(k)'s imputation rule applies to ABA Model Rule 1.8(h)(2)'s prohibition on lawyers settling claims or potential claims by clients or former clients – which has no counterpart in Virginia Rule 1.8.

ABA Model Rule 1.8(k) does not apply the imputation rule to ABA Model Rule 1.8(j)'s prohibition on lawyers' sexual relations with clients that did not precede the attorney-client relationship. As explained above, Virginia Rule 1.8 does not contain such a provision.

ABA Model Rule 1.8(k) does not address the scenario in which related lawyers represent opposing clients. Virginia Rule 1.8(k) does not impute that Virginia Rule 1.8(i)'s prohibition. As discussed above, ABA Model Rule 1.7 cmt. [11] deals with that scenario. That ABA Model Rule Comment similarly explains that “[t]he disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated.”

## Comment

### Virginia Rule 1.8 Comment [1]

Virginia Rule 1.8 cmt. [1] addresses both lawyers' business transactions with clients, and the very different issue of lawyers' "use" of protected client confidential information. This potentially confusing combination contrasts with the ABA Model Rules' more logical separation of Comments about the former issue (addressed in ABA Model Rule 1.8 cmts. [1] – [4] and the latter (addressed in ABA Model Rule 1.8 cmt. [5])).

Virginia Rule 1.8 cmt. [1] first explains that such business transactions must be "fair and reasonable to the client," and warns that it is "often advisable" for an "independent counsel" to review the transaction.

Virginia Rule 1.8 cmt. [1] then switches to the "use" issue—beginning with the confusing word "Furthermore." The word "[f]urthermore" seems inappropriate. The second sentence (which focuses on Virginia Rule 1.8(b)) does not address the same issue as Virginia Rule 1.8 cmt. [1]'s first sentence – which focuses on Virginia Rule 1.8(a)'s topic. As explained below, Virginia Rule 1.8 cmt. [1] confusingly switches back to Virginia Rule 1.8(a)'s topic a few sentences later.

Virginia Rule 1.8 cmt. [1]'s second sentence contains the common-sense principle that "a lawyer may not exploit information relating to the representation to the client's disadvantage." This certainly is true, but is only a subset of black letter Virginia Rule 1.8(b)'s prohibition. Virginia Rule 1.8 cmt. [2] addresses the other prohibition against lawyers' use of protected client confidential information "for the advantage of the lawyer or of a third person". Lawyers just reading Virginia Rule 1.8 cmt. [1] and not Virginia Rule

1.8 cmt. [2] might not appreciate the broader prohibition. The Virginia Rule Comment provides an example: “a lawyer who has learned that the client is investing in specific real estate may not, without the client’s consent, seek to acquire nearby property where doing so would adversely affect the client’s plan for investment.” Thus, that sentence does not involve a business transaction with a client. Instead, the sentence relates to lawyers’ use of client confidential information to the client’s disadvantage. That prohibition appears in Virginia Rule 1.8(b), not Virginia Rule 1.8(a).

And to make matters more confusing, Virginia Rule 1.8 cmt. [2] contains essentially the same factual scenario – explaining the additional prohibitions on the lawyer’s use of such information. It might have been more clear if just one Virginia Rule 1.8 Comment described that scenario, followed by a comprehensive discussion of the prohibitions.

Virginia Rule 1.8 cmt. [1]’s third sentence switches back to Virginia Rule 1.8(a) – confirming that Virginia Rule 1.8(a)’s restriction “does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others.”

The Virginia Rule’s third sentence includes the inappropriate word “however” – just as the preceding sentence begins with the inappropriate word “[f]urthermore.” Virginia Rule 1.8 cmt. [1] provides examples: “banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services”. Virginia Rule 1.8 cmt. [1] understandably explains that “[i]n such transactions, the lawyer has no advantage in dealing with the client,” so “the restrictions in [Virginia Rule 1.8(a)] are unnecessary and impracticable.” Although the rarely-used word “impracticable” is largely synonymous with “impractical”, the latter word would seem more appropriate. The word

“impractical,” focuses on the wisdom of taking the deferred step, while the word “impracticable” focuses on the difficulty of doing so. ABA Model Rule 1.8 cmt. [1] uses the same word “impracticable.”

**ABA Model Rule 1.8 cmt. [1]** addresses lawyers’ “business transactions with a client” – but provides much more extensive guidance than Virginia Rule 1.8 cmt. [1]’s see-saw discussion of Virginia Rule 1.8(a) and Virginia Rule 1.8(b).

ABA Model Rule 1.8 cmt. [1] begins with an explanation not found in Virginia Rule 1.8 cmt. [1] – warning of the “possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client,” because of the lawyer’s “legal skill and training, together with the relationship of trust and confidence” with a client. ABA Model Rule 1.8 cmt. [1] provides an example: “a loan or sales transaction or a lawyer investment on behalf of a client.”

In contrast to Virginia Rule 1.8 cmt. [1], ABA Model Rule 1.8 cmt. [1] then explains that the requirements of ABA Model Rule 1.8(a) apply “even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client.”

ABA Model Rule 1.8 cmt. [1] next turns to a topic that is not addressed in Virginia Rule 1.8 cmt. [1] – “lawyers engaged in the sale of goods or services related to the practice of lawyer.” ABA Model Rule 1.8 cmt. [1] provides examples: “the sale of title insurance or investment services to existing clients of the lawyer’s legal practice” (citing ABA Model Rule 5.7). Virginia did not adopt ABA Model Rule 5.7, which addresses law-related services. Although lawyers’ sale of title insurance would seem to meet the “related

to the practice of law” standard, lawyers’ “sale of . . . investment services to existing clients of the lawyer’s legal practice” would not seem to meet that standard.

ABA Model Rule 1.8 cmt. [1] then provides another example of lawyers’ transactions with clients: “lawyers purchasing property from estates they represent.” Of course, that type of transaction contrasts with the preceding sentence’s sale of law-related services to their clients. The estate example typifies the core type of transaction in which lawyers deal with their clients in a way that could involve overreaching – and therefore must satisfy all of ABA Model Rule 1.8(a)’s requirements. And in most if not all states, such lawyers could also be subject to common law limitations imposed on fiduciaries who deal with the beneficiaries of that fiduciary duty. In Virginia, case law might presume such a transaction to be fraudulent, and even flip the lawyer’s burden of proof – requiring such a lawyer to overcome the presumption of fraud by “clear and convincing evidence.”

ABA Model Rule 1.8 cmt. [1] next contains another statement not found in Virginia Rule 1.8 cmt. [1], which excludes from ABA Model Rule 1.8(a)’s application “ordinary fee arrangements between client and lawyer, which are governed by [ABA Model] Rule 1.5.” Also, in contrast to Virginia Rule 1.8 [1], ABA Model Rule 1.8 cmt. [1] also warns that ABA Model Rule 1.8(a) applies “when the lawyer accepts an interest in the client’s business or other nonmonetary property as payment of all or part of a fee.”

ABA Model Rule 1.8 cmt. [1] concludes with the same exception as Virginia Rule 1.8 cmt. [1] – explaining that ABA Model Rule 1.8(a) does not apply to “standard commercial transactions between the lawyer and the client” – providing the same examples and rationale as Virginia Rule 1.8 cmt. [1] (although the Virginia Rule Comment

uses the term “utilities” rather than the ABA Model Rule Comment’s use of the possessive “utilities”).

### **Virginia Rule 1.8 Comment [2]**

Virginia Rule 1.8 cmt. [2] addresses lawyers’ use of protected client confidential information.

ABA Model Rule 1.8 addresses this topic in ABA Model Rule 1.8 cmt. [5]. It would have been helpful if Virginia Rule 1.8 likewise addressed that topic in a Virginia Rule 1.8 cmt. [5]. Instead, for some reason the Virginia Rules address this topic in Virginia Rule 1.8 cmt. [2]. This mismatch could cause some confusion among Virginia or non-Virginia lawyers seeking Virginia’s approach to such use of protected client confidential information.

Virginia Rule 1.8 cmt. [2] also addresses the prohibition on lawyers’ use of protected client confidential information. As explained above, Virginia Rule 1.8 cmt. [2] supplements Virginia Rule 1.8 cmt. [1]’s discussion, in a way that might be confusing.

Virginia Rule 1.8 cmt. [2] begins with the understandable warning that lawyers violate their “duty of loyalty” by using protected client confidential information “for the advantage of the lawyer or a third person or to the disadvantage of the client.”

As explained above, Virginia Rule 1.8 cmt. [1] articulates a subset of that prohibition – warning that “a lawyer may not exploit information relating to the representation to the client’s disadvantage.”

Virginia Rule 1.8 cmt. [2] then explains that Virginia Rule 1.8(b)’s prohibition on lawyers’ use of protected client confidential information “applies when the information is

used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer.” This understandable explanation is immediately followed by a scenario describing how the general principle works: “if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client or third party make such a purchase.” This scenario and warning makes sense, but mimics to a certain extent Virginia Rule 1.8 cmt. [1]’s scenario addressed above. To be sure, that other articulation focuses on a lawyer’s use of information that would disadvantage the client. But it might have been clearer if Virginia Rule 1.8 cmt. [1] and Virginia Rule 1.8 cmt. [2] was combined in some way, or at least articulated the same scenario and then provided a comprehensive list of the prohibitions involving that scenario.

Virginia Rule 1.8 cmt. [2] next describes exceptions to the general prohibition on lawyers’ use of protected client confidential information to the client’s disadvantage, or to the lawyer’s or some third person’s advantage. Not surprisingly, the first exception is the client’s informed consent. Virginia Rule 1.8 cmt. [2] then articulates a common sense general exception, followed by several references: “except as permitted or required by these [Virginia] Rules. See [Virginia] Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b).” This wise general reference to any Virginia Rule’s exception takes the same approach as parallel ABA Model Rule 1.8 cmt. [5] (discussed immediately below), although Virginia Rule 1.8 cmt. [2]’s list of references does not include Virginia Rule 8.1 and 8.3, in contrast to the ABA Model Rule 1.8 cmt. [5]’s inclusion of ABA Model Rule 8.1 and 8.3).

But Virginia Rule 1.8 cmt. [2]'s exception articulation is a mismatch with black letter Virginia Rule 1.8(b), which refers only to Virginia Rule 1.6 and Virginia Rule 3.3. The mismatch may have more than linguistic inconsistency. Virginia Rule Scope's first paragraph explains that "[c]omments do not add obligations to the [Virginia] Rules but provide guidance for practicing in compliance with the [Virginia] Rules." Presumably Virginia Rule 1.8(b)'s truncated list of Virginia Rules thus trumps Virginia Rule 1.8 cmt. [2]'s more logical reference to any Virginia Rule provision providing an exception, and the helpful reference list of specific Virginia Rules that might apply. This is an unfortunate inconsistency.

Virginia Rule 1.8 cmt. [2] concludes with the odd statement that Virginia Rule 1.8(b) "does not limit an attorney's use of information obtained independently outside the attorney-client relationship." Presumably this statement is intended to equate the phrase "information obtained independently outside the attorney-client relationship" and information unprotected by Virginia Rule 1.6. In other words, Virginia Rule 1.8 cmt. [2]'s last sentence presumably reminds lawyers that Virginia Rule 1.8(b) only applies to protected client confidential information. But its articulation could be confusing. Virginia Rule 1.6 cmt. [3] explains that Virginia Rule 1.6's confidentiality duty applies to all "information gained in the professional relationship" that meets the Virginia Rule 1.6 standard – "whatever its source." Virginia Rule 1.8 cmt. [2]'s concluding sentence's phrase "information obtained independently outside the attorney-client relationship" is an inexact match with Virginia Rule 1.6 cmt. [3]'s articulation. For instance, information a lawyer acquires from a witness while representing her client in preparing for litigation presumably is "information gained in the professional relationship" that is covered by

Virginia Rule 1.6. But it might be seen as having been “obtained independently outside the attorney-client relationship – and thus unprotected by Virginia Rule 1.8(b)’s prohibition on the lawyer’s use of the information. It might have been more clear if Virginia Rule 1.8 cmt. [2]’s concluding sentence had used the same formulation as Virginia Rule 1.6, including Virginia Rule 1.6 cmt. [3].

### **ABA Model Rule 1.8 Comment [5]**

ABA Model Rule 1.8 cmt. [5] addresses lawyers’ “use” of protected client information. Of course, presumably the lawyer’s disclosure of such information would constitute one “use” of the information. In other words, the “use” can either be explicit “disclosure” of the information or the lawyer’s taking some action based on the information without disclosing the information to anyone.

ABA Model Rule 1.8 cmt. [5] begins with the understandable statement that lawyers’ “[u]se of information relating to the representation to the disadvantage of the client violates the lawyer’s duty of loyalty.” Virginia Rule 1.8 cmt. [1] has similar language in its second sentence (which inexplicably starts with the inappropriate word “[f]urthermore”): “a lawyer may not exploit information relating to the representation to the client’s disadvantage.”

ABA Model Rule 1.8 cmt. [5] then states that ABA Model Rule 1.8(b) (which prohibits lawyers from using protected client confidential information “to the disadvantage of the client”) “applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer.” This does not necessarily follow. Although it is certainly true that the lawyer’s use of protected client

confidential information to benefit herself or a third person might also disadvantage the client. But a lawyer can use protected client confidential information to help herself or to help a third party without disadvantaging the client. For instance, a lawyer might learn from the client that a piece of land will soon be going on the market. If the client disclaims any interest in purchasing the land, the lawyer might use the protected client confidential information about the land's impending availability to purchase the land herself or to suggest that another client or friend purchase the land when it becomes available. That would certainly benefit the lawyer or a third party, but would not disadvantage the client—who is not interested in the land. ABA Model Rule 1.8 cmt. [5] somewhat clears up any ambiguity later (discussed immediately below).

ABA Model Rule 1.8 cmt. [5] provides an example: a lawyer may not use client confidential information about the client's intent to purchase land to purchase the land herself or to recommend the purchase to another client.

ABA Model Rule 1.8 cmt. [5] next assures that ABA Model Rule 1.8(b) “does not prohibit uses that do not disadvantage the client.” The ABA Model Rule Comment provides an example of this principle: “a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients.” Of course, this makes sense – otherwise, lawyers could not effectively practice law. But given this and other obvious examples, one might wonder ABA Model Rule 1.8 cmt. [5]'s second sentence states unconditionally that ABA Model Rule 1.8(b) “applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer.” That

sentence could not be any clearer – yet just two sentences later ABA Model Rule 1.8 cmt. [5] takes a very different (and common sense) approach.

Significantly, as explained above, Virginia Rule 1.8(b) separately and independently prohibits lawyers' use of "information relating to representation of a client for the advantage of the lawyer or of a third person" – presumably even if the use would not be "to the disadvantage of the client."

ABA Model Rule 1.8 cmt. [5] concludes with a reminder that ABA Model Rule 1.8(b) "prohibits disadvantageous use of client information unless the client gives informed consent." But the ABA Model Rule Comment also points to exceptions – "as permitted or required" by several ABA Model Rules that permit or require lawyers' use of client information absent the client's informed consent: ABA Model Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3. As explained above, Virginia Rule 1.8 cmt. [2]'s list of Virginia Rule references does not include Virginia Rule 8.1 and Virginia Rule 8.3. It is unclear why these have been left out of the references.

### **ABA Model Rule 1.8 Comment [2]**

Virginia did not adopt ABA Model Rule 1.8 cmt. [2].

ABA Model Rule 1.8 cmt. [2] addresses the context and the logistics of business transactions between lawyers and their clients.

As explained above, ABA Model Rule 1.8(a)'s requirements for ethically permissible lawyer-client business transactions are similar but not exactly the same as Virginia Rule 1.8(a)'s requirements.

ABA Model Rule 1.8 cmt. [2] begins by stating that such transactions must be “fair to the client” under ABA Model Rule 1.8(a)(1). Virginia Rule 8.1(a) also contains that requirement. Interestingly, ABA Model Rule 1.8 cmt. [2] only mentions that business transactions between lawyers and client must “be fair to the client,” rather than using the more complete and arguably different black letter ABA Model Rule 1.8(a)(1) phrase “fair and reasonable to the client.”

ABA Model Rule 1.8 cmt. [2] next requires that a transaction’s “essential terms be communicated to the client, in writing, in a manner that can be reasonably understood.” Virginia Rule 1.8(a)(1) contains that requirement. ABA Model Rule 1.8 cmt. [2] then explains that lawyers must advise their clients “in writing, of the desirability of seeking the advice of independent legal counsel.” That requirement appears in ABA Model Rule 1.8(a)(2), but does not appear in Virginia Rule 1.8(a). ABA Model Rule 1.8 cmt. [2] explains that lawyers must also give their clients “a reasonable opportunity to obtain such [“independent legal counsel’s”] advice.” That requirement appears in ABA Model Rule 1.8(a)(2), and also in Virginia Rule 1.8(a)(2). Significantly, ABA Model Rule 1.8 cmt. [2] (and black letter ABA Model Rule 1.8(2)) does not prohibit business transactions between lawyers and clients if the client decides not to obtain “the advice of independent legal counsel” on a transaction. Instead, lawyers must only advise clients “of the desirability of seeking” such independent legal counsel’s advice, and give clients “a reasonable opportunity” to do so.

That is quite a difference. As explained below, it is useful to think of a spectrum of possible requirements when lawyers interact with their clients in some way that might advantage the lawyer: (1) not imposing any requirements, but simply allowing lawyers to

interact with their clients as any other third person would do so; (2) requiring lawyers to advise their clients of the desirability of seeking independent advice, and giving them the opportunity to do that; (3) prohibiting lawyers from proceeding unless the client actually receives such independent advice; (4) prohibiting lawyers from proceeding with the interaction, even if they comply with one or both of the other possible requirements. Presumably ethics rules require greater disclosure and client protection the higher the stakes for the client in the interaction.

ABA Model Rule 1.8(a)(2) requires only one of the less demanding steps.

As explained below, ABA Model Rule 1.8(h) deliberately mandates different standards for different situations. Under ABA Model Rule 1.8(h)(1), lawyers may not “make an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless the client is independently represented in making agreement.” Under the very next provision (ABA Model Rule 1.8(h)(2)), lawyers may not “settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.” Thus, the first of those ABA Model Rule 1.8(h) subparts requires that clients actually receive independent advice, while the second subpart matches the lesser requirement the ABA chose for ABA Model Rule 1.8(a)(2).

ABA Model Rule 1.8 cmt. [2] then turns to the requirement that “the lawyer obtain the client’s informed consent, in a writing signed by the client” to the business transaction between them. That requirement appears in ABA Model Rule 1.8(a)(3). Virginia Rule 1.8(a)(3) similarly requires that “the client consents in writing” – but does not include a

signature requirement. ABA Model Rule 1.8 cmt. [2] explains that a client’s “informed consent, in a writing signed by the client” must include: [1] “the essential terms of the transaction;” and [2] “the lawyer’s role.” That dual requirement appears in ABA Model Rule 1.8(a)(3). Virginia Rule 1.8(a)(1) and (3) implicitly include the former required information (the transaction’s terms), but significantly does not include the latter: “the lawyer’s role.” This is a surprising void. Common law fiduciary duty principles might require such disclosure, even though Virginia Rule 1.8(a) does not explicitly require it.

ABA Model Rule 1.8 cmt. [2] concludes with guidance not found in Virginia Rule 1.8(a) or in Virginia Rule 1.8 cmt. [1]. The ABA Model Rule Comment begins this guidance with the phrase “[w]hen necessary” – which presumably means that lawyers must not always follow the guidance – but instead only follow it when there is some necessity (without providing any guidance about those scenarios.) ABA Model Rule 1.8 cmt. [2] then contains what could be seen as an archaic suggestion that lawyers “should discuss” listed topics (emphasis added). The word “discuss” seems to imply an oral conversation. The phrase “consult” “with the client regarding” the topics would probably be more up-to-date. The word “consults” presumably includes communications by electronic means, which is probably more common than lawyers and clients “discussing” a matter in an oral conversation. For instance, ABA Model Rule 1.18(a) (which addresses requirements for a would-be client to receive certain rights as a defined “prospective client”) originally used the word “discusses,” but the ABA later changed the word to “consults.”

ABA Model Rule 1.8 cmt. [2] lists the topics that lawyers “should discuss certain” with their clients: (1) “the material risks of the proposed transaction, including any risk

presented by the lawyer’s involvement”; (2) “the existence of reasonably available alternatives”; and (3) an explanation “why the advice of independent legal counsel is desirable.”

Virginia Rule 1.8(a)(1) presumably covers the first topic, although neither Virginia Rule 1.8(a) nor Virginia Rule 1.8 cmt. [1] requires lawyers to disclose or discuss “the lawyer’s role in the transaction” or the resulting “risk presented by the lawyer’s involvement.” Neither Virginia Rule 1.8(a) nor Virginia Rule 1.8 cmt. [1] requires disclosure of or discussions about the third and fourth topics listed in ABA Model Rule 1.8 cmt. [2].

### **ABA Model Rule 1.8 Comment [3]**

Virginia did not adopt ABA Model Rule 1.8 cmt. [3].

ABA Model Rule 1.8 cmt. [3] also addresses lawyers’ business transactions with their clients.

ABA Model Rule 1.8 cmt. [3] begins by explaining that the “greatest” risk is when clients expect lawyers to represent them in a business transaction between them, or when the “lawyer’s financial interest otherwise poses a significant risk that the lawyer’s representation of the client will be materially limited by the lawyer’s financial interest in the transaction.” In contrast to Virginia Rule 1.8(a)(1) and (3), ABA Model Rule 1.8(a)(3) explicitly requires lawyers to disclose if they are “representing the client in the transaction.”

ABA Model Rule 1.8 cmt. [3] then further explains that lawyers in that setting must also comply with ABA Model Rule 1.7’s requirements, including disclosing to the client

“the risks associated with the lawyer’s dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer’s interests at the expense of the client.” Presumably this “risk” involves ABA Model Rule 1.7(a)(2)’s so-called “material limitation” conflict. ABA Model Rule 1.7(a)(2) explains that lawyers face a conflict (which may or may not be consentable) if “there is a significant risk that the representation of one or more clients will be materially limited by the . . . personal interest of the lawyer.” ABA Model Rule 1.8 cmt. [3] next explains that such lawyers must obtain clients’ “informed consent”.

ABA Model Rule 1.8 cmt. [3] concludes with a warning that “[i]n some cases, the lawyer’s interest may be such that [ABA Model] Rule 1.7 will preclude the lawyer from seeking the client’s consent to the transaction.” That presumably describes situations where no reasonable lawyer would think that she could undertake the representation, even with the client’s consent—because of an obvious “material limitation” on the lawyer’s representation.

#### **ABA Model Rule 1.8 Comment [4]**

Virginia did not adopt ABA Model Rule 1.8 cmt. [4].

ABA Model Rule 1.8 cmt. [4] addresses ABA Model Rule 1.8(a)’s logistical requirements.

ABA Model Rule 1.8 cmt. [4] first explains that ABA Model Rule 1.8(a)(2) provisions requiring lawyers to advise clients in writing of the desirability of independent counsel does not apply if the client is “independently represented in the transaction.” ABA Model Rule 1.8 cmt. [4] notes that in that situation, ABA Model Rule 1.8(a)(1)’s “requirement for

full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client’s independent counsel.” This is somewhat ambiguous. It could either mean that: (1) the client’s independent lawyer must provide such a “written disclosure”; or (2) the fact of the client’s representation by “independent counsel” eliminates the requirement that the lawyer “involved in a transaction” provide a “written disclosure.” The latter interpretation makes the most sense.

ABA Model Rule 1.8 cmt. [4] concludes with the additional explanation that a client’s representation by an independent lawyer “is relevant in determining whether the agreement was fair and reasonable to the client” as required by ABA Model Rule 1.8(a)(1). That seems to weaken what would otherwise be an objective standard. The transaction’s fairness and reasonableness really has nothing to do with the client’s representation by another lawyer.

### **Virginia Rule 1.8 Comment [6]**

Virginia Rule 1.8 cmt. [6] addresses lawyers’ acceptance of client gifts, which Virginia Rule 1.8(c) governs. Interestingly, Virginia Rule 1.8 cmt. [6] does not even mention Virginia Rule 1.8(c)’s prohibition on lawyers’ solicitation rather than acceptance of client gifts.

Virginia Rule 1.8 cmt. [6], explains that lawyers may accept “ordinary gifts from a client” – providing examples of “a present given at a holiday or as a token of appreciation.” Virginia Rule 1.8 cmt. [6] then turns to the lawyer’s role in preparing the related paperwork. The Virginia Rule Comment explains that if a “legal instrument such as a will or conveyance” is required for “effectuation of a substantial gift,” clients “should have the

detached advice that another lawyer can provide.” The use of the word “should” is inapt, because Virginia Rule 1.8(c) requires (not just suggests) that clients rely on another lawyer (not in the gift recipient’s law firm) to prepare such paperwork if the lawyer or the lawyer’s relative will receive such a substantial gift (unless the lawyer or his relative is related to the donor).

Virginia Rule 1.8 cmt. [6] highlights a spectrum of possible requirements when lawyers interact with their clients in some way that might advantage the lawyer: (1) not imposing any requirements, but simply allowing lawyers to interact with their clients as any other third person would do so; (2) requiring lawyers to advise their clients of the desirability of seeking independent advice, and giving them the opportunity to do that; [3] prohibiting lawyers from proceeding unless the client actually receives such independent advice; [4] prohibiting lawyers from proceeding with the interaction, even if they comply with one or both of the other possible requirements. Presumably ethics rules require greater disclosure and client protection the higher the stakes for the client in the interaction.

Virginia Rule 1.8 cmt. [6] concludes by noting that Virginia Rule 1.8’s requirements do not apply “where the client is a relative of the donee or the gift is not substantial.” The insubstantiality of the gift obviously takes that gift out of Virginia Rule 1.8(c)’s reach, because Virginia Rule 1.8(c) on its face only applies to a “substantial gift.”

But the exception where the client is a relative of the donee does not necessarily follow. There may be more litigation about lawyers’ overreaching or undue influence when they prepare legal instruments for family members under which the lawyer receives substantial money than there are cases involving non-relatives. It therefore seems

strange that Virginia Rule 1.8 cmt. [6] as well as black letter Virginia Rule 1.8(c) (and the parallel ABA Model Rule provisions) do not require at least one if not two of the possible steps discussed above – requiring either or both: (1) that the lawyer advise her relative of the desirability of seeking independent advice about the documents (and the transaction), and giving that relative the opportunity to do so; or (2) requiring that relative obtain such independent legal advice.

**ABA Model Rule 1.8 cmt. [6]** also addresses lawyers’ acceptance of client gifts.

But ABA Model Rule 1.8 cmt. [6] contains a more substantive discussion of ABA Model Rule 1.8(c)’s provision governing client gifts to lawyers. Like Virginia Rule 1.8 cmt. [6], ABA Model Rule 1.8 cmt. [6] acknowledges the permissibility of lawyers accepting client gifts “meet[ing] general standards of fairness,” such as a “simple gift such as a present given at a holiday or as a token of appreciation.”

But there are two differences between ABA Model Rule 1.8 cmt. [6] and Virginia Rule 1.8 cmt. [6].

First, in contrast to Virginia Rule 1.8 cmt. [6], ABA Model Rule 1.8 cmt. [6] explains that lawyers may accept substantial gifts that the client offers, but warns that “such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent.” Presumably substantive law governs that issue. That fiduciary/contract law raises interesting issues that actually may be more important to a lawyer than the ethical impropriety of the lawyer accepting a substantial gift from a client. If the gift is “substantial” enough, presumably the lawyer would not mind giving up the profession and living on the gift. Presumably the same substantive law would apply in Virginia.

Second, in contrast to Virginia Rule 1.8 cmt. [6], ABA Model Rule 1.8 cmt. [6] explains that “a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer’s benefit,” except if the lawyer is related to the client.

As explained above, the exception for “where the lawyer is related to the client as set forth in [ABA Model Rule 1.8(c)]” is questionable. Lawyers seem just as likely (if not more likely) to take advantage of an aging parent or a relative with no heirs than to take advantage of a stranger. As explained above, one would think that with all or at least some distant relatives, lawyers would be required to either or both: (1) to advise her relative of the desirability of seeking independent advice about the documents (and the transaction), and giving that relative the opportunity to do so; or (2) to insist that the relative obtain such independent legal advice.

ABA Model Rule 1.8 cmt. [6] creates a significant mismatch with black letter ABA Model Rule 1.8(c). Black letter ABA Model Rule 1.8(c) prohibits lawyers from “solicit[ing] any substantial gift from a client . . . or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift” (subject to an exception). So that black letter ABA Model Rule involves a “substantial gift” either to the lawyer or to “a person related to the lawyer.” ABA Model Rule 1.8 cmt. [6] introduces a totally different concept: “a substantial gift . . . for the lawyer’s benefit.” This seems far broader than black letter ABA Model Rule 1.8(c)’s prohibition on a “substantial gift” to “a person related to the lawyer.” ABA Model Rule Scope [14] concludes with an assurance that “[c]omments do not add obligations to the [ABA Model] Rules but provide guidance for practicing in compliance with the [ABA Model] Rules.” So it is unclear whether ABA Model Rule 1.8 cmt. [6]’s “for the lawyer’s benefit” prohibition has any teeth.

This additional prohibition presumably covers such scenarios as a lawyer suggesting that a wealthy client provide such a gift to the lawyer's suggested charity, the lawyer's alma mater, etc. Such gifts would clearly be "for the lawyer's benefit" if the lawyer received some recognition for the gift (such as naming a college building for the lawyer). But even short of that explicit benefit, presumably the lawyer would receive some implicit benefit by bringing substantial money to the charity, college, etc.

**ABA Model Rule 1.8 cmt. [7]** contains the same sentence contained in Virginia Rule 1.8 cmt. [6] explaining that clients "should have detached advice" if a substantial gift requires preparing a legal instrument.

As with the identical language in Virginia Rule 1.8 cmt. [6], it seems odd to use the word "should" in this context – because clients must (not just should) turn to another lawyer to prepare such legal instruments. ABA Model Rule 1.8 cmt. [7] also mentions the "sole exception" to the rule – "where the client is a relative of the donee." This exception also appears in Virginia Rule 1.8 cmt. [6]. As explained above, that "relative of the donee" exception is unconditional, and perhaps inappropriate. One would think that such lawyers in some situations if not all would have to take one or both of the steps discussed above – advising the relative of the desirability of seeking independent advice and giving the relative that opportunity, or actually insisting that the relative obtain independent advice.

In contrast to Virginia Rule 1.8 cmt. [6]'s additional exception "or the gift is not substantial," ABA Model Rule 1.8 cmt. [7] does not contain that self-evident exception.

#### **ABA Model Rule 1.8 Comment [8]**

Virginia did not adopt ABA Model Rule 1.8 cmt. [8].

ABA Model Rule 1.8 cmt. [8] addresses lawyers' ability to seek a role as executor or some other similar "potentially lucrative fiduciary position."

ABA Model Rule 1.8 cmt. [8] first explains that ABA Model Rule 1.8(e) "does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position." That makes some sense, because such a role is not a gift – it is a job.

ABA Model Rule 1.8 cmt. [8] then warns that such appointments are subject to ABA Model Rule 1.7's general conflict of interest provision when "there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary." The phrase "materially limit" presumably refers to ABA Model Rule 1.7(a)(2)'s so-called "material limitation" conflict. That provision recognizes a conflict (which may or may not be consentable) if "there is a significant risk that the representation of one or more clients will be materially limited by the . . . personal interest of the lawyer."

Remarkably, ABA Model Rule 1.8 cmt. [8] does not also mention the obvious applicability to ABA Model Rule 1.8(a). It would seem obvious that ABA Model Rule 1.8(a)'s prohibition on "[a] lawyer . . . enter[ing] into a business transaction with a client" would include the lawyer playing the executor, trustee or other similar position. To be sure, ABA Model Rule 1.8 cmt. [1] explains that ABA Model Rule 1.8(a) does not apply to ordinary fee arrangements between client and lawyer." But that exception does not seem to apply to a lawyer earning a fee while acting as the executor, trustee or similar fiduciary role.

It is somewhat less remarkable (but still surprising) that ABA Model Rule 1.8 cmt. [8] likewise does not mention ABA Model Rule 5.7, which addresses law-related services. Lawyers acting as executor, trustee or other similar fiduciary role would seem to be governed by that ABA Model Rule. ABA Model Rule 1.8 cmt. [1] mentions ABA Model Rule 5.7, so one would think that ABA Model Rule 1.8 cmt. [8] would also refer to that ABA Model Rule.

ABA Model Rule 1.8 cmt. [8] concludes with the guidance that in obtaining the client's informed consent if there is such a conflict, "the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position." Presumably the required disclosure would include the lawyer's hourly fee or percentage compensation arrangement, and how those compare to what other lawyer and non-lawyer fiduciaries would charge for such services.

### **Virginia Rule 1.8 Comment [9]**

Virginia Rule 1.8 cmt. [9] addresses lawyers' acquisition of "literary or media rights concerning the conduct of the representation."

That is an odd phrase. It seems much narrower than black letter Virginia Rule 1.8(d)'s reference to "literary or media rights to a portrayal or account based in substantial part on information relating to the representation." The black letter Virginia Rule phrase makes much more sense – because it covers the underlying events, not just "conduct of the representation." As discussed above and below, ABA Model Rule 1.8(d) and ABA Model Rule 1.8 cmt. [9] contain the same inexplicable mismatch.

Virginia Rule 1.8 cmt. [9] explains that such a lawyer's acquisition "creates a conflict between the interests of the client and the personal interests of the lawyer." Virginia Rule 1.8 cmt. [9] then contains a vague warning that "[m]easures suitable in a representation of a client may detract from the publication value of an account of the representation." Presumably this means that lawyers' possible interest in obtaining literary or media rights might materially affect the lawyer's representation of the client—because the lawyer will be tempted to recommend or take measures in the representation to maximize the literary or media value. If this is the worry, one would have thought that Virginia Rule 1.8 cmt. [9] (and the identical ABA Model Rule 1.8 cmt. [9]) would have explained it that way, instead of the reverse.

Virginia Rule 1.8 cmt. [9] next notes that Virginia Rule 1.8(d) "does not prohibit the lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property" – as long as "the arrangement conforms to [Virginia] Rule 1.5 and [Virginia Rule 1.8(j)]." Virginia Rule 1.5 addresses fees, and Virginia Rule 1.8(j) addresses lawyers' acquisition of "a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client."

Inexplicably, Virginia Rule 1.8 cmt. [9] does not mention Virginia Rule 1.8(a). A lawyer acquiring such literary or media rights clearly is "enter[ing] into a business transaction with a client. The absence of that reference must have been deliberate, because ABA Model Rule 1.8 cmt. [9] (discussed below) explicitly mentions ABA Model Rule 1.8(a), as well as ABA Model Rule 1.8(j). The absence of that reference in Virginia

Rule 1.8 cmt. [9] seems strange, but presumably Virginia Rule 1.8(a) applies regardless of the absence in Virginia Rule 1.8 cmt. [9] of a reference to the Virginia Rule.

**ABA Model Rule 1.8 cmt. [9]** contains essentially the identical language as Virginia Rule 1.8 cmt. [9].

But there are some differences between ABA Model Rule 1.8 cmt. [9] and Virginia Rule 1.8 cmt. [9].

In contrast to Virginia Rule 1.8 cmt. [9], ABA Model Rule 1.8 cmt. [9] requires that lawyers comply with ABA Model Rule 1.5, ABA Model Rule 1.8(a) and (i) if they “acquire[] literary or media rights concerning the conduct of the representation” – because that “creates a conflict between the interests of the client and the personal interests of the lawyer.” The reference to ABA Model Rule 1.8(i) is the same as Virginia Rule 1.8 cmt. [9]’s reference to Virginia Rule 1.8(j) – given the differing letter. ABA Model Rule 1.8(a) governs lawyers’ business transactions with their clients.

Like Virginia Rule 1.8 cmt. [9], ABA Model Rule 1.8 cmt. [9] seems to describe the opposite scenario that causes such concern. ABA Model Rule 1.8 cmt. [9] warns that “[m]easures suitable in the representation of the client may detract from the publication value of an account of the representation.” One might have expected ABA Model Rule 1.8 cmt. [9] to describe the reverse – measures that would increase the “publication value of an account of the representation” tempting the lawyer to take “[m]easures” that are not “suitable in the representation of the client.” In other words, ABA Model Rule 1.8 cmt. [9] would have been more appropriate if it focused on literary or media rights transactional relationship affecting the representation, not vice versa.

## **Virginia Rule 1.8 Comment [10]**

Virginia Rule 1.8 cmt. [10] addresses lawyers' financial assistance to their litigation clients under Virginia Rule 1.8(e).

Virginia Rule 1.8 cmt. [10] first explains that “[l]awyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses.” Virginia Rule 1.8 cmt. [10] notes that such arrangements “would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation.”

Not surprisingly, Virginia Rule 1.8 cmt. [10] only focuses on lawsuits lawyers bring “on behalf of their clients.” To be sure, plaintiffs are more likely to need financial assistance until they recover some money through settlement or judgment. But defendants might need money too. So it seems odd that Virginia Rule 1.8 cmt. [10] would not mention clients on either side of the court room. Black letter Virginia Rule 1.8(e) refers generically to a client,” without characterizing the client as a plaintiff or a defendant.

Virginia Rule 1.8 cmt. [10] then explains that such “dangers do not warrant a prohibition on lawyers lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence.” Virginia Rule 1.8 cmt. [10] contends that “these advances are virtually indistinguishable from contingent fees and help ensure access to the courts.”

Virginia Rule 1.8 cmt. [10] concludes by noting that it is “warranted” for lawyers representing indigent clients to “pay court costs and litigation expenses regardless of whether these funds will be repaid.”

**ABA Model Rule 1.8 cmt. [10]** contains identical language.

### **ABA Model Rule 1.8 Comment [11]**

ABA Model Rule 1.8 cmt. [11] addresses the 2020 ABA Model Rule provision allowing pro bono lawyers to provide specified “modest gifts” to their indigent clients.

ABA Model Rule 1.8 cmt. [11] begins by listing the lawyers who may ethically provide such modest gifts. The list matches black letter ABA Model Rule 1.8(e)(3), although for some reason ABA Model Rule 1.8 cmt. [11] describes the first category of lawyers as those “representing an indigent client without fee” – in contrast to black letter ABA Model Rule 1.8(e)(3)’s presumably synonymous term “pro bono.” This variation is especially odd, because ABA Model Rule 1.8 cmt. [11]’s list contains the term “pro bono” two other times in the same sentence.

ABA Model Rule 1.8 cmt. [11] next describes the category of “modest gifts” such pro bono lawyers may provide to their indigent clients. The list essentially matches black letter ABA Model Rule 1.8(e)(3)’s list, except it contains the presumably synonymous terms “modest contributions,” and contains the phrase “similar basic necessities of life” rather than the black letter rule’s term “basic living expenses.”

ABA Model Rule 1.8 cmt. [11] concludes with a requirement that “the lawyer should consult with the client” “[i]f the gift may have consequences for the client, including, e.g., for receipt of government benefits, social services, or tax liability.” ABA Model Rule 1.8 cmt. [11] refers to ABA Model Rule 1.4, which is the core ABA Model Rule communication requirement.

## **ABA Model Rule 1.8 Comment [12]**

ABA Model Rule 1.8 cmt. [12] also addresses ABA Model Rule 1.8(e)(3)'s provision allowing pro bono lawyers to provide certain specified “modest gifts” to their indigent clients.

ABA Model Rule 1.8 cmt. [12] begins with the acknowledgement that ABA Model Rule 1.8(e)(3)'s “exception is narrow.” ABA Model Rule 1.8 cmt. [12] then explains that “[m]odest gifts are allowed in specific circumstances where it is unlikely to create conflicts of interest or invite abuse.”

ABA Model Rule 1.8 cmt. [12] next unhelpfully simply repeats black letter ABA Model Rule 1.8(e)(3)(i), (ii) and (iii). One might wonder why ABA Model Rule 1.8 cmt. [11] would simply parrot the black letter rule, rather than provide some useful guidance about a black letter ABA Model Rule's application.

ABA Model Rule 1.8 cmt. [12] concludes with a reminder that ABA Model Rule 1.8(e)(3)'s “modest gifts” constitute financial assistance “beyond court costs and expenses of litigation in connection with contemplated or pending litigation or administrative proceedings” (emphasis added).

As a linguistic matter, it seems odd (but presumably meaningless) that ABA Model Rule 1.8 cmt. [12] contains the term “contemplated or pending litigation” rather than paralleling black letter ABA Model Rule 1.8(e)'s term “pending or contemplated litigation.”

On a more substantive basis, ABA Model Rule 1.8 cmt. [12] mentions “administrative proceedings” – which black letter ABA Model Rule 1.8(e) notably does not mention. Presumably ABA Model Rule 1.8 cmt. [12] may not expand ABA Model Rule 1.8(e)'s application beyond that denoted in the black letter rule. But if so, one might

wonder why ABA Model Rule 1.8 cmt. [12] so deliberately added that term. Among other things, the reference might implicate ABA Model Rule 3.9's provisions which apply to "[a] lawyer representing a client before [an] administrative agency in a non-adjudicative proceeding."

### **ABA Model Rule 1.8 Comment [13]**

ABA Model Rule 1.8 cmt. [13] addresses the 2020 ABA Model Rule amendments permitting specified financial assistance circumstances where lawyers might also obtain their fees.

ABA Model Rule 1.8 cmt. [13] begins by explaining that ABA Model Rule 1.8(e)'s "[f]inancial assistance" "may be provided even if the representation is eligible for fees under a fee-shifting statute." ABA Model Rule 1.8 cmt. [13] confirms that this principle applies to "[f]inancial assistance, including modest gifts pursuant to [ABA Model Rule 1.8(e)(3)]."

ABA Model Rule 1.8 cmt. [13] next explains that ABA Model Rule 1.8(e)(3) "does not permit lawyers to provide assistance in other contemplated or pending litigation in which the lawyer may eventually recover a fee." In other words, ABA Model Rule 1.8(e)(3) is limited to lawyers' possible recovery of a fee "under a fee-shifting statute."

ABA Model Rule 1.8 cmt. [13] concludes with examples of scenarios in which lawyers might recover their fees, but which do not constitute the statutory fee-shifting context in which lawyers may provide "modest gifts." Those other scenarios are "such as contingent-fee personal injury cases or cases in which fees may be available under a contractual fee-shifting provision, even if the lawyer does not eventually receive a fee."

ABA Model Rule 1.8 cmt. [13] contains the same phrase “contemplated or pending litigation” contained in preceding ABA Model Rule 1.8 cmt. [12]. As explained above, both of those contrast at least linguistically with black letter ABA Model Rule 1.8(e)’s term “pending or contemplated litigation.”

It is unclear why ABA Model Rule 1.8 cmt. [13] ends with the phrase “even if the lawyer does not eventually receive a fee.” That sentence’s point seems to focus on the distinction between statutory fee-shifting provisions and contractual fee-shifting provisions (and standard contingent-fee agreement provisions). So whether “the lawyer does not eventually receive a fee” seems to be a superfluous condition.

### **Virginia Rule 1.8 Comment [11]**

Virginia Rule 1.8 cmt. [11] addresses lawyers being paid by non-clients, as allowed under Virginia Rule 1.8(f).

Virginia Rule 1.8 cmt. [11] first explains that lawyers must disclose to their clients “that the lawyers are being paid for by a third party. Not surprisingly, the arrangement must also comply with Virginia Rule 1.6 (the confidentiality rule), Virginia Rule 1.7 (the main current-client conflicts rule) and Virginia Rule 5.4(c). Virginia Rule 5.4(c) prohibits lawyers from permitting those who pay the lawyer to render “legal services for another” to “direct or regulate the lawyer’s professional judgement in rendering such legal services.”

Virginia Rule 1.8 cmt. [11] concludes with an explanation that the required consent to lawyers being paid by non-clients in a class-action setting may be obtained “by court-

supervised procedure.” Preceding the word “procedure” with the word “a” or “the” would have been more linguistically appropriate.

**ABA Model Rule 1.8 cmt. [14]** also addresses lawyers being paid by non-clients to represent clients.

ABA Model Rule 1.8 cmt. [14] is more elaborate than Virginia Rule 1.8 cmt. [11]. ABA Model Rule 1.8 cmt. [14] provides examples of third parties who might pay lawyers (“in whole or in part”) to represent their clients: “a relative or friend, an indemnitor (such as a liability insurance company), or a co-client (such as a corporation sued along with one or more of its employees).”

ABA Model Rule 1.8 cmt. [14] then acknowledges that “such third-party payers frequently have interests that differ from those of the client – “including interests in minimizing the amount spent on the representation and in learning how the representation is progressing.” Those concerns certainly are understandable. A third party such an insurance carrier paying for the insured’s lawyer or a corporation paying for a co-defendant executive’s lawyer will want to keep those lawyers’ fees to a minimum, and be kept up-to-date on developments.

In contrast to Virginia Rule 1.8 cmt. [11], ABA Model Rule 1.8 cmt. [14] next directly addresses standards under which lawyers may represent a client while being paid by someone else – explaining that “lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer’s professional judgment.” The ABA Model Rule Comment understandably also requires that “there is informed consent from the client.”

Similar to Virginia Rule 1.8 cmt. [11], ABA Model Rule 1.8 cmt. [14] refers to ABA Model Rule 5.4 (describing it as “prohibiting interference with a lawyer’s professional judgment by one who recommends, employs or pays the lawyer to render legal services for another”). Ironically, ABA Model Rule 1.8 cmt. [14]’s articulation of ABA Model Rule 5.4(c)’s prohibition seems better worded than ABA Model Rule 5.4(c) itself. ABA Model Rule 1.8 cmt. [14] describes ABA Model Rule 5.4(c) as “prohibiting interference with a lawyer’s professional judgment by one who recommends, employs or pays the lawyer to render legal services for another.” ABA Model Rule 5.4(c) itself uses a more awkward formulation – explaining that lawyers “shall not permit a person who recommends, employs or pays the lawyer to render legal services for another” to take certain steps. The “prohibiting interference” formulation seems more appropriate. And ABA Model Rule 5.4(c) itself uses a limited phrase in describing the prohibited conduct that lawyers not permit such third-party payors to engage in: “direct or regulate the lawyer’s professional judgment in rendering such legal services.” The simpler and more extensive word “interference” makes more sense than the phrase “direct or regulate”.

In contrast to Virginia Rule 1.8 cmt. [11], ABA Model Rule 1.8 cmt. [14] does not refer to ABA Model Rule 1.6 or 1.7. ABA Model Rule 1.8 cmt. [14] likewise does not mention class-action context consents.

As explained below, ABA Model Rule 1.8 cmt. [15] refers to those other ABA Model Rules, but does not mention class-action context consents.

### **ABA Model Rule 1.8 Comment [15]**

Virginia did not adopt ABA Model Rule 1.8 cmt. [15].

ABA Model Rule 1.8 cmt. [15] also addresses non-clients paying lawyers.

ABA Model Rule 1.8 cmt. [15] first acknowledges that “[s]ometimes, it will be sufficient for the lawyer to obtain a client’s informed consent regarding the fact of the payment and the identity of the third-party payer.” Presumably, such minimal disclosure would be “sufficient” if the parties were sophisticated and frequent users of lawyers’ services in such settings.

But ABA Model Rule 1.8 cmt. [15] then warns that “[i]f . . . the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with [ABA Model] Rule 1.7 [dealing with current client conflicts] and . . . must also conform to the requirements of [ABA Model] Rule 1.6 concerning confidentiality.” ABA Model Rule 1.8 cmt. [15] further explains that “[u]nder [ABA Model] Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer’s representation of the client will be materially limited by the lawyer’s own interest in the fee arrangement or by the lawyer’s responsibilities to the third-party payer (for example, when a third-party payer is a co-client).” Lawyers representing multiple clients face a hard enough time dealing with loyalty and confidentiality issues. ABA Model Rule 1.7 cmt. [29] – [33] addresses those. If the joint clients do not evenly divvy up payments for the lawyer’s bill, presumably those different issues are compounded.

ABA Model Rule 1.8 cmt. [15] next acknowledges that “[u]nder [ABA Model] Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client.” But ABA Model Rule 1.8 cmt. [15] then mentions a significant exception: “unless the conflict is nonconsentable under [ABA Model Rule 1.7(b)].” ABA Model Rule 1.7(b) implicitly identifies several situations in which lawyers may not

represent a client. First, if “the lawyer [does not] reasonably believe[] that the lawyer will be able to provide competent and diligent representation to each affected client,” the lawyer may not represent the client even with that client’s consent. Second, under ABA Model Rule 1.7(b)(2), if “the representation is . . . prohibited by law,” the lawyer may not represent the client even with that client’s consent. Third, under ABA Model Rule 1.7(b)(3), if “the representation [involves] the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal,” the lawyer may not represent the client even with those clients’ consents.

Although Virginia Rule 1.8 does not contain a similar Comment, presumably all of the same considerations would apply in Virginia (although under Virginia Rule 1.7(b)(4) clients’ informed consents must merely be “memorialized in writing,” not “confirmed in writing.”).

### **Virginia Rule 1.8 Comment [12]**

Virginia Rule 1.8 cmt. [12] addresses lawyers’ conflicting family relationships (under Virginia Rule 1.8(i)). As discussed above, the ABA Model Rules deal with such conflicting family relationships in ABA Model Rule 1.7 cmt. [11].

Virginia Rule 1.8 cmt. [12] first explains that Virginia Rule 1.18(i) “applies to related lawyers who are in different firms.” Virginia Rule 1.8 cmt. [12] then notes that Virginia Rules 1.7, 1.9 and 1.10 apply when “[r]elated lawyers [are] in the same firm”.

Virginia Rule 1.8 cmt. [12] concludes by explaining that any disqualification under Virginia Rule 1.8(i) “is personal and is not imputed to members of firms with whom the lawyers are associated.” In other words, Virginia Rule 1.8(i)’s prohibition only applies to

the lawyer who has the relationship with the other side’s lawyer. Other lawyers in the firm may freely represent the client.

The term “disqualification” is somewhat inapt. It correctly conveys the concept that the lawyer may not undertake a representation. But Virginia Rule 1.8(i) describes prohibitions on lawyers’ conduct. ABA Model Rule 1.7 cmt. [11] (discussed below) also uses the word “disqualification,” so in both of those situations, the meaning seems clear, though the term “prohibition” might have been more appropriate.

Of course every lawyer must consider Virginia Rule 1.7(a)(2)’s so-called “material limitation” conflict. Under Virginia Rule 1.7(a)(2) a lawyer faces a conflict (which may or may not be consentable) if “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to . . . a third person or by a personal interest of the lawyer.” For instance, a lawyer representing a client adverse to a defendant represented by the law firm’s overbearing chairman’s newly-admitted sole practitioner lawyer daughter, they might be tempted to “pull punches” to avoid angering the firm’s chairman.

As explained above, the ABA Model Rules deal with lawyers’ family relationships in ABA Model Rule 1.7 cmt. [11]. That ABA Model Rule Comment is narrower than Virginia Rule 1.8(i), because it applies only to lawyers “closely related by blood or marriage.” That ABA Model Rule 1.7 cmt. [11] standard contrasts with Virginia Rule 1.8(i)’s application to lawyers who are also “intimately involved” with each other. Virginia Rule 1.8(i)’s approach makes more sense than ABA Model Rule 1.7 cmt. [11] approach – which focuses solely on “blood or marriage” rather than on some other intimate relationship that presumably triggers exactly the same (or perhaps greater) risks.

In contrast to Virginia Rule 1.8 cmt. [12]'s blunt assurance that under Virginia Rule 1.8(i) an individual lawyer's disqualification under the family relationship rule is "personal and is not imputed to members of firms with whom the lawyers are associated," ABA Model Rule 1.7 cmt. [11] contains the word "ordinarily." So ABA Model Rule 1.7 cmt. [11] does not contain a per se safe harbor from imputation of an individual lawyer's disqualification to all of her associated law firm colleagues.

### **ABA Model Rule 1.8 Comment [16]**

Virginia did not adopt ABA Model Rule 1.8 cmt. [16].

ABA Model Rule 1.8 cmt. [16] addresses aggregate settlements, under ABA Model Rule 1.8(g).

ABA Model Rule 1.8 cmt. [16] first warns that "[d]ifferences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer." ABA Model Rule 1.7 cmts. [29] – [33] also addresses challenges lawyers face when representing multiple clients on the same matter.

ABA Model Rule 1.8 cmt. [16] then inexplicably states that "[u]nder [ABA Model] Rule 1.7 this is one of the risks that should be discussed before undertaking a representation as part of the process of obtaining the clients' informed consent" (emphasis added). This seems to be one of those numerous places where the ABA Model Rules and their Comments improperly use the word "should" when the word "must" would be preferable or required. One would think that lawyers "must" discuss such risks before undertaking a joint representation.

ABA Model Rule 1.8 cmt. [16] next refers to ABA Model Rule 1.2(a), which “protects each client’s right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case.” In other words ABA Model Rule 1.2(a) gives clients the absolute power “whether to accept or reject an offer of settlement” (or an analogous arrangement in a criminal context).

Virginia Rule 1.2(a) addresses clients’ right to approve or reject settlements. But that Virginia Rule contains an odd sentence that probably does not mean what it seems to say: “[a] lawyer shall abide by a client’s decision, after consultation with the lawyer, whether to accept an offer of settlement of a matter.” The next sentence contains similar language (“after consultation with the lawyer”) describing the similar issue in the criminal context. Ultimately that does not mean that clients have no power to accept or reject a settlement unless they first engage in “consultation with a lawyer.”

Virginia Rule 1.2 cmt. [1] differs from ABA Model Rule 1.2 cmt. [1], and does not contain ABA Model Rule 1.2 cmt. [1] blunt statement that the decision whether to settle a civil matter . . . must . . . be made by the client.” But there is no reason to think that Virginia would not take the same approach.

ABA Model Rule 1.8 cmt. [16] next explains that before lawyers may accept any settlement offer or plea bargain “on behalf of multiple clients,” lawyers “must comply with ABA Model Rule 1.0(e) (which defines “informed consent”) by “inform[ing] each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea is accepted.” This ABA Model Rule 1.8 cmt. [16] language seems to make it clear that the required disclosure under ABA Model Rule 1.8(g) of “the

participation of each person in the settlement” requires more than each person’s participation in some process that will later allocate benefits or payments – but instead apparently also requires disclosure of the exact amount that each aggregate settlement client participant “will receive or pay.” Some have argued for an ethics rule allowing lawyers’ participation in aggregate settlements that involve a process (often involving a special master) that will later determine the exact amounts that each participant will receive or pay. ABA Model Rule 1.8(g) (as described in ABA Model Rule 1.8 cmt. [16]) apparently would not allow such an arrangement.

ABA Model Rule 1.8 cmt. [16] then turns to another issue. ABA Model Rule 1.8 cmt. [13] acknowledges that “[l]awyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class.” But ABA Model Rule 1.8 cmt. [16] notes that “such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.”

ABA Model Rule 1.8 cmt. [16]’s description of class action lawyers’ duties seems misplaced. The class action context is totally different from the aggregate settlement scenario. In the former, lawyers either represent or are adverse to a group of plaintiffs who are led by a court-approved individual or group of individuals – but which are treated as essentially one client for technical purposes. That dramatically contrasts with the aggregate settlement situation, in which lawyers represent multiple clients on the same matter.

Lawyers representing a class or defending a class action have an arguably easier time dealing with notification issues, because they must obtain court approval of any

notice. And presumably courts also have the authority and discretion to approve any type of settlement that passes legal muster. Lawyers instead representing multiple clients in pursuing or defending against claims must navigate the difficult notification and aggregate settlement rules without such court supervision.

On first blush this might seem like an advantage, but lawyers acting on their own without such court supervision actually face greater risks—although at a later time. A lawyer representing multiple plaintiffs might worry that after the settlement some disgruntled client will claim not to have received the necessary disclosures about what his fellow clients received – and sue his former lawyer for fraud, file an ethics charge for the plaintiff lawyer’s lack of disclosure, etc. A lawyer defending against such claims might have a greater worry – that the lack of full disclosure arguably required by the aggregate settlement rule might void the settlement’s release, thus having failed to bring the “peace” the defendant sought (but without hopes of retrieving the settlement payments the defense lawyer’s client already made).

### **ABA Model Rule 1.8 Comment [17]**

Virginia did not adopt ABA Model Rule 1.8 cmt. [17].

ABA Model Rule 1.8 cmt. [17] addresses lawyers prospectively limiting their liability to their clients for malpractice, under ABA Model Rule 1.8(h)(1).

ABA Model Rule 1.8(h)(i) prohibits such arrangements “unless the client is independently represented in making the agreement.”

This “independently represented” requirement is the middle requirement of the trifecta discussed above: (1) requiring lawyers to suggest that clients obtain independent

advice, and giving them the opportunity to do so; (2) requiring that the clients actually receive such independent advice; and (3) prohibiting the transaction or arrangement. For instance, ABA Model Rule 1.8(a)(2) requires the first of the trifecta. Strangely, ABA Model Rule 1.8(c) does not contain any of those trifecta possibilities.

ABA Model Rule 1.8 cmt. [17] explains that in the absence of such independent advice, such liability-limiting agreements “are likely to undermine competent and diligent representation.” ABA Model Rule 1.8 cmt. [17] also notes that “many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement.”

ABA Model Rule 1.8 cmt. [17] then assures that ABA Model Rule 1.8(h) does not “prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement.” Courts and bars have addressed the type of information that lawyers must provide to their clients before entering into an enforceable arbitration agreement for resolving either a fee dispute or a malpractice claim. Those usually include lawyers’ careful explanation to their clients that, in contrast to litigation, arbitrations: (1) often do not allow discovery; (2) obviously do not provide for a jury trial; and (3) normally do not permit the recovery of punitive damages.

ABA Model Rule 1.8 cmt. [17] next explains that ABA Model Rule 1.8(h) likewise does not “limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law,” provided that: (1) “each lawyer remains personally liable to the client for his or her own conduct”; and (2) “the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability

insurance.” Many lawyers do not appreciate the first point – that they normally must always remain personally liable for their own malpractice. Of course, malpractice insurance normally eliminates the possibility of some disastrous financial impact of such personal liability. Ethics rules or other statutory or regulatory requirements sometimes mandate lawyers’ reporting of, and sometimes disclosure to their clients of, lawyers’ malpractice insurance.

ABA Model Rule 1.8 cmt. [17] concludes by assuring that ABA Model Rule 1.8(h) does not “prohibit an agreement in accordance with [ABA Model] Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.” For instance, a lawyer presumably could not ethically represent a client under an arrangement where the lawyer explicitly warns the client that the lawyer will only research one possible cause of action – and not research, explore or suggest other possible causes of action.

As explained above, black letter Virginia Rule 1.8(h) prohibits agreements prospectively limiting such malpractice liability except for in-house lawyers, who may limit their liability only if the client “of which the lawyer is an employee” is “independently represented in making the agreement” prospectively limiting such in-house lawyers’ liability for malpractice.

### **ABA Model Rule 1.8 Comment [18]**

Virginia did not adopt ABA Model Rule 1.8 cmt. [18].

ABA Model Rule 1.8 cmt. [18] addresses lawyers’ settlement of “a claim or a potential claim for malpractice” under ABA Model Rule 1.8(h)(2).

The Virginia Rules do not contain a similar black letter provision.

ABA Model Rule 1.8 cmt. [18] first recognizes “the danger that a lawyer will take unfair advantage of an unrepresented client or former client” in “settling a claim or a potential claim for malpractice.” Thus, ABA Model Rule 1.8 cmt. [18] explains that lawyers in that situation “must first advise such a person [client or former client] in writing of the appropriateness of independent representation,” and “must give the client or former client a reasonable opportunity to find and consult independent counsel.”

ABA Model Rule 1.8 cmt. [18] thus uses the first of the trifecta requirements discussed above. In other words, it matches a lawyer’s duty in ABA Model Rule 1.8(a)(2) and contrasts with ABA Model Rule 1.8(h)(1)’s requirement that the client actually obtain independent advice before agreeing to prospectively limit the lawyer’s “liability to a client for malpractice.”

Inexplicably, ABA Model Rule 1.8 cmt. [18]’s description of that limited requirement is a mismatch with ABA Model Rule 1.8(a)(2). In contrast to ABA Model Rule 1.8(a)(2)’s requirement that lawyers advise clients “of the desirability of seeking” “independent legal counsel,” ABA Model Rule 1.8 cmt. [18] only requires that lawyers advise their clients “of the appropriateness [not the “desirability”] of independent representation.” The word “desirability” presumably denotes a greater degree of encouragement than the term “appropriateness.” And in contrast to ABA Model Rule 1.8(a)(2)’s requirement that clients are “given a reasonable opportunity to seek the advice of independent legal counsel,” ABA Model Rule 1.8 cmt. [18] states that lawyers “must give the client or former client a reasonable opportunity to find and consult independent counsel” (emphasis added). This may not be a material difference, but likewise does not add much guidance.

### **Virginia Rule 1.8 Comment [16]**

Virginia Rule 1.8 cmt. [16] addresses lawyers' acquisition of an interest in litigation, under Virginia Rule 1.8(j).

Virginia Rule 1.8 cmt. [16] first points to “the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation” – which “has its basis in common law champerty and maintenance.” These ancient doctrines generally prohibit lawyers' pursuit of litigation on behalf of a third party, while being paid by the lawyer's client. The goal was to prevent clients from “stirring up” litigation to harass others, or to reap some financial benefit in such litigation. Though Virginia and other states have left such misconduct on the criminal books, they are rarely enforced.

Virginia Rule 1.8 cmt. [16] then notes that the general prohibition “is subject to specific exceptions developed in decisional law and continued in these [Virginia] Rules.” Virginia Rule 1.8 cmt. [16] provides examples: “such as the exception for reasonable contingent fees set forth in [Virginia] Rule 1.5 and the exception for certain advances or payment of the costs of litigation set forth in [Virginia Rule 1.8(b)].”

**ABA Model Rule 1.8 cmt. [19]** also addresses lawyers' acquisition of an interest in litigation.

ABA Model Rule 1.8 cmt. [19] begins with the same historical discussion about champerty and maintenance contained in Virginia Rule 1.8 cmt. [16].

In contrast to Virginia Rule 1.8 cmt. [16], ABA Model Rule 1.8 cmt. [19] then explains that “the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation . . . is designed to avoid giving the lawyer too great an

interest in the representation.” The term “great” seems inapt. Presumably the worry comes from the type of lawyer’s interest (personal financial interest) rather than its magnitude. Clients presumably would welcome “great . . . interest in the representation.”

ABA Model Rule 1.8 cmt. [19] next notes that clients may have a more difficult time discharging a lawyer “when the lawyer acquires an ownership interest in the subject of the representation.” In addition to citing ABA Model Rule 1.8(e), ABA Model Rule 1.8 cmt. [19] also points to permissible liens under ABA Model Rule 1.8(i) – noting that “[t]he law of each jurisdiction determines which liens are authorized by law.” ABA Model Rule 1.8 cmt. [16] explains that such authorized liens “may include liens granted by statute, liens originating in common law and liens acquired by contract with the client.”

ABA Model Rule 1.8 cmt. [19] concludes by warning that ABA Model Rule 1.8(a) (governing lawyers’ business transactions with clients) applies “[w]hen a lawyer acquires by contract a security interest in property other than that recovered through the lawyer’s efforts in the litigation,” and that ABA Model Rule 1.5 governs “[c]ontracts for contingent fees in civil cases.”

### **ABA Model Rule 1.8 Comment [20]**

Virginia did not adopt ABA Model Rule 1.8 cmt. [20].

ABA Model Rule 1.8 cmt. [20] addresses client-lawyer sexual relationships.

ABA Model Rule 1.8 cmt. [20] explains that “[t]he relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence.” For this reason, “[t]he relationship is almost always unequal” because “a sexual relationship between lawyer and client can involve unfair exploitation of the

lawyer’s fiduciary role.” That would “violat[e] . . . the lawyer’s basic ethical obligation not to use the trust of the client to the client’s disadvantage.”

ABA Model Rule 1.8 cmt. [20] also notes the “significant danger that, because of the lawyer’s emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment.” Presumably the phrase “impairment of the exercise of independent professional judgement” involves ABA Model Rule 1.7(a)(2)’s so-called “material limitation conflict.” Under ABA Model Rule 1.7(a)(2), a lawyer faces a conflict (which may or may not be consentable) if “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to . . . a third person or by a personal interest of the lawyer.” Client-lawyer sexual relationship might implicate either one of those possibilities – if the lawyer or the client are married to a “third person.” Of course a sexual relationship involves “a personal interest of the lawyer” that might also trigger a “material limitation” conflict.

ABA Model Rule 1.8 cmt. [20] next warns that the “blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney- client evidentiary privilege.” This is because “client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship.” In other words, sexual partners’ “pillow talk” might not constitute communications “in the context of the client-lawyer relationship” as opposed to the sexual relationship.

ABA Model Rule 1.8 cmt. [20] then points to another rationale supporting the per se representation prohibition unless the client-lawyer sexual relationship preceded that

relationship: “[b]ecause of the significant danger of harm to client interests and because the client’s own emotional involvement renders it unlikely that the client could give adequate informed consent.” Thus, ABA Model Rule 1.8(j) “prohibits a lawyer from having sexual relations with a client regardless of whether the relationship was consensual and regardless of the absence of prejudice to the client.”

### **ABA Model Rule 1.8 Comment [21]**

Virginia did not adopt ABA Model Rule 1.8 cmt. [21].

ABA Model Rule 1.8 cmt. [21] also addresses client-lawyer sexual relationships.

ABA Model Rule 1.8 cmt. [21] first explains that “[s]exual relationships that predate the client-lawyer relationship are not prohibited.” ABA Model Rule 1.8 cmt. [21] explains that in that circumstance “[i]ssues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship.”

But ABA Model Rule 1.8 cmt. [21] then warns that “before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer’s ability to represent the client will be materially limited by the relationship” (pointing to ABA Model Rule 1.7(a)(2)’s so-called “material limitation” conflict). Under ABA Model Rule 1.7(a)(2), a lawyer faces a conflict (which may or may not be consentable) if “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to . . . a third person or by a personal interest of the lawyer” (among other interests). For instance, a lawyer engaged in an adulterous sexual

relationship might face an insoluble material limitation on his representation – because of the need for secrecy or some other step that another lawyer would not take.

### **ABA Model Rule 1.8 Comment [22]**

Virginia did not adopt ABA Model Rule 1.8 cmt. [22].

ABA Model Rule 1.8 cmt. [22] also addresses client-lawyer sexual relationships.

ABA Model Rule 1.8 cmt. [22] first warns that “inside counsel or outside counsel” for an organizational client may not “hav[e] a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization’s legal matters.”

Although ABA Model Rule 1.8 cmt. [22] does not explain the reason for this prohibition, it should be obvious. Both the lawyers’ and the organizational representatives’ judgment may be and almost certainly will be materially affected by their sexual relationship.

### **ABA Model Rule 1.8 Comment [23]**

Virginia did not adopt ABA Model Rule 1.8 cmt. [23].

ABA Model Rule 1.8 cmt. [23] addresses the imputation of prohibitions on individual lawyers.

ABA Model Rule 1.8 cmt. [23] first explains that all of ABA Model Rule 1.8’s prohibitions on individual lawyers’ actions are imputed to “all lawyers associated in a firm with the personally prohibited lawyer” – except ABA Model Rule 1.8(j)’s prohibition on client-lawyer sexual relationships. ABA Model Rule 1.8 cmt. [23] provides one example

of such imputation: “one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with [ABA Model Rule 1.8(a)], even if the first lawyer is not personally involved in the representation of the client.” That approach applies to all but one of the prohibitions identified in ABA Model Rule 1.8.

ABA Model Rule 1.8 cmt. [23] concludes with an explanation that “[t]he prohibition [on “sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced”] is personal and is not applied to associated lawyers.” The literal interpretation of that language is unintentionally awkward – it prohibits other lawyers in the firm from such sexual relationships, not from the representation of the associated law firm colleague’s sexual partner.

As explained throughout this document, neither ABA Model Rules nor its Comments (or the Virginia Rules nor its Comments) define “associated.” The absence of guidance on that key concept might not have a dramatic effect in this setting.

The Virginia Rules address such imputation issues in black letter Virginia Rule 1.8(k) – which explains that an individual lawyer’s prohibition under every Virginia Rule 1.8 provision (except Virginia Rule 1.8(i)’s family prohibition) is imputed to all other lawyers “associated in a firm” with the individually prohibited lawyer. So Virginia Rule 1.8(k) would not extend any imputed prohibition to “associated” lawyers outside the firm. The Virginia Terminology definition of “firm” and “law firm” include (among other things) the “legal department of a corporation or other organization.” ABA Model Rule 1.0(c) contains the same definition.

As explained above, the ABA Model Rules do not address such family relationship conflicts in ABA Model Rule 1.8, but instead addresses those in ABA Model Rule 1.7 cmt. [11]. ABA Model Rule 1.7 cmt. [11] contains the same approach as the Virginia Rules: explaining that “[t]he disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated” (referring to ABA Model Rule 1.10).

# **RULE 1.9**

## **Conflict of Interest: Former Client**

ABA Model Rule 1.9 is entitled “Duties to Former Clients.” This broader title makes more sense than the Virginia title, which focuses only on conflicts of interest. Both Virginia Rule 1.9 and ABA Model Rule 1.9 also addresses lawyers’ confidentiality duty to former clients, which does not primarily implicate conflicts.

### **Rule**

#### **Virginia Rule 1.9(a)**

Virginia Rule 1.9(a) addresses lawyers’ adversity to their former clients.

Virginia Rule 1.9(a) explains that “[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless both the present and former client consent after consultation.”

Virginia Rule 1.9(a) applies to individual lawyers who “formerly represented a client.” As explained below, Virginia Rule 1.9(b) governs lawyers who did not formerly represent a client, but who otherwise acquired information about a client represented by a colleague at a former firm where the lawyer previously practiced.

Virginia Rule 1.9(a) prohibits lawyers from representing “another person” in a matter that is “materially adverse to the interests of a former client.”

Virginia Rule 1.9(a) uses several words that could generate some confusion.

First, Virginia Rule 1.9(a) uses the word “person.” The term “another person” presumably means “another client.” As explained below, Virginia Rule 1.9 cmt. [1] uses the term “another client” as a synonym for Virginia Rule 1.9(a)’s “another person.”

But interestingly, it differs from the term used in Virginia Rule 1.7(a)’s prohibition on lawyers’ “direct advers[ity]” to a current client. Virginia Rule 1.7(a) states that lawyers “shall not represent a client” (among other things) “if the representation of one client will be directly adverse to another client.” Virginia Rule 1.7(a)(1). ABA Model Rule 1.7(a) and ABA Model Rule 1.7(a)(1) contain the identical language. If the same meaning was intended for lawyers’ adversity to former clients, one would have thought that Virginia Rule 1.9(a) would have prohibited lawyers from “representing another client” under the specified circumstances – not “representing another person” in those specified circumstances. If the Virginia Rules and the ABA Model Rules intended a different meaning, it is frustrating that there is no explanation of why those undoubtedly deliberately drafted rule used different terms.

Second, Virginia Rule 1.9(a) uses the phrase “materially adverse.” The Virginia Rules and the ABA Model Rules apply different standards of adversity when addressing lawyers’ representation adverse to a current or to a former client. Of course, both the Virginia Rules and the ABA Model Rules use variations of the term “adversity” (and different standards for that adversity) in addressing clients’ and others’ interests, law, etc. But in defining lawyers’ representations that are adverse to clients or others, Virginia Rules and the ABA Model Rules use a variety of terms.

Virginia Rule 1.9's former client conflict Rule prohibits lawyer (absent consent or some other Rule exception in the Rules) from representing a client in a matter that is "materially adverse" to the interests of a former client (emphasis added). As mentioned above, Virginia Rule 1.7(a)(1) prohibit lawyers (absent consent or some other exception in the Rules) from representing a client in a matter "directly adverse to another client" (emphasis added). Virginia Rule 1.7 cmt. [6] also uses that term. ABA Model Rule 1.7(a)(1) and ABA Model Rule 1.7 cmt. [7] also use that term. As explained above, Virginia Rule 1.9 cmt. [2] uses that term. ABA Model Rule 1.9(a) uses the term "materially adverse," as does ABA Model Rule 1.9 cmt. [2] (emphasis added). Virginia Rule 1.10(b) (which addresses a law firm's ability to represent a client adverse to a client formerly represented by one of the firm's lawyers who has since left the firm) contains a "materially adverse" standard (emphasis added). ABA Model Rule 1.10(b) uses the same standard. But interestingly, Virginia Rule 1.10 cmt. [5] describes Virginia Rule 1.10(b) as sometimes allowing a law firm "to represent a person with interests directly adverse" to a former client (emphasis added) – although black letter Virginia Rule 1.10(b) uses the "materially adverse" term rather than the "directly adverse" term. ABA Model Rule 1.10(b) and ABA Model Rule 1.10 cmt. [5] contain the same mismatch. Virginia Rule 1.11(c) (addressing government lawyers' ability to represent a client adverse to a person about whom the government lawyer acquired confidential information) uses a different phrase without any adjectives: "whose interests are adverse" (emphasis added). ABA Model Rule 1.11(c) uses the same "whose interests are adverse" standard. Virginia Rule 1.18(c) (which addresses lawyers' representation of a client adverse to a former "prospective client")

uses a "interests materially adverse" standard (emphasis added). ABA Model Rule 1.18(c) uses the same standard.

None of these various standards are defined. Presumably "direct" or "material" adversity is only a subset of the general term "adversity." In other words, a lawyer's representation against a client, former client or other person can be "adverse" without being "directly adverse" or "materially adverse."

The terms "direct" and "material" seem to focus on different characteristics. The word "direct" would seem to focus on the adversity's type – denoting straight adversity, as opposed to indirect adversity. The term "material" seems to focus on the intensity or extensiveness of the adversity, not its type. Adversity can be "direct" without being "material." For instance, a lawyer's representation of a client in litigation or in a transaction "adverse" to a current client would certainly be "direct," but might not be "material" if the litigation or the transaction involves a miniscule amount of money. Similarly, adversity can be "material" without being "direct." For instance, a lawyer's litigation against or transaction with a current restaurant client's landlord would not be "directly adverse" to the client, but could be "materially adverse" if the litigation or the transaction with the landlord resulted in the restaurant client losing her lease, and thus forcing her closure.

To the extent that the prohibition on "direct adversity" is broader than a prohibition on "material adversity," that would make sense in the Virginia Rules and the ABA Model Rules. The "direct adversity" prohibition applies to current clients, who understandably should receive more protection than former clients. Lawyers cannot be adverse to current clients on any matter, even unrelated to any matter they are then handling for the client. Lawyers can be adverse to their former clients unless there is some relationship to the

matter they had previously handled for that now-former client. This greater degree of loyalty owed to current clients makes sense. Neither the Virginia nor the ABA Model Rules nor Comments explain the difference.

It is unclear if those two standards are intended to be different. Normally it would be safe to assume the Virginia Rules and the ABA Model Rules deliberately selected different words to mean different things. But as mentioned above, Virginia Rule 1.10 cmt. [5] uses a “directly adverse” standard, although black letter Virginia Rule 1.10(b) contains a “materially adverse” standard. ABA Model Rule 1.10 cmt. [5] contains the same language mismatch – apparently equating its “directly adverse standard” and the black letter ABA Model Rule’s “materially adverse” standard.

Third, Virginia Rule 1.9(a) uses the phrase “materially adverse to the interests of the former client” (emphasis added). Virginia Rule 1.9(b)(1) uses the phrase “whose interests are materially adverse” (emphasis added). Virginia Rule 1.7(a)(1) uses the phrase “directly adverse to another client” (emphasis added). Virginia Rule 1.10(b) uses the phrase “interests materially adverse to those of a client” (emphasis added).

Linguistically, it would seem that adversity to someone’s “interests” denotes a broader type of adversity than adversity to that person. In other words, people have “interests” that are broader than the people themselves. But neither the Virginia Rules nor the ABA Model Rules explain why their different provisions use different standards, and how they differ.

Virginia Rule 1.9(a) next describes the type of representation that lawyers may not undertake against a former client. Lawyers may not represent another client in a matter that is “materially adverse to the interests of a former client” if the new matter is either: (1)

"the same" as the matter in which the lawyer previously represented the now-former client; or (2) "substantially related" to the matter in which the lawyer previously represented the now-former client. The terms "matter" and "substantially related" are explored below, in the discussion of Virginia Rule 1.9 cmt. [2].

Virginia Rule 1.9(a) contains an exception: "unless both the present and former client consent after consultation." The use of the phrase "present . . . client" confirms that the phrase "another person" appearing earlier in Virginia Rule 1.9(a) refers to another client – and raises again the question of why Virginia Rule 1.9(a) did not use the obvious "another client" rather than the term "another person."

The phrase "after consultation" is the standard Virginia Rule formulation that presumably is synonymous with the standard ABA Model Rule formulation "informed consent." The Virginia Rules Terminology section does not define "consent," but the Virginia Rules Terminology section defines "consult" and "consultation" (which must precede a consent) as "denot[ing] communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." ABA Model Rule 1.0(e) defines "informed consent" as "denot[ing] the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Presumably both types of pre-consent disclosure would require the identical type of information.

Most importantly, Virginia Rule 1.9(a)'s requirement that both the new client and the former client consent differs dramatically from the ABA Model Rule 1.9(a)'s requirement that only the former client consent. That is explained below.

**ABA Model Rule 1.9(a)** also addresses lawyers' adversity to former clients.

ABA Model Rule 1.9(a) governs lawyers who personally represented the now-former client. As explained below, ABA Model Rule 1.9(b) governs lawyers who did not personally represent a client, but who otherwise acquired information that could be used against the former client from associated colleagues at a law firm where the lawyer previously practiced.

ABA Model Rule 1.9(a) contains the same basic approach as Virginia Rule 1.9(a). Like Virginia Rule 1.9(a), ABA Model Rule 1.9(a) uses the phrase "another person" rather than the more appropriate phrase "another client." As mentioned above, ABA Model Rule 1.7(a)'s provision prohibiting lawyers from adversity to a current clients uses the phrase "a client."

Also like Virginia Rule 1.9(a), ABA Model Rule 1.9(a) uses the term "materially adverse to the interests of the former client." Like Virginia Rule 1.7(a)(1), ABA Model Rule 1.7(a)(1) prohibits lawyers from representing a client in any matter "directly adverse to another client." As with the inexplicable use of the term "another person," the ABA Model Rules do not contain any explanation of why ABA Model Rule 1.9(a) uses the term "materially adverse" when addressing lawyers' adversity to former clients. As discussed above, the ABA Model Rules use several variations of "adversity" in describing different permissible and impermissible representations – sometimes without an adjective, sometimes with the adjective "direct" and sometimes with the adjective "material."

There are several differences (mostly logistical, but one of which is highly significant) between ABA Model Rule 1.9(a) and Virginia Rule 1.9(a).

First, and most importantly, in contrast to Virginia Rule 1.9(a)'s requirement that both the former client and the current client consent to the lawyer's representation of the latter in the specified type of matter adverse to the former, ABA Model Rule 1.9(a) requires only the former client's consent.

Virginia Rule 1.9(a)'s requirement that the lawyer's new client also consent is dramatically different from the ABA Model Rules' requirement. The Virginia Rules approach makes more sense than the ABA Model Rule approach, and presumably lawyers governed by the ABA Model Rules' approach probably would seek such consent (or at least give a heads up) even if ABA Model Rule 1.9(a) does not require it. For instance, suppose that a new client seeks to hire a lawyer to take a litigation or transactional matter adverse to Acme. If the lawyer had previously represented Acme in the same or a "substantially" related matter, under ABA Model Rule 1.9(a) the lawyer could proceed in her representation of the new client adverse to Acme as long as Acme consents. But common sense and lawyers' ABA Model Rule 1.4 communication duty would seem to require, or at least strongly encourage, the lawyer to also seek the new client's consent to her representation of the client in a matter "material adverse" to her former client Acme.

ABA LEO 497 (2/10/21) understandably acknowledged that under ABA Model Rule 1.9(a), "[i]nformed consent may also need to be obtained from the lawyer's current client if there is a 'significant risk' that the lawyer's representation of such client 'will be materially limited' by the lawyer's responsibilities to the former client."

There are several reasons why doing so would be prudent, and probably should be required (as in Virginia Rule 1.9(a)).

The new client might fear that her lawyer will “pull punches” when representing the new client adverse to former client Acme on the same or substantially related matter. Virginia Rule 1.9(a)’s dual consent requirement approach to former client conflicts is thus consistent with ABA Model Rule’s 1.7 – which requires consents both from: (1) a current client against whom the lawyer wants to take an adverse matter and (2) another current client retaining the lawyer to handle that matter. The ABA Model Rule 1.7(a) scenario presents the same sort of “punch pulling” concern that could (and probably does) arise when a lawyer represents a client adverse to a former client whom the lawyer previously represented in the same or a substantially related matter. The obvious reason for this temptation to “pull punches” is the lawyer’s lingering loyalty or favoritism toward a former client, or the lawyer’s hope to represent that former client again.

The new client might also understandably worry that Acme could move to disqualify its former lawyer at some point, wasting the new client’s time and resources. In fact, it would be easy to argue that ABA Model Rule 1.4’s duty to communicate material facts to clients would require such an explanation. Among other things, the new client receiving such material information about a possible disqualification side show could understandably decide to hire another lawyer without such former-client related baggage.

Virginia Rule 1.9(a)’s approach requiring both the former and the current clients’ consent for a lawyer to represent the latter in matters against the former makes more sense than the ABA Model Rules’ requirement that lawyers must only obtain the former client’s consent.

Third, in contrast to Virginia Rule 1.9(a)'s requirement of two consents (without mentioning written consents), ABA Model Rule 1.9(a) requires that the former client's consent be in writing.

Fourth, in contrast to Virginia Rule 1.9(a)'s apparent requirement only of an oral consent, and in contrast to the current-client Virginia Rule 1.7(b)(4)'s requirement that consents be "memorialized in writing," ABA Model Rule 1.9(a) requires that the former client's consent be "confirmed in writing."

ABA Model Rule 1.0(b) defines "confirmed in writing." The written consent requirement is consistent with similar provisions elsewhere in the ABA Model Rules, such as the current chart conflicts rule (ABA Model Rule 1.7), but is absent in many parallel Virginia Rules.

### **Virginia Rule 1.9(b)**

Virginia Rule 1.9(b) addresses a different situation – a lawyer's ability to handle matters adverse to a client who is or had been represented by a firm where the lawyer had previously worked.

Under Virginia Rule 1.9(b), "[a] lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client" – under two conditions, discussed below.

Virginia Rule 1.9(b) thus contains the standard for determining whether a lawyer can handle a matter adverse to a person whom that lawyer did not formerly represent, but whom her law firm represented when she worked at that law firm. In other words, lawyers governed by Virginia Rule 1.9(b) did not personally represent the clients against

whom they may not take a matter – those lawyers are governed by Virginia Rule 1.9(a). Instead, Virginia Rule 1.9(b) contains an information-based prohibition based on lawyers' possession of information that they presumably learned from associated law firm colleagues while practicing at the firm “with which the lawyer formerly was associated.”

Virginia Rule 1.9(b) contains several terms that deserve discussion.

First, the word “knowingly” implicates the Virginia Rules Terminology definition of “knowingly” – which denotes “actual knowledge of the fact in question” although “[a] person’s knowledge may be inferred from circumstances.”

Interestingly, Virginia Rule 1.9(a) does not contain a knowledge requirement. In other words, Virginia Rule 1.9(a) is a strict liability prohibition – in contrast to Virginia Rule 1.9(b)'s prohibition only if the lawyer “knowingly” undertakes a prohibited representation. Perhaps the absence of a knowledge requirement in Virginia Rule 1.9(a) rests on the presumption that lawyers are expected to remember whom they formerly represented. After all, Virginia Rule 1.9(a) focuses on an individual lawyer's prohibited adversity to a former client – in contrast to Virginia Rule 1.9(b)'s focus on lawyers' possession of information about their own former clients or some former law firm colleague's clients.

Second, the term “same” and the phrase “substantially related” are discussed below, in connection with Virginia Rule Comment [2].

Third, the term “firm” implicates the Virginia Terminology definition – which “denotes a professional entity, public or private, organized to deliver legal services, or a legal department of a corporation or other organization.” Virginia Rule 1.10 cmt. [1] – [1d] provide further guidance on that definition.

Fourth, the word “associated” is not defined in the Virginia Rules (or in the ABA Model Rules). That frustrating oversight makes it difficult to interpret many Virginia Rules and ABA Model Rules, some of which depend on knowing whether a lawyer is or was “associated” with other lawyers. The term has been interpreted to mean a sufficiently close relationship that the lawyers share access to confidential information about all of the other lawyers’ clients. The “associated” issue sometimes arises in the disqualification analysis for lawyers who are employed by but who are not intimately involved in law firms’ operations and who do not have access to all the law firm’s clients’ confidences. For instance, a lawyer paid by a law firm but working remotely on a discrete privilege review project for one client normally would not be deemed to be “associated” with that law firm for disqualification purposes. Thus, a lawyer with that sort of relationship with a firm would not normally be covered by Virginia Rule 1.9 – unless, of course, the lawyer worked on or otherwise acquired information about the former law firm’s client against whom that lawyer now wishes to take an adverse matter.

Fifth, Virginia Rule 1.9(b) uses two words that seem synonymous, but presumably have very different meanings: “formerly” and “previously.”

At first blush one might think that the term “formerly” presumably means the same as the term “previously” – contained in Virginia Rule 1.9(b). Virginia Rule 1.9(b) uses the word “formerly” to refer to lawyers “formerly . . . associated” with a firm. And four words later, the Virginia Rule 1.9(b) uses the word “previously” to refer to the law firm which “had previously represented a client.”

The word “formerly” seems clear in that context. The word refers to a lawyer’s past practice at a law firm. In other words, a lawyer “formerly” practiced at a firm but no longer practices at that firm. ABA Model Rule 1.9(b)(1) contains the identical language.

Virginia Rule 1.9(b)’s phrase “had previously represented a client” would seem to cover only the lawyer’s former firm’s former client. In other words, the term “previously represented” obviously refers to something that occurred in the past. But that linguistically logical interpretation of the words would dramatically narrow the Virginia Rule 1.9(b) prohibition. If interpreted as written, Virginia Rule 1.9(b) would only prohibit a lawyer who had not personally represented a firm client but who had acquired information from her colleagues at her former firm (that she could now use against one of that firm’s clients) from representing a new client in a matter adverse to a client that her former firm had “formerly represented” but no longer represented. Under that interpretation, Virginia Rule 1.9(b) would not prohibit that lawyer from representing a new client in a matter “materially adverse” to such a client that her former firm was continuing to represent on that matter.

But that interpretation seems illogical and inappropriate. Thus, presumably the phrase “previously represented a client” means that the law firm represented that client at the time when the lawyer was practicing at that firm – and does not refer to a former client of that firm.

So despite what seems to be this clear meaning, presumably Virginia Rule 1.9(b)’s phrase “previously represented” means “previously represented or currently represents.” In other words, the prohibition prevents a lawyer from representing a client in a matter adverse to one of her former firm’s former clients or one of that firm’s current clients – if Virginia Rule 1.9(b)(1) and (2)’s conditions are met. Interestingly, Virginia Rule 1.9(c),

discussed below, uses the phrase “formerly represented” rather than Virginia Rule 1.9(b)’s “previously represented.” As explained more fully below, despite that obvious and presumably deliberately different formulation, the meanings of those two term might be the same.

Sixth, Virginia Rule 1.9(b) contains the same consent exception as Virginia Rule 1.9(a): “unless both the present and former client consent after consultation.” That key distinction between Virginia Rule 1.9 and ABA Model Rule 1.9 is discussed above.

**ABA Model Rule 1.9(b)** also addresses lawyers’ ability to represent a client adverse to a client represented by associated colleagues in the law firm where the lawyer previously practiced.

ABA Model Rule 1.9(b) thus addresses lawyers handling a matter adverse to a client of the lawyer’s law firm when she worked there (but not her own client).

ABA Model Rule 1.9(b) contains identical language as Virginia Rule 1.9(b), except for the very different consent requirement discussed below.

The word “knowingly” implicates ABA Model Rule 1.0(f), which contain the same definition as the Virginia Rule Terminology – “denot[ing] actual knowledge of the fact in question,” although “a person’s knowledge may be inferred from circumstances.” Like Virginia Rule 1.9(b), ABA Model Rule 1.9(b) uses the phrase “a person” – which differs from ABA Model Rule 1.7(a)’s use of the term “a client,” and therefore raises the question of why ABA Model Rule 1.9(b) uses a deliberately different phrase. The phrase “the same or a substantially related matter” is discussed below.

ABA Model Rule 1.9(b)’s use of the term “firm” implicates ABA Model Rule 1.0(c)’s definition. That word “denotes a lawyer or lawyers in a law partnership, professional

corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.” ABA Model Rule 1.0 cmt. [2] – [4] provide further guidance. Those parallel Virginia Rule 1.0 cmt. [1] – [1d].

ABA Model Rule 1.9(b)'s use of the term “associated” involves the same frustrating aspect of the ABA Model Rules as mentioned above in connection with the Virginia Rules. That term is not defined, although it plays a key role in many Rules, such as the imputed disqualification issue addressed in ABA Model Rule 1.10, ABA Model Rule 1.11 and ABA Model Rule 1.12.

In contrast to Virginia Rule 1.9(b)'s provision allowing lawyers to represent clients adverse to former clients in certain circumstances if “both the present and former client consent after consultation,” ABA Model Rule 1.9(b)(2) contains a very different consent provision – requiring only the former client’s consent. Despite its strange placement, the ABA Model Rule 1.9(b)(2) phrase “unless the former client gives informed consent, confirmed in writing” raises all the same issues as the same language in ABA Model Rule 1.9(a), discussed above.

### **Virginia Rule 1.9(b)(1)**

Virginia Rule 1.9(b)(1) addresses the first condition under which a lawyer may not represent a client against her former law firm’s client without the consent of the new client and that former client.

Virginia Rule 1.9(b)(1) defines the type of prohibited representation as one in which the new client’s “interests are materially adverse to” her former law firm's client.

As explained above in the discussed of Virginia Rule 1.9(a), the phrase “materially adverse” differs from Virginia Rule 1.7(a)’s prohibition on a lawyer representing a client that “will be directly adverse to another [current] client.”

### **Virginia Rule 1.9(b)(2)**

Virginia Rule 1.9(b)(2) addresses the second condition for the prohibition on a law firm’s former lawyer representing a new client adverse to a client whom the law firm represented when she was at that firm.

Virginia Rule 1.9(b)(2) only applies the prohibition to her former law firm’s clients “about whom the lawyer had acquired information protected by [Virginia] Rules 1.6 and [Virginia] 1.9(c) that is material to the matter. In other words, Virginia Rule 1.9(b)(2) refers to information that the lawyer did not acquire while personally representing the former firm’s client when she practiced there – that is covered by Virginia Rule 1.9(a). Instead, Virginia Rule 1.9(b)(2) applies if the lawyer otherwise acquired information about the firm’s client in a setting other than a representational setting. Presumably that could have been through communications with her colleagues, firm meetings or internal communications, etc.

Only certain information triggers the prohibition – information “that is material to the matter.” In other words, the prohibition only applies if the lawyer wants to represent a new client in “the same or a substantially related matter” to that in which her former firm “previously represented” its client – and about whom the lawyer acquired information “material to the matter” the former law firm lawyer now wants to handle adverse to her former law firm’s client.

Virginia Rule 1.9(b)(2)'s prohibition only applies if the lawyer herself “had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter.” In other words, the lawyer who has formerly worked at a law firm only takes the information that is in her brain when she leaves. When the lawyer is working at the law firm, the ethics rules and perhaps other law automatically imputes all of her associated colleagues' knowledge to her. But when she leaves, that presumption evaporates and she must only deal with the knowledge she takes with her.

The phrase “by Rules 1.6 and 1.9(c)” is interesting (emphasis added). Perhaps it would have been better if Virginia Rule 1.9(b)(2) had used the phrase “by Rules 1.6 or Rule 1.9(c).”

Significantly, Virginia Rule 1.9(c)(1) and Virginia Rule 1.9(c)(2) (discussed below) use the word “or” rather than “and” when referring to two Virginia Rules (for a different analysis purpose) (emphasis added). So presumably the deliberate use of the word “and” in Virginia Rule 1.9(b)(2) was intended to apply only to information protected both by Virginia Rule 1.6 and by Virginia Rule 1.9(c), rather than by either. If Virginia Rule 1.9(b)(2) meant to apply either to Virginia Rule 1.6 or Virginia Rule 1.9(c), presumably it would have used the term “or” as the Virginia Rules do just one provision later.

But using the phrase “Rules 1.6 and 1.9(c)” could have a significant and unintended effect on Virginia Rule 1.9(b)(2)'s application. That is because Virginia's main confidentiality Rule 1.6 contains a very different definition of protected client confidential information from Virginia Rule 1.9(c). Virginia Rule 1.6(a) protects as confidential (1) information conveyed in privileged communications; (2) information “gained in the professional relationship” that the client has “requested be held inviolate;” and (3)

information “gained in the professional relationship . . . the disclosure of which would be embarrassing or would be likely to be detrimental to the client.” That is only a subset of the information protected by Virginia Rule 1.9(c). That Rule covers “information relating to or gained in the course of a representation.” Thus, Virginia Rule 1.9(c) – protected information includes information that the client has not asked to be held confidential, and (more importantly) information the disclosure of which would not be “embarrassing or would be likely to be detrimental to the client.” So Virginia uses different definitions – protecting a far broader range of former clients’ information under Virginia Rule 1.9 than current clients’ information under Virginia Rule 1.6(b).

So if the information defined in Virginia Rule 1.9(b)(2) applies only to information protected both by both Virginia Rule 1.6 and Virginia Rule 1.9(c) rather by either, it logically would only protect the subset of the Virginia Rule 1.6 - protected information that is also protected under Virginia Rule 1.9(c).

It is far more likely that Virginia Rule 1.9(b)(2)’s use of the word “and” rather than “or” is a mistake rather than a deliberate policy choice. But that is difficult to understand, because just one Rule later Virginia Rule 1.9(c)(1) deliberately uses the word “or” instead of the word “and” in another Virginia Rule and in an admittedly a different context.

**ABA Model Rule 1.9(b)(2)** contains language identical to Virginia Rule 1.9(b)(2), but conveying a totally separate meaning – for two reasons.

ABA Model Rule 1.9(b)(2) contains the same materiality element as Virginia Rule 1.9(b)(2). In other words, the lawyer’s possession of immaterial information from previous work at the law firm where her colleagues did represent or are still representing the client

against whom the lawyer now wants to represent another client does not trigger the prohibition.

First, ABA Model Rule 1.9(b)(2) describes another condition for the prohibition on a lawyer's representation of a client in a matter materially adverse to a client "previously" represented by the law firm where the lawyer formerly practiced. The ABA Model Rule describes the former law firm's client who is off-limits to such adversity absent consent – as discussed below: "about whom the lawyer had acquired information protected by [ABA Model] Rule 1.6 and 1.9(c) that is material to the matter."

In contrast to the informational mismatch between Virginia Rule 1.6(a) and Virginia Rule 1.9(c) discussed above, ABA Model Rule 1.6 and ABA Model Rule 1.9(c) describe essentially the same information. ABA Model Rule 1.6(a) protects as confidential "information relating to the representation of a client." ABA Model Rule 1.6 cmt. [3] explains that ABA Model Rule 1.6 "applies not only to matters communicated in confidence by the client, but also to all information relating to the representation, whatever its source." ABA Model Rule 1.9(c) also applies to information relating to the representation." Thus, ABA Model Rule 1.9(b)(2)'s use of the word "and" seems substantively appropriate – because ABA Model Rule 1.6 and ABA Model Rule 1.9(c) describe the same information. This contrasts dramatically with the same language in Virginia Rule 1.9(b)(2) – discussed above.

But ABA Model Rule 1.9(b)(2)'s use of the word "and" rather than "or" probably is at least a linguistic mistake. ABA Model Rule 1.6 protects current clients' information. ABA Model Rule 1.9(c) protects former clients' information. So theoretically there is no

way that information would be protected by both ABA Model Rule 1.6 and ABA Model Rule 1.9(c) – because a client is either a current client or a former client.

Second, and perhaps more significantly, ABA Model Rule 1.9(b)(2) concludes with the consent requirement that would allow the lawyer to proceed: “unless the former client gives informed consent, confirmed in writing.” That requirement only for the former client’s consent presents the same issue discussed above in connection with the same language in ABA Model Rule 1.9(a). The ABA Model Rule 1.9 standard differs significantly from Virginia Rule 1.9(a) and (b)’s former client conflicts standard.

And the “confirmed in writing” phrase also implicates the same issues discussed above, in connection with ABA Model Rule 1.9(a).

### **Virginia Rule 1.9(c)**

Virginia Rule 1.9(c) addresses lawyers’ use or disclosure of former clients’ confidential information.

Virginia Rule 1.9(c) applies to “[a] lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter.”

Significantly, Virginia Rule 1.9(c) thus includes information that the lawyer has acquired either: (1) by personally representing the client; (2) from colleagues at the lawyer’s “present” firm, who “formerly represented” the client; or (3) from the lawyer’s “former” firm, which “formerly represented” the client.

Of course lawyers can only use or disclose information they personally possess. So Virginia Rule 1.9(c) presumably applies only to individual lawyers possessing such information – either because they formerly represented the client or because they

otherwise acquired information about the client from a colleague in their current or in their former firm.

Virginia Rule 1.9(c) appears to use the word “formerly” and “former” in a manner that intentionally differs in meaning from the word “previously” used in Virginia Rule 1.9(b).

Virginia Rule 1.9(c) addresses information from or about clients: (1) whom the individual lawyer “formerly” represented (but no longer represents); and (2) clients whom the lawyer’s current or previous firm “formerly” represented. In other words, Virginia Rule 1.9(c) describes a scenario where neither the lawyer nor a law firm represent the now-“former” client. This is a different scenario from that described in Virginia Rule 1.9(b), in which a lawyer who did not personally represent a client may be prohibited from representing another client adverse to a client represented by a law firm where that lawyer formerly worked. Virginia Rule 1.9(b) describes that law firm as follows: “a firm with which the lawyer formerly was associated [which] had previously represented a client” (emphasis added). As discussed above, the word “previously” presumably describes the time period when the lawyer worked at that law firm. It is not the same as the word “formerly” – because the lawyer’s former law firm might still currently represent that client. In other words, Virginia Rule 1.9(b) addresses a lawyer’s information that she obtained while working at her former firm – which might prohibit that lawyer from adversity to one of the law firm’s clients, whether that client is still a client of the law firm or is now only a former client of that law firm.

Thus, Virginia Rule 1.9(c)’s use of the words “former” and “formerly” seems deliberately different from the previous Virginia Rule 1.9(b)’s use of the similar-sounding words “formerly” and “previously.” Virginia Rule 1.9(c)’s presumably deliberate word

choice seem to indicate that the word “formerly” means “in the past, but not now.” That certainly is the meaning attributed to the exact same word “formerly” just fourteen words earlier. The phrase “[a] lawyer who has formerly represented a client” clearly denotes a representation that had ended. Virginia Rule 1.9(b) clearly uses the word “formerly” to mean the same thing in discussing a lawyer’s association with a firm.

Virginia Rule 1.9(c)(1) uses the term “former client,” which could mean either the individual lawyer’s “former client” or the lawyer’s former law firm’s “former client.” But if Virginia Rule 1.9(c) only covers lawyers’ use of information that their former firm’s former (not current) clients, one would have to look elsewhere for prohibition on such lawyers’ use of such information about clients that the lawyer’s firm still represents. Virginia Rule 1.9(b) would prevent such lawyers from adversity to those clients (as discussed above). But applying the word “formerly” to clients as well as to lawyers when interpreting Virginia Rule 1.9(c) would remove Virginia Rule 1.9(c) as guidance for such lawyers’ use or disclosure of information that the lawyer obtained while at the law firm which continues to represent the client about whom that lawyer learned the information when she practiced there.

**ABA Model Rule 1.9(c)** contains the identical language.

ABA Model Rule 1.9(c) thus implicates the same question discussed above – whether its prohibition on a law firm’s former lawyer’s use and disclosure of information about the law firm’s clients which she obtained while practicing at the firm applies only to the firm’s former clients or also applies to clients the law firm continues to represent after she left the firm.

ABA Model Rule 1.9(c)'s phrase "formerly represented a client" and ABA Model Rule 1.9(c)(1)'s phrase "former client" would seem to support the former interpretation – under which ABA Model Rule 1.9(c) would only govern lawyers' use or disclosure of former law firm's former clients – and would not extend to her use or disclosure of protected client confidential information she obtained from or about clients that her former law firm continues to represent. One would therefore have to look elsewhere for an ABA Model Rule governing misuse or improper disclosure of that information.

### **Virginia Rule 1.9(c)(1)**

Virginia Rule 1.9(c)(1) addresses lawyers' "use" of former client confidential information.

Virginia Rule 1.9(c)(1) prohibits lawyers from using to the former client's "disadvantage" information "relating to or gained in the course of the representation."

Virginia Rule 1.9(c)(1) includes "information relating to or gained in the course of the representation" (emphasis added). Those two terms seem very different. The "relating to" phrase focuses on the information's content. The phrase "gained in the course of the representation" seems to focus on the source of the information rather than on its content. In other words, lawyers can "gain information in the course of the representation" that does not "relat[e] to" the representation.

Virginia Rule 1.9(c)(1)'s reference to information "relating to or gained in the course of the representation" differs from the information described in Virginia Rule 1.6(a) – which covers "information gained in the professional relationship." On its face, Virginia Rule 1.6(a)'s language includes information that does not meet the "relating to" standard. As explained below (in the discussion of Virginia Rule 1.9(b)(2) – which incorporates

information protected by this Rule as well as Virginia Rule 1.6), information “gained in the course” of a representation may not “relate[ ] to” the representation. Such information might be harmless information about the client’s favorite television show, etc., or might be potentially harmful information, such as the client’s intense dislike of certain nationalities. The former presumably would not be protected by Virginia Rule 1.6 – unless it was (1) “protected by the attorney-client privilege under applicable law” (which would seem unlikely if it was during an extraneous conversation rather than as part of the client’s request for legal advice); (2) “the client has requested” the information to be “held inviolate” (which might be applicable, if the lawyer complies with his Virginia Rule 1.4 duty to communicate the possible disclosure of that information to others); or (3) “the disclosure of which would be embarrassing or would be likely to be detrimental to the client.”

Disclosing a client’s favorite television show presumably would not meet that standard. Of course, the same would not be true of information “gained in the professional relationship” – but not “related to” the representation – about the client’s racial animus. Even if that information was not privileged (because it was not communicated to the lawyer with a request for legal advice), a client presumably would ask for it to be kept “inviolate.” And presumably the disclosure of such a racial animus “would be embarrassing or would be likely to be detrimental to the client.” Other Rules might also prohibit lawyers’ disclosure or use of the information, even if the information is not “related to” the representation.

It is strange that the Virginia Rule 1.9(c)(1) uses the phrase “relating to or gained in the course of the representation,” while the more general Virginia Rule 1.6(a)

confidentiality rule applicable to current clients uses the narrower phrase “information gained in the professional relationship.” Virginia Rule 1.6 cmt. [3] makes it clear that information can be gained from sources other than the client in the professional relationship. So perhaps the “relating to” is surplus, because the more expansive term “gained in the course of the representation” includes information “relating to” the representations and information not relating to the representation.” The term “gained in” might also include information that the lawyer gains from sources other than the client. Otherwise, the phrase would have been “gained from the client” rather than “gained in the course of the representation.” But if Virginia Rule 1.9(c)(1) intended that broad approach, it would have been better to use the temporal-focused phrase “gained during” the representation rather than the phrase “gained in” the representation. The phrase “gained during” would emphasize that Virginia Rule 1.9(c)(1) covers information gained from any source “during” the representation.

Virginia Rule 1.9(c)(1)’s broad phrase “relating to or gained in the course of the representation” seems more appropriate than the more limited ABA Model Rule 1.9(c)(1)’s narrower phrase “relating to the representation.” As explained above, such client information “gained in” the representation but unrelated to the representation might include such sensitive information about the client’s infidelity, racial animus, etc.

Virginia Rule 1.9(c)(1) prohibits lawyers from using former client protected client confidential information “to the disadvantage of the former client.”

Virginia Rule 1.9(c)(1)’s prohibition on using such information “to the disadvantage of the former client” creates a mismatch with the Virginia Rule 1.8(b), which prohibits lawyers from using information “protected under Rule 1.6” to the client’s disadvantage –

or “for the advantage of a lawyer or of a third person.” In other words, on its face Virginia Rule 1.9(c)(1) allows lawyers to “use” former clients’ protected client confidential information for their own advantage or for a third person’s advantage.

ABA Model Rule 1.8(b) and ABA Model Rule 1.9(c)(1) do not have that mismatch, because both of those Rules prohibit lawyers’ use of protected client confidential information – from either current or former clients – “to the disadvantage of” the current or the former client. Thus, under those ABA Model Rules, lawyers may use either current clients’ or former clients’ confidential information “relating to the representation” to their own advantage or to a third party’s advantage, although other Rules might affect that analysis.

The absence in Virginia Rule 1.9(c)(1) of a provision prohibiting lawyers from using former clients’ confidential information “for the advantage of the lawyer or of a third person” seems to create a higher confidentiality duty to current clients than to former clients. For instance, a lawyer currently representing a client could not use the client’s confidential information to help herself or to help some third person, as long as that does not disadvantage the current client. But a lawyer could use a former client’s similar information to help herself or some third person – as long as it would not disadvantage the former client. Perhaps this distinction was intentional. It does not appear in the ABA Model Rules, because those Rules use the same prohibition (limited to using the information to the disadvantage of a client) when addressing duties to current clients under ABA Model Rule 1.8(b) and to former clients (under ABA Model Rule 1.9(c)(1)).

Virginia Rule 1.9(c)(1) contains two exceptions to the general prohibition on lawyers' "use [of] information relating to or gained in the course of the representation to the disadvantage of the former client."

First, lawyers may "use" such information: "as [Virginia] Rule 1.6 or [Virginia] Rule 3.3 would permit or require with respect to a client." The reference to "use" of information under Virginia Rule 1.6 is odd. That Virginia Rule (and ABA Model Rule 1.6) does not address "use" of current clients' information. Instead, that Virginia Rule addresses lawyers' disclosure (Virginia Rule 1.6(a) uses the synonymous term "reveal") of current clients' information. An entirely different Rule (Virginia Rule 1.8(b)) deals with lawyers' "use" of current clients' information. Perhaps Virginia Rule 1.9(c)(1) rests on the assumption that the greater power to disclose includes the lesser power to "use." But one would think that Virginia Rule 1.9(c)(1) would have referred to the specific Virginia Rule 1.8(b) provision that actually applies.

Under Virginia Rule 1.8(b), lawyers "shall not use information protected under Rule 1.6 for the advantage of the lawyer or of a third person or to the disadvantage of the client." There are two exceptions: (1) "unless the client consents after consultation;" or (2) "except as permitted or required by [Virginia] Rule 1.6 or [Virginia] Rule 3.3." So even Virginia Rule 1.8(b) refers back to Virginia Rule 1.6 – perhaps incorporating the "disclosure" discretion or duty into the "use" analysis.

ABA Model Rule 1.8(b) does not involve that circular referencing. ABA Model Rule 1.8(b) states that "[a] lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as

permitted or required by these [ABA Model] Rules.” That generic reference makes more sense, and also thereby generally and automatically incorporates any rules changes.

Virginia Rule 1.9(c)(1)’s reference to Virginia Rule 3.3 involves the same mismatch as its reference to Virginia Rule 1.6. Virginia Rule 3.3 also addresses disclosure, not “use,” of protected client confidential information (among other information). Virginia Rule 3.3 contains a lengthy series of circumstances where lawyers must disclose protected client confidential information – all of which are addressed in this document’s summary and analysis of Virginia Rule 3.3.

By referring only to Virginia Rule 1.6 and Virginia Rule 3.3, Virginia Rule 1.9(c)(1) impliedly ignores (presumably unintentionally) other Rules that might permit or require disclosure (and therefore presumably “use”) of protected client confidential information. For instance, under Virginia Rule 4.1(b), lawyers “shall not knowingly . . . fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or a fraudulent act by a client.” Presumably that disclosure obligation would also apply to lawyers’ “use” of such information – and therefore should have been included in Virginia Rule 1.9(c)(1)’s reference to other Virginia Rules that might “permit or require” use of disclosure.

As explained below, ABA Model Rule 1.9(c)(1) avoids this problem by referring generically to an exception “as these [ABA Model] Rules would permit or require with respect to a [current] client.” It is unfortunate that Virginia did not use the same generic description, rather than list only two rules when at least one other Virginia Rule (and perhaps others) might permit or require disclosure, and therefore presumably might also permit or require “use.”

Second, Virginia Rule 1.9(c)(1) allows lawyers to “use information relating to or gained in the course of the representation to the disadvantage of the former client . . . when the information has become generally known.” Thus, lawyers are free to use (but not disclose – as discussed below) information about their former clients (or about clients whom their former law firm represented when the lawyer worked there) when that information is widely available to others. The term “generally known” is not defined, but ABA LEO 479 (2/15/17) provides some guidance about that term. It does not mean just “publicly available,” which could include information available through some careful Internet search or combing through some public archive in a remote courthouse. Instead, the term “generally known” presumably means information that is widely available to the public.

It might seem odd that lawyers may ever use information that they acquired in some confidential setting (either from personally representing the client or otherwise from a current or a former law firm colleague who personally represented the client) to the disadvantage of a former client. As mentioned above (and further discussed below), lawyers cannot disclose such information – they can only use it. Of course, presumably they can “use” it to point their new client in that direction, or otherwise cleverly arrange for its ultimate disclosure. Perhaps this “generally known” exception is intended to avoid disputes about where the lawyer gained the information that she has “used” against the former client (which itself would be difficult to uncover).

For whatever reason, the exception permits lawyers to use such “generally known” information to their former client’s disadvantage.

**ABA Model Rule 1.9(c)(1)** also addresses lawyers’ “use” of information about former clients whom they had personally represented, or whom their present or former law firm formerly represented. As explained above, ABA Model Rule 1.9(c)(1)’s term “former client” seems to limit ABA Model Rule 1.9(c)’s reach to information the lawyer has about a client that her former law firm formerly represented but does not currently represent.

ABA Model Rule 1.9(c)(1) prohibits lawyers from using “to the disadvantage of the former client” information “relating to the representation” – subject to the exceptions discussed below.

As explained above, the phrase “relating to the representation” describes only a subset of the information protected under Virginia Rule 1.9(c)(1) – which covers information “relating to or gained in the course of the representation.”

ABA Model Rule 1.9(c) presumably does not include information “gained in” the relationship – but unrelated to the representation. But as with Virginia Rule 1.9(c)(1), the “relating to” presumably includes information that the lawyer learns from sources other than the client.

As explained above, the ABA Model Rules’ definition of protected client confidential information in ABA Model Rule 1.6(a), ABA Model Rule 1.9(b)(2) and ABA Model Rule 1.9(c) (among other places) seems too narrow – because it would not include information “gained in” but unrelated to the representation. Such unprotected information might include sensitive and potentially damaging personal information the lawyer learns while representing the client, but that bears no relationship to the representation itself. For example, a client’s extraneous personal information (such as confession to infidelity)

or even information about the client’s racial bias such as use of the “n” word is information “gained in the professional relationship” – but not information “relating to the representation.” Thus, such derogatory information would be protected under Virginia Rule 1.6(a) and Virginia Rule 1.9(a), but apparently not under the parallel ABA Model Rules. It is difficult to imagine that the ABA Model Rules intend this result, but the language would seem to compel it.

ABA Model Rule 1.9(c)(1)’s two exceptions also differ from Virginia Rule 1.9(c)’s two exceptions.

The first ABA Model Rule 1.9(c)(1) exception is generic: “except as these [ABA Model] Rules would permit or require with respect to a client.” ABA Model Rule 1.9(c)(1)’s use of the general term “these Rules” is broader than Virginia Rule 1.9(c)(1)’s specific reference to Virginia Rule 1.6 and Virginia Rule 3.3. ABA Model Rule 1.9(c)(1)’s general reference to all ABA Model Rule is more appropriate, both because it incorporates all of the other ABA Model Rules and because it will not have to be tweaked if any of those Rules change.

The second ABA Model Rule 1.9(c)(1) exception contains the same language as the parallel Virginia Rule 1.9(c)(1) exception: “when the information has become generally known.” Presumably this exception is designed to free lawyers from the prohibition on using information to a former client’s disadvantage if many others also possess the information. Not surprisingly, the increasing availability of information through the Internet has colored the analysis of whether information has become “generally known.” ABA LEO 479 (12/15/17) discusses that issue. Lawyers still cannot

“reveal” (disclose) such information. That is still prohibited by Virginia Rule 1.9(c)(2), discussed below. But the lawyer can use it.

### **Virginia Rule 1.9(c)(2)**

Virginia Rule 1.9(c)(2) addresses lawyers’ disclosure (not “use”) of former clients’ protected client confidential information.

Virginia Rule 1.9(c)(2) prohibits “[a] lawyer who has formerly represented the client in a matter or whose present or former firm has formerly represented a client in a matter” from “reveal[ing] information relating to the representation except as [Virginia] Rule 1.6 or [Virginia] Rule 3.3 would permit or require with respect to a [current] client.”

Both Virginia Rule 1.9(c)(2) and ABA Model Rule 1.9(c)(2) use the term “reveal.” The term “reveal” is presumably synonymous with the term “disclose.” The terms are used synonymously throughout Virginia Rule 1.6 and ABA Model Rule 1.6.

Virginia Rule 1.9(c)(2)’s use of the phrase “relating to the representation” and the reference to “except as Rule 1.6 or Rule 3.3 would permit or require” implicate the same issues discussed above, in connection with Virginia Rule 1.9(c)(1).

But Virginia Rule 1.9(c)(2) raises several other issues worth mentioning. First, Virginia Rule 1.9(c)(2) uses the phrase “relating to the representation,” in contrast to Virginia Rule 1.9(c)(1)’s use of the phrase “relating to or gained in the course of the representation.” It is unclear why Virginia Rule 1.9(c)(2) would protect an arguably narrow range of protected client confidential information than Virginia Rule 1.9(c)(1).

Second, Virginia Rule 1.9(c)(2) does not have the same limitations on the disclosure that Virginia Rule 1.9(c)(1) imposes on use: “to the disadvantage of the former client.” In other words, Virginia Rule 1.9(c)(2) prohibits the disclosure of former clients’

protected client confidential information whether or not it would disadvantage the former client.

Third, Virginia Rule 1.9(c)(2) does not contain Virginia Rule 1.9(c)(1)'s "generally known" exception. Thus, lawyers may not disclose former clients' information just because that information has become "generally known."

**ABA Model Rule 1.9(c)(2)** contains essentially the same language, but with one exception.

As with ABA Model Rule 1.9(c)(1), ABA Model Rule 1.9(c)(2) contains the generic and appropriate "except as these [ABA Model] Rules would permit or require" – in contrast to the more specific and less appropriate Virginia Rule 1.9(c)(2) phrase "except as [Virginia] Rule 1.6 or [Virginia] Rule 3.3 would permit or require." As explained above, ABA Model Rule 1.9's global reference to all of the ABA Model Rules makes more sense because it covers the waterfront and will not require "tweaking" if any of the possibly applicable ABA Model Rules change.

## Comment

### Virginia Rule 1.9 Comment [1]

Virginia Rule 1.9 cmt. [1] addresses lawyers' handling of a matter adverse to a former client.

Virginia Rule 1.9 cmt. [1] prohibits lawyers from “represent[ing] another client” “[a]fter termination of a client-lawyer relationship,” except as Virginia Rule 1.9 permits. The phrase “another client” confirms that Virginia Rule 1.9(a)'s term “another person” means another client.

Virginia Rule 1.9 cmt. [1] then points to “[t]he principles in [Virginia] Rule 1.7 [as] determin[ing] whether the interests of the present and former clients are adverse.” The reference to Virginia Rule 1.7's “principles” confirms that the definition of “adversity” applies in the same way to former clients under Virginia Rule 1.9 as to current clients in Virginia Rule 1.7.

Although determining whether “adversity” exists involves the Virginia Rule 1.7 standard, Virginia Rule 1.9(a) does not prohibit all “adversity” to current clients. Instead, Virginia Rule 1.9(a) only prohibits “material advers[ity]” – “to the interests of the former client” (rather than adversity to the former client herself) (emphasis added). As discussed above, there is a mismatch: (1) between Virginia Rule 1.7(a)(1)'s “directly adverse” standard and Virginia Rule 1.9(a)'s “materially adverse” standard; and (2) between Virginia Rule 1.7(a)(1)'s “adverse to another client” standard and Virginia Rule 1.9(a)'s “adverse to the interests of the former client” standard. Virginia Rule 1.9 cmt. [1] does not provide any guidance on those presumably deliberate policy differences.

Virginia Rule 1.9 cmt. [1] next provides two examples of impermissible adversity to a former client – both of which seem somewhat flawed.

First, a lawyer “could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client.” Second, a former prosecutor who had “prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction.”

Both of those examples inexplicably explain that the lawyer in the scenario “could not properly” undertake the new described representation. The word “properly” seems unnecessary. The examples correctly conclude that the lawyer could not undertake the described representations. The word “properly” is superfluous.

The former example otherwise makes sense, but the latter is a strange example – especially use of the term “transaction.” The example might cover a prosecutor’s role in prosecuting a transaction-related crime and thus prohibit the former prosecutor from representing the criminal defendant in a case “against the government” concerning that transaction. But the term “transaction” seems completely inappropriate for crimes, especially blue-collar crimes. A word like “underlying facts” or “event” might have been more appropriate.

**ABA Model Rule 1.9 cmt. [1]** also addresses lawyers representing a client adverse to a former client.

In contrast to Virginia Rule 1.9 cmt. [1], ABA Model Rule 1.9 cmt. [1] begins with the unsurprising general statement that “[a]fter termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest, and thus may not represent another client except in conformity with this Rule.”

As explained throughout this document, the ABA Model Rules use various presumably synonymous terms for a relationship between a client and a lawyer: “client-lawyer relationship,” “lawyer-client relationship,” “attorney-client relationship.”

ABA Model Rule 1.9 cmt. [1] then includes the same two examples as Virginia Rule 1.9 cmt. [1]. Both of those use the inexplicable word “properly,” and the second example contains the seemingly inapt word “transaction.”

In contrast to Virginia Rule 1.9 cmt. [1], ABA Model Rule 1.9 cmt. [1] also contains another example, which involves a joint representation scenario. ABA Model 1.9 cmt. [1] explains that a lawyer who had formerly jointly represented multiple clients cannot later represent one against another in “the same or a substantially related matter after a dispute arose among the clients in that matter” – “unless all affected clients give informed consent.” This guidance creates a potentially significant mismatch with black letter ABA Model Rule 1.9(a). Black letter ABA Model Rules 1.9(a) on its face would only require the “former client’s” consent to represent another client adverse to a former client in that scenario. As explained above, Virginia Rule 1.9(a) requires both the new client’s and the former client’s consent.

ABA Model Rule Scope [14] explains that ABA Model Rule Comments “do not add obligations to the [ABA Model] Rules but provide guidance for practicing in compliance with the Rules.” But ABA Model Rule 1.9 cmt. [1] seems to include an obligation to obtain consent from the client whom a lawyer wishes to represent in a matter adverse to one of the lawyer’s former clients – despite black letter ABA Model Rule 1.9(a) pointedly not requiring the current client’s consent – instead only requiring the now-adverse former client’s consent.

ABA Model Rule 1.9 cmt. [1] concludes with an understandable reminder that “[c]urrent and former government lawyers must comply with [ABA Model Rule 1.9] to the extent required by [ABA Model] Rule 1.11.

### **Virginia Rule 1.9 Comment [2]**

Virginia Rule 1.9 cmt. [2] addresses the definition of “matter.”

Not surprisingly, Virginia Rule 1.9 cmt. [2] first explains that the scope of a “matter” may “depend on the facts of a particular situation or transaction.”

Although admittedly addressing the term “matter” in the different context of current and former government-employee lawyers, Virginia Rule 1.11(f)(1) defines the term “matter” as “includ[ing] [thus not limiting the definition to]” any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties.” Although obviously not on point in a more general context, this definition tends to show that the term “matter” denotes a fairly specific circumstance.

Virginia Rule 1.9 cmt. [1]’s next statement is confusing: “[t]he lawyer’s involvement in a matter can also be a question of degree.” That erudite-sounding but unhelpful phrase (which also appears in ABA Model Rule 1.9 cmt. [2]), does not seem especially pertinent in defining a “matter” when assessing disqualification or for any other purpose. The extent of a lawyer’s involvement might affect any analysis of the information the lawyer did or may have acquired during a representation, but that seems like a separate issue.

Virginia Rule 1.9 cmt. [2] then describes a lawyer’s involvement in a “specific transaction” (which bars the lawyer from representing another client with materially adverse interests presumably involving the same transaction). The Virginia Rule

Comment contrasts that scenario with that of “a lawyer who recurrently handled a type of problem for a former client [but] is not precluded from later representing another client in a wholly distinct problem of that type” – even if the later representation “involves a position adverse to the same client.”

This is not a very helpful scenario, or even relevant. Virginia Rule 1.9 (and ABA Model Rule 1.9) do not rest on a lawyer’s taking “a position adverse” to a former client. A conflict arises if a lawyer represents a client whose interests are “materially adverse to the interests of the former client.” So a merely adverse “position” presumably does not trigger a Virginia Rule 1.9 former-client conflict.

This reference may implicate the type of “positional adversity” addressed in Virginia Rule 1.7 cmt. [24] (and addressed more extensively in ABA Model Rule 1.7 cmt. [24]). Virginia Rule 1.9 cmt. [2] might also involve the type of pattern litigation in which (typically) an outside lawyer or former in-house lawyer for a large corporation terminates the representation of that client and begins to represent plaintiffs suing the former corporate client or client employer. Those corporate clients’ motions to disqualify their former lawyers from pursuing such plaintiff’s actions usually fail. The disqualification motions usually focus on whether the lawyers possessed only general knowledge about the corporate client or the type of “playbook” information that Virginia Rule 1.9 does not directly address (but which ABA Model Rule 1.9 cmt. [3] addresses, as discussed below). Of course, those and other lawyers always face the possibility that their new representation might trigger a “material limitation” conflict under Virginia Rule 1.7(a)(2) – because there could be a “significant risk” that their new representation “will be materially limited” by the lawyer’s possession of information from those earlier representations.

Virginia Rule 1.9 cmt. [2] then turns to another scenario. The Virginia Rule Comment notes that “[s]imilar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdiction.” Presumably those “[s]imilar considerations” involve a military lawyer’s handling of a prosecution which is similar to but not specifically identical to cases the military lawyer handled while having been assigned to the defense side. In other words, the military lawyer’s recurrent handling of defense cases does not bar him or her from prosecuting similar cases. The military scenario is very specific, and one might wonder why such a peculiar scenario would be included in the Virginia Rule 1.9 Comments (although it also appears in ABA Model Rule 1.9 cmt. [2]).

Virginia Rule 1.9 cmt. [2] concludes by posing the “underlying question” as “whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.” That standard seems far too narrow. Actual “side-switching” is extremely rare, because it is so intuitively improper. Most former client conflicts analyses do not involve such “side-switching,” but instead focus on factual and legal contexts and information.

**ABA Model Rule 1.9 cmt. [2]** contains essentially the same language as Virginia Rule 1.9 cmt. [2].

Thus, ABA Model Rule 1.9 cmt. [2] also begins with the obvious point that the scope of a “matter” depends on the facts, and the unhelpful next statement that “[t]he lawyer’s involvement in a matter can also be a question of degree” (without explaining what that means or its significance to the conflicts analysis).

In contrast to Virginia Rule 1.9 cmt. [2]’s second scenario, ABA Model Rule 1.9 cmt. [2]’s second scenario involves a lawyer who has “recurrently handled a type of problem for a former client” but who may later represent an adversary in “a factually distinct problem of that type” – in contrast to the phrase “wholly distinct problem of that type” in Virginia Rule 1.9 cmt. [2]. ABA Model Rule 1.9 cmt. [2]’s phrase “factually distinct” does not seem as narrow as the Virginia Rule Comment’s phrase “wholly distinct.” It is unclear whether those phrases would be applied differently, but on its face the ABA Model Rule 1.9 cmt. [2] seems to allow more latitude for a lawyer to take a matter adverse to a former client than the Virginia Rule 1.9 cmt. [2] formulation.

### **Virginia Rule 1.9 Comment [3]**

Virginia Rule 1.9 cmt. [3] addresses what it calls the “the second aspect of loyalty to a client” – the “obligation to decline subsequent representations involving positions adverse to a former client arising in substantially related matters.” As explained above (in connection with Virginia Rule 1.9 cmt. [2]), lawyers are not obligated to “decline subsequent representations involving positions adverse to a former client” (emphasis added). Virginia Rule 1.9(a) recognizes a conflict if lawyers represent a client adverse to a former client if the client’s “interests are materially adverse to the interests of the former client” – requiring materiality, and not focusing on “positions.”

Virginia Rule 1.9 cmt. [3] first focuses on an individual lawyer’s prohibition on adversity to a former client, and then on that prohibition’s imputation to other lawyers in the same firm.

Virginia Rule 1.9 cmt. [3] then notes that an individual lawyer’s inability to handle such a new matter “may be subject to imputed disqualification under [Virginia] Rule 1.10.”

The phrase “may be” is potentially confusing. Absent some exception, the individual lawyer’s prohibition definitely will be imputed under Virginia Rule 1.10 to other associated colleagues in the same law firm. Perhaps the “may be” refers to former clients’ possible consent to other lawyers in the firm handling a matter adverse to the client, or to former government lawyers’ screening by the law firm under Virginia Rule 1.11 (which would allow others to take matters adverse to the government).

Virginia Rule 1.9 cmt. [3] next turns to a scenario in which a lawyer “left one firm for another.” In that setting, the lawyer’s “new affiliation would not preclude the firms involved from continuing to represent clients with adverse interests in the same or related matters, as long as the conditions of [Virginia Rule] 1.9(b) and (c) concerning confidentiality have been met.” The phrase “continuing to represent” might apply to the law firm that the lawyer left, and which was representing that client when he left. But if the lawyer brings a client to the new law firm, that law firm would not be seen as “continuing to represent” that client. Instead, the law firm would begin representing that client when the lawyer representing the client moved to that new firm.

It seems odd that this sentence would appear in Virginia Rule 1.9 cmt. [3], rather than one of the next four Comments – which appear under the subtitle “Lawyers Moving Between Firm.” As explained in connection with ABA Model Rule 1.10 and its Comments, Virginia has not adopted the ABA Model Rule provisions allowing hiring law firms to avoid the imputed disqualification of an individually disqualified lawyer whom the firm hires – through what might be called a “self-help” ethics screen. This document addresses that ABA Model Rule process in its summary and analysis of ABA Model Rule 1.10.

**ABA Model Rule 1.9** does not have a similar Comment.

### **ABA Model Rule 1.9 Comment [3]**

ABA Model Rule 1.9 cmt. [3] addresses the key definition of ABA Model Rule 1.9's "substantial relationship" standard (also sometimes called the "substantially related" standard).

Unfortunately, ABA Model Rule 1.9 cmt. [3] is dramatically different from Virginia Rule 1.9 cmt. [3]. Virginia did not adopt any substantive part of highly significant ABA Model Rule 1.9 cmt. [3]. ABA Model Rule 1.9 cmt. [3] contains extensive useful guidance that does not appear anywhere in the Virginia Rules or in the Virginia Rule Comments.

ABA Model Rule 1.9 cmt. [3] first explains that "[m]atters are substantially related" if: (1) "they involve the same transaction or legal dispute," or (2) "if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter."

Unfortunately, neither the Virginia Rules nor the Virginia Rule Comments provide any guidance on this obviously critical "substantial relationship" analysis. Virginia lawyers therefore might look to Virginia federal and state courts' analyses of that term's meaning in disqualification cases.

There are two very different approaches that require very different analyses. The ABA Model Rules adopt both of those approaches, so it is worth considering both.

The first way in which a matter might be "substantially related" to an earlier matter involves the factual context, legal issues, parties, etc. The second way in which a matter might be "substantially related" to an earlier matter is much more subtle. That assessment focuses on whether a lawyer's work on the earlier matter would "normally" have caused

that lawyer to have obtained “confidential factual information” that could be used in the new matter adverse to the former client. That obviously involves a very complex analysis.

And it is worth noting that the information-based second possible means of applying the “substantial relationship” test is entirely separate from the stand-alone ABA Model Rule 1.9(c) limit on lawyers’ use or disclosure of a former client’s protected client confidential information they actually possess. ABA Model Rule 1.9 cmt. [3]’s information-based analysis looks at what material protected client confidential information the lawyer “normally would have . . . obtained” in the earlier representation (emphasis added) – and uses that assessment to determine if there is a “substantial relationship” that triggers the prohibition in ABA Model Rule 1.9(a) or ABA Model Rule 1.9(b). This analysis does not require a showing that the lawyer actually obtained such material protected client confidential information.

That seems like an odd way to judge the “substantial relationship” between two matters. In other areas of the law (such as collateral estoppel, res judicata, misjoinder, etc.) the law analyzes overlap between factual and legal issues. And there can be a mismatch between protected client confidential information a lawyer actually obtains during a representation, and such information that a lawyer “normally” would have obtained. The former might include personal information that the lawyer gains in a former representation – even during informal social communications with the client. That information would be covered by ABA Model Rule 1.9(c) (if it was “relating to the representation”) and presumably would not count in the information-based analysis of determining whether there is a “substantial relationship” between the matters. But such information might prevent the lawyer from representing another client adverse to the

former client who had shared such personal (and possibly sensitive and damaging) information with the lawyer. Perhaps the information would be “material” to the new matter, and therefore covered by ABA Model Rule 1.9(b)(2). It is more likely that such information would trigger an ABA Model Rule 1.7(a)(2) “material limitation” conflict. That Rule would prohibit the representation because the lawyer’s “responsibilities to . . . a former client” would “materially limit[ ]” the lawyer’s representation of the new client.

ABA Model Rule 1.9 cmt. [3] takes both approaches. If a proposed representation meets either “substantial relationship” standard, the lawyer may undertake the representation only with the former’s client’s consent.

ABA Model Rule 1.9 cmt. [3] then provides a useful example of the second type of approach – in which a lawyer wishes to undertake a representation against a former client that is legally and factually unrelated to the lawyer’s previous representation of the client, but in which the lawyer “would normally have . . . obtained” material information that the lawyer could now use against the former client in a totally unrelated matter. The example involves “a lawyer who has represented a businessperson and learned extensive private financial information about that person [who] may not then represent that person’s spouse in seeking a divorce”. This is an excellent example of how ABA Model Rule 1.9 (and Virginia Rule 1.9) works. A lawyer who represents a business person in a financial deal could not seek to represent his wife in a divorce by pointing to the completely different factual and legal contexts of the business transaction and the divorce. The lawyer’s possession of extensive and perhaps private financial information about the businessperson obtained during a business transaction representation would give the lawyer an advantage in representing the business person’s spouse in the divorce.

ABA Model Rule 1.9 cmt. [3] also provides another more subtle example: “a lawyer who has previously represented a client in securing environmental permits to build a shopping center” cannot later represent a client seeking to oppose re-zoning “on the basis of environmental considerations.” But that lawyer could represent a tenant resisting the former-client shopping center’s efforts to evict the tenant for non-payment of rent. That permissible representation does not involve the same factual or legal issues as the environmental permit representation. But more than that (and thus unlike the business transaction/divorce example discussed above), the lawyer presumably would not have received any confidential information during the environmental permit representation that the lawyer could use against the former client in the eviction representation.

ABA Model Rule 1.9 cmt. [3] does not explain it, but presumably the lawyer could be disqualified under the “substantially related” standard if that lawyer actually obtained disqualifying materially adverse protected client confidential information – even if he “normally” would not have done so in the earlier representation. For example, in the ABA Model Rule 1.9 cmt. [3]’s business transaction/divorce scenario discussed above, over lunch or dinner the business person might confide in his lawyer that he had been unfaithful to his wife, had transferred money overseas to keep her from knowing about it, etc. In that scenario, the lawyer presumably could not represent the wife in a later divorce – because the lawyer’s possession of that information would obviously help the wife, yet the lawyer could not “use” or disclose it. This makes sense, even if a lawyer handling such business transactions “normally” would not have obtained information about his client’s marital fidelity or infidelity. Under ABA Model Rule 1.9 or under ABA Model Rule

1.7(a)(2)'s so-called “material limitation” conflict standard, that lawyer presumably could never represent the wife in a divorce action.

The same scenario might arise in the shopping center example. While representing the shopping center in the environmental permit representation, the lawyer might have learned facts from that client about the shopping center's unrelated dispute with the tenant who was not keeping up with the rent. The shopping center representative client might have discussed (even over lunch with the lawyer) what the shopping center intended to do, what “bottom line” settlement the shopping center might agree to with the tenant, etc. Even if that information was not “related to” the environmental permit representation and therefore not strictly within ABA Model Rule 1.6(a) protection (or not covered by ABA Model Rule 1.9 cmt. [3] because the information is not “related to” the environmental permit matter, presumably the lawyer could not “use” the information to shopping center client's disadvantage (and the tenant's advantage) under ABA Model Rule 1.8(b). And such “use” prohibition presumably would also prohibit the lawyer's disclosure of that information.

ABA Model Rule's 1.9 cmt. [3] thus builds the protected client confidential information issue into the “matter” definition, and – more importantly – into the “substantially related” analysis. In other words, matters are “substantially related” if information the lawyer gained in one matter would be materially relevant in a later matter. This has the effect of essentially merging ABA Model Rule 1.9(b)'s loyalty analysis and ABA Model Rule 1.9(b)'s information use or disclosure analysis.

It is unclear how the Virginia Rules would address these issues. To be sure, Virginia Rule 1.9 contains both a “materially adverse” standard (in Virginia Rule 1.9(b)(1))

and the information standard (in Virginia Rule 1.9(b)(2)). And it is useful to consider in the “substantial relationship” analysis the type of material information the lawyer obtained or “would normally have . . . obtained” during the representation. But neither the Virginia Rules nor the Virginia Rule Comments explore this issue. And the Virginia Bar has not adopted a specific standard for determining if matters are “substantially related.” In several legal ethics opinions, the Virginia Bar has focused on a legal and factual similarity – without pointing to the likelihood that a lawyer representing a client in the former matter normally would have obtained material confidential information that would be used against the client in a later matter (or whether the lawyer actually obtained such information). Virginia LEO 1806 (9/20/04) (noting that the Virginia Bar has not adopted a specific “substantial relationship” standard, but has quoted court decisions using terms such as “essentially the same,” “arising from substantially the same facts,” “the by-products of the same transaction,” “entail virtually a congruence of issues or a patently clear relationship in subject matter”); Virginia LEO 1720 (12/2/98) (“substantial relatedness between the matters in a former representation and a current representation is a fact-specific inquiry from case to case . . . in previous opinions, substantial relationship dependent upon whether the same parties, the same subject matter, or the same issues were present”); Virginia LEO 1652 (7/8/96) (explaining that a substantial relationship depends on whether the matters “involve either the same facts . . . the same parties . . . or the same subject matter;” also using the phrases “essentially the same, arise from substantially the same facts, or are by-products of the same transaction”). These Virginia legal ethics opinions all focus on the factual and legal similarity between the past and

future matters – rather than incorporating an information-based standard into the “substantial relationship” test.

Virginia Rule 1.9(b)(2) also focuses on lawyers’ possession of confidential information that would be useful in a new matter adverse to a former client. That would seem to focus on protected client confidential information that the lawyer actually received. This contrasts with ABA Model Rule 1.9 cmt. [3]’s odd prediction of what material information lawyers “would normally have . . . obtained” in a representation in judging the “substantial relationship” between the previous matter and the current matter.

ABA Model Rule 1.9 cmt. [3] then moves to another issue – the earlier disclosure or the staleness of material protected client confidential information a lawyer “would normally have . . . obtained.” Unfortunately, neither the Virginia Rules nor the Virginia Rule Comments contain such helpful guidance.

ABA Model Rule 1.9 cmt. [3] first notes that “[i]nformation that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying.” In other words, that sort of information apparently will not satisfy the “substantially related” standard. But that does not make much sense. ABA Model Rule 1.9 cmt. [3]’s discussion focuses on whether the matters are “substantially related.” The ABA Model Rule Comment does not focus on what information the lawyer actually acquired. It is illogical to say that matters are not “substantially related” because information a lawyer learned during the earlier representation is no longer secret (or has become stale, as mentioned below). To be sure, under ABA Model Rule 1.9(c)(1), lawyers may use such information that has become “generally known.” The “generally known” standard seems different from ABA Model Rule 1.9 cmt. [3] “disclosed to the

public or to other parties adverse to the former client” standard. But the concept is the same. The availability of the confidential information to others affects the lawyers’ ability to use or disclose it. Those developments may change how the lawyer must or can use or disclose the information – but they logically should have no bearing on the “substantial relationship” analysis.

ABA Model Rule 1.9 cmt. [3] then turns to the concept of staleness. The ABA Model Rule Comment acknowledges that “[i]nformation acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related.” Of course, the obsolescence of such information does not change the prohibition on lawyers’ use or disclosure of such obsolete information under ABA Model Rule 1.9(c). But under ABA Model Rule 1.9 cmt. [3]’s analysis, the staleness of the information may be “relevant” in the “substantial relationship” analysis. That principle certainly makes sense, but intellectually it seems inappropriate to squeeze the staleness square peg into the “substantial relationship” round hole.

ABA Model Rule 1.9 cmt. [3] next addresses other key issues not discussed in any Virginia Rules or Virginia Rule Comments.

Most significantly, ABA Model Rule 1.9 cmt. [3] explains that: “[i]n the case of an organizational client, general knowledge of the client’s policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant in the matter in question ordinarily will preclude such a representation.”

Thus, lawyers who have learned what makes a corporate client “tick” or its “policies and practices” about personal injury claims, handling employment disputes, etc., ordinarily will not be forever precluded from representing other clients adverse to that former corporate client.

But lawyers who have represented a corporation and gained “knowledge of specific facts” are prohibited from adversity to the corporation – if those specific facts “are relevant to the matter in question.”

Some commentators call such specific information “playbook” information. This comes from a football scenario, which highlights the difference between general information and specific information. For instance, anyone can watch a football team’s play week after week, and learn sometime about how it devises and runs plays, the team’s decision-making at certain points in the game, etc. That is the sort of generic information about corporate clients that does not disqualify lawyers from adversity to former corporate clients. In contrast, it would be unfair and probably violate league rules for an adversary to obtain a football team’s specific “playbook” about the next game. That very detailed game plan would give the adversary an unfair advantage. Similarly, lawyers having former corporate clients’ very specific information are disqualified from adversity to former corporate clients in matters in which such “playbook” information would be material.

ABA Model Rule 1.9 cmt. [3] next provides useful logistical guidance not found in the Virginia Rules or Virginia Rule Comments.

ABA Model Rule 1.9 cmt. [3] assures that former clients are “not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter.” Of course,

that addresses disqualification motions – in which a former client normally must carry the burden of showing that its former lawyer is representing another client in a matter adverse to the former client, and had acquired material information while representing the now-former client that satisfies the “substantial relationship” standard. In contrast, one would expect a former client seeking her former lawyer’s disqualification to use extrinsic evidence in establishing the factual or legal overlap that might also support the “substantially related” argument.

This makes some sense, but does not preclude the possibility of mischief. Because former clients understandably do not have to disclose confidences when seeking to disqualify their former lawyers from adversity to them, those former clients can exaggerate or possibly even lie about what information they conveyed to the lawyers during the representation. And to make matters more difficult for the lawyer defending against a disqualification motion, the moving party almost surely will file under seal any affidavits describing the confidences that the moving party had shared (or claimed to have shared) with the lawyer during the former representation. In a disqualification context, this means that the lawyer trying to avoid disqualification must essentially “shadow box” with the former client seeking the former lawyer’s disqualification.

ABA Model Rule 1.9 cmt. [3] concludes with an explanation that “[a] conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.” The “ordinary practice” standard seems to mirror ABA Model Rule 1.9 cmt. [3]’s “would normally have been obtained” standard, discussed above. In essence, this essentially creates a presumption that a client’s former

lawyer possesses disqualifying material information (usable in both the “substantial relationship” analysis and in determining whether the lawyer has wrongfully used or disclosed such information) if in lawyers’ “ordinary practice” they would have obtained such information in providing services in such a matter. ABA Model Rule 1.9 cmt. [3] therefore adopts what amounts to an objective standard for determining what information clients gave their lawyers during a representation. This concept does not appear in Virginia Rule 1.9.

#### **Virginia Rule 1.9 Comment [4]**

Virginia Rule 1.9 cmt. [4] addresses lawyers’ adversity to clients of their former law firm, under Virginia Rule 1.9(b).

Virginia Rule 1.9 cmt. [4] first acknowledges that clients have the right to be “reasonably assured that the principle of loyalty to the client is not compromised.” This seems like the wrong term. Lawyers owe their former clients loyalty, but only based on the confidential information the lawyer obtained while representing those clients. In other words, lawyers owe their former clients confidentiality, but not ongoing loyalty (as they do to their current clients). If they owed a loyalty duty, lawyers could never be adverse to former clients – just as they cannot ever be adverse to current clients (absent consent or some other exception).

Virginia Rule 1.9 cmt. [4] next acknowledges that a prohibition on lawyers’ adversity to former clients “should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel.” The Virginia Comment then recognizes that lawyers increasingly change firms. That certainly focuses on lawyers’ financial success, although as in other situations involving lawyers moving from firm to firm, the

Virginia Comment warns of “radical curtailment . . . of the opportunity of clients to change counsel.” This approach rests on the questionable concept that lawyers are not essentially fungible, but instead that each lawyer is so unique that society would suffer if clients could not choose whichever lawyer they want. This unique pretentious common sense-defying professional principle also justifies ethics rules’ prohibition on non-competes, and/or restrictions on lawyers’ practice both in employment agreements and in settlement agreements. Virginia Rule 5.6 (and ABA Model Rule 5.6) addresses those prohibitions.

**ABA Model Rule 1.9 cmt. [4]** contains the identical language.

#### **Virginia Rule 1.9 Comment [4a]**

Unique Virginia Rule 1.9 cmt. [4a] addresses lawyers’ ability to represent clients in matters adverse to clients represented by their former firms.

Virginia Rule 1.9 cmt. [4a] begins with an acknowledgement that reconciliation of the competing principles addressed in Virginia Rule 1.9 cmt. [4] “in the past has been attempted under two rubrics.” The Virginia Rule Comment describes one such “rubric” as based on the presumption that every lawyer in a firm has access to information from every other lawyer in the firm. The Virginia Rule Comment explains that in some circumstances such a presumption “may be unrealistic where the client was represented only for limited purposes” and that it “exaggerates the difference between a partner and an associate in modern law firms.”

Virginia Rule 1.9 cmt. [4a] and the next Virginia Rule Comment might be interesting as an historical survey of the ethics rules’ evolution, but does not provide any useful guidance for current lawyers.

**ABA Model Rule 1.9** does not have a similar Comment.

### **Virginia Rule 1.9 Comment [4b]**

Unique Virginia Rule 1.9 cmt. [4b] addresses the “other rubric” used “in the past.”

Virginia Rule 1.9 cmt. [4b] describes assessing lawyers’ ability to represent clients adverse to their former law firms’ clients under the “appearance of impropriety” standard formerly found in Virginia Code of Professional Responsibility Canon 9. Virginia Rule 1.9 cmt. [4b] criticizes that standard as possibly basing disqualification decisions on the “subjective judgment by the former client,” and as hindered by the “impropriety” standard’s imprecision.

Virginia Rule 1.9 cmt. [4]b concludes by noting that the current standard “based on a functional analysis is more appropriate for determining the question of vicarious disqualification.” It is unclear why the Virginia Rule Comments felt it necessary to discuss two now inappropriate historical standards.

**ABA Model Rule 1.9** does not have a similar Comment.

### **Virginia Rule 1.9 Comment [5]**

Virginia Rule 1.9 cmt. [5] also addresses lawyers’ adversity to their former firm’s current or former clients.

Virginia Rule 1.9 cmt. [5] first confirms that only lawyers’ “actual knowledge” triggers the analysis: “[t]hus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients

conflict.” In other words, Virginia Rule 1.9 cmt. [5] focuses on the lawyer’s actual possession of protected client confidential information from her tenure at her former firm.

This difference makes sense, because the lawyer covered by Virginia Rule 1.9(b) did not herself represent the client. So there is no way to determine the likelihood of that lawyer having obtained such information about a client that she never represented at the former firm. But there is a chance that she would have acquired such information, through discussions with colleagues, internal law firm meetings or reports, etc.

Virginia Rule 1.9 cmt. [5] refers to Virginia Rule 1.6 and Virginia Rule 1.9(b) as defining the information that triggers Virginia Rule 1.9(b)’s prohibition. The latter may be a typo. ABA Model Rule 1.9 cmt. [5] refers to ABA Model Rule 1.9(c), not ABA Model Rule 1.9(b). But there may be no harm, no foul aspect to this – because Virginia Rule 1.9(b)(2) itself refers to Virginia Rule 1.9(c), along with Virginia Rule 1.6. But that is an odd way of finally ending up mentioning Virginia Rule 1.9(c) – which contains the proper definition of former clients’ protected information.

Interestingly, Virginia Rule 1.9 cmt. [5] (and the parallel ABA Model Rule Comment) use the phrase “related matter” rather than the phrase “substantially related matter” – which the Virginia and ABA black letter Rules use.

Virginia Rule 1.9 cmt. [5] concludes by pointing to Virginia Rule 1.10(b) as applicable to lawyers in private practice, and to Virginia Rule 1.11(d) as applicable to lawyers “moving from private employment to public employment.”

**ABA Model Rule 1.5 cmt. [5]** contains the substantially identical language as Virginia Rule 1.9 cmt. [5] in its first several sentences.

Those sentences emphasize that ABA Model Rule 1.9(b) applies only if the lawyer obtained “actual knowledge” of protected client confidential information at the former firm. This emphasis on actual knowledge of information differs dramatically from ABA Model Rule 1.9(a), which analyzes the “substantial relationship” between matters by assessing the likelihood that a lawyer who previously represented the client “normally” would have acquired such material information that could now be used against the former client (along with assessing the factual and legal context of the two matters).

In contrast to Virginia Rule 1.9 cmt. [5]’s reference to Virginia Rule 1.9(b), ABA Model Rule 1.9 cmt. [5] refers to information protected by ABA Model Rule 1.9(c).

In contrast to Virginia Rule 1.9 cmt. [5]’s reference to Virginia Rule 1.10(b) and 1.11(d) for guidance on lawyers moving from firm to time, ABA Model Rule 1.9 cmt. [5] only refers to ABA Model Rule 1.10(b), thus not also referring to ABA Model Rule 1.11(d).

### **Virginia Rule 1.9 Comment [6]**

Virginia Rule 1.9 cmt. [6] addresses lawyers’ access to protected client confidential information at her law firm.

Virginia Rule 1.9 cmt. [6] begins with an odd sentence: “[p]reserving confidentiality is a question of access to information.” It is unclear what that means. Preventing someone’s access to information certainly preserves its confidentiality. But the rest of Virginia Rule 1.9 cmt. [5] does not address keeping confidential information away from the lawyer. Instead, it addresses inferences about what information lawyers obtain based on the access they are given to such information in their law firms’ files.

Virginia Rule 1.9 cmt. [6] explains that lawyers’ access to their former firm’s protected client confidential information involves “a question of fact in particular

circumstances, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together.” The Virginia Rule Comment suggests that lawyers may have “general access to files of all clients of a law firm and may regularly participate in discussions of their affairs” – in which case “it should be inferred that such a lawyer in fact is privy to all information about all the firm’s clients.” On the other hand, lawyers working in more limited fashion normally should be inferred to have information only about “the clients actually served but not those of other clients.”

Virginia Rule 1.9 cmt. [6] does not explain how these inferences work. As explained above, Virginia Rule 1.9 cmt. [5] makes it clear that lawyers’ disqualification under Virginia Rule 1.9(b) requires that “the lawyer involved has actual knowledge” of the protected client confidential information. Thus, Virginia Rule 1.9 cmt. [5] and Virginia Rule 1.9 cmt. [6] seem inconsistent. Because Virginia Rule 1.9 does not seem to use “actual knowledge” or even inferred knowledge of protected client confidential information in its “substantial relationship” analysis, the mismatch is not as significant as in the ABA Model Rule 1.9 context.

**ABA Model Rule 1.9 cmt. [6]** is similar to Virginia Rule 1.9 cmt. [6], but with several differences.

In contrast to Virginia Rule 1.9 cmt. [6], ABA Model Rule 1.9 cmt. [6] does not begin with the unhelpful ambiguous sentence: “[p]reserving confidentiality is a question of access to information.”

Instead, ABA Model Rule Comment 1.9 cmt. [6] picks up with the concept that appears in Virginia Rule 1.9 cmt. [6]’s second sentence – about “inferences, deductions

or working presumptions”). ABA Model Rule 1.9 cmt. [6] explains that those affect the “application of [ABA Model Rule 1.9] paragraph (b).”

ABA Model Rule 1.9 cmt. [6] contains essentially identical language as Virginia Rule 1.9 cmt. [6] contrasting lawyers’ “general access” to all law firm client files and more limited access to just the client files on which the lawyer works. But, it is unclear how this analysis affects one of ABA Model Rule 1.9’s “substantial relationship” standards – which surmises what protected client confidential information a lawyer “normally” would have acquired during a representation.

As explained above in connection with Virginia Rule 1.9 cmt. [6], there seems to be a mismatch between ABA Model Rule 1.9 cmt. [5] and cmt. [6]. The former focuses on “actual knowledge,” while the latter focuses on inferences about knowledge.

Perhaps ABA Model Rule 1.9 cmt. [6]’s analysis goes to the “substantially related” standard. As explained above, ABA Model Rule 1.9 cmt. [3] takes the strange position that the “substantially related” standard could either (or both) look at: (1) the factual and legal context of two matters; or (2) the type of information that lawyers “normally” would have obtained “in the prior representation.” But if ABA Model Rule 1.9 cmt. [6] was intended to illuminate that “substantially related” test, the ABA Model Rule Comment could have been much clearer.

ABA Model Rule 1.9 cmt. [6] concludes with a statement that in overcoming the inference that a lawyer engaging in a limited representation only acquired confidential information about the clients that the lawyer served (rather than all of the other law firm’s clients), the “firm whose disqualification is sought” has “the burden of proof” (a statement contained in separate Virginia Rule 1.9 cmt. 6[a], discussed below).

### **Virginia Rule 1.9 Comment [6a]**

Virginia Rule 1.9 cmt. [6a] addresses the burden of proof in disqualification motions.

Virginia Rule 1.9 cmt. [6a] places the burden of proof “upon the firm whose disqualification is sought” on all of the issues governed by Virginia Rule 1.9(b). This contrasts with ABA Model Rule 1.9 cmt. [6]’s placement of the burden of proof “upon the firm whose disqualification is sought” only on the narrower issue of lawyers’ access to information when the lawyer works “only [for] a limited number of clients.”

### **Virginia Rule 1.9 Comment [7]**

Virginia Rule 1.9 cmt. [7] addresses lawyers’ continuing confidentiality duty when changing jobs.

Virginia Rule 1.9 cmt. [7] unsurprisingly confirms that lawyers “changing professional association” must comply with their continuing confidentiality duty they owe to former clients. The Virginia Rule Comment refers to Virginia Rule 1.6 (the core Virginia confidentiality rule) and to Virginia Rule 1.9 itself. It seems odd that a Comment to Virginia Rule 1.9 would refer generically to Virginia Rule 1.9.

**ABA Model Rule 1.9 cmt. [7]** contains essentially the same language. ABA Model Rule 1.9 cmt. [7]’s more specific reference to ABA Model Rule 1.9(c) is more useful than Virginia Rule 1.9 cmt. [7]’s general reference to Virginia Rule 1.9.

### **Virginia Rule 1.9 Comment [8]**

Virginia Rule 1.9 cmt. [8] addresses lawyers’ use or disclosure of former clients’ protected client confidential information.

Virginia Rule 1.9 cmt. [8] first states that information “acquired by the lawyer in the course of representing a client” may not be later be used or disclosed by the lawyer “to the disadvantage of the client.” Presumably this Virginia Rule Comment involves the type of “actual knowledge” described in Virginia Rule 1.9 cmt. [5] – which instead focuses on disqualification rather than on confidentiality. Of course, lawyers can only use or disclose information that they actually possess. In other words, Virginia Rule 1.9 cmt. [8] (and black letter Virginia Rule 1.9(c)) applies to knowledge the lawyer actually possesses, not knowledge that the lawyer is inferred to possess.

Significantly, Virginia Rule 1.9 cmt. [8] matches black letter Virginia Rule 1.9(c)(1)’s prohibition on using former clients’ protected client confidential information “to the disadvantage of the former client.” This narrower prohibition contrasts with the three Virginia Rule 1.8(b) prohibitions on lawyers’ “use” of current client confidential information. Under Virginia Rule 1.8(b), lawyers may not use such protected client confidential information “relating to representation of a client”: (1) “to the disadvantage of the client” (which matches Virginia Rule 1.9(c)(1)’s prohibition); (2) “for the advantage of the lawyer;” or (3) “for the advantage . . . of a third person.” So in the Virginia Rules there is a very different prohibition standard for lawyers’ use of former and current clients’ information. The ABA Model Rules treat both former and current client’s information the same way – only prohibiting lawyers from using either type of clients’ information “to the disadvantage” of the former or the current client.

Virginia Rule 1.9 cmt. [8] next assures that lawyers are not precluded “from using non-confidential information about that client when later representing another client.” Virginia Rule 1.9 cmt. [8]’s use of the term “non-confidential information” does not make

much sense. Under Virginia Rule 1.9(c)(1), lawyers may not use to the disadvantage of their former clients “information relating to or gained in the course of the representation” – unless Virginia Rule 1.6 or Virginia Rule 3.3 “would permit or require,” or unless such information “has become generally known.”

Virginia Rule 1.9 cmt. [8]’s phrase “non-confidential information” differs dramatically from the black letter Virginia Rule 1.9(c)(1) phrase “generally known.” Information can be “non-confidential” but not “generally known.” The obligation or discretion to use information under Virginia Rule 1.6 or Virginia Rule 3.3 does not render the information “non-confidential.” Instead, those Virginia Rules continue to recognize the information as confidential, but requires or permit its disclosure. The same is true of the similar exception in Virginia Rule 1.9(c)(2) (also citing Virginia Rule 1.6 and Virginia Rule 3.3) to the general prohibition on disclosing information “relating to the representation.” If the phrase “non-confidential” information was meant to define information whose use or disclosure was required or permitted under those other Virginia Rules, that is an awkward turn of phrase.

Although Virginia Rule 1.9 cmt. [8] explains that lawyers may use “non-confidential information about that client when later representing another client,” presumably the phrase “when later representing another client” is not a limitation on that use – but rather is an example of such permissible use of that poorly-defined type of information.

**ABA Model Rule 1.9 cmt. [8]** also addresses the general prohibition on lawyers using or disclosing former client’s protected client confidential information, and the “generally known” exception.

ABA Model Rule 1.9 cmt. [8] begins with a reference to ABA Model Rule 1.9(c). However, in stark contrast to Virginia Rule 1.9 cmt. [8]’s questionable use of the term “non-confidential” in describing information that lawyers may freely disclose about their former clients, ABA Model Rule 1.9 cmt. [8] understandably uses the term “generally known.” That term appears in black letter ABA Model Rule 1.9(c)(1) (and also in black letter Virginia Rule 1.9(c)(1)).

Interestingly, ABA Model Rule 1.9 cmt. [8] contains the same language as Virginia Rule 1.9 cmt. [8] in explaining that lawyers’ are “not preclude[d]” from using the specified information about a former client “when later representing another client.” It is unclear whether lawyers’ use of that information is ethical in other contexts – or instead is limited only to lawyers’ use of such information “when later representing another client.”

### **Virginia Rule 1.9 Comment [9]**

Virginia Rule 1.9 cmt. [9] addresses disqualification.

Virginia Rule 1.9 cmt. [9] first explains that lawyers’ disqualification from adversity to a former client “is primarily for the protection of former clients but may also affect current clients.” The Virginia Rule Comment then notes that “this protection . . . can be waived by both” former and current clients. This matches the black letter Virginia Rule 1.9(a)’s requirement that lawyers must obtain both: (1) the former client’s consent to the lawyer representing another client adverse to that former client; and (2) the current client’s consent to the lawyer’s representation of it adverse to the former client (presumably after disclosure of the previous representation). ABA Model Rule 1.9(a) only requires the former client’s consent.

Virginia Rule 1.9 cmt. [9] concludes with a reminder that such “[a] waiver is effective only if there is full disclosure of the circumstances, including the lawyer’s intended role in behalf of the new client.” The term “in behalf of the new client” may be technically correct as a matter of grammar, but the term “on behalf of” is more commonly used even though it is not technically as good a fit.

**ABA Model Rule 1.9 cmt. [9]** also addresses disqualification and consents.

ABA Model Rule 1.9 cmt. [9] mentions protection only of “former clients,” and states that the protection “can be waived if the client” (presumably only the former client) gives “informed consent” in writing.

The difference between this provision and Virginia Rule 1.9 cmt. [9]’s requirement for both the former and current clients’ consent to lawyers’ representation of the latter against the former reflects the dramatic difference between the consents required in black letter Virginia Rule 1.9(a) and in black letter ABA Model Rule 1.9(a). Virginia Rule 1.9(a) requires both clients’ consent, while ABA Model Rule 1.9(a) requires only the former client’s consent.

ABA Model Rule 1.9 cmt. [9] then explains that the former client’s “consent must be confirmed in writing under [ABA Model Rule 1.9] paragraphs (a) and (b)” – referring to ABA Model Rule 1.0(e)’s definition of “informed consent.”

ABA Model Rule 1.9 cmt. [9]’s requirement of the former client’s consent to be “confirmed in writing” matches the ABA Model Rule’s general logistical requirement for such written consents. Virginia Rule 1.9 does not require the former client’s consent to be in writing. Virginia Rule 1.7(b)(4) requires only that current clients’ consents be “memorialized in writing.”

ABA Model Rule 1.9 cmt. [9] does not contain Virginia Rule 1.9 cmt. [9]’s reminder that such consents’ effectiveness depend on “full disclosure of the circumstances.” But that condition is implicit in the ABA Model Rules’ requirements for all consents to be “informed.”

ABA Model Rule 1.9 cmt. [9] next points to ABA Model Rule 1.7 cmt. [22] for guidance about “the effectiveness of an advance waiver.” The ABA Model Rule Comment’s reference to an “advance waiver” does not appear in Virginia Rule 1.9 cmt. [9], because the Virginia Rules do not address prospective consents anywhere in the Virginia Rules or in the Virginia Rule Comments.

ABA Model Rule 1.9 cmt. [9] concludes with a reference to ABA Model Rule 1.10, which addresses “disqualification of a firm with which a lawyer is or was formerly associated.” The concluding ABA Model Rule 1.9 cmt. [9] sentence about disqualification of a lawyer’s former firm does not appear in Virginia Rule 1.9 cmt. [9], but does appear in Virginia Rule 1.9 cmt. [10] (which is discussed immediately below).

### **Virginia Rule 1.9 Comment [10]**

Virginia Rule 1.9 cmt. [10] also focuses on disqualification.

Virginia Rule 1.9 cmt. [10] refers to an unidentified Virginia Rule 1.7 Comment “[w]ith regard to an opposing party’s raising a question of conflict of interest.” This reference presumably focuses on Virginia Rule 1.7 cmt. [9], which notes that “opposing counsel may properly raise the question” of a conflict, but that “[s]uch an objection should be viewed with caution, however, for it can be misused as a technique of harassment.” ABA Model Rule 1.7 cmt. [9] does not contain that provision.

Although Virginia Rule 1.9 cmt. [10] does not refer to it, the seventh Virginia Scope paragraph contains a similar principle. That Virginia Scope paragraph states that ethics rules do “not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule.” ABA Model Rule Scope [20] contains the same language.

Virginia Rule 1.9 cmt. [10] concludes with a reference to Virginia Rule 1.10 “[w]ith regard to disqualification of a firm with which a lawyer is or was formerly associated.” The reference to a lawyer’s former firm presumably focuses on Virginia Rule 1.10(b), which indicates that a law firm may represent a person in a matter “materially adverse” to a client that had been represented by a lawyer who has since left the firm and that is “not currently represented by the firm.” Virginia Rule 1.10(b) indicates that such a law firm may undertake such a representation adverse to one of its former clients unless: (1) the matter “is the same or substantially related” to the previous representation by the lawyer who has since left the firm; and (2) “any lawyer remaining in the firm has information protected by [Virginia] Rules 1.6 and 1.9(c) that is material to the matter.”

In essence, Virginia Rule 1.10(b) removes the taint prohibiting a law firm from adversity to a client whom one of its former lawyers represented while at the firm. The prohibition analysis’s focus on whether any “lawyer” remaining in the firm has “material” protected client confidential information seems too narrow. On its face, the Virginia Rule 1.10(b) would permit a law firm to take a matter directly adverse to a client in the same matter that any of its former lawyers who have since left the firm represented that client – even if paralegals and secretaries who had worked with the now-departed lawyer on the matter were still working at the firm, and even if the firm still possessed the former

client's files containing damaging information which anyone in the firm could access. To be sure, a firm in that situation might face a so-called Virginia Rule 1.7(a)(2) "material limitation conflict" preventing it from representing a client adverse to its former client. The remaining non-lawyers and those with access to the former client's damaging files would have a duty to use what they know to represent their current client – but would be prevented from doing so by their Rule 1.6 confidentiality duty (among other duties).

**ABA Model Rule 1.9** does not contain a similar Comment.

# RULE 1.10

## Imputed Disqualification: General Rule

### Rule

#### Virginia Rule 1.10(a)

Virginia Rule 1.10(a) addresses the imputation of an individual lawyer's disqualification to other lawyers "associated in a firm" with that individually disqualified lawyer.

Virginia Rule 1.10(a) prohibits any lawyer "associated in a firm" from undertaking a representation when such a lawyer "knows or reasonably should know" that any associated law firm colleague "practicing alone would be prohibited from doing so by [Virginia] Rules 1.6, 1.7, 1.9, or 2.10(e)."

Virginia Rule 1.10(a) contains four significant terms, one of which is not defined elsewhere, two of which are defined, and one of which seems superfluous.

First, the term "associated" appears throughout the Virginia Rules (and throughout the ABA Model Rules), but unfortunately is not defined anywhere. The absence of any definition could cause confusion when lawyers try to address imputed disqualification, among many other issues. This document addresses the application of the term "associated" in several places. It is clear that all lawyers in a firm are not "associated," and that "associated lawyers" are not necessarily all in the same firm. The closest hint of a meaning for the term "associated" appears in Virginia Rule 1.10 cmt. [1], which identifies as one factor in determining if "associated lawyers" are a firm "is the fact that they have

mutual access to information concerning the clients they serve.” That theme also appears in disqualification case law. But the Virginia Rules’ and the ABA Model Rules’ unfortunate failure to clearly define “associated” produces uncertainty in several key ethics rules.

Second, the term “firm” is defined in Virginia Terminology and discussed in several Virginia Rule Comments – as discussed below. The Virginia Terminology section defines “firm” as denot[ing] a professional entity, public or private, organized to deliver legal services, or a legal department of a corporation or other organization” (also referring to Virginia Rule 1.10’s Comment).

Third, the term “knows” is defined in the Virginia Rule Terminology as “denot[ing] actual knowledge of the fact in question,” which “may be inferred from circumstances.”

Fourth, the term “reasonably should know” obviously does not involve “actual knowledge.” Instead, it presumably denotes a negligence standard. This unique negligence standard was triggered by a Virginia Supreme Court case involving the brother of Virginia Governor Ralph Northam. Northam v. Va State Bar, 737 S.E.2d 905 (Va. 2013) (reversing the public admonition of a lawyer who represented a husband in a divorce despite knowing that the wife had interviewed one of his partners; finding that the Virginia State Bar had not established that the lawyer representing the husband had actual knowledge that the lawyer’s partner was disqualified from representing the wife based on information that she had given the partner). After that opinion, Virginia added the “or reasonably should know” standard to Virginia Rule 1.10(a) – which does not appear in ABA Model Rule 1.10(a).

Fifth, the term “practicing alone” seems superfluous. If a lawyer is individually disqualified by Virginia Rules 1.6, 1.7, 1.9, or Rule 2.10(e), that disqualification will govern

that lawyer’s future representations whether she is “practicing alone,” in a law firm or anywhere else. The phrase’s presence in Virginia Rule 1.10(a) might generate some confusion – if it triggers a lawyer’s focus on that as a factor in determining an individual lawyer’s disqualification.

The list of Virginia Rules - based individual lawyer disqualification is somewhat odd. The first rule in the list is Virginia Rule 1.6 – the core confidentiality rule. Black letter Virginia Rule 1.6 does not prohibit lawyers from representing clients. Instead, Virginia Rule 1.6 describes protected client confidential information, and the exceptions that allow or require lawyers to disclose such information. Perhaps Virginia Rule 1.10(a)’s reference to lawyers’ inability to represent clients refers to lawyers’ required withdrawal. To be sure, Virginia Rule 1.6 cmt. [9] mentions the requirement that a lawyer must withdraw from a representation if his services “will be used by the client in materially furthering a course of criminal or fraudulent conduct.” But that Virginia Rule Comment refers to Virginia Rule 1.16(a)(1) – which is the Rule actually requiring such a withdrawal.

The next two Virginia Rule references make sense. Virginia Rule 1.7 is the core conflict rule applying to current clients. Virginia Rule 1.9 is the core conflicts rule addressing former clients.

The final Virginia Rule listed in Virginia Rule 1.10(a) is Virginia Rule 2.10(e). That Rule indicates that a lawyer “who serves or has served as a third party neutral may not serve as a lawyer on behalf of any party to the dispute, nor represent one such party against the other in any legal proceeding related to the subject of the dispute resolution proceeding.”

**ABA Model Rule 1.10(a)** also addresses the imputation issue.

ABA Model Rule 1.10(a) prohibits any lawyer from “knowingly represent[ing] a client when any one of [“lawyers . . . associated in a firm”] practicing alone would be prohibited from doing so by [ABA Model] Rules 1.7 or 1.9.

This language raises the same issues as Virginia Rule 1.10(a) (discussed above) about the meaning of “associated,” “firm,” “knowingly,” and “practicing alone.”

ABA Model Rule 1.10(a) differs from Virginia Rule 1.10(a) in three ways.

First, ABA Model Rule 1.10(a) imputation of an individual lawyer’s disqualification does not contain a negligence standard (as is reflected in Virginia Rule 1.10(a)’s “knows or reasonably should know” formulation). In other words, ABA Model Rule 1.10(a)’s imputed disqualification applies only when a lawyer actually knows that an associated firm colleague cannot undertake a representation because of that colleague’s disqualification under an ABA Model Rule.

Second, ABA Model Rule 1.10(a) on its face imputes a smaller category of individual lawyers’ disqualification than Virginia Rule 1.10(a). Virginia Rule 1.0(a) imputes to an entire firm the disqualification of a lawyer who would be individually prohibited from representing a client by Virginia Rule 1.6. ABA Model Rule 1.10(a) does not include a reference to ABA Model Rule 1.6. As explained above, the Virginia Rule’s reference seems odd, because Rule 1.6 does not address lawyers’ inability to represent clients.

More significantly, Virginia Rule 1.10(a) also describes lawyers’ inability to represent clients under Virginia Rule 2.10(e) and imputes such an individually disqualified lawyers’ preclusion to all other associated law firm colleagues. There is no ABA Model Rule 2.10, so there is no similar reference in ABA Model Rule 1.10(a). Virginia Rule 2.10(e) prohibits lawyers who are serving or have served as third party neutrals from later

“serv[ing] as a lawyer on behalf of any party to the dispute” or to “represent one such party against the other in a legal proceeding related to the subject of the dispute resolution proceeding.”

Although there is no ABA Model Rule 2.10, ABA Model Rule 2.4 cmt. [4] explains that a lawyer who has served as a third-party neutral (the ABA Model Rules use a hyphen, in contrast to the Virginia Rules) “subsequently may be asked to serve as a lawyer representing a client in the same matter.” That ABA Model Rule Comment explains that ABA Model Rule 1.12 governs such lawyers’ and their firms’ conflicts of interest. ABA Model Rule 1.12(a) does not automatically prohibit such former third-party neutrals from representing anyone in connection with a matter “in which the lawyer participated personally and substantially as a . . . mediator or other third-party neutral.” ABA Model Rule 1.12(a) instead allows such a later representation if “all parties to the proceeding give informed consent, confirmed in writing.” ABA Model Rule 1.12 cmt. [2] provides some explanation of this approach.

Thus, Virginia Rule 1.10(a) absolutely prohibits third party neutral lawyers from later representing any party in an adverse legal proceeding related to the dispute resolution proceeding, while ABA Model Rule 2.4 cmt. [4] and ABA Model Rule 1.12(a) permits such lawyers’ later representation with all parties’ written consent.

### **ABA Model Rule 1.10(a)(1)**

Virginia did not adopt a black letter rule similar to ABA Model Rule 1.10(a)(1).

ABA Model Rule 1.10(a)(1) contains a key exception that avoids an individual lawyer’s “personal interest” disqualification from being automatically imputed to all associated law firm colleagues.

ABA Model Rule 1.10(a)(1) explains that an individual lawyer’s disqualification is not imputed to all other lawyers “associated in a firm” if the individual lawyer’s “prohibition” on representing a client “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 the remaining lawyers in the firm.”

The term “remaining lawyers in the firm” is inapt and potentially confusing. ABA Model Rule 1.10(a)(1)’s scenario does not describe a situation in which one or more lawyers leave a firm, while others remain at the firm. Instead, ABA Model Rule 1.10(a)(1) describes a scenario in which one lawyer has a personal interest conflict – which may or may not present a material limitation risk to the other lawyers in the firm. That phrase – “other lawyers in the firm” – would have been far better. The chance for confusion is even more likely because nearby ABA Model Rule 1.10(b) addresses a scenario in which one or more lawyers leave a firm and other lawyers do not leave the firm. ABA Model Rule 1.10(b)(2) allows a law firm to represent one of its former clients who was represented by one of the law firm’s lawyers who has since left that firm – unless, among other things, “any lawyer remaining in the firm” has material confidential information about that former client (emphasis added). So ABA Model Rule 1.10(b)(2)’s phrase “lawyers remaining in the firm” properly describes that scenario. In other words, ABA Model Rule 1.10 uses the term “remaining” twice – in two very different ways. In ABA Model Rule 1.10(a)(1), the term “remaining lawyers” means other lawyers in the firm. In ABA Model Rule 1.10(b)(2), the term “remaining in the firm” means those lawyers still at the firm, in contrast to lawyers who have left the firm.

Turning to ABA Model Rule 1.10(a)(1)'s substance, that ABA Model Rule addresses the imputation effect of an individually disqualified lawyer's "personal interest." Such "personal interest" conflicts involve the so-called "material limitation" conflict under ABA Model 1.7(a)(2). Under ABA Model Rule 1.7(a)(2), lawyers face a "concurrent conflict of interest" if "there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer" (among other things). Virginia Rule 1.7(a)(2) contains the same "material limitation" conflict provision.

ABA Model Rule 1.7 cmts. [10] - [12] address such "personal interest" conflicts. ABA Model Rule 1.7 cmt. [10] provides some examples of a lawyer who may be prohibited from representing a client because of the lawyer's "personal interest": lawyers whose own conduct "is in serious question"; lawyers who have discussed possible employment with a client's opponent or its law firm; or lawyers with "related business interests."

Virginia Rule 1.7 cmt. [10] mentions "business or personal interests." That Virginia Rule Comment provides a different set of examples: lawyers who take on a matter that they cannot handle "competently" because of their "need for income"; lawyers who "refer clients to an enterprise in which the lawyer has an undisclosed interest"; and lawyers whose representation of a client may be "adversely affect[ed]" because of the lawyers' "romantic or other intimate personal relationship."

ABA Model Rule 1.7 cmt. [11] describes family relationships as triggering such possible personal interest conflicts. Virginia deals with such family conflicts issues in Virginia Rule 1.8(i). ABA Model Rule 1.7 cmt. [12] includes lawyers' sexual relationships with clients under that same category (referring to ABA Model Rule 1.8(j)). To date,

Virginia deals with client-lawyer sexual relationships only in a Virginia Legal Ethics Opinion, not in a Virginia Rule or a Virginia Rule Comment.

Under ABA Model Rule 1.10(a)(i), these and other individual lawyers’ “personal interest” disqualifications are not imputed to all other associated law firm colleagues – as long as the individual lawyer’s disqualification “does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.” Virginia does not contain a similar provision, which presumably means that individual lawyers’ personal interest conflicts are imputed to all other associated law firm colleagues.

The Virginia Standing Committee on Legal Ethics recommended that the Virginia Supreme Court take the ABA Model Rule approach to this “personal interest” imputed disqualification issue, but in 2018 the Virginia Supreme Court declined to do so.

Of course, consents may sometimes cure an individual lawyer’s disqualification, and therefore moot the imputation issue.

### **ABA Model Rule 1.10(a)(2)**

ABA Model 1.10(a)(2) addresses lawyers’ individual disqualification based on their work at a previous firm.

Virginia did not adopt a rule allowing what might be called self-help screening by a law firm hiring an individually disqualified lawyer, which would allow the hiring law firm to avoid that individual lawyer’s disqualification from being imputed to all of her associated colleagues at the hiring firm.

ABA Model Rule 1.10(a)(2) recognizes law firms’ ability to prevent the imputation of an individual lawyer’s disqualification under ABA Model Rule 1.9(a) and (b) based on her “association with a prior firm.”

As explained above (and throughout this document), the Virginia Rules' and the ABA Model Rules' unfortunate failure to define the term "associated" renders this and many other key issues difficult to assess.

This ABA Model Rule 1.10(a)(2) scenario generally involves a law firm which hires a lawyer from another private law firm. But on its face ABA Model Rule 1.10(a)(2) could also apply to law firm mergers. This document's analysis will describe the ABA Model Rule's application in the former scenario, but anyone applying ABA Model Rule 1.10(a)(2)'s approach in their state's parallel ethics rules should remember its broader applicability.

ABA Model Rule 1.10(a)(2) allows what could be called "self-help" screening that permits hiring law firms to bring individually disqualified lawyers on board without imputation to the entire hiring firm of the newly - hired lawyers' individual disqualification.

ABA Model Rule 1.0(c) specifically includes law departments in the definition of "firm." The Virginia Rule Terminology also includes law departments in its definition of firm. ABA Model Rule 1.0 cmt. [2] - [4] also provide guidance on the definition of "firm." Virginia Rule 1.10 cmt. [1] provides essentially the same guidance.

ABA Model Rule 1.10(a)(2) points to such individual hire's disqualification under ABA Model Rule 1.9(a) or (b), which address lawyers' duties to former clients. ABA Model Rule 1.9(a) prohibits lawyers from representing another client in a matter "materially adverse" to the interest of a former client whom the lawyer previously represented "in the same [matter] or a substantially related matter" to that which the lawyer now wishes to handle for another client – unless the former client consents.

ABA Model Rule 1.10(a)(2) allows the hiring law firm to avoid the new hire's individual disqualification being imputed to all of her new firm's associated colleagues under three conditions.

First, under ABA Model Rule 1.10(a)(2)(i), the hiring firm must assure that “the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.” ABA Model Rule 1.0(k) describes the screening process and ABA Model Rule 1.0 cmt. [8] - [10] provides further guidance about screening. This document summarizes and analyzes those ABA Model Rule Comments in its analysis of ABA Model Rule 1.0. Unfortunately, no Virginia Rule or Virginia Rule Comment describes or provides any guidance on such screens.

Second, under ABA Model Rule 1.10(a)(2)(ii), the hiring law firm must promptly give “written notice . . . to any affected former client,” allowing the former client to “ascertain compliance with the provisions of this [ABA Model] Rule.” The written notice must include: (1) “a description of the screening procedures employed”; (2) a “statement” assuring the hiring law firm’s and the screened lawyer’s “compliance with these Rules”; (3) a “statement that review may be available before a tribunal”; and (4) “an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures.”

It is unclear what the phrase “review may be available before a tribunal” means. It presumably does not refer to a tribunal’s advisory opinion on that issue. Presumably that obliquely refers to a disqualification motion, in which a tribunal can assess whether the hiring law firm has adequately screened its newly hired individually disqualified lawyer, and therefore may proceed to represent a client adverse to the new hire’s former client.

Third, under ABA Model Rule 1.10(a)(2)(iii), the screened lawyer and a hiring law firm partner must provide “certifications of compliance with these Rules and with the screening procedures” at “reasonable intervals upon the former client’s written request and upon termination of the screening procedures.” As mentioned above, this ABA Model Rule uses the plural “Rules” rather than the singular – both of which appear in the preceding ABA Model Rule 1.10(a)(2)(ii). Many lawyers presumably overlook ABA Model Rule 1.10(a)(2)(iii)’s final requirement that the law firm provide a certification “of compliance with these Rules . . . to the former client . . . upon termination of the screening procedures.” That would be an easy requirement to overlook, because once the matter requiring the screening has ended, the screening requirement’s rationale and purpose also ends.

Virginia Rule 1.10 does not allow such self-help screening of private lawyers who move to another law firm. But Virginia Rule 1.11(b) and (c) allow self-help screening of former government lawyers moving to private employment. And Virginia Rule 1.12(c) allows self-help screening of “a judge, other adjudicative officer, arbitrator or a law clerk to such a person” under certain conditions.

### **Virginia Rule 1.10(b)**

Virginia Rule 1.10(b) addresses law firms’ ability to represent a client in a matter “materially adverse” to one of the law firm’s former clients who had been represented by lawyers who have since left the law firm.

This scenario normally involves a lawyer who leaves a firm and takes a client with her to a new law firm. Of course, if a lawyer leaves the firm but the firm continues to

represent the lawyer's former client, Virginia Rule 1.7 governs (and generally prohibits) adversity to that continuing law firm client.

Virginia Rule 1.10(b) allows a law firm to undertake the representation of "a person with interests materially adverse" to a former law firm "client" – under certain conditions.

Virginia Rule 1.10(b)'s presumably deliberate distinction between a law firm's representation of "a person" adverse to those of "a client" formerly represented by that law firm" parallels the odd mismatch between the terms "person" and "client" contained in Virginia Rule 1.9(a) (and the parallel ABA Model Rule 1.9(a)). Virginia Rule 1.9(a) describes a formerly represented "client" and another person" the lawyer may not now represent. ABA Model Rule 1.9(a) has the same language. One might be tempted to think that the deliberately chosen word "person" refers to someone who will never become a client because of the prohibition. But Virginia Rule 1.7(a)(1) describes a "concurrent conflict" as a situation where "the representation of one client will be directly adverse to another client." ABA Model Rule 1.7(a)(1) likewise uses the term "client" twice in that provision.

So the mystery remains about the Virginia Rules' and the ABA Model Rules' dual use of "client" in Rule 1.7 but very different use of the word "person" and the separate word "client" in Rule 1.9 and Rule 1.10.

Turning to the substantive issue, under Virginia Rule 1.10(b) a law firm may freely represent a "person" adverse to one of the law firm's former clients unless two conditions exist. Virginia Rule 1.10(b) is thus permissive rather than prohibitory. And the permission does not exist unless both of the conditions exist.

First, a law firm may represent a person adverse to one of the law firm's former clients who was represented by a lawyer who has since left the firm unless "the matter is the same or substantially related to that [matter] in which the formerly associated lawyer represented the client." This condition is obvious. Even if the lawyer was still at the firm, she or the law firm could represent another client adverse to the law firm's former client as long as the new matter was not "the same or substantially related to" the matter in which the lawyer herself or the law firm formerly represented the now-former client. That simply states the Virginia Rule 1.9(a) standard for prohibited (or permissible) representations adverse to a former client. To be sure, Virginia Rule 1.9's definition of "substantially related" might differ from ABA Model Rule 1.9's definition of "substantially related." This document summarizes and analyzes those differences in its analysis of Virginia Rule 1.9. But as a general matter, lawyers can be adverse to former clients unless the adversity is in the same or "substantially related" matter to that in which the lawyer formerly represented that client.

This first condition allowing a law firm to represent a client against one of its former clients who was represented by a now-departed lawyer is obvious. If the now-departed lawyer (or any other lawyer still at the firm) did not represent the now-former client in a matter that is "the same or substantially related" to the previous matter, generally there would be no prohibition on the law firm or any of its current or former lawyers handling such "matter." So the key provision is the second condition - focusing on whether any lawyers with any pertinent disqualifying information are still at the firm.

Second, Virginia Rule 1.10(b) allows a law firm to represent a person adverse to one of the law firm's former clients who had previously been represented by a lawyer who

has since left the firm unless – “any lawyer remaining in the firm has information protected by [Virginia] Rules 1.6 and 1.9(c) that is material to the matter” (emphasis added).

Virginia Rule 1.10(b)(2)’s exclusive focus on any “lawyer remaining in the firm” is odd. Remarkably, Virginia Rule 1.10(b) on its face would allow a law firm to take a matter directly adverse to a former client in a high-stakes litigation matter even if the firm had formerly represented the client in that very same matter – as long as any “lawyers” who had material protected client confidential information were no longer associated with the firm. Thus, the Virginia Rule would allow such adversity even if several key paralegals, secretaries, or other nonlawyers who had worked for the client in the earlier representation remained at the firm – and possessed critical financial or other sensitive information that could be used to devastating effect in any matter adverse to the former client.

It seems even more strange that Virginia Rule 1.10(b)(2) does not even require such remaining non-lawyers to be screened from their firm’s new matter involving representation of a person directly adverse to the law firm’s former client.

Similarly, Virginia Rule 1.10(b)(2)’s exclusive focus on lawyers’ continuing presence at the law firm ignores the possibility that the firm still possesses damaging confidential documents obtained during the earlier representation of the now-adverse client, to which anyone in the firm has easy access. As with the surprising absence of a screening requirement if lawyers “remaining in the firm” possess material information that could be used against the now-former client, Virginia Rule 1.10(b)(2) likewise has no requirement that the law firm prohibit access to a former client’s documents remaining in

the law firm that contain or might contain material information that could be used to the former client's material disadvantage.

Although the Virginia Rules do not describe the elements of an effective “screen” that can avoid imputation of an individual lawyer's disqualification to other associated law firm colleagues, ABA Model Rule 1.0(k) describes what such a “screen” must include to be effective. ABA Model Rule 1.10 cmt. [8] - [10] provides guidance on such screens. ABA Model Rule 1.0 cmt. [9] includes screening the pertinent lawyer from “any contact with any firm files or other information, including information in electronic form.” So the ABA Model Rules understandably consider information in a law firm's files as significant. As explained in this document's analysis of ABA Model Rule 1.0 cmt. [9], this concern about lawyers' access to files seems misplaced in the scenario primarily described by that ABA Model Rule Comment. If a lawyer joins a new firm which hopes to avoid imputation of her individual disqualification (based on her previous representation of a client that her new law firm is now adverse to), the key is to avoid her disclosure of information to her new colleagues – who might use it against her former client. It really does not matter that she learns all about her new firm's representation of her former client's adversary, reviews the files in her new firm, etc. As long as she does not pass any of that information back to her former colleagues at her old firm, there should be no harm in that.

But ABA Model Rule 1.0 cmt. [9] understandably and properly recognizes that law firm files can and usually do contain important protected client confidential information. Undoubtedly, Virginia would take the same obvious approach. So it is remarkable that the Virginia Rules (and the ABA Model Rules) do not require either the remaining lawyers or

staff from accessing the files left at the firm from its earlier work for a former client who was primarily represented by a lawyer who has since left the firm. Those files could be very useful in the firm's permissible (under Virginia Rule 1.10(b) and ABA Model Rule 1.10(b) of a new client adverse to the firm's former client.

**ABA Model Rule 1.10(b)** contains the same remarkably inappropriate language.

### **Virginia Rule 1.10(c)**

Virginia Rule 1.10(c) addresses client consent.

Virginia Rule 1.10(c) explains that any disqualification under Virginia Rule 1.10 may be waived by “the affected client” under Virginia Rule 1.7’s conditions.

The Virginia Rule’s use of the term “waived” is somewhat inconsistent with the general Virginia Rules terminology – which usually refers to a client’s “consent” rather than “waiver.” The terms are probably synonymous, but “consent” arguably requires some affirmative client action, in contrast to the concept of “waiver” (which could occur through client inaction). The terminology distinction probably has little practical importance, because the actual provisions governing adversity to current and former clients under Virginia Rules 1.7, 1.8, and 1.9 use the term “consent,” and describe the necessary consent process.

**ABA Model Rule 1.10(c)** contains the identical language.

### **Virginia Rule 1.10(d)**

Virginia Rule 1.10(d) addresses the imputation of individual lawyers’ prohibitions under Virginia Rule 1.8.

Virginia Rule 1.10(d) points to Virginia Rule 1.8(k) as governing “imputed prohibition of improper transactions.” Virginia Rule 1.8(k) indicates that “[w]hile lawyers are associated in a firm, none of them shall knowingly enter into any transaction or perform any activity when any one of them practicing alone would be prohibited from doing so by” every Virginia Rule 1.8 provision but one. The one exception is an individual lawyer’s inability to represent (absent consent after consultation) a client adverse to any person the lawyer knows to be represented by the lawyer’s “parent, child, sibling or spouse,” or another lawyer with whom the lawyer is “intimately involved.” Under Virginia Rule 1.8(k), that prohibition is not imputed to associated law firm colleagues.

As explained in the analysis of Virginia Rule 1.8’s and ABA Model Rule 1.8’s differing provisions, those Rules contain different definitions of persons who have a close enough relationship to justify the specified representation prohibitions.

**ABA Model Rule 1.10** does not contain a black letter provision similar to Virginia Rule 1.10(d).

Instead, ABA Model Rule 1.8(k) addresses imputation of individual prohibitions under that ABA Model Rule. But ABA Model Rule 1.10 cmt. [12] (discussed below) similarly points to ABA Model Rule 1.8(k) rather than to ABA Model Rule 1.10 in determining the imputation of such individually prohibited actions. ABA Model Rule 1.8(k) imputes to all associated law firm colleagues an individual lawyer’s prohibition under all but one ABA Model Rule 1.8 provision. The one exception is ABA Model Rule 1.8(j). ABA Model Rule 1.9(j) prohibits lawyers from engaging in sexual relations with a client “unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.” The exclusion of that provision from the imputed prohibitions

identified in ABA Model Rule 1.8(k) thus has the effect of applying the prohibition on sexual relations only to the individual lawyer.

The juxtaposition of the ABA Model Rule 1.8(j) and the ABA Model Rule 1.8(k) language is unintentionally awkward. ABA Model Rule 1.8(j) prohibits certain sexual relationships, not the representation of a client. This means that literally ABA Model Rule 1.8(k) does not prohibit other lawyers in the firm from having such a relationship with a client. But of course any such lawyer would then be individually prohibited from representing that client. But this linguistic awkwardness presumably does not obscure the common sense meaning – declining to prohibit a lawyer from representing a client because one of the lawyer’s associated law firm colleagues is in a sexual relationship with that client.

### **Virginia Rule 1.10(e)**

Virginia Rule 1.10(e) addresses the imputation impact of current or former government lawyers’ association with other lawyers.

Virginia Rule 1.10(e) contains what might seem to be an inappropriate description of a possible scenario: “lawyers associated in a firm with former or current government lawyers.” As mentioned throughout this document, neither the Virginia Rules nor the ABA Model Rules define the term “associated,” which creates potential ambiguity in many ethics analyses. But more substantively, one might wonder if lawyers “in a firm” could ever be “associated” with a “current” government lawyer. The Virginia Rules Terminology section defines “firm” as “denot[ing] a professional entity, public or private, organized to deliver legal services, or a legal department of a corporation or other organization.” This

presumably includes government organizations. So Virginia Rule 1.10(e)'s reference to "a firm" presumably includes a government organization that employs lawyers.

Virginia Rule 1.10(e) points to Virginia Rule 1.11 as governing the imputed disqualification of former or current government lawyers. Virginia Rule 1.11 generally allows private law firms hiring former government lawyers to self-help screen them to avoid imputation of their individual disqualification (which can arise in very different scenarios from that governing private practice lawyers).

**ABA Model Rule 1.10(d)** contains identical language.

## Comment

### Virginia Rule 1.10 Comment [1]

Virginia Rule 1.10 cmt. [1] addresses the definition of the term “firm” that appears in Virginia Rule 1.10(a), (b), and (e).

As explained elsewhere, Virginia Rule 1.10 cmt. [1] - [1d] parallel (but are not identical to) ABA Model Rule Comments appearing in an entirely different rule: ABA Model Rule 1.0 cmt. [2] - [4]. And of course it is easy to confuse these two rules – Virginia Rules 1.10 and the ABA Model Rules 1.0. This is one of the most potentially confusing mismatches between the Virginia Rules and the ABA Model Rules.

Virginia Rule 1.10 cmt. [1] parallels ABA Model Rule 1.0 cmt. [2].

Virginia Rule 1.10 cmt. [1] points to the Virginia Rules Terminology section as defining what constitutes a “firm.” That Virginia Terminology provision (the third Virginia Terminology paragraph) explains that the term “denotes a professional entity, public or private, organized to deliver legal services, or a legal department of a corporation or other organization.” The Virginia Terminology definition in turn refers back to a Virginia Rule 1.10 Comment (without specifying which Comment).

Not surprisingly, Virginia Rule 1.10 cmt. [1] acknowledges that whether lawyers “constitute a firm . . . can depend on specific facts.” Virginia Rule 1.10 cmt. [1] then addresses the effect of lawyers sharing office space. The Virginia Rule Comment explains that such lawyers “ordinarily would not be regarded as constituting a firm” if they only “occasionally consult or assist each other.” But such office-sharing lawyers “should be regarded as a firm for the purposes of the Rules” if they “present themselves to the public

in a way suggesting that they are a firm or conduct themselves as a firm.” That standard is a remarkable example of circular reasoning.

Interestingly, Virginia Rule 1.10 cmt. [1]’s first analysis focuses on whether lawyers sharing an office space constitute a “firm” – not whether those lawyers are “associated” with one another. This could be significant for liability purposes and imputed disqualification purposes.

Virginia Rule 1.10 cmt. [1] next notes that determining if lawyers constitute a “firm” can also depend on: (1) “[t]he terms of any formal agreement between associated lawyers” and; (2) whether “they have mutual access to information concerning the clients they serve.”

It seems under-inclusive to use the term “formal agreement.” Presumably informal agreements may likewise be relevant in determining whether associated lawyers constitute a “firm.”

Virginia Rule 1.10 cmt. [1] (and the parallel ABA Model Rule 1.0 cmt. [2]) provides what amounts to the only helpful hint about what the term “associated” means in both sets of Rules. As explained elsewhere, the absence of any definition of that critical term makes it very difficult to analyze many key ethics issues. Virginia Rule 1.10 cmt. [1]’s reference to “the fact that they [lawyers] have mutual access to information concerning the clients they serve” seems to be a theme of case law analyzing the impact on disqualification and other issues of lawyers being “associated” with each other.

Virginia Rule 1.10 cmt. [1] seems to indicate that “associated lawyers” may or may not be considered a “firm” depending on those two factors: (1) “[t]he terms of any formal agreement” between them; and (2) “the fact that they have mutual access to information

concerning the clients they serve." So that seems to indicate that "associated" lawyers may or may not constitute a "firm."

Virginia Rule 1.10 cmt. [1] then states that "in doubtful cases" it is "relevant" to "consider the underlying purpose of the Rule that is involved." That is an unhelpful statement, because it provides no guidance of how such an "underlying purpose" (whatever that is) affects the analysis of whether lawyers constitute a "firm".

Virginia Rule 1.10 cmt. [1] then explains that "[a] group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer must not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to the other" (emphasis added).

**ABA Model Rule 1.10 cmt. [1]** addresses the same issue, but with significantly different language. ABA Model Rule 1.10 cmt. [1] refers to and essentially repeats the definition of "firm" in ABA Model Rule 1.0(c). Under ABA Model Rule 1.10 cmt. [1], the term "firm" "denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization."

ABA Model Rule 1.10 cmt. [1] also refers to ABA Model Rule 1.10 cmts. [2] - [4] for determining whether "two or more lawyers constitute a firm."

### **Virginia Rule 1.10 Comment [1a]**

Virginia Rule 1.10 cmt. [1a] addresses lawyers practicing in a law department, and the identity of their clients.

Virginia Rule 1.10 cmt. [1a] parallels ABA Model Rule 1.0 cmt. [3].

Virginia Rule 1.10 cmt. [1a] acknowledges that “there is ordinarily no question that the members of the [law] department [of an organization] constitute a firm” within the Virginia Rules’ meaning.

But notably for in-house lawyers, Virginia Rule 1.10 cmt. [1a] then explains that “there may be uncertainty as to the identity of the client” in those circumstances. Virginia Rule 1.10 cmt. [1a] provides a key example: “it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed.” This is a highly significant point. Most in-house lawyers presumably assume that they represent the entire corporate family, not just the corporate family member who pays them. And as long as the corporate family remains intact, it may not make much difference for in-house lawyers to know whether or not if they also represent their corporate employer’s subsidiaries. But it could be critically important for in-house lawyers to know whether they had represented such a subsidiary if the subsidiary becomes an adversary – after being spun off, sold, or declaring bankruptcy (and possibly ending up in a trustee’s hands). The earlier existence of an attorney – client relationship obviously could affect conflicts, file ownership, attorney – client privilege protection, malpractice claims, etc.

Virginia Rule 1.10 cmt. [1a] concludes with an acknowledgment that “[a] similar question can arise concerning an unincorporated association and its local affiliates.” Unfortunately, Virginia Rule 1.10 does not provide any helpful guidance about that “question.” It is odd to say that an "unincorporated association" has "local affiliates." What does that mean?

**ABA Model Rule 1.10** does not contain a similar Comment. But the nearly identical language appears in ABA Model Rule 1.0 cmt. [3].

The only substantive difference is ABA Model Rule 1.0 cmt. [3]’s inclusion of the phrase “including the government” in the sentence describing the “law department of an organization.” That reference to the government does not appear in Virginia Rule 1.10 cmt. [1a].

### **Virginia Rule 1.10 Comment [1b]**

Virginia Rule 1.10 cmt. [1b] addresses lawyers “in legal aid.” This Virginia Rule Comment parallels ABA Model Rule 1.0 cmt. [4].

As a linguistic matter, it would seem that the sentence should have used the phrase, “legal aid organizations.” That term appears in the next sentence, and in ABA Model Rule 1.0 cmt. [4].

Virginia Rule 1.10 cmt. [1b] explains that such lawyers constitute a firm when they are “employed in the same unit of a legal service organization,” (emphasis added), but that the same characterization would not necessarily apply if those lawyers are “employed in separate units (emphasis added).” It is unclear what the term “units” means. Presumably that word has the same meaning as the word “components” used in ABA Model Rule 1.0 cmt. [4].

Virginia Rule 1.10 cmt. [1b] concludes with an acknowledgement that “whether the lawyers should be treated as associated with each other can depend on the particular rule that is involved, and on the specific facts of the situation.” By using the term “associated,” Virginia Rule 1.10 cmt. [1b] compounds any confusion. It is unclear how the “associated” standard interacts with the terms “unit” or “firm.”

**ABA Model Rule 1.10** does not contain a similar comment. But ABA Model 1.0 cmt. [4] similarly addresses “lawyers in legal aid and legal services organizations.”

ABA Model Rule 1.0 cmt. [4] indicates that “the entire organization or different components of it may constitute a firm or firms” – “[d]epending upon the structure of the organization.”

### **Virginia Rule 1.10 Comment [1c]**

Virginia Rule 1.10 cmt. [1c] addresses lawyers who join a private firm “after having represented the government.”

Presumably Virginia Rule 1.10 cmt. [1c] refers to lawyers employed by the government and then joining a private firm. Lawyers employed by private law firms obviously can also represent the government, but those lawyers’ representations presumably are governed by Virginia Rule 1.9 and perhaps other Rules.

Virginia Rule 1.10 cmt. [1c] points to Virginia Rule 1.11(b) and (c) as governing former government-employed lawyers’ conflicts. That should be obvious, because Virginia Rule 1.11 explicitly addresses former government lawyers.

Virginia Rule 1.10 cmt. [1c]’s reference to lawyers “having represented the government” sheds helpful light (although perhaps not dispositive light) on Virginia Rule 1.11(b)’s reach. As explained in this document’s analysis of Virginia Rule 1.11(b), it is not clear whether that Rule’s phrase “lawyer [who] participated personally and substantially as a public officer or employee” denotes only lawyers who acted in a representational role, or instead also includes lawyers who acted in a non-representational role. Virginia Rule 1.10 cmt. [1c] clearly refers to the former. But of course such lawyers may only

constitute a subset of lawyers who act both in a representational and in a non-representational role while government employees.

Virginia Rule 1.10 cmt. [1c] next addresses the opposite scenario – involving a lawyer who has “served private clients” and then later “represents the government.” As in the previous phrase, this Virginia Rule Comment presumably refers to lawyers employed by the government, not those representing the government as private lawyers. Virginia Rule 1.10 cmt. [1c] points to Virginia Rule 1.11(d)(1) as governing those lawyers’ conflicts. As explained in this document’s Virginia Rule 1.11(d) analysis, private law firms hiring former government lawyers may normally avoid imputation of such lawyers’ individual disqualification to all associated law firm colleagues by screening them from the hiring firm’s representation adverse to (and even of) the government in matters in which those lawyers were “personally and substantially” involved while in the government. Of course, this differs dramatically from private Virginia law firms’ inability to avoid a similar imputation when they hire lawyers from other private law firms. The ABA Model Rules allow such self-help screening in both of those scenarios.

Virginia Rule 1.10 cmt. [1c] concludes by unsurprisingly reminding individual lawyers that they are “bound by the [Virginia] Rules generally, including Virginia Rules 1.6, 1.7 and 1.9.”

**ABA Model Rule 1.10 cmt. [11]** is similar to Virginia Rule 1.10 cmt [1c].

ABA Model Rule 1.10 cmt. [11]’s first phrase is identical to the first phrase in Virginia Rule 1.10 cmt. [1c], although the ABA Model Rule Comment specifically indicates that lawyers having joined a private firm after “having represented the government” are

governed by ABA Model Rule 1.11(b) and (c) – not ABA Rule Model 1.10. That should be obvious.

But ABA Model Rule 1.10 cmt. [11] differs in several substantive ways from Virginia Rule 1.10 cmt. [1c].

First, ABA Model Rule 1.10 cmt. [11]’s second sentence is more expansive than the parallel phrase in Virginia Rule 1.10 cmt. [1c]. The ABA Model Rule Comment identifies a scenario in which a lawyer “represents the government” (as explained above, presumably while being employed by the government). In contrast to Virginia Rule 1.10 cmt. [1c]’s reference to lawyers in that situation “having [earlier] served private clients,” ABA Model Rule 1.10 cmt. [11] includes a longer list of possible earlier representations: “after having served clients in private practice, nongovernmental employment or in another government agency.” For those lawyers, ABA Model Rule 1.10 cmt. [11] refers to the imputation rule in ABA Model Rule 1.11(d). According to the ABA Model Rule 1.10 cmt. [11], ABA Model Rule 1.11(d) does not impute “former client conflicts” of such lawyers to “government lawyers associated with the individually disqualified lawyer.” In other words, a government lawyer’s individual disqualification based on earlier representations is not imputed to other associated government colleagues – as it presumably would be in a private law firm or in a law department setting.

But the reference to ABA Model Rule 1.11(d) is a bit confusing. ABA Model Rule 1.11(d)(1) addresses an individual lawyer’s disqualification when moving from private practice to the government. But that black letter ABA Model Rule says nothing about such a lawyer’s individual disqualification being imputed to other government colleagues. Instead, ABA Model Rule 1.11 cmt. [2] addresses the imputation issue in that setting.

ABA Model Rule 1.11 cmt. [2] explains that such individual lawyers' disqualification is not imputed "to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers."

As explained in this document's summary, analysis and comparison of ABA Model Rule 1.11, the reference to "other associated government officers or employees" is strange (emphasis added). Another lawyer's individual disqualification under the ethics rules normally is not imputed to non-lawyers in private or government settings to which an individually disqualified lawyer moves. Although the conflict is not imputed, ABA Model Rule 5.3 may trigger the same effect. Under ABA Model Rule 5.3(a) and (b), institutional managerial and direct supervisory lawyers must "make reasonable efforts" to ensure that nonlawyers' conduct "is compatible with the professional obligations of the lawyer." Presumably those include such nonlawyers' ability to work on a matter from which a lawyer in the firm would be disqualified. That technically does not involve imputation of such a lawyer's disqualification to such a nonlawyer.

In contrast, Virginia Rule 1.10 cmt. [1c] simply states that a lawyer's representation of the government "after having served private clients" is governed by Virginia Rule 1.11(d)(1). Virginia Rule 1.11(d)(1) does not deal with imputed disqualification – it addresses such lawyers' individual disqualification. Virginia Rule 1.11(e) indicates that such lawyers' individual disqualification under Virginia Rule 1.11(d) is not imputed to "other lawyers in the disqualified lawyer's agency." That makes more sense than ABA Model Rule 1.11 cmt. [2]'s mention of possible imputation of a lawyer's disqualification to non-lawyers.

Second, ABA Model Rule 1.10 cmt. [11] does not contain the reminder at the end of Virginia Rule 1.10 cmt. [1c], which unsurprisingly explains that individual lawyers are bound by all Virginia Rules.

### **Virginia Rule 1.10 Comment [1d]**

Virginia Rule 1.10 cmt. [1d] addresses the “[d]ifferent provisions” governing the “movement of a lawyer from one private firm to another” and the “movement of a lawyer between a private firm and the government.”

It seems inappropriate for this Virginia Rule Comment to address lawyers’ movement. The description of lawyers’ “movement . . . from one private firm to another” is appropriate – that is Virginia Rule 1.10’s purpose. But the next description of lawyers’ “movement” . . . between a private firm and the government” seems overly broad. Such “movement . . . between a private firm and the government” could be movement in either direction. Virginia Rule 1.10 cmt. [1d] clearly addresses lawyers moving from the government into private practice. Virginia Rule 1.11(b) addresses “movement” in that direction. Virginia Rule 1.11(d) addresses lawyers who moved in the other direction – from private employment to the government. So it would have been better for Virginia Rule 1.10 cmt. [1d] to have used the phrase “movement of a lawyer from the government to a private firm” – instead of using the term “between.”

Virginia Rule 1.10 cmt [1d] next explains the rationale for the liberal imputation rule governing former government lawyers compared to former private firm lawyers moving to another private firm. Virginia Rule 1.10 cmt. [1d] notes that governments are “entitled to protection” under the client confidentiality rules in Virginia Rules 1.6, 1.9 and 1.11. But Virginia Rule 1.10 cmt. [1d] then warns that “the potential effect on the government would

be unduly burdensome” if what the Virginia Rule Comment calls the “more extensive disqualification in [Virginia] Rule 1.10 were applied to former government lawyers.” Virginia Rule 1.10 cmt. [1d] explains that “[t]he government deals with all private citizens and organizations and, thus, has a much wider circle of adverse legal interests than does any private law firm.” Presumably this means that the government is essentially adverse to all private entities and persons, so that government lawyers are more frequently adverse to private entities and persons than lawyers in private practice. It is unclear why that attribute of the government justifies a different imputation rule.

Virginia Rule 1.10 cmt. [1d] then turns to the more obvious and justifiable rationale for the more liberal imputation standard for lawyers leaving the government and entering private practice. Virginia Rule 1.10 cmt. [1d] explains that “the government’s recruitment of lawyers would be seriously impaired if [Virginia] Rule 1.10 were applied to the government.” For this reason, “[o]n balance...the government is better served in the long run by the protections stated in [Virginia] Rule 1.11.” In other words, the government will be able to attract more talented lawyers if those lawyers know that they will have an easier time obtaining a private firm job after they leave the government. The self-help screening mechanism of those hiring private law firms makes that more likely. Although Virginia Rule 1.10 cmt. [1d] correctly explains the rationale for different individual and imputed disqualification rules for government lawyers, it seems odd that Virginia Rule 1.10 would address these conflicts and imputed disqualification rules governing former government lawyers. Those are specifically governed by the next Rule – Virginia Rule 1.11.

**ABA Model Rule 1.11** and its Comments do not contain a provision similar to Virginia Rule 1.10 cmt. [1d]. Instead, ABA Model Rule 1.11 understandably addresses those issues.

### **Virginia Rule 1.10 Comment [2]**

Virginia Rule 1.10 cmt. [2] addresses the general rule imputing an individual lawyer's disqualification to all of her associated law firm colleagues.

Virginia Rule 1.10 cmt. [2] first mentions the “principle of loyalty” to the client applicable to “lawyers who practice in a law firm” based on: (1) “the premise that a firm of lawyers is essentially one lawyer, for purposes of the rules governing loyalty to the client;” or (2) “the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated.” It is unclear why Virginia Rule 1.10 cmt. [2] mentions both of these premises. Perhaps the first premise tends to emphasize the loyalty duty among lawyers who are practicing in the same firm, but who are not “associated” with one another.

Virginia Rule 1.10 cmt. [2] next explains that Virginia Rule 1.10(a)'s imputation rule “operates only among the lawyers currently associated in a firm.” The Virginia Rule Comment's use of the term “associated” is yet another example of the Virginia Rules' and Comments' unfortunate use of that undefined term. Virginia Rule 1.10 cmt. [2] refers to Virginia Rules 1.9(b) and 1.10(b) as governing a situation “[w]hen a lawyer moves from one firm to another.” Virginia Rule 1.9(b) generally explains that lawyers leaving a law firm only bring their own loyalty duties and knowledge from matters that they actually handled at their former firm, or information they actually obtained there. This is notably

different from lawyers' shared loyalty and imputed knowledge with colleagues that applied when they were practicing at their former firm. Virginia Rule 1.10(b) is discussed above.

**ABA Model Rule 1.10 cmt. [2]** contains essentially the same language as Virginia Rule 1.10 cmt. [2].

However, in contrast to Virginia Rule 1.10 cmt. [2], ABA Model Rule 1.10 cmt. [2] also refers to ABA Model Rule 1.10(a)(2). The absence of that reference in the Virginia Rule Comment makes sense, because the Virginia Rules do not allow what could be called self-help screening of lateral private lawyer hires, which ABA Model Rule 1.10(a)(2) allows (as explained below).

### **Virginia Rule 1.10 Comment [2a]**

Virginia Rule 1.10 cmt. [2a] addresses lawyers' and law firms' duty to check for conflicts before beginning a representation, and during the course of a representation.

Virginia Rule 1.10 cmt. [2a] explains that lawyers or firms "should maintain and use an appropriate system for detecting conflicts of interest." The Virginia Rule Comment then warns that lawyers may violate Virginia Rule 1.10(a) if they fail to maintain such a system or to use such a system "when making a decision to undertake employment in a particular matter" – "if proper use of a system would have identified the conflict."

Virginia Rule 1.10 cmt [2a] is consistent with black letter Virginia Rule 1.10(a)'s prohibition on lawyers undertaking a representation if the lawyer "knows or reasonably should know" that one of her associated law firm colleagues would be "prohibited from doing so." The "reasonably should know" language does not appear in ABA Model Rule 1.10(a), and essentially imposes a negligence standard. Virginia Rule 1.10 cmt. [2a] takes the same negligence approach.

Presumably such negligence might violate other ABA Model Rules, such as ABA Model Rule 5.1's duty of law firm management and supervising lawyers to take reasonable steps to assure the institution's and their direct lawyer subordinates' compliance with the ethics rules. ABA Model Rule 5.3 similarly requires those lawyers to take the same reasonable steps to assure that their non-lawyer subordinates act in a way that is "compatible" with the ABA Model Rules.

**ABA Model Rule 1.10** does not contain a similar Comment.

### **ABA Model Rule 1.10 Comment [3]**

Virginia did not adopt ABA Model Rule 1.10 cmt. [3].

ABA Model Rule 1.10 cmt. [3] begins by explaining that: "[t]he rule in [ABA Model Rule 1.10(a)] does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented." Thus, ABA Model Rule 1.10(a)(1) does not impute the individual disqualification of a lawyer who faces a "personal interest" material limitation conflict – which does not involve either a traditional client conflict or a confidential information – generated conflict. Such an individual lawyer's disqualification "does not prohibit representation" of that client by other lawyers in the firm, except under certain circumstances.

ABA Model Rule 1.10 cmt. [3] next addresses ABA Model Rule 1.10(a)(1) – a provision not found in Virginia Rule 1.10(a). Black letter ABA Model Rule 1.10(a) excludes imputation of an individual lawyer's disqualification based on a "personal interest of the disqualified lawyer" – which "does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm."

As explained above, the word “remaining lawyers in the firm” is a poor choice of words. That black letter ABA Model Rule 1.10(a)(1) scenario and the guidance in ABA Model Rule 1.10 cmt. [3] does not involve a situation in which some lawyers leave a firm and others remain. Black letter ABA Model Rule 1.10(a)(i) would have been more clear if it had used the phrase “other lawyers in the firm. The possible confusion is especially acute because ABA Model Rule 1.10(b) uses the term “remaining” in the proper sense – lawyers staying at a firm while others have left the firm.

On a substantive level, ABA Model Rule 1.10 cmt [3] refers to the sort of “personal interest” that could trigger an ABA Model Rule 1.7(a)(2) “material limitation” conflict. Such a conflict arises if a lawyer’s “personal interest” creates “a significant risk that the representation of one or more clients will be materially limited.” Virginia Rule 1.7(a)(2) contains the identical language – often called the “material limitation” conflict provision.

ABA Model Rule 1.10 cmt. [3] next describes the example of a lawyer’s inability to represent a client because of the lawyer’s “strong political beliefs.” Such an individual lawyer’s disqualification would not be imputed to the entire firm if “that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm.” ABA Model Rule 1.10 cmt. [3] does not explain that concept, but one might suppose that such an individual lawyer’s “strong political beliefs” would have such a material limit on her colleagues’ representation if the individually disqualified lawyer was a small law firm’s strong-willed, hands-on leader, etc. A new associate at a firm run with an iron hand by a leader with strongly held political beliefs might be tempted to “pull punches” if that associate’s representation of a client conflicted with the leader’s beliefs.

ABA Model Rule 1.10 cmt. [3] then provides an example with the opposite effect: “if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.” In other words, a lawyer representing a plaintiff suing a restaurant that is owned by a senior partner who is also a close friend (and perhaps in financial difficulty) might be tempted to “pull punches” while representing the plaintiff suing that restaurant.

The Virginia Rules do not contain this or a similar Comment. The absence makes sense, because Virginia Rule 1.10(a)’s general imputation rule does not contain any exception for imputation based on an individual lawyer’s Virginia Rules 1.7(a)(2) “material limitation” disqualification based on a lawyer’s “personal interest.” The Virginia State Bar Standing Committee on Ethics sought the Virginia Supreme Court’s adoption of a Virginia Rule provision that would follow the ABA Model Rule approach – generally declining to impute to associated law firm colleagues an individual lawyer’s “personal interest” disqualification. But in 2018, the Virginia Supreme Court declined to adopt the proposed change.

#### **ABA Model Rule 1.10 Comment [4]**

Virginia did not adopt ABA Model Rule 1.10 cmt. [4].

ABA Model Rule 1.10 cmt. [4] addresses the inapplicability of the general imputation rule under ABA Model Rule 1.10(a) in two scenarios involving different categories of persons.

First, ABA Model Rule 1.10(a)’s general imputation rule does not apply: “where the person prohibited from involvement in a matter is a non-lawyer, such as a paralegal or

legal secretary.” Although the meaning seems clear, ABA Model Rule 1.10 cmt. [4]’s language does not seem to fit. On its face, ABA Model Rule 1.10(a) refers only to lawyers – using the term “lawyers” and later the phrases “none of them” and “any one of them,” both of which presumably refer to lawyers. But ABA Model Rule 1.10 cmt. [4] describes the scenario “where the person prohibited from involvement in a matter is a non-lawyer.” ABA Model Rule 1.10(a) does not include such a scenario. Neither ABA Model Rule 1.10 nor apparently any other ABA Model Rule address non lawyers’ “prohibit[ion] from involvement in a matter.” And the ABA Model Rules clearly know how to describe non lawyers. Of course, ABA Model Rule 1.10 cmt. [4] itself does that. ABA Model Rule 5.3 explicitly addresses lawyers’ responsibilities when supervising “a nonlawyer employed or retained by or associated with a lawyer.” So, if ABA Model Rule 1.10(a) intended to individually disqualify a nonlawyer and possible impute that individual nonlawyer’s disqualification to associated law firm lawyer or nonlawyer colleagues, it could have done so – but it did not. ABA Model 1.10 cmt. [4] presumably intended to equate for this purpose lawyers and nonlawyers, but if so it did that without much explanation.

ABA Model Rule 1.10 cmt. [4] explains that such persons “ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect” – referring to ABA Model Rules 1.0(k) and ABA Model Rule 5.3. ABA Model Rule 1.0(k) defines the term “screened.” No Virginia Rule or Comment defines that term. ABA Model Rule 5.3 addresses lawyers’ supervision of nonlawyers. Virginia Rule 5.3 deals with that issue.

The Virginia Rules do not contain a similar Comment addressing the imputation rule governing nonlawyers. But a 2004 Virginia Legal Ethics Opinion addressed a law firm which used a similar self-help screening method to avoid a newly hired secretary's individual disqualification from being imputed to the whole hiring firm. Virginia LEO 1800 (10/8/04)

While law firms undoubtedly welcome this very generous approach to non-lawyers like paralegals or legal secretaries, it arguably makes little sense. Paralegals, secretaries and other nonlawyers often if not usually have as much (if not more) information about client matters than lawyers who work on those matters. And they are not as likely to be as familiar as lawyers with the stringent confidentiality rules governing such information. Perhaps most significantly, they are not as likely to be deterred as lawyers from disclosing such information to others in the new firm (or even outside the firm). Lawyers may be punished professionally and even disbarred for violating those strict confidentiality rules but nonlawyers do not have as much to lose – because they do not jeopardize some professional license if they violate the ethics rules, although of course they might be guilty of tortious or even criminal conduct.

It seems odd that ABA Model Rule 1.10 cmt. [4] explains only that such nonlawyers "ordinarily" must be screened – rather than "always" must be screened. Perhaps this seemingly more discretionary screening process relies on ABA Model Rule 5.3(a) and (b)'s requirement that institutional managerial and direct supervisory lawyers take "reasonable steps" to ensure that such nonlawyers' conduct are "compatible with the professional obligations of the lawyer." That seems more demanding than Virginia Rule 1.10 cmt. [4]'s "ordinarily" screening standard.

Second, ABA Model Rule 1.10 cmt. [4] explains that ABA Model Rule 1.10(a)'s general imputation rule does not apply. "if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did as a law student." The word "events" seems inapt. An "event" seems like a discrete incident. One normally would not describe a law student's work as an "event." Words such as "experience" presumably would have been more appropriate.

As with ABA Model Rule 1.10 cmt. [4]'s preclusion of current nonlawyers' "prohibit[ion] from involvement in a matter" resulting from some unstated ABA Model Rule, law firms undoubtedly welcome this more forgiving standard. But it makes even less sense than the imputation preclusion for current nonlawyers discussed above. To be sure, such lawyers presumably would be hesitant to violate some lawyer-based ethical duty (such as disclosing protected client confidential information) – because the stakes are much higher for them. And they presumably understand lawyers' strong confidentiality duty from their early days as a law student. But if ABA Model Rule 1.10 cmt. [4]'s reference to "events before the person became a lawyer" include employment as law clerks (such as summer clerks), those nonlawyers are much more likely to have acquired the type of material protected confidential information that would otherwise result in disqualification if they had been lawyers all along. One might thus think that lawyers' disqualifying conduct or information would include pre-lawyer days.

This surprising and arguably illogical distinction between lawyers and nonlawyers who either work at law firms or later became lawyers appears in another setting that arguably makes no sense – in ABA Model Rule 1.10(b)'s application (whose pertinent Comments are discussed below).

## **Virginia Rule 1.10 Comment [5]**

Virginia Rule 1.10 cmt. [5] addresses Virginia Rule 1.10(b)'s provision allowing law firms to represent clients directly adverse to the law firm's former clients – as long as the lawyers with protected client confidential information about the matter for that now-former client have all left the firm.

Virginia Rule 1.10 cmt. [5] essentially explains the Virginia Rule's effect, and notes that the analysis focuses only on lawyers remaining in the firm who might have disqualifying information (implicitly excluding nonlawyers from the analysis).

Virginia 1.10(b) (and ABA Model 1.10(b)) and Virginia Rule 1.10 cmt. [5] seem odd, because they focus only on whether lawyers possessing disqualifying information remain at the firm when the firm considers representing a client adverse to a former law firm client. That exclusive focus on lawyers presumably would allow such a firm to avoid disqualification even if paralegals, secretaries, file clerks or other non-lawyers possessing critical sensitive protected client confidential information about that former law firm client remain at the firm. Virginia Rule 1.10 cmt. [5] does not address any screening of such nonlawyers remaining in the firm.

This questionable distinction between lawyers and nonlawyers parallels that difference when law firms hire those two types of persons. As explained above, ABA Model 1.10 cmt. [4] (which Virginia Rule 1.10 does not contain) off-handedly suggests that law firms hiring such nonlawyers "ordinarily" must screen them – but without any of the strict formalities that law firms must follow when they hire individually disqualified lawyers.

The disparate treatment of lawyers and nonlawyers is even more stark in the context of law firms' ability to represent a person directly adverse to one of the law firm's former clients (even in the same matter in which that law firm previously represented the now-former client) – as long as all of the lawyers with protected client confidential information have left that firm. This lawyer – centric view is remarkable. On Its face, Virginia Rule 1.10(b) would allow a law firm to undertake such direct adversity against one of its former clients even if a large number of paralegals, legal assistants, file clerks, etc. who had worked for that client still worked at the firm. Virginia 1.10(b) does not even require such nonlawyers to be screened from their law firm's representation directly adverse to one of the law firm's former client. To be sure, Virginia Rule 5.3(a) and Virginia Rule 5.3(b) require manager lawyers and direct supervisory lawyers to “make reasonable efforts” to ensure that those nonlawyers' conduct “is compatible with the professional obligations of the lawyer.” Presumably that means that those institutional managerial and direct supervisory lawyers would warn the remaining nonlawyers at the firm with protected client confidential information that could be used against the law firm's former client not to disclose or use it. But Virginia Rule 1.10(b) does not even mention such nonlawyers, let alone remind law firms of such Virginia Rule 5.3 duties.

Similarly, Virginia Rule 1.10(b) would presumably permit law firms to take on matters directly adverse to a former law firm client as long as all of the lawyers with protected client confidential information had left the firm – even if that now – adverse former client's files remain at the firm. In other words, a law firm representing a person directly adverse to one of the law firm's former clients could possess in its files the former client's particularly important confidential information that could be used against the now-

adverse former client. And just as Virginia Rule 1.10(b) does not require the screening of remaining nonlawyers in the firm who had worked for that now-adverse former client, Virginia Rule 1.10(b) does not mention denying access to such law firm files by the law firm lawyers now representing the former client's adversary.

One might have expected that Virginia Rules 1.10(b) and ABA Model Rules 1.10(b) would require law firms to screen any remaining nonlawyers with material harmful information from their participation in the earlier representation of the now – former client. And one might have also expected the same treatment of material harmful documents and information about the now-former client that remain in the law firm's possession.

**ABA Model Rule 1.10 cmt. [5]** contains identical language.

#### **ABA Model Rule 1.10 Comment [6]**

Virginia did not adopt ABA Model Rule 1.10 cmt. [6].

ABA Model Rule 1.10 cmt. [6] addresses ABA Model Rule 1.10(c)'s provision allowing law firms to avoid an imputation of an individual lawyer's disqualification if that disqualification is "waived by the affected client" or the former client "under the conditions stated in [ABA Model] Rule 1.7." Of course, incorporating ABA Model Rule 1.7's conditions also incorporates the many scenarios in which consent may not be sought, would not be effective even if given, etc. So ABA Model Rule 1.10(c) is not a generally applicable blanket permission to undertake a representation with client consent.

ABA Model Rule 1.10 cmt. [6] next understandably reminds lawyers that they must determine if a representation is "not prohibited by [ABA Model] Rule 1.7(b)," and that (if not), any necessary client or former client informed consents are "confirmed in writing." ABA Model Rule 1.10(a) then warns that in some situations "the risk may be so severe

that the conflict may not be cured by client consent.” This phrase presumably refers to representations that are not per se prohibited under ABA Model Rule 1.7(b), but that are still so severely conflicted that the lawyer may not proceed even with consent.

Virginia Rule 1.7 allows lawyers to undertake representations with client’s consent, under certain conditions. Those generally match ABA Model Rule 1.7’s principles. But Virginia Rule 1.7 cmt. [19] includes a limitation that is more explicit than ABA Model Rule 1.7’s provisions: “when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client’s consent.” This is an objective rather than a subjective standard. In other words, consent is not always a panacea – even in situations where the Virginia Rules permit consents to cure conflicts.

ABA Model Rule 1.10 cmt. [6] concludes with a reference to ABA Model Rule 1.7 cmt. [22] for “a discussion of the effectiveness of client waivers of conflicts that might arise in the future,” and a reference to ABA Model Rule 1.0(e) for the definition of “informed consent.”

Neither the Virginia Rules nor the Virginia Comments define or even acknowledge the possible effectiveness of such prospective consents.

### **ABA Model Rule 1.10 Comment [7]**

Virginia did not adopt ABA Model Rules 1.10 cmt. [7], because Virginia does not allow what could be called “self-help” screening of individually disqualified private law firm lateral hires.

ABA Model Rule 1.10 cmt. [7] addresses ABA Model Rule 1.10(a)(2)'s process for hiring law firms to avoid the imputed disqualification of an individually disqualified lawyer whom the firm hires.

Significantly, ABA Model Rule 1.10 cmt. [7] first notes that unlike ABA Model Rule 1.10(c), the self-help screening of an individually disqualified new lawyer lateral hire avoids imputation “without requiring that there be informed consent by the former client.” That is why it can be called self-help screening. Although the former client does not have to consent for the hiring law firm to avoid such imputed disqualification, a firm must of course follow all the procedures described in ABA Model Rule 1.10(a)(2)(i)-(iii).

The ABA Model Rule 1.10 cmt. (7) then points to ABA Model Rule 1.0(k) for a description of the proper screening methods.

ABA Model Rule 1.10 cmt. (7) concludes with a warning that “[I]awyers should be aware, however, that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation.” Because hiring law firms normally worry more about disqualification than about an ethics charge, this added uncertainty is troubling. The disqualification case law highlights these risks. Some courts disqualify law firms despite their having timely imposed an ethically-compliant screen. Courts sometimes hold that such screens do not work if the law firm is too small, or even too large. Courts sometimes find that the law firms' internal communications should have included warnings that lawyers breaching the screen would be punished, should have been sent out more frequently, etc. Thus despite ABA Model Rule 1.10(a)(2)'s promise that lawyers may help self-screen individually

disqualified new hires and avoid what might be a disastrous imputation of their individual disqualification to all associated law firm colleagues, uncertainty remains.

### **ABA Model Rule 1.10 Comment [8]**

Virginia did not adopt ABA Model Rule 1.10 cmt. [8], because Virginia does not allow what could be called “self-help” screening of individually disqualified private law firm lateral hires to avoid imputation to the whole firm of those new hires’ individual disqualification (as permitted under ABA Model Rule 1.10(a)(2)(i)).

ABA Model Rule 1.10 cmt. [8] addresses such new hires’ financial screening required under ABA Model Rule 1.10(a)(2)(i).

ABA Model 1.10 cmt. [8] explains that such screened lateral hires may receive “a salary or partnership share established by prior independent agreement, but that [such a screened] lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.”

### **ABA Model Rule 1.10 Comment [9]**

Virginia did not adopt ABA Model Rule 1.10 cmt. [9], because Virginia does not allow what could be called “self-help” screening of individually disqualified private law firm lateral hires.

ABA Model Rule 1.10 cmt. [9] addresses the required notice under ABA Model Rule 1.10(a)(2)(ii) – which allows the hiring law firm to avoid the imputed disqualification of an individually disqualified new private sector hire.

ABA Model Rule 1.10 cmt. [9] first describes the timing of and the content that “generally should” be included in the notice required by ABA Model Rule 1.10(a)(2)(ii).

Such a notice “generally should be given as soon as practicable after the need for screening becomes apparent. The notice “should” include: (1) “a description of the screened lawyer’s representation;” (2) “a statement by the screened lawyer and the firm that the client’s material confidential information has not been disclosed or used in violation of the [ABA Model] Rules.”

Presumably the pertinent content’s limitation to “the client’s material confidential information” intentionally include the materiality element. Such a materiality element when analyzing lawyers’ duties to protect former clients of a new hire is consistent with ABA Model Rule 1.9’s approach to lawyers’ duties to former clients. ABA Model Rule 1.9(a) (like Virginia Rule 1.9(a)) contains a “materially adverse” standard when judging lawyers’ adversity to former clients. ABA Model rule 1.10 cmt. [9]’s limitation is not surprising, because absent client consent the lawyer moving to the new firm would not even be able to disclose basic information as when she worked for the client, etc. ABA Model Rule 1.6(b)(7) allows lawyers to “reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary...to detect and resolve conflicts of interest arising from the lawyer’s change in employment or from changes in the composition or ownership of a firm.” But that discretionary power to disclose protected client confidential information is permitted “only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.” ABA Model Rule 1.6 cmt. [13] - [17] provides further guidance.

ABA Model Rule 1.10 cmt. [9] concludes by articulating the rationale for the notice, which “is intended to enable the former client to evaluate and comment on the effectiveness of the screening procedures.” It is unclear what happens next. Presumably

a former client's evaluation and comment upon the screen procedure's effectiveness might result in improvement of that process. But if the hiring law firm does not provide much notice beforehand, it will be too late for the hiring law firm to avoid a disqualification risk if the former client contends that the screening process was inadequate.

### **ABA Model Rule 1.10 Comment [10]**

Virginia did not adopt ABA Model Rule 1.10 cmt. [10], because Virginia does not allow what could be called “self-help” screening of individually disqualified private sector lateral new hires to avoid imputation to the whole firm of those new hires’ individual disqualification (as permitted under ABA Model Rule 1.10(a)(2)).

ABA Model Rule 1.10 cmt. [10] addresses ABA Model Rule 1.10(a)(2)(iii)’s certification requirements.

ABA Model Rule 1.10 cmt. [10] first explains that those required certifications “give the former client assurance that the client’s material confidential information has not been disclosed or used inappropriately.” As explained above, the addition of a materiality standard implicitly limits the range of protected client confidential information that the certificate must assure the former client has not been disclosed to.

Significantly, ABA Model Rule 1.10 cmt. [10] then states that the lawyer’s and the new firm’s certification (that the former client's "material confidential information has not been disclosed or used inappropriately") – “either prior to timely implementation of a screen or thereafter.” Black letter ABA Model Rule 1.10(a)(2)(iii) does not contain this logical temporal scope requirement.

ABA Model Rule 1.10 cmt. [10] concludes with a warning that “[i]f compliance cannot be certified, the certificate must describe the failure to comply.” Use of the term

“certificate” seems odd, because ABA Model Rule 1.10(a)(2)(iii) and ABA Model Rule 1.10 cmt. [10] itself use the more generic term “certification.” The term “certificate” normally refers to a tangible item, rather than the content of some communication.

Virginia Rule 1.10 does not contain similar Comments or similar certification requirements. Virginia Rule 1.11(b)(2) requires written notice in scenarios involving former government lawyers/employees, but that provision and the accompanying Virginia Comments do not use the word “certification” and do not require such specific substance and procedures.

#### **ABA Model Rule 1.10 Comment [11]**

Because ABA Model Rule 1.10 cmt. [11] parallels Virginia Rule 1.10 cmt. [1c], this document addresses it in connection with that Virginia Rule Comment (above).

#### **ABA Model Rule 1.10 cmt. [12]**

Virginia did not adopt ABA Model Rule 1.10 cmt. [12].

ABA Model Rule 1.10 cmt. [12] is similar to black letter Virginia Rule 1.10(d). The ABA Model Rule Comment notes that ABA Model Rule 1.8(k) (rather than the ABA Model Rule 1.10) governs the imputation to associated law firm colleague of an individual lawyer’s prohibition “from engaging in certain transactions under [ABA Model] Rule 1.8.

# **RULE 1.11**

## **Special Conflicts of Interest For Former And Current Government Officers And Employees**

ABA Model Rule 1.11 is entitled “Special Conflicts of Interest for Former and Current Government Officers and Employees”.

### **Rule**

#### **Virginia Rule 1.11(a)**

Virginia Rule 1.11(a) addresses lawyers who currently “hold[ ] public office.”

Virginia Rule 1.11(a) does not define the term “public office,” which presumably differs from the phrase “public . . . employee” – which appears elsewhere in Virginia Rule 1.11 and in ABA Model Rule 1.11.

Virginia Rule 1.11(c) uses the phrase “public officer or employee,” highlighting that they are not synonymous. Presumably the term “public office” denotes a higher level within the government hierarchy than “public . . . employee.”

One key issue is whether Virginia Rule 1.11(a) governs lawyers’ conduct in all of their “public office” actions or just such lawyers’ actions when they represent the government. This important issue is discussed below, in connection with lawyer’s former or current role as “a public officer or employee.” As explained below, it appears that the

more elaborate Virginia Rule 1.11 provisions governing lawyers who served or are currently serving in one of those two roles applies to non-representational roles in one of those positions. Although Virginia Rule 1.11(a) does not provide any guidance about this issue in the context of lawyers who “hold[ ] public office,” it seems far less likely that a lawyer who is in “public office” would simultaneously represent the government. So it seems more likely in this context that lawyers would be governed by Virginia Rule 1.11(a) even in non-representational roles.

**ABA Model Rule 1.11** does not have a similar rule.

### **Virginia Rule 1.11(a)(1)**

Virginia Rule 1.11(a)(1) addresses prohibited activities by a lawyer who “holds public office.”

Virginia Rule 1.11(a)(1) first states that lawyers “hold[ing] public office” shall not “use the public position to obtain, or attempt to obtain, a special advantage in legislative matters for the lawyer or for a client under circumstances where the lawyer knows or it is obvious that such action is not in the public interest.” Thus, Virginia Rule 1.11(a)(1) prohibits lawyers who hold “public office” from abusing their office by seeking a “special advantage” for themselves or a client. But interestingly, the prohibition only applies to “legislative matters.” Thus, it deliberately does not apply to similar misbehavior in the context of executive actions or tribunals’ action. But presumably other Virginia Rules would prohibit such misconduct in the context of those other two branches of government.

The fact that lawyers holding “public office” might have a “client” seems to indicate that such lawyers would also be engaged in private practice. This might seem odd at

first, but in Virginia lawyers who hold elected office may simultaneously represent private clients. Presumably the same is true in many if not all other states. Perhaps the term “client” also includes government entities – which of course could be represented either by a government-employed lawyer or by a private sector lawyer.

Virginia Rule 1.11(a) only prohibits the specified misbehavior “where the lawyer knows or it is obvious that such action is not in the public interest.” The Virginia Rules Terminology section defines “knows” as “denot[ing] actual knowledge of the fact in question,” which “may be inferred from circumstances.” The term “obvious” presumably creates an objective “reasonable lawyer”-type standard, and seems to require a higher level of certainty than “reasonably should know.”

That condition creates quite an exception, because such lawyers could always argue that the “special advantage in legislative matters” is “in the public interest.” If the advantage is “special,” and is for “the lawyer or for a client,” it would seem unlikely that it would be “in the public interest.” But the lawyer could always argue that.

### **Virginia Rule 1.11(a)(2)**

Virginia Rule 1.11(a)(2) addresses such lawyers’ tribunal-related misconduct.

Virginia Rule 1.11(a)(2) prohibits such lawyers from “us[ing] the public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client. Virginia Rule 1.11(a)(2) thus describes different misconduct from the legislative-context prohibition in Virginia 1.11(a)(1). Virginia 1.11(a)(2) focuses on “influence,” while Virginia 1.11(a)(1) focuses on a “special advantage.” Perhaps those were meant to be

synonymous phrases. Significantly, Virginia 1.11(a)(2)'s prohibition does not have the same exception as Virginia Rule 1.11(a)(1), discussed above.

### **Virginia Rule 1.11(a)(3)**

Virginia Rule 1.11(a)(3) addresses a different type of prohibited conduct by a lawyer who “hold[s] public office.”

Virginia Rule 1.11(a)(3) prohibits such lawyers from “accept[ing] anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer’s action as a public official.” This essentially prohibits lawyers from accepting improper bribes.

As explained above, the “obvious” standard seems to fall somewhere between the “know” and “reasonably should know” standard. In at least one sense, Virginia Rule 1.11(a)(3)'s prohibition seems overbroad. Presumably supporters of someone holding public office contribute campaign-supporting funds “for the purpose of influencing the lawyer’s action as a public official.” And Virginia Rule 1.11(a)(3)'s language seems inapt. One would think that Virginia Rule would examine the payment rather than the “offer” to pay.

### **Virginia Rule 1.11(b)**

Virginia Rule 1.11(b) addresses the ability of a lawyer who previously worked as a “public officer or employee” to represent clients after leaving that public office or employment.

Virginia Rule 1.11(b) explains that, “[e]xcept as law may otherwise expressly permit,” such lawyers may not represent “a private client in connection with a matter in

which the lawyer participated personally and substantially as a public officer or employee” (absent consent, as explained below).

Virginia Rule 1.11(b) contains several terms whose meaning could be significant.

First, the term “private client” could mean either: (1) a non-government client; or (2) any client of a lawyer in private practice. As explained above, lawyers sometimes may simultaneously represent private clients while holding public office (such as elective office). Such lawyers might also continue to represent private clients while employed by or serving in other governmental roles, such as “special counsel,” etc. The former definition might seem more intuitive, but it appears that the latter definition might be correct. Virginia Rule 1.11 cmt. [5] addresses the possibility that a government agency “should be treated as a private client for purposes of this Rule.” ABA Model Rule 1.11 cmt. [5] does not contain the same language. So the meaning of “private client” might not be as clear in the ABA Model Rule’s context. Understanding that the term “private clients” might include other government agencies helps with analyzing Virginia Rule 1.11’s application.

Second, the term “in connection with” seems to imply a broader relationship than the word “in.” For example, Virginia Rule 1.9(a), (b) and (c) use the phrase “in a matter” (or its equivalent). Presumably Virginia Rule 1.11(b)’s choice of the phrase “in connection with a matter” was deliberately intended to describe a different relationship. But Virginia Rule 1.11 does not explain any difference.

Third, the term “matter” is defined in Virginia Rule 1.11(f), and could be one of two things. Virginia Rule 1.11(f)(1) defines the term “matter” as “include[ing]” (presumably meaning that the list is not complete, which is explained below) “any judicial or other

proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties.” Virginia Rule 1.11(f)(2) includes a catch-all provision, explaining that the term “matter” also includes “any other matter covered by the conflict of interest rules of the appropriate government agency.” The term “government agency” also involves a definitional issue, discussed below.

Fourth, the term “personally and substantially” is used to describe government-employed lawyers’ role in Virginia Rule 1.11 and ABA Model Rule 1.11. The term “personally” presumably denotes the lawyer’s direct personal rather than hierarchical role. The term “substantially” presumably denotes some involvement more than chiefly ministerial hierarchical-based conduct. The Virginia Rules Terminology section defines “substantial” as “denoting a material matter of clear and weighty importance – when used in reference to degree or extent.”

Fifth, Virginia Rule 1.11(b) uses the phrase “public officer or employee.” It is unclear whether the term “public officer” is synonymous with the term “holds public office” in Virginia Rule 1.11(a). The language would seem to render those terms synonymous because they use the same two words. But Virginia Rule 1.11(a)’s reference to a lawyer “who holds public office” deliberately differs linguistically from the phrase “public officer or employee” in Virginia Rule 1.11(b). But a lawyer holding elective office might not normally be referred to as a “public officer” and definitely would not normally be called a “public . . . employee.” So it is unclear whether those terms mean the same thing or different things.

Virginia Rule 1.11(b) uses the past tense “participated personally and substantially as a public officer or employee.” Thus, on its face, Virginia Rule 1.11(b) is not limited to

lawyers who have left government employment. Lawyers who simultaneously serve as a “public officer or employee” while representing private clients presumably would be governed by Virginia Rule 1.11(b) if still employed by the government, but having “participated” in the type of matters and to the specified degree described in Virginia Rule 1.11(b).

Significantly, Virginia Rule 1.11(b) does not on its face address only lawyers who had acted in a representational role as a lawyer for a government entity. In other words, Virginia Rule 1.11(b) presumably applies to any active member of the bar who served as a government-employed public officer or employee, either in a representational role or otherwise.

This is an elemental issue that affects the analysis under Virginia Rule 1.11 (and ABA Model Rule 1.11). In Virginia, the issue is more complicated – because Virginia Rule 1.11(a) (which is not contained in the ABA Model Rules) applies to a lawyer “who holds public office.” As mentioned above, that phrase may or may not be synonymous with Virginia Rule 1.11(b)’s phrase “participated . . . as a public officer.”

Some Virginia Rule 1.11 provisions and Virginia Rule Comments (and ABA Model Rule 1.11 provisions and Comments) describe such government-employed lawyers as representing clients – thus clearly acting in a representational role. For instance, Virginia Rule 1.11 cmt. [2] begins with the phrase “[a] lawyer representing a government agency. . . .” But the similar ABA Model Rule 1.11 cmt. [1] does not use the phrase “representing.” Instead, that ABA Model Rule Comment covers a lawyer “who has served or is currently serving as a public officer or employee.” But ABA Model Rule 1.11 cmt. [2] (which is not contained in the Virginia Rules), refers to an individual lawyer “who has

served or is currently serving as an officer or employee of the government” who has obligations “toward a former government . . . client.” That seems to involve both a representational and perhaps a non-representational role.

Elsewhere, both the Virginia Rule Comments and the ABA Model Rule Comments refer to current or former government or non-government “clients.” For instance, Virginia Rule 1.10 cmt. [1c] and ABA Model Rule 1.10 cmt. [11] mentions lawyers joining “a private firm after having represented the government” – also apparently referring to a representational role. So it is not clear whether government-employed lawyers acting in a non-representational role are governed by Virginia Rule 1.11 or by ABA Model Rule 1.11.

As mentioned above, Virginia Rule 1.11(b) contains an exception that permits such former government-employed lawyers to engage in such representation of “a private client” if “the private client and the appropriate government agency consent after consultation.”

This phrase also contains terms whose meaning could obviously be significant. First, the term “private client” is discussed above.

Second, the term “appropriate government agency” is not defined. Virginia Rule 8.5(b)(1) contains the phrase “court, agency, or other tribunal.” So an “agency” can be a kind of “tribunal.” Virginia Rule 1.13 cmt. [9] uses a confusing mix of terms in discussing governmental entities. Virginia Rule 1.13 cmt. [9] states that “in some circumstances the client may be a specific agency,” but “generally the government as a whole” is the client. Virginia Rule 1.13 cmt. [9]’s next sentence confuses things: “[f]or example, if the action or failure to act involves the head of a bureau, either the department of which the bureau

is a part or the government as a whole may be the client for purposes of this [Virginia] Rule [1.13].” So the government includes agencies, departments and bureaus – but none of those terms are defined.

Third, the phrase “consent after consultation” is the Virginia Rule formulation for consent, which contrasts with the standard ABA Model Rule formulation “informed consent.”

Significantly, Virginia 1.11(b) prohibits a government-employed lawyer who previously acted as “public officer” or “employee” from representing any “private client” in connection with a “matter” in which she was “personally and substantially” involved – without limiting that prohibition to a matter that is adverse to the government. Thus, this prohibition is as significant for what it does not include as for what it does. The core of Virginia Rule 1.7’s current-client conflicts provision only prohibits lawyers from representing clients “directly” adverse to other current clients. And the core of Virginia Rule 1.9’s former-client conflicts provision only prohibits lawyers from representing another client in a matter “materially adverse” to the interests of a former client. But Virginia Rule 1.11(b) prohibits former government-employed lawyers from representing private clients in a matter even if it is not adverse to the government. That key distinction between private sector conflicts rules and the government-context conflicts rule presumably rests on public interests other than the loyalty and confidentiality interest that underlie Virginia Rule 1.7 and Virginia Rule 1.9.

Perhaps even more significantly (because it differs from ABA Model Rule 1.11(a), discussed below), Virginia Rule 1.11(b)’s exception allowing former government-employed lawyers to handle such matters requires both “the private client and the

appropriate government agency [to] consent after consultation.” In other words, both the private client and the government must consent to the former government-employed lawyer’s representation of the former in a matter involving the latter.

As discussed below, under ABA Model Rule 1.11(a) such lawyers may undertake such representations after obtaining only the government’s consent. This significant distinction between the Virginia Rule approach and the ABA Model Rule approach parallels the consents required when a lawyer takes on a representation adverse to a former client. Virginia Rule 1.9(a) requires that such lawyers obtain both the new client’s consent and the former client’s consent. Parallel ABA Model Rule 1.9(a) only requires the former client’s consent. Presumably lawyers following the ABA Model Rule approach would nevertheless have to disclose the situation to their new clients in either scenario – under those lawyers’ communication duty under ABA Model Rule 1.4, 1.9 and 1.11 as well as their fiduciary duties.

Virginia Rule 1.11(b) also deals with the imputation of an individually disqualified former government-employed lawyer’s disqualification to a law firm where the former government-employed lawyer now practices. And as also discussed below, ABA Model Rule 1.11 deals with that imputation issue in a separate rule.

Under Virginia Rule 1.11(b), “[n]o lawyer in a firm with which that [disqualified former government-employed] lawyer is associated may knowingly undertake or continue representation in such a matter.” As explained throughout this document, the Virginia Rules’ (and the ABA Model Rules’) failure to define the key word “associated” could generate confusion. The term “undertake” obviously refers to a lawyer’s decision whether to undertake the representation. The phrase “or continue” presumably refers to a former

government-employed lawyer's colleagues at the firm where she now works. In other words, those law firm colleagues must discontinue their representation of clients they are then representing if the newly hired former government-employed lawyer would be individually disqualified from representing those firm clients.

But unlike the scenario where a law firm hiring an individually disqualified private - sector lawyer cannot avoid imputation of her disqualification by imposing what can be called a self-help screen, law firms hiring former government-employed lawyers may avoid such imputed disqualification, under two conditions – as explained below.

**ABA Model Rule 1.11(a)** also addresses the government-employed lawyers' individual disqualification after leaving the government employment (imputation of such individual lawyers' disqualification is in a separate rule: ABA Model Rule 1.11(b), discussed below).

ABA Model Rule 1.11(a) first explains that “[e]xcept as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government” is subject to a requirement and a prohibition. Like Virginia Rule 1.11(b), ABA Model Rule 1.11(a) does not explain whether lawyers who formerly “served as a public officer or employee” face disqualification only if they acted in a representational role, rather than in any capacity.

First, under ABA Model Rule 1.11(a)(1), such lawyers are “subject to” [ABA Model] Rule 1.9(c). ABA Model Rule 1.9(c)(1) prohibits lawyers from “us[ing] information relating to the [former] representation to the disadvantage of the former client except as these [ABA Model] Rules would permit or require with respect to a [current] client, or when the information has become generally known.” ABA Model Rule 1.9(c)(2) prohibits such

former lawyers from “reveal[ing] information relating to the [former] representation except as these [ABA Model] Rules would permit or require with respect to a [current] client.”

Second, under ABA Model Rule 1.11(a)(2), such former government-employed lawyers “shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.”

ABA Model Rule 1.11(a) contrasts with Virginia Rule 1.11(b) in several ways.

First, in contrast to Virginia Rule 1.11(b), ABA Model Rule 1.11(a)(1) reminds such lawyers that they are subject to ABA Model Rule 1.9(c), as discussed above. Virginia Rule 1.11 (b) does not contain a similar provision, although presumably all lawyers would recognize their obligation under the former client Virginia Rule 1.9 provisions. For instance, Virginia Rule 1.10 cmt. [1c] reminds lawyers who have “represented the government” and then “joined a private firm” that they are bound by Virginia Rule 1.9 (among other Virginia Rules).

Second, ABA Model Rule 1.11(a)(2) does not use the term “private client,” which appears in Virginia Rule 1.11(b). Instead, the ABA Model Rule uses the simpler term “client,” which avoids Virginia Rule 1.11(b)’s possible definitional confusion.

Third, ABA Model Rule 1.11(a)(2) contains a consent exception (as does Virginia Rule 1.11(b)), but that exception is different in several ways from the Virginia Rule 1.11(b) consent exception. ABA Model Rule 1.11(a)(2) only requires that “the appropriate government agency gives its informed consent.” In other words, in contrast to Virginia Rule 1.11(b), the former government-employed lawyer’s new “client” does not need to

consent to the representation in a matter on which the former government-employed lawyer “participated personally and substantially.” Also in contrast to Virginia Rule 1.11(b), ABA Model Rule 1.11(a) requires the appropriate government agency “to provide informed consent, confirmed in writing.” The absence in Virginia Rule 1.11(b) of a written consent requirement is consistent with the more generic Virginia Rule 1.9(b) former client consent requirement – which likewise has no requirement that the consent be in writing or even “memorialized in writing”.

### **Virginia Rule 1.11(b)(1)**

Virginia Rule 1.11(b)(1) addresses a hiring law firm’s use of an ethics screen to avoid imputed disqualification of an individually disqualified former government-employed lawyer.

Virginia Rule 1.11(b)(1) first explains that a hiring law firm may avoid imputed disqualification of an individually disqualified former government-employed lawyer if “the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.”

Interestingly, (but probably not significantly), Virginia Rule 1.11(b)(1) does not on its face require that the individually disqualified former government-employed lawyer be “timely” screened. Elsewhere, Virginia Rule 1.12(c)(1) requires that a former judge or arbitrator be “timely screened” to avoid imputation of his individual disqualification. Similarly, Virginia Rule 1.18(d)(2)(i) requires that an individually disqualified lawyer who has received “significantly harmful” information from a “prospective client” be “timely

screened” to avoid her individual disqualification’s imputation to her colleagues. Presumably, Virginia Rule 1.11(b)(1)’s screening requirement would similarly require that the individually disqualified former government-employed lawyer be screened in a “timely” fashion.

Virginia Rule 1.11(b)(1) contrasts dramatically from Virginia Rule 1.10(a), which automatically imputes an individually disqualified private-sector lawyer’s disqualification to the entire hiring firm, absent the former client’s consent. In other words, Virginia 1.11(b)(1) allows what could be called self-help screening when a law firm hires a former government-employed lawyer, but does not allow such self-help screening when a private law firm hires a private-sector lawyer.

None of the Virginia Rules nor Comments define “screened.” But presumably the general ABA Model Rule approach would satisfy Virginia Rule 1.11(b)(1). ABA Model Rule 1.10(k) defines such screens, and ABA Model Rule 1.0 cmt. [8] – [10] provide guidance. And the screening includes a financial separation – prohibiting the former government lawyer from receiving any “part of the fee” from their new colleagues’ representation of a private client in a matter that the new hire could not have handled.

**ABA Model Rule 1.11(b)(1)** contains the identical language as Virginia Rule 1.11(b)(1), although it also uses the term “timely” in describing the necessary screen.

### **Virginia Rule 1.11(b)(2)**

Virginia Rule 1.11(b)(2) addresses the second condition (in addition to the screening) that the hiring law firm must meet before beginning or continuing a

representation adverse to the government or otherwise that the new former government-employed lawyer hire could not individually handle because she is disqualified from it.

Virginia Rule 1.11(b)(2) requires that “written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this [Virginia] Rule [1.11(b)].” As explained above, the term “appropriate government agency” is not defined.

**ABA Model Rule 1.11(b)(2)** contains the identical language as Virginia Rule 1.11(b)(2).

### **Virginia Model Rule 1.11(c)**

Virginia Rule 1.11(c) addresses another prohibition imposed on former government-employed lawyers.

Virginia Rule 1.11(c) generally prohibits such former government-employed lawyers from representing a “private” client “in a matter whose interests are adverse” to a “person” if the lawyer possesses “information that the lawyer knows is confidential government information about [the] person acquired when the lawyer was a public officer or employee” – if “the information could be used to the material disadvantage of that person.” In other words, the prohibition comes from the former government-employed lawyer’s possession of information about the person – not about the government.

Virginia Rule 1.11(c) defines such “confidential government information” as “information that has been obtained under governmental authority and that the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public.”

There is an exception for the prohibition based on a former government lawyer's possession of otherwise disqualifying information: “[e]xcept as law may otherwise expressly permit.”

Some of Virginia Rule 1.11(c)'s terms deserve attention because they differ from terms used elsewhere in the Virginia Rules. Presumably all of the terms are deliberately selected, but with all or most of the provisions using slightly different terms there is no guidance explaining whether a different term intends a different meaning. Some of these varying terms involve the intensity of adversity, while others involve the use of information.

First, Virginia Rule 1.11(c) uses the term “adverse.” The word “adverse” differs from: (1) the term “directly adverse” found in Virginia Rule 1.7(a)(1) and ABA Model Rule 1.7(a)(1); and (2) the term “materially adverse” (contained in Virginia Rule 1.10(b) and ABA Model Rule 1.10(b)). This presumably deliberate selection of standards does not make much sense. One would think that the general term “adverse” would encompass a greater range of adversity than what seems to be a narrower term “directly adverse” (applicable in the current-client Rule 1.7 conflicts rule) or the narrower phrase “materially adverse” (contained in Virginia Rule 1.10's provision allowing law firms to take matters adverse to one of its former clients once all of the pertinent lawyers have left the firm). This mismatch seems most acute between the Rule 1.11 use and the Rule 1.7 use. One would think that current clients would deserve greater protection than a person about whom a former government-employed lawyer obtained information while employed by the government.

Second, Virginia Rule 1.11(c) prohibits former government-employed lawyers from representing private clients “whose interests are adverse” to a person about whom those

lawyers acquired information while employed by the government. ABA Model Rule 1.11(c) contains the same term. Interestingly, Virginia Rule 1.11(c) does not refer to former government-employed lawyers' representation of a private client "adverse" to the person about whom the lawyer obtained information while employed by the government. Instead, the prohibition covers the former government-employed lawyer's representation of "a private client whose interests are adverse" to such a person (emphasis added). That is an undefined and potentially broader prohibition than a prohibition on a representation that is "adverse" to a person. A representation might be adverse to a person's "interests" even if that person is not a direct or even indirect litigation party or direct or indirect transactional counterparty. But Virginia Rule 1.11(c) does not provide any guidance about this or some other difference.

Third, Virginia Rule 1.11(c) uses the term "material disadvantage" in characterizing the use of information that former government-employed lawyers might have obtained while employed by the government – that could now be used against a person about whom the lawyer obtained the information. ABA Model Rule 1.11(c) uses the same term. That term differs from the word "disadvantage" contained in Virginia Rule 1.8(b) (and ABA Model Rule 1.8(b)) – which addresses the prohibition on lawyers' "use" of information against a current client. The term "material disadvantage" likewise differs from the term "disadvantage" contained in Virginia Rule 1.9(c)(1) (and ABA Model Rule 1.9(c)(1)) – which addresses lawyers' use of information against former clients. This presumably deliberate selection of different standards makes sense, because one would expect current clients and former clients to be more protected from misuse of their information than a "person" about whom a government-employed lawyer obtained information.

Virginia Rule 1.11(c) concludes with an imputation provision, which allows other lawyers “associated” with the individually prohibited former government lawyer to “undertake or continue” such a representation (despite the individual lawyer’s inability to do so) – as long as the individually disqualified former government-employed lawyer is “screened from any participation in the matter and is apportioned no part of the fee therefrom.” As indicated above, the Virginia Rules and Comments do not define the words “associated” or “screen.”

**ABA Model Rule 1.11(c)** is largely identical to Virginia Rule 1.11(c).

Among other things, ABA Model Rule 1.11(c) presumably covers information lawyers obtained in government employment that was not in a representational role. In addition, as explained above, the terms “adverse,” “adverse interests” and “material disadvantage” involve the same odd mismatches discussed above.

But there are two differences between ABA Model Rule 1.11(c) and Virginia Rule 1.11(c).

First, in contrast to Virginia Rule 1.11(c), ABA Model Rule 1.11(c) prohibits former government-employed lawyers from representing “a private client” in the specified scenario. Virginia Rule 1.11(c) does not contain the word “private.” Interestingly, the word “private” likewise does not appear in ABA Model Rule 1.11(a)(2). As explained above, the word “private” is somewhat ambiguous by itself, but the mismatch between ABA Model Rule 1.11(c) and ABA Model Rule 1.11(a) adds to the potential ambiguity.

Second, in contrast to Virginia Rule 1.11(c), ABA Model Rule 1.11(c)’s imputed disqualification provision requires that the former government lawyer be “timely screened.” Virginia Rule 1.11(c) does not contain the word “timely.”

### **Virginia Model Rule 1.11(d)**

Virginia Rule 1.11(d) contains prohibitions on lawyers who are currently “serving as a public officer or employee.”

Virginia Rule 1.11(d) also contains an overall exception to the later-described prohibitions: “[e]xcept as law may otherwise expressly permit.”

**ABA Model Rule 1.11(d)** contains the identical language.

### **Virginia Model Rule 1.11(d)(1)**

Virginia Rule 1.11(d)(1) addresses the prohibition on government-employed lawyers from participating in matters which the lawyer handled before joining the government.

Virginia Rule 1.11(d)(1) prohibits (“[e]xcept as law may otherwise expressly permit”) a lawyer “serving as a public officer or employee” from participating “in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment.”

Virginia Rule 1.11(d)(1) contains several provisions that differ from those found elsewhere in Virginia Rule 1.11.

First, the phrase “serving as a public officer or employee” mentioned above, and incorporated into Virginia Rule 1.11(d)(1) differs from the phrase “holds public office” contained in Virginia Rule 1.11(a). As discussed above, the phrase “serving as a public officer or employee” presumably is not limited to government-employed lawyers who represent the government. The Virginia Rules and the ABA Model Rules know how to describe lawyers’ representational role in a government context. As explained more fully

above, Virginia Rule 1.13 cmt. [9] repeatedly refers to government organizations as a “client” and explains that government-employed lawyers “represent” the government, etc. Virginia Rule 1.11 cmt. [2] begins with the phrase “[a] lawyer representing a government agency.” The ABA Model Rules have similar examples of explicitly describing government-employed lawyers acting in a representational role. So presumably the absence of such explicit language in Virginia Rule 1.11 intentionally broadens its application to government-employed lawyers acting other than in a representational role. In other words, lawyers who are not representing the government presumably must also comply with Virginia Rule 1.11(d).

Second, Virginia Rule 1.11(d)(1) addresses only “a matter.” Virginia Rule 1.11(f) defines “matter” in this context, as discussed below. This contrasts with Virginia Rule 1.9(a) and other Virginia Rules provisions – which use the broader phrase “same or a substantially related matter.” In other words, Virginia Rule 1.11(d)(1) does not examine whether matters are “substantially related.” The Virginia Rule presumably applies only if the matters are the same.

Third, Virginia Rule 1.11(d)(1)’s provision only applies if the lawyer had previously “participated personally and substantially” in the “matter” while in private practice. That phrase makes sense in the government setting (as in Virginia Rule 1.11(b)) – because the hierarchical structure of government organizations sometimes means a lawyer has authority over a matter but really does not have much involvement in it. Presumably the phrase “personally and substantially” requires more than simple line authority. But that phrase normally is not used in connection with lawyers practicing in the private sector. Instead, in several Virginia Rules lawyers’ individual disqualification comes from

representing or having represented a client or having acquired confidential information (whether representing the client or not) that could be used against the former client. That usual private sector standard triggering lawyers' individual disqualification is much more draconian than the more generous "personally and substantially" standard that applies in the government setting, but which Virginia Rule 1.11(d)(1) and a parallel ABA Model Rule 1.11(d)(1) apply to lawyers leaving the private sector and entering government employment.

Fourth, Virginia Rule 1.11(d)(1) prohibits lawyers employed by the government from participating in a matter in which the lawyer "participated personally and substantially" before joining the government – even if the lawyer's government role is not adverse to the lawyer's former private practice client. Thus, this provision takes the same approach as Virginia Rule 1.11(b)'s general prohibition on lawyers in private practice representing a client in a "matter in which the lawyer participated personally and substantially" while in the government – even if the later private representation is not adverse to the former government employer.

Fifth, it is unclear what the term "nongovernmental employment" means in Virginia Rule 1.11(d)(1). The Virginia Rule phrase "private practice or nongovernmental employment" (which also appears in ABA Model Rule 1.11(d)(2)(i)) presumably distinguishes between the normal private practice of lawyers and other "nongovernmental employment." It presumably includes an in-house lawyer role, etc. It presumably also includes lawyers acting in a non-representational role outside the government. For instance, the phrase presumably covers lawyers working in a purely business non-representational role. To this extent, it seems to mirror the same broad approach the

Virginia Rules (and the ABA Model Rules) take to lawyers acting as public officers or employees – which presumably also covers their participation in non-representational roles while government employees.

Virginia Rule 1.11(d)(1) contains two exceptions under which “a lawyer serving as a public officer or employee” may participate in matters related in a specified way to such a lawyer’s pre-government activity.

First, government-employed lawyers may participate in such a matter if “under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer’s stead in the matter.” This mirrors what is called the “rule of necessity” – under which judges or other government officials or bodies may act if they would otherwise be stymied from doing so by disqualifications – if that disqualification would leave the government unable to act.

Second, such government-employed lawyers may engage in the otherwise prohibited participation if “the private client and the appropriate government agency consent after consultation.” This requirement that both the private client and the government consent matches Virginia Rule 1.11(b)’s consent requirement applicable to former government-employed lawyers who wish to represent private clients in certain matters adverse to (or even not adverse to) their former government employer. In essence, it would allow a private client formerly represented by a lawyer who is now employed by the government to veto that lawyer from later participating as a public officer or employee in the matter – even if the matter is not adverse to the former private client. That might arguably hamper the government’s ability to obtain a lawyer’s legal or other

assistance in that matter, which perhaps explains the presence of the first Virginia Rule 1.11(d)(1) exception (which is similar to the “rule of necessity”).

**ABA Model Rule 1.11(d)(2)(i)** also addresses the prohibition on lawyers’ participation in certain matters while “currently serving as a public officer or employee.”

ABA Model Rule 1.11(d)(2)(i) prohibits lawyers from “participat[ing] in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment.”

ABA Model Rule 1.11(d)(2)(i) is similar to Virginia Rule 1.11(d)(1). Among other things, ABA Model Rule 1.11(d)(2)(i)’s term “nongovernmental employment” is not defined.

But there are several differences.

First, in contrast to Virginia Rule 1.11(d)(1)’s exception if “under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer’s stead in the matter,” ABA Model Rule 1.11(d)(2)(i) does not contain such an exception – which is based on what is commonly called the “rule of necessity.”

Second, as in the reciprocal ABA Model Rule 1.11(a) rule governing former government-employed lawyers, ABA Model Rule 1.11(d)(2)(i) requires only that “the appropriate government agency” gives informed consent. Virginia Rule 1.11(d)(1)’s consent exception requires both the “private client and the appropriate government agency consent after consultation.” That is a significant difference. As explained above, ABA Model Rule 1.11(d)(2)(i) on its face requires only the government’s consent for a government-employed lawyer to participate in a matter “in which the lawyer participated personally and substantially while in private practice or non-governmental employment.”

Of course, government-employed lawyers presumably must comply with ABA Model Rule 1.9(c)'s prohibition on their use or disclosure of former clients' information. And if those government-employed lawyers are acting in a representational role while government employees, presumably they would also be prohibited by ABA Model Rule 1.9(a) from representing the government in a matter adverse to a former client (private or otherwise) under ABA Rule 1.9(a)'s specific terms.

Third, consistent with other ABA Model Rules provisions, ABA Model Rule 1.11(d)(2)(i) requires that the government agency's informed consent be "confirmed in writing." Virginia Rule 1.11(d)(1) does not require written consent, or even consent memorialized in writing.

### **ABA Model Rule 1.11(d)(1)**

Virginia Rule did not adopt ABA Model Rule 1.11(d)(1).

ABA Model Rule 1.11(d)(1) addresses another requirement imposed upon lawyers "currently serving as a public officer or employee."

ABA Model Rule 1.11(d)(1) explains that such lawyers are "subject to [ABA Model] Rules 1.7 and 1.9." ABA Model Rule 1.7 addresses lawyers' adversity to current clients, including ABA Model Rule 1.7(a)(2)'s so-called "material limitation" conflict. ABA Model Rule 1.9 addresses lawyers' representations adverse to their former clients. It also addresses law firms' ability to represent clients adverse to former clients as long as all of the lawyers who had represented those clients have left the firm. Finally, ABA Model Rule 1.9 addresses lawyers' use or disclosure of former clients' information.

### **Virginia Rule 1.11(d)(2)**

Virginia Rule 1.11(d)(2) addresses another prohibition applicable to a “lawyer serving as a public officer or employee.”

Virginia Rule 1.11(d)(2) prohibits (“[e]xcept as law may otherwise expressly permit”) such lawyers from “negotiat[ing] for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially.” The Virginia Rule thus prohibits such lawyers from negotiating for a job after they leave the government in certain situations. Presumably this prohibition intends to: (1) prevent government-employed lawyers from parlaying their government role into more lucrative private employment based on the hiring law firm’s worry that disappointing such a government-employed lawyer’s search for employment might result in adverse consequences by such government-employed lawyer’s vindictive action; or (2) (more cynically) hoping to assure favorable consequences or government action by offering lucrative post-government private employment.

Significantly, the introductory clause of Virginia Rule 1.11(d) applies to lawyers “serving as a public officer or employee” – which presumably extends beyond lawyers serving in a representative role (as discussed above).

Virginia Rule 1.11(d)(2) contains the word “matter” – which (as discussed below) is defined in Virginia Rule 1.11(f). The Virginia Rule also contains the phrase “personally and substantially,” which is discussed above.

Notably, Virginia Rule 1.11(d)(2)’s prohibition on its face only applies when “a lawyer is participating personally and substantially” (emphasis added). To be sure, the rationale for the prohibition applies most acutely when such a lawyer “is” heavily involved

in a government action affecting the possible future private employer. But the rationale would also seem to apply both before and after such a government-employed lawyer “is” involved to that extent. A government-employed lawyer about to become personally and substantially involved in such a matter presumably would face all of the same temptations as a government-employed lawyer who “is” involved to implicitly threaten some bad outcome for a private employer who spurns such a government-employed lawyer’s job application. And a government-employed lawyer who was previously (but is not now) “personally and substantially” involved in a matter presumably will still have colleagues in the government who might adversely or favorably play a role in that matter. So a private employer presumably would realize that those colleagues could make life more difficult for the private employer if it turns down a government-employed lawyer’s application. And such potential private employers might not know whether the government-employed lawyer “is” participating in such a matter – and thus might face the fear of the government-employed lawyer’s vindictive behavior discussed above. Finally, a government-employed lawyer who was participating in the matter but has taken a hiatus might participate again if she does not land lucrative private employment.

To be sure, Virginia Rule 1.11(b)’s more liberal imputation-avoidance process (compared to the private sector lawyers) is understandably based on (as Virginia Rule 1.11 cmt. [4] puts it) the “legitimate need to attract qualified lawyers as well as to maintain high ethical standards” – thus making it easier for government-employed lawyers to find private employment so that well-qualified lawyers will not be deterred from going into the government. But Virginia Rule 1.11(d)(2) seems to swing the pendulum too far in the other direction.

The employment negotiation prohibition applies to those lawyers from seeking employment with: (1) “any person who is involved as a party” in the government matter in which the lawyer is “participating personally and substantially” – including presumably companies or other entities who are involved as parties; and (2) “any person who is involved . . . as attorney for a party” in such a matter.

It is unclear whether the term “negotiate” includes only a back-and-forth communications about a possible future job, or whether that term also excludes the lawyer from simply accepting the first job offer from such a person or lawyer who is interested in hiring her. It seems too good to be true for the prohibition to apply just to the former situation, but not to the latter situation. So presumably the term “negotiate” covers any communication about possible future employment, not just a back-and-forth negotiation over salary, etc.

Virginia Rule 1.11(d)(2) contains an exception. A lawyer “serving as a law clerk to a judge, other adjudicative officer, mediator or arbitrator may negotiate for private employment.” Virginia Rule 1.11(d)(2) states that such permissible job negotiations can occur only “as permitted by [Virginia] Rule 1.12(b), and subject to the conditions stated in [Virginia] Rule 1.12(b).” But there is a mismatch between Virginia Rule 1.11(d)(2) and the specified Virginia Rule 1.12(b). The former indicates that lawyers serving as law clerks to mediators may negotiate for private employment, but the latter does not include mediators’ law clerks. This document discusses this issue in its summary and analysis of Virginia 1.12(b).

**ABA Model Rule 1.11(d)(2)(ii)** is similar to Virginia Rule 1.11(d)(2). Among other things, ABA Model Rule 1.11(d)(2)(ii) also raises the troubling issue indicated by the

negotiation prohibition's limitation to a lawyer "is" (not one who "has" or "might in the future") participate in the specified matter. But there are several differences between ABA Model Rule 1.11(a)(2)(ii) and Virginia Rule 1.11(d)(2).

First, ABA Model Rule 1.11(d)(2)(a) uses the word "lawyer" rather than attorney. That word always seems better than the pretentious word "attorney."

Second, ABA Model Rule 1.11(d)(2)(ii)'s exception (referring to ABA Model Rule 1.12(b)) includes mediators' clerks. Thus, the ABA Model Rule does not contain the Virginia Rule 1.11(d)(2)(ii) mismatch between mediators' clerks mentioned in that Rule – but not mentioned in Virginia Rule 1.12(b).

But ironically, ABA Model Rule 1.11(d)(2)(ii) has its own mismatch. ABA Model Rule 1.11(d)(2)(ii) assures that "a lawyer serving as a law clerk to "[an] arbitrator may negotiate for private employment as permitted by [ABA Model] Rule 1.12(b) and subject to the conditions stated in [ABA Model] Rule 1.12(b)." But ABA Model Rule 1.12(b) does not mention arbitrators' clerks. And the absence is obviously deliberate. ABA Model Rule 1.12(b) specifically mentions lawyers serving "as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral." But the next sentence specifically includes a shorter list of clerks who may negotiate for employment under certain conditions: "[a] lawyer serving as a law clerk to a judge or other adjudicative officer."

### **Virginia Rule 1.11(e)**

Virginia Rule 1.11(e) addresses imputed disqualification of an individual lawyer's Virginia Rule 1.11(d) prohibitions.

Virginia Rule 1.11(e) bluntly states that Virginia Rule 1.11(d)'s individual disqualification does not disqualify other lawyers "in the disqualified lawyer's agency." It seems only marginally accurate to say that the prohibitions lead to the lawyers' "disqualification." It would be somewhat more clear for the provision to contain language such as: "does not apply to other lawyers in the pertinent lawyer's agency," or words to that effect. That is probably a linguistic issue, because the meaning seems clear.

Virginia Rule 1.11(e) allows other lawyers in the agency to continue their work – presumably without even being screened from the colleague who is prohibited by Virginia Rule 1.11(d)(1) based on that colleague's former private sector personal and substantial representation. One might have expected that Virginia Rule 1.11(e) would include a screening requirement – given the possibility of such former private-client confidential information's deliberate or accidental misuse.

Virginia Rule 1.11(e)'s non-imputation approach makes more sense when applied to Virginia Rule 1.11(d)(2). A colleague's prohibition on negotiating for private employment should not deter a government-employed lawyer from handling her job.

Virginia Rule 1.11(e)'s use of the term "disqualified lawyer's agency" is a little off the mark and potentially ambiguous. As discussed above, Virginia Rule 1.13 cmt. [9] uses undefined terms like "government as a whole," "specific agency," "department," "bureau." So it is unclear what the term "agency" means in this (or any other) context.

**ABA Model Rule 1.11** does not contain a similar provision.

Interestingly, ABA Model Rule 1.11's failure to limit imputation of a government-employed lawyer's individual disqualification to her associated colleagues could theoretically trigger some inappropriate result. ABA Model Rule 1.0(c) defines "firm" as

including lawyers in “the legal department of a corporation or other organization.” ABA Model Rule 1.0 cmt. [3] explains that “[w]ith respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the [ABA Model] Rules of Professional Conduct” (emphasis added).

And under ABA Model Rule 1.10(a), “[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by [ABA Model] Rule 1.7 or 1.9. ABA Model Rule 1.11(d) applies both ABA Model Rule 1.7 and 1.9 to “a lawyer currently serving as a public officer or employee” – “[e]xcept as law may otherwise expressly permit.” This combination of apparently applicable ABA Model Rules would seem to impute to all associated colleagues in some governmental entity an individual government-employed lawyer’s disqualification.

Given the uncertainty of the ABA Model Rules’ definition of pertinent governmental entities in the specifically addressed situations makes this imputation possibility even more confusing and perhaps troublesome.

### **Virginia Rule 1.11(f)**

Virginia Rule 1.11(f) defines the term “matter” as used in Virginia Rule 1.11.

The list begins with the word “includes,” so presumably the list is non-exclusive. Virginia Rule 1.11(f)(1)’s list includes “matter” fairly specific government-related matters: “any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest.” Virginia Rule

1.11(f)(1) then contains a generic reference to “other particular matter involving a specific party or parties.”

Virginia Rule 1.11(f)(2) expands the definition of “matter” even further, by incorporating government policies: “any other matter covered by the conflict of interest rules of the appropriate government agency.” So Virginia Rule 1.11(f) essentially incorporates the pertinent government agency’s internal conflicts of interest rules into the ethics rules. But unfortunately, it also incorporates the confusion about the meaning of the term “agency.” As explained above, the term “agency” is not defined in the Virginia Rules. And Virginia Rules other than Virginia Rule 1.11 might create some ambiguity by using other rules. For instance, Virginia Rule 1.13 cmt. [9] appears under the title “Government Agency.” The Virginia Rule Comment uses the following terms: “specific agency”; “the government as a whole” (which is described as “generally” the client when a lawyer represents the government); “bureau;” “department of which the bureau is a part.”

**ABA Model Rule 1.11(e)** contains the identical language. Among other things, ABA Model Rule 1.11(e)’s term “government agency” implicates the same confusing list of undefined government entities that appear in ABA Model Rule 1.13 cmt. [9], among other places.

## Comment

### Virginia Rule 1.11 Comment [1]

Virginia Rule 1.11 cmt. [1] addresses the rationale for Virginia Rule 1.11's prohibitions.

Virginia Rule 1.11 cmt. [1] explains that Virginia Rule 1.11(a) “prevents a lawyer from exploiting public office for the advantage of the lawyer or a private client.” Presumably the term “public office” refers to Virginia Rule 1.11(a)'s application to “[a] lawyer who holds public office,” although it is unclear if it might also refer to a lawyer acting as “a public officer” (the term used in Virginia Rule 1.11(b), (c), and (d)).

Virginia Rule 1.11 cmt. [1]'s second sentence contains a completely different principle – focusing on possible conflicts between such lawyers' public and private activities. Virginia Rule 1.11 cmt. [1] warns that lawyers serving as a “public officer” “should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with official duties or obligations to the public.” It probably would have been more appropriate to use the word “must” rather than “should.”

Interestingly, the sentence refers to “[a] lawyer who is a public officer.” As explained above, the term “public officer” seems different from the phrase “holds public office” contained in Virginia Rule 1.11(a). Of course, that is a subset of the term “public officer or employee” that appears in Virginia Rule 1.11(b), (c), and (d).

**ABA Model Rule 1.11** does not contain a similar black letter rule or a similar Comment.

## **Virginia Rule 1.11 Comment [2]**

Virginia Rule 1.11 cmt. [2] addresses lawyers “representing a government agency.”

Thus, Virginia Rule 1.11 cmt. [2] clearly applies only to government-employed lawyers’ representational role, and only to lawyers currently playing that role. As explained above, it is not explicitly clear throughout Virginia Rule 1.11 (and parallel ABA Model Rule 1.11) whether a lawyer acting “as a public officer or employee” includes government-employed lawyers acting in non-representational roles for the government. It would seem safe to presume that a lawyer acting “as a public officer or employee” includes lawyers acting in a non-representational role – in other words, lawyers not representing the government, but rather working as government employees in some other non-representational role.

Unfortunately, Virginia Rule 1.11 cmt. [2] does not clear up Virginia Rule 1.11’s undefined and potentially confusing use of the term “government agency.” As discussed above, the term “agency” does not have an obvious and generally used definition. As explained below, Virginia Rule 1.11 cmt. [5] on its face seems to describe “a city” as government “agency” – which seems inappropriate.

Virginia Rule 1.11 cmt. [2] first contains the unsurprising general statement that lawyers “representing a government agency whether employed or specially retained by the government” are subject to all of the Virginia Rules.

Virginia Rule 1.11 cmt. [1] contains another confusing phrase: “specially retained by the government.” Presumably this includes private lawyers who represent the government. But the title of Virginia Rule 1.11 itself seems to exclude such private lawyers from the Rule’s provisions. That title explicitly refers to “Former And Current

Government Officers And Employees.” So perhaps the term “specially retained” refers to some sort of temporary arrangement in which a lawyer leaves the private sector and represents the government as a government employee.

Virginia Rule 1.11 cmt. [2] specifically mentions Virginia Rule 1.7 and Rule 1.9 as applicable. Although it is not significant (because the reference to those Rules is preceded by the word “including”), Virginia Rule 1.11 cmt. [2]’s description of Virginia Rule 1.7 only mentions “the prohibition against representing adverse interests.” It does not mention Virginia Rule 1.7(a)(2)’s so-called “material limitation conflict”.

Virginia Rule 1.11 cmt. [2] then makes the obvious statement that such lawyers are also subject to Virginia Rule 1.11, as well as “statutes and government regulations regarding conflict of interest.”

Virginia Rule 1.11 cmt. [2] concludes with a reminder that such government statutes and regulations “may circumscribe the extent to which the government agency may give consent under this Rule.” That phrase presumably refers to statutory, regulatory or even common law limits on governments consenting to lawyers’ adversity to them. For instance, some ethics opinions or case law prohibit municipalities’ lawyers from providing such consents. This presumably parallels law that precludes application of estoppel principles against the government.

**ABA Model Rule 1.11 cmt. [1]** is similar to Virginia Rule 1.11 cmt. [2]), but there are several differences.

First, ABA Model Rule 1.11 cmt. [1] applies to a lawyer “who has served or is currently serving as a public officer or employee.” This is broader than Virginia Rule 1.11 cmt. [2], which covers lawyers currently “representing a government agency, whether

employed or specially retained by the government.” Thus, the ABA Model Rule presumably applies to lawyers serving in a non-representational role. This issue is discussed above.

Second, ABA Model Rule 1.11 cmt. [1] refers to a lawyer “who has served or is currently serving as a public officer or employee (emphasis added)” (raising the issue discussed above and below – whether the rule applies to lawyers who are serving or have served in a non-representational government role). This contrasts with Virginia Rule 1.11 cmt. [2], which only covers lawyers “representing a government agency” – using the present tense and not also using the past tense.

Third, ABA Model Rule 1.11 cmt. [1] applies all of the ABA Model Rules to such lawyers, but specifically mentions only “the prohibition against concurrent conflicts of interest stated in [ABA Model] Rule 1.7.” This contrasts with Virginia Rule 1.11 cmt. [2], which also subjects lawyers representing government agencies to all of the Rules – but specifically mentions Virginia Rule 1.7, “the protections afforded former clients in [Virginia] Rule 1.9,” and the self-evident fact that such lawyers are “subject to [Virginia] Rule 1.11.”

### **ABA Model Rule 1.11 Comment [2]**

Virginia did not adopt ABA Model Rule cmt. [2].

ABA Model Rule 1.11 cmt. [2] addresses “the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client” (referring to three ABA Model Rule 1.11 provisions).

The reference to lawyers serving or having served “a former government . . . client” presumably refers to lawyers acting in a representational role. This again raises the confusing question of whether a lawyer acting as “an officer or employee of the government” includes a government-employed lawyer acting in a non-representational role.

ABA Model Rule 1.11 cmt. [2] next explains that ABA Model Rule 1.10 (which generally covers individual lawyers’ disqualifications’ imputation to their associated law firm colleagues) “is not applicable to the conflicts of interest addressed by this Rule.” In other words, ABA Model Rule 1.11 cmt. [2] understandably notes that ABA Model Rule 1.11 governs lawyers in the specific context of government employment and post-employment (rather than the more generic ABA Model Rule 1.10 standard).

ABA Model Rule 1.11 cmt. [2] then notes that lawyers leaving government employment can rely on ABA Model Rule 1.11(b) to avoid such imputation of their individual disqualification to their new private sector associated law firm colleague through “screening and notice.”

ABA Model Rule 1.11 cmt. [2] concludes by noting that ABA Model Rule 1.11(d) “does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees” – “[b]ecause of the special problems raised by imputation within a government agency.” The ABA Model Rule Comment does not identify or explain those “special problems.”

ABA Model Rule 1.11 cmt. [2] explains that because of such unidentified and unexplained “special problems,” there is no imputation – “although ordinarily it will be prudent to screen such lawyers.” Perhaps the absence of imputation to other government

officers or employees who are acting as lawyers is based on what is often called the “rule of necessity” – preventing the government from being stymied from taking some action because everyone who has authority to take the action is prohibited by some rule from doing so. Virginia Rule 1.11(d)(1) specifically refers to that principle (although not using that name). Or perhaps ABA Model Rule 1.11 cmt. [2] focuses on the possible deprivation of such government lawyers’ services. One might have thought that government agencies should be held to the same screening process as private law firms – at least as to lawyers acting in a representational role. But ABA Model Rule 1.11 cmt. [2] only mentions that “ordinarily” such individually disqualified government lawyers should be screened from their associated colleagues.

### **Virginia Rule 1.11 Comment [3]**

Virginia Rule 1.11 cmt. [3] addresses the broad scope of Virginia Rule 1.11’s provisions, which differ from standard conflicts prohibitions applicable to non-government lawyers.

Virginia Rule 1.11 cmt. [3] first explains that Virginia Rule 1.11(b)’s former client conflict provisions (applicable to former government lawyers/employees now representing private clients) and Virginia Rule 1.11(d)’s provisions (applicable to lawyer public officer/employees formerly engaged in private practice) “apply regardless of whether a lawyer is adverse to a former client.” That is an important distinction that differentiates these conflicts provisions from the Virginia Rule 1.9 standard former client conflict rule. Virginia Rule 1.9 (and the parallel ABA Model Rule 1.9) recognize a conflict only if lawyers are undertaking representations materially adverse to former clients (or

seeking employment in law firms that represent the government or clients who are not adverse to the government). In contrast, Virginia Rule 1.11(b) (and the parallel ABA Model Rule 1.11) require the former government lawyer officers/employees to take the required steps even if their later private sector representations are not adverse to the government for which they formerly worked.

Virginia Rule 1.11 cmt. [3] next explains that this broader reach is designed “also to prevent a lawyer from exploiting public office for the advantage of another client.” The term “another client” would seem to strengthen the notion that Virginia Rule 1.11 applies to government-employed lawyers acting in a representational role. Virginia Rule 1.11 cmt. [3] provides several examples: (1) lawyers who have “pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client” after leaving the government service (unless “authorized to do so by the government agency”); (2) lawyers who have “pursued a claim on behalf of a private client may not pursue the claim on behalf of the government,” except as authorized by Virginia Rule 1.11(d).

Virginia Rule 1.11 cmt. [3] concludes by repeating Virginia Rule 1.11 cmt. [2]’s statement that Virginia Rule 1.10 (the general imputation rule) does not apply “to the conflicts of interest addressed by these paragraphs.”

**ABA Model Rule 1.11 cmt. [3]** contains essentially the same language.

#### **Virginia Rule 1.11 Comment [4]**

Virginia Rule 1.11 cmt. [4] addresses government-employed lawyer officers and employees’ move to the private sector.

Virginia Rule 1.11 cmt. [4] begins with a warning that “the risk exists that power or discretion vested in public authority might be used for the special benefit of a private client” where “successive clients are a public agency and a private client.” The Virginia Rule Comment’s reference to public and private “successive clients” certainly covers government lawyers acting in a representational role – but not those acting in a non-representational role. This highlights the ambiguity (discussed repeatedly above) about Virginia Rule 1.11’s possible application to government-employed lawyers acting in a non-representational role. Virginia Rule 1.11 cmt. [4]’s phrasing seems to include lawyers acting in such a non-representational role.

Virginia Rule 1.11 cmt. [4] next explains that lawyers “should not be in a position where benefit to a private client might affect performance of the lawyer’s professional functions on behalf of public authority.” The odd term “public authority” is not defined. But Virginia’s choice of that term is deliberate – ABA Model Rule 1.11 cmt. [4] uses the more common and common sense word “government.” Presumably the explicitly different term derives something distinct from the “government.” But it is unclear what that is.

The last half of that sentence produces more ambiguity – because lawyers’ “professional functions on behalf of public authority” could either be in a representational or a non-representational role. Virginia Rule 1.11 cmt. [4] also warns that private clients may gain an “unfair advantage” because of “access to confidential government information about the client’s adversary obtainable only through the lawyer’s government service.” Virginia Rule 1.11(c) covers such information-based implications. But the Virginia Rule Comment then explains that “the rules governing lawyers presently or

formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government,” which might hamper the government’s attraction of “qualified lawyers” to government service.

This explanation is similar to the justification for the different principles governing former government and private sector lawyers contained in Virginia Rule 1.10 cmt. [1d]. Virginia Rule 1.10 cmt. [1d] (which would seem to belong in Virginia Rule 1.11 instead of Virginia Rule 1.10) explains that “the government’s recruitment of lawyers would be seriously impaired if [Virginia] Rule 1.10 were applied to the government.” In essence, Virginia Rule 1.11 makes it easier for the government to hire and keep good lawyers by making it easier for them to land private jobs after leaving the government.

Virginia Rule 1.11 cmt. [4] concludes with an explanation that “private client[s] should be informed of the lawyer’s prior relationship with a public agency at the time of engagement of the lawyer’s services.” This apparently is a generic rule that applies even if Virginia Rule 1.11 would not otherwise apply. Unlike ABA Model Rule 1.11(b), Virginia Rule 1.11(b) requires a later private client’s consent to lawyers’ representation of the private client “in connection with a matter” in which the lawyer had been “personally and substantially” involved as a “public officer or employee.” Thus, in those situations requiring consent, the lawyer understandably must inform the private client of the lawyer’s “prior relationship with a public agency.” This unfortunate use of the word “should” provides another example of the misuse of that non-mandatory word in situations where the word “must” would have been appropriate.

**ABA Model Rule 1.11 cmt. [4]** is similar to Virginia Rule 1.11 cmt. [4]. But there are several differences.

First, in contrast to Virginia Rule 1.11 cmt. [4]’s warning that lawyers should “not be in a position” where private clients’ benefits “might affect performance of the lawyer’s professional functions on behalf of public authority,” ABA Model Rule 1.11 cmt. [4] uses the commonly and more obvious term “government” rather than “public authority.”

Second, in contrast to Virginia Rule 1.11 cmt. [4], ABA Model Rule 1.11 cmt. [4] points to the public policy rationale for “[t]he limitation of disqualification in [ABA Model Rule 1.11] paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked.” Thus, ABA Model Rule 1.11 cmt. [4] explains the rationale for further limiting the circumstances in which a government-employed lawyer will face restrictions on her post-government employment.

Third, in contrast to Virginia Rule 1.11 cmt. [4], ABA Model Rule 1.11 cmt. [4] does not contain the final sentence indicating that lawyers “should” inform private clients of the lawyers’ “prior relationship with a public agency.” This difference reflects the ABA Model Rule’s requirement that a former government-employed lawyer must only obtain the government’s consent to take on a private client adverse to (or even not adverse to) the government. This contrasts with Virginia Rule 1.11(b)’s requirement that such lawyers obtain both the later private client’s and the former government employer’s consent.

### **Virginia Rule 1.11 Comment [5]**

Virginia Rule 1.11 cmt. [5] addresses lawyers moving from one government job to another government job.

Virginia Rule 1.11 cmt. [5] first describes a scenario “[w]hen the client is an agency of one government.” That obviously refers to lawyers acting in a representational role. Of course, as explained elsewhere, the term “agency” is not defined. In such a scenario, “that agency [meaning the agency represented as a client by a government-employed lawyer] should be treated as a private client for purposes of this Rule” – “if the lawyer thereafter represents an agency of another government.” In other words, a government-employed lawyer who represents another government agency must treat “as a private client for purposes of” Virginia Rule 1.11 another government agency that the government-employed lawyer had previously represented. Virginia Rule 1.11 cmt. [5] provides an example: “as when a lawyer represents a city and subsequently is employed by a federal agency.”

This is a remarkable suggestion. Virginia Rule 1.11 cmt. [5]’s statement that “a “government agency” should be treated as a private client for purposes of” Virginia Rule 1.11 on its face incorporates several Virginia Rule 1.11 provisions that seem inapplicable. As explained below, ABA Model Rule 1.11 cmt. [5] avoids this complicating issue by stating only that “it may be appropriate to treat that second agency as another client” (emphases added), in contrast to Virginia Rule 1.11 cmt. [5]’s statement that first agency (not the second agency) “should be treated as a private client” if the government-employed lawyer later represents another government agency.

The term “private client” seems more appropriately applied to non-government clients (or at the least, government institutions represented by private practice lawyers).

For instance, Virginia Rule 1.11(b) prohibits lawyers from representing “a private client” (absent that private client’s and the former government-employed agency’s

consent) in a matter in which the lawyer “participated personally and substantially as a public officer or employee” – whether or not the new matter is adverse to the former government agency. Treating the former government client as a “private client” presumably means that such a lawyer could not undertake a representation of another agency without meeting that standard and obtaining those consents. Similarly, under Virginia Rule 1.11(c), a former government lawyer “may not represent a private client” adverse to a person about whom the lawyer learned information while serving as a government officer or employee that “could be used to the material disadvantage of that person.” If such a lawyer’s former government agency client is treated as a “private client” under Virginia Rule 1.1(c), there could be limits on what the government lawyer could do.

The Virginia Rule 1.11(d)(1) reference to “the private client” presumably would not create the same ambiguity – because that Virginia Rule covers lawyers’ “private practice or nongovernmental employment” in which they represented “the private client.”

As explained above, ABA Model Rule 1.11 cmt. [5] does not have the same level of ambiguity – because in contrast to Virginia Rule 1.11 cmt. [5]’s statement that such lawyers “should” treat the government agency “as a private client,” ABA Model Rule 1.11 cmt. [5] states that “it may be appropriate to treat that government agency as another client” – not as a “private client” (emphasis added).

Virginia Rule 1.11 cmt. [5]’s contrast between “a lawyer [who] represents a city and subsequently is employed by a federal agency” again raises the ambiguity about Virginia Rule 1.11’s application to lawyers acting in a non-representational role. The city role seems to clearly be representational, but the federal agency role is deliberately different – Virginia Rule 1.11 cmt. [5] could have used the phrase “subsequently represents a

federal agency,” but deliberately used the very different phrase “subsequently is employed by a federal agency.” That would seem to purposely apply to a non-representational role. The parallel ABA Model Rule 1.11 cmt. [5], discussed below, does not have that ambiguity – because it uses the words “employed by” when referring both to the city and to the later federal agency work.

**ABA Model Rule 1.11 cmt. [5]** contains similar language. But there are several significant differences.

First, ABA Model Rule 1.11 cmt. [5] explains that “it may be appropriate” for a lawyer to treat the government entity to which she moves “as another client for purposes of this [ABA Model] Rule.” This contrasts with Virginia Rule 1.11 cmt. [5]’s statement that lawyers “should” treat that new government employer “as a private client for purposes of this [Virginia] Rule.” As explained above, treating a government agency “as a private client” creates an enormous number of complications, unlike the more benign ABA Model Rule 1.11 cmt. [5] phrase “another client.”

Second, ABA Model Rule 1.11 cmt. [5] explicitly indicates that “it may be appropriate” for lawyers moving to another government entity to “treat that second agency as another client for purposes of this Rule” (emphasis added). This contrasts with Virginia Rule 1.11 cmt. [5], which indicates that lawyers “should . . . treat[ ] as a private client for purposes of this Rule” the lawyer’s previous government agency client – not the lawyer’s new government agency to which the lawyer moves. In other words, ABA Model Rule 1.11 cmt. [5] focuses on a government-employed lawyer’s second client – in contrast to Virginia Rule 1.11 cmt. [5]’s focus on the government-employed lawyer’s first client. This obviously is an important difference.

Third, in contrast to Virginia Rule 1.11 cmt. [5], the ABA Model Rule 1.11 cmt. [5] explicitly notes that under ABA Model Rule 1.11(d), the second client agency client “is not required to screen the lawyer as paragraph (b) requires a law firm to do.” That phrase contrasts the government lawyer’s situation from that when a government lawyer joins a private law firm – which can avoid an individually disqualified government lawyer’s disqualification from being imputed to the whole law firm that hired the lawyer. ABA Model Rule 1.11 cmt. [5]’s explanation that government agencies do not need to screen lawyers who have worked for other government agencies is consistent with black letter Virginia Rule 1.11(e)’s general statement that government agencies do not have to screen individually disqualified lawyers.

Fourth, in contrast to Virginia Rule 1.11 cmt. [5], ABA Model Rule 1.11 cmt. [5] concludes with an acknowledgement that “[t]he question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules” (referring to ABA Model Rule 1.13 cmt. [9], discussed below). Presumably case law supplies guidance on that issue. Virginia Rule 1.11 cmt. [5] does not contain a similar statement.

### **Virginia Rule 1.11 Comment 6**

Virginia Rule 1.11 cmt. [6] addresses lawyers’ ability to be paid after moving from government employment to private employment under Virginia Rule 1.11(b)(1) and (c).

Virginia Rule 1.11 cmt. [6] explains that former government officers and employees individually disqualified under Virginia Rule 1.11(b)(1) and (c) and thus screened from certain matters after moving to private practice may nevertheless receive “a salary or

partnership share established by prior independent agreement.” But such lawyer may not receive compensation “directly relating . . . to the fee in the matter in which the lawyer is disqualified.”

**ABA Model Rule 1.11 cmt. [6]** contains a similar provision, as well as a reference to ABA Model Rule 1.0(k)’s screening procedure requirements. The Virginia Rules do not contain such a screening definition or procedure provision.

### **Virginia Rule 1.11 Comment 7**

Virginia Rule 1.11 cmt. [7] addresses the timing of former government officers’ or employees’ (or a hiring law firm’s) requirement to “promptly” give written notice under Virginia Rule 1.11(b)(2) to the appropriate government agency so it can ascertain compliance with Virginia Rule 1.11(b)’s screening provisions.

Virginia Rule 1.11 cmt. [7] first explains that Virginia Rule 1.11(b)(2) “does not require that a lawyer give notice to the government agency at a time when premature disclosure would injure the client,” – noting that “a requirement for premature disclosure might preclude engagement of the lawyer.”

Presumably the term “engagement of the lawyer” does not mean the private law firm’s or other organization’s retention of the former government-employed lawyer. So it must mean “engagement” of one of that individually disqualified former government-employed lawyer’s colleagues at whatever law firm or other legal organization hires her. Virginia Rule 1.11 cmt. [7] thus confusingly uses the term “a lawyer” to describe a former government-employed lawyer’s newly associated colleague, but the sentence uses the

term “the lawyer” to describe former government-employed lawyer. In other words, those two similarly-sounding terms seems to describe two different lawyers.

It is unclear what the term “premature disclosure” means. The disclosure obligation arises when such an associated law firm colleague either undertakes a representation or “continues” a representation that the former government-employed lawyer could not personally undertake. It should seem obvious that such colleagues, law firms or other legal organization would not normally be required to provide written notice before they undertake a representation. Virginia Rule 1.11(d) does not require the government’s consent to such a representation. So there would be no reason for disclosure before a colleague undertakes a new representation. The same would be true of a hiring law firm or other legal organization which seeks to “continue” a representation despite hiring an individually disqualified former government-employed lawyer. There would not be a reason for such a hiring law firm or other organization to provide the required notice before the hiring. Because it might be called a self-help screen, the government cannot stop the colleague from undertaking or continuing the representation.

The concept of allowing a hiring law firm or other organization to delay the required notice because the notice “would injury the client” might create the opportunity for mischief. The hiring law firm or other legal organization theoretically could delay such a notice by claiming that its new or continuing client would suffer injury from the disclosure.

Virginia Rule 1.11 cmt. [7] concludes with a requirement that such notices must be “given as soon as practicable.” The purpose of such notices is to give “the government agency . . . a reasonable opportunity to ascertain that the lawyer is complying with

[Virginia] Rule 1.11 and to take appropriate action if it believes the lawyer is not complying.”

**ABA Model Rule 1.11 cmt. [7]** contains a similar provision.

ABA Model Rule 1.11 cmt. [7] also explains that such notices “should be given as soon as practicable after the need for screening becomes apparent.” This seems to represent another example of ABA Model Rules’ inappropriate use of the term “should” instead of the more appropriate term “must.” Black letter ABA Model Rule 1.11(b)(2) requires such written notice. So it seems inappropriate for ABA Model Rule 1.11 cmt. [7] to use the word “should” – even if referring only to the temporal aspect of the required notice.

ABA Model Rule 1.11 cmt. [7] differs from Virginia Rule 1.11 cmt. [7] in two ways.

First, in contrast to Virginia Rule 1.11 cmt. [7], ABA Model Rule 1.11 cmt. [7] does not contain the exception when a “premature notice” would “injure the client.” Second, in contrast to Virginia Rule 1.11 cmt. [7], ABA Model Rule 1.11 cmt. [7] does not explain that the purpose of the notice is to allow the government to check on the lawyer’s compliance with Virginia Rule 1.11(b)(2) and to take “appropriate action” if the government suspects the lawyer or the hiring firm are not complying.

### **Virginia Rule 1.11 Comment [8]**

Virginia Rule 1.11 cmt. [8] addresses Virginia Rule 1.11(c)’s prohibition on a former government officer or employee representing a client adverse to a person about whom the lawyer learned confidential government information while working in the government that could be used to the “material disadvantage” of that person.

Virginia Rule 1.11 cmt. [8] explains that the prohibition applies if the lawyer has “actual knowledge” of such confidential government information, and therefore does not apply “with respect to information that merely could be imputed to the lawyer.” That would seem obvious. Lawyers can only use information that they actually know.

**ABA Model Rule 1.11 cmt. [8]** contains the identical language.

### **Virginia Rule 1.11 Comment [9]**

Virginia Rule 1.11 cmt. [9] addresses lawyers’ joint representations of “a private party and a government agency.”

Virginia Rule 1.11 cmt. [9] indicates that Virginia Rule 1.11(b) (applying to government officers/employees moving to the private sector) and Virginia Rule 1.11(d) (applying to private sector lawyers who move to the government) “do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by [Virginia] Rule 1.7 and is not otherwise prohibited by law.”

The reference to Virginia Rule 1.11(b) makes sense, because that provision applies to lawyers who leave the government and begin private practice. And of course such lawyers may jointly represent “a private party and a government agency” if the Virginia Rules and law allows such a joint representation. But the reference to Virginia Rule 1.11(d) is puzzling, because that rule applies to “a lawyer serving as a public officer or employee.” Absent some statutory, regulatory or other dispensation, government-employed lawyers cannot represent private parties – either jointly with a government agency or not.

**ABA Model Rule 1.11 cmt. [9]** contains the identical language, although one ABA Model Rule 1.11 provision (ABA Model Rule 1.11(a)) has a different number from the similar Virginia Rule provision (Virginia Rule 1.11(b)).

### **ABA Model Rule 1.11 Comment [10]**

Virginia did not adopt ABA Model Rule 1.11 cmt. [10].

ABA Model Rule 1.11 cmt. [10] warns that a “matter” as defined in ABA Model Rule 1.11(e) “may continue in another form.” It is unclear what this curious statement means. Unfortunately, ABA Model Rule 1.11 cmt. [10] does not provide any guidance.

ABA Model Rule 1.11 cmt. [10] then explains that “[i]n determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.”

Interestingly, this approach is somewhat inconsistent with the ABA Model Rule 1.9 approach of analyzing the relationship between different matters. In contrast to the Virginia Rule 1.9 approach, the ABA Model Rule 1.9 approach to that analysis focuses both: (1) on the similarity of fact, parties, etc.; and (2) on whether the lawyer handling a matter would likely have received confidential client information that would be useful in another matter – which could also help establish the “substantial relationship” between the matters. ABA Model Rule 1.11 cmt. [10] seems to take just the former approach, without the information-based additional analysis.

# RULE 1.12

## Former Judge Or Arbitrator

ABA Model Rule 1.12 has a different title; “Former Judge, Arbitrator, Mediator or Other Third-Party Neutral.”

### Rule

#### Virginia Rule 1.12(a)

Virginia Rule 1.12(a) addresses lawyers’ ability to represent clients after having earlier participated in a matter while playing a different, non-representational role.

Virginia Rule 1.12(a) prohibits lawyers (absent consent, as described below) from representing “anyone in connection with a matter in which the lawyer participated personally and substantially” in a number of roles – as a: “(1) judge, (2) “other adjudicative officer”, (3) “arbitrator”, or (4) “a law clerk to such person.”

Virginia Rule 1.12(a) contains a number of undefined terms that could generate some confusion about its application.

First, Virginia Rule 1.12(a) prevents certain lawyers from “represent[ing] anyone in connection with a matter” later defined in that Virginia Rule. The phrase “in connection with” presumably denotes a broader reach than such lawyer’s representation of anyone “in . . . a matter” defined in that Virginia Rule. For instance, Virginia Rule 1.9(a) uses the phrase “in” a matter – not “in connection with” a matter. The phrase “in connection with” is not defined, and there is no Virginia Rule 1.12 Comment providing any guidance. The

undefined phrase “in connection with” also appears in Virginia Rule 1.11(b). It also appears in ABA Model Rule 1.12(a) and ABA Model Rule 1.11(a)(2). It is unclear how the linguistically broader phrase “in connection with” extends the prohibition beyond a prohibition on such lawyers’ representation “in” the matter.

Second, Virginia Rule 1.12(a) uses the term “matter.”

Virginia Rule 1.11(f) defines the term “matter” in the context of former government-employed lawyers’ later work. In that specialized context, Virginia Rule 1.11(b) defines “matter” as “includ[ing]” (meaning that the term “matter” presumably includes other things): “any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties” – “and . . . any other matter covered by the conflict of interest rules of the appropriate government agency.” That definition does not seem very useful in the non-government-employed lawyer setting. ABA Model Rule 1.11(e) contains the identical language for use in the same context.

In contrast to the Virginia Rules, ABA Model Rule 1.9 (the main former-client conflict rules) also references the term “matter” in ABA Model Rule 1.9 cmt. [2]. Unfortunately, that ABA Model Rule Comment is generally useless – acknowledging only that “[t]he scope of a ‘matter’ for purposes of this [ABA Model Rule 1.9] depends on the facts of a particular situation or transaction.” ABA Model Rule 1.9 cmt. [3] provides a glimmer of an explanation about the term’s meaning, by extensively discussing the term “substantially related” in the context of successive matters. But, the ABA Model Rules (like the Virginia Rules) do not offer much guidance about the meaning of the term “matter.”

Interestingly, Virginia Rule 1.12(a) applies only to lawyer's representation "in connection with a matter in which" the lawyer played such a non-representational role. As explained above, the "in connection with" standard goes to the lawyer's role in the new "matter." So presumably the "matter" must essentially be identical to the "proceeding" in which the lawyer had acted in the described non-representational role. One might have thought that Virginia Rule 1.12(a) would have used a broader phrase such as that contained in Virginia Rule 1.9(a): "the same or a substantially related matter." In other words, the term "matter" is very narrow.

Third, Virginia Rule 1.12(a) uses the phrase "participated personally and substantially." As explained below, Virginia Rule 1.12 cmt [1] provides a hint of what that means. That phrase (which also appears in Virginia Rule 1.11(b) and Virginia Rule 1.11(d), as well as the ABA Model Rule parallels) presumably requires more than the specified lawyers' hierarchical responsibility for a matter or some other sign-off, ministerial or similar non-substantive participation. And by its terms, the phrase also covers only such lawyers' "substantial" substantive personal involvement. It would have been helpful if Virginia Rule 1.12 had defined that repeatedly – used term.

Fourth, Virginia Rule 1.12(a) uses the term "proceeding." That term could have several meanings. It could denote the earlier "matter" in which the lawyer had acted in that other defined non-representational role. In other words, such lawyers could not later represent anyone in connection with a new "matter" without the consent of all of the parties to the earlier "proceeding" in which the lawyer acted in a non-representational role. That seems like the likeliest meaning. But another possibility is that the term "proceeding" means the new "matter" in which the specified lawyers wish to represent a person. That

seems like a less likely meaning. Lawyers act as judges, adjudicative officers, arbitrators or law clerks in a “proceeding.” But such lawyers might later represent proceedings’ parties in a “matter” other than a proceeding. This confusion results from Virginia Rule 1.12(a) using the terms “a matter” (which clearly means a matter arising after the lawyer had played the non-representational role) and the phrase “the proceeding.” If Virginia Rule 1.12(a) had used the phrase “to the earlier matter” rather than “the proceeding,” the meaning would have been clear.

Fifth, Virginia Rule 1.12(a) uses a list of lawyers whose role triggers its application: “judge, other judicative officer, arbitrator or a law clerk to such a person.” The terms “judge” and “law clerk” seem fairly clear. The phrase “other adjudicative officer” is undefined and thus could generate some confusion. And surprisingly, the term “arbitrator” is clear on its face, but Virginia Rule 1.12(a)’s use of that term might cause more confusion than the other terms.

Virginia’s unique approach to both the individual and the imputed disqualification of lawyers playing different roles in tribunal and non-tribunal settings amounts to a confusing hodge podge that could easily lead lawyers in the wrong direction. Practitioners frequently must check several rules to assess such lawyers’ individual and imputed disqualifications, depending on their roles.

Two examples highlight the Virginia Rules’ bewildering complexity.

First, Virginia Rule 1.12(a) addresses arbitrators’ individual disqualification, and Virginia Rule 1.12(c) addresses their individual disqualification’s imputation to her associated law firm colleagues. But the Virginia Rules deal with three different types of

arbitrators – with different standards for their individual disqualification and their imputed disqualification.

Virginia 1.12(d) (discussed below) addresses arbitrators “who are selected as a partisan of a party in a multimember arbitration panel.” Under that Virginia Rule, those arbitrators can freely represent (in a representational capacity) the party for whom the arbitrator was selected as a partisan.

Another type of arbitrator acts in a binding arbitration, presumably as a more traditional arbitrator rather than as an arbitrator “selected as a partisan of a party.” That seems to be the type of arbitrator identified in Virginia Rule 1.12(a) as individually disqualified from representing anyone “in connection with” the arbitration in which such arbitrator had “participated personally and substantially” – unless “all parties to the proceeding consent after consultation.” As explained above, the phrase “the proceeding” probably (but not necessarily) denotes the earlier matter in which the lawyer acted as an arbitrator – rather than the matter” that the lawyer now wants to handle in a representational role. Under Virginia Rule 1.12(c) (discussed below), such a binding arbitrator’s individual disqualification is imputed to all other associated law firm colleagues, unless the arbitrator is screened and notice provided as required in that Virginia Rule.

There is a third type of arbitrator that is not even mentioned in Virginia Rule 1.12 – despite the Rule’s title and the Rule’s listing an arbitrator in its first provision (Virginia Rule 1.12(a)). That type of arbitrator shows up in an entirely different rule – Virginia Rule 2.10. Virginia Rule 2.10 cmt. [1] addresses “[d]ispute resolution proceedings that are conducted by a third party neutral” – including “mediation, conciliation, early neutral

evaluation, non-binding arbitration and non-judicial settlement conferences”(emphasis added). Thus, non-binding arbitration proceeding arbitrators are considered third-party neutrals under Virginia Rule 2.10. It is unclear and unexplained whether the term “arbitrator” in Virginia Rule 1.12(a) includes all arbitrators, just arbitrators who are involved in binding rather than non-binding arbitration, or if that term is not meant to include non-binding arbitration arbitrators.

There is an enormous distinction between the individual disqualification of arbitrators: (1) binding arbitration arbitrators under Virginia Rule 1.12(a) may represent a party to the arbitration in a later “matter” if “all parties to the proceeding consent after consultation.” In contrast, under Virginia Rule 2.10(c) a “third party neutral” (presumably including a non-binding arbitration arbitrator) cannot represent a party to the non-binding arbitration in a later related matter even if all the parties consent (Virginia Rule 2.10(e)).

So the Virginia Rules recognize three different types of arbitrators, with differing individual and imputed disqualification standards.

To make matters more confusing, the Virginia Rules’ handling of arbitrators differs dramatically from the ABA Model Rules approach. As explained below, ABA Model Rule 1.12(a) seems to indicate that all arbitrators are third-party neutrals – that ABA Model Rule uses the phrase “an arbitrator, mediator or other third-party neutral.” (emphasis added) ABA Model Rule 2.4(a) makes it very clear: “[s]ervice as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.” ABA Model Rule 2.4 cmt. [1] similarly indicates that “[a] third-party neutral is a person, such as a mediator, arbitrator, .

. .” At least ABA Model Rule 1.12(d) matches Virginia Rule 1.12(d) in treating partisan arbitrators in the same way.

Second, the Virginia Rules addressing third-party neutrals (including mediators) is as confusing as its provisions governing arbitrators – recognizing different types of third-party neutrals and discussing them in two separate rules.

Virginia Rule 1.12(a) does not on its face address the later disqualification of lawyers acting as mediators or other third-party neutrals (as does ABA Model Rule 1.12(a)). Third-party neutrals (including mediators) are instead specifically governed by Virginia Rule 2.10 (entitled “Third Party Neutral”). And a particular type of third-party neutral – mediators – are also governed by Virginia Rule 2.11 (entitled (“Mediator”). Virginia Rule 2.10(e) explains that “[a] lawyer who serves or has served as a third party neutral may not serve as a lawyer on behalf of any party to the dispute, nor represent one such party against the other in any legal proceeding related to the subject of the dispute resolution proceeding.” There is no exception for consent. This general non-consentable prohibition presumably applies to a mediator, who is identified as “a third party neutral” in Virginia Rule 2.11(a). Thus, mediators and other third-party neutrals are treated differently (and even in different rules) from arbitrators – who (1) may represent a party to a binding arbitration in a later related matter with the consent of all the parties (Virginia Rule 1.12(a)); (2) may do so even without the consent of the parties to a binding arbitration, if the arbitrators were “selected as a partisan of a party in a multimember arbitration panel” (Virginia Rule 1.12(d)); (3) may not represent any parties to a non-binding arbitration in a later related matter, even with their consent. (Virginia Rule 2.10(e)).

Some of these perplexing provisions are addressed elsewhere. Unfortunately, Virginia lawyers must carefully sort through the exact role a lawyer plays as an arbitrator, mediator, etc. – and then carefully check the jerry-built rules applicable to that exact role.

Virginia Rule 1.12(a) contains an exception that would allow the specified lawyers to represent a person “in connection with a matter” in which those lawyers had played the specified non-representational role if: “all parties to the proceeding consent after consultation.” As explained above, the term “proceeding” presumably means the “proceeding” in which those specified lawyers played one of the listed non-representational roles.

**ABA Model Rule 1.12(a)** also addresses lawyers’ later ability to represent clients after having earlier participated in a proceeding while playing a different non-representational role.

Like Virginia Rule 1.12(a), ABA Model Rule 1.12(a) contain some of the same phrases that might cause confusion: “in connection with,” “matter,” “personally and substantially,” and “proceeding.”

ABA Model Rule 1.12(a) contains the same basic provision as Virginia Rule 1.12(a), but ABA Model Rule 1.12(a) contains a different list of roles: “judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral.” Thus, ABA Model Rule 1.12(a) does not apply to law clerks to arbitrators or mediators (if there is such a role).

The absence of arbitrators’ law clerks in ABA Model Rule 1.12(a)’s list of those individually disqualified from representing a client is interesting. ABA Model Rule 1.11(d)(2)(ii) seems to list arbitrators’ law clerks among those who can negotiate for

private employment under certain situations: “as permitted by [ABA Model] Rule 1.12(b) and subject to the conditions stated in [ABA Model] Rule 1.12(b). Placement of the comma after the word “judge” might be significant. The three individuals identified in ABA Model Rule 1.11(b)(2)(ii) could either be: (1) law clerks to judges; (2) law clerks to “other adjudicative” officers, or (3) law clerks to arbitrators. That seems like the most logical reading of that trio. An alternative is to read ABA Model Rule 1.12(b)(2)(ii) as having a different list: (1) law clerks to judges, (2) “other adjudicative” officers themselves, not law clerks to “other adjudicative” officers; or (3) arbitrators themselves (not law clerk to arbitrators). That list would not make much sense. A lawyer who herself has served as an adjudicative officer or an arbitrator presumably would not be treated differently when she herself seeks later employment than a lawyer who served as a judge. That ABA Model Rule clearly seems focused on making it easier for law clerks to seek later employment.

ABA Model Rule 1.12(b)’s last sentence’s notice provision supports the more logical reading discussed above. The notice provision requires law clerks to “notif[y] the judge, other adjudicative officer or arbitrator.” That list identifies supervisors for whom law clerk serve – meaning that an arbitrator’s law clerk would be required to provide such notice. Consistent with this reading, ABA Model Rule 1.12(b) differentiates between lawyers who themselves serve in the clerk roles from lawyers serving in a non-clerk role. ABA Model Rule 1.12(b)’s first sentence focuses on the former (imposing a flat prohibition) while ABA Model Rule 1.12(b)’s second sentence deals with the latter – permitting (under certain conditions) conduct forbidden for lawyers serving in a non-clerk role.

Yet ABA Model Rule 1.12(b) specifically excludes arbitrators' law clerks from such permissible negotiation – as discussed below. It seems strange that arbitrators' law clerks are: (1) listed in ABA Model Rule 1.12(a) as individually disqualified from representing a party in a proceeding in which they had participated in the clerk role; (2) identified in ABA Model Rule 1.11(d)(2)(ii) as free to negotiate for private employment with a law firm that had represented a party in the proceeding in which that lawyer served as an arbitrator's law clerk ("as permitted by" and "subject to" the conditions in ABA Model Rule 1.12(b)); (3) explicitly excluded by language of the specifically-referenced ABA Model Rule 1.12(b) provision, which allows judges' and other adjudicative officers' law clerks from negotiating with such private law firms – but which deliberately leaves out arbitrators' law clerks from the list of clerks who may negotiate with such private law firms.

Also in contrast to Virginia Rule 1.12(a), ABA Model Rule 1.12(a) applies to mediators and "other third-party neutrals." Thus, ABA Model Rule 1.12(a) covers: (1) judges and other adjudicative offices and their law clerks; and (2) arbitrators, mediators or other third-party neutrals (without mentioning their law clerks). This contrasts with Virginia Rule 1.12(a)'s reference to judges, other adjudicative officers, arbitrators and any of those person's law clerks. So ABA Model Rule 1.12(a) includes two categories of lawyers not found in the parallel Virginia Rule 1.12(a): mediators and other third-party neutrals. But ABA Model Rule 1.12(a) excludes one category of lawyer found in Virginia Rule 1.12(a): third-party neutrals' (including arbitrators') law clerks.

Finally, as explained below, a separately numbered ABA Model Rule 1.12(d) contains another exception also found in a separate Virginia Rule "[a]n arbitrator selected as a partisan of a party in a multimember arbitration panel." As in Virginia Rule 1.12(d),

that type of arbitrator “is not prohibited from subsequently representing” the party who selected the arbitrator to serve as “a partisan [arbitrator] in a multimember arbitration panel.”

As in other contexts, the ABA Model Rule 1.12(a)’s exception depends on “informed consent, confirmed in writing.” Virginia Rule 1.12(a) uses the standard Virginia Rule formulation “consent after consultation,” and does not require consent in writing.

### **Virginia Rule 1.12(b)**

Virginia Rule 1.12(b) addresses job-seeking by lawyers then serving in certain listed non-representational roles.

Virginia Rule 1.12(b) addresses lawyers currently playing those other non-representational roles, instead of listing those lawyers who themselves may not later represent a party to a matter in which the lawyers had earlier participated in those non-representational roles. Virginia Rule 1.12(b) specifically addresses those lawyers’ negotiation for employment with a party or a lawyer for a party in the matter in which the lawyers are then playing those non-representational roles.

Virginia Rule 1.12(b) confusingly starts with the latter rather than the former. The analysis would probably make more sense if it had reversed the order of consideration.

The lawyers who might seek such employment are those who are “participating personally and substantially as a judge, other adjudicative officer or arbitrator.” The persons with whom such lawyers might negotiate for employment are: “any person who is involved as a party or as an attorney for a party” in a “matter” in which the employment-seeking lawyers are “participating personally and substantially.”

Virginia Rule 1.12(b) then applies a different standard for clerks. These are discussed below.

Virginia Rule 1.12(b) presumably serves to avoid the possible mischief if a lawyer serving in some judicial or semi-judicial role in a proceeding seeks employment with a party or a lawyer for a party in that proceeding. Such a situation obviously would tempt the employment-seeking lawyer to favor the party or his lawyer in explicit or implicit return for a more lucrative job offer. And of course the hiring law firm might hope that the employment-seeking lawyer would succumb to such temptation. Alternatively, the hiring law firm might worry that the employment-seeking lawyer playing a non-representational role as judge, etc., might be offended by not receiving a job offer – and maltreat the law firm’s client in the proceeding.

Virginia Rule 1.12(b) contains a number of undefined terms that could generate some confusion about its application.

First, Virginia Rule 1.12(b) uses the word “negotiate.” That could either mean a give-and-take discussion about employment, or it could mean any communication about employment. Presumably it means the latter. It would not make much sense for the term “negotiate” to exclude such a lawyer’s solicitation of employment – which is immediately accepted by the hiring party or lawyer without any back-end forth haggling about salary, terms, etc.

Second, Virginia Rule 1.12(b) uses the term “employment.” Presumably, that term would also include a consultant or other role that might not technically be considered “employment.”

Third, the use of the present tense verb “is” presumably allows such negotiation by such “judge, other adjudicative officer or arbitrator” who formerly participated “personally and substantially” in that matter.

Fourth, Virginia Rule 1.12(b) uses the term “involved.” That word plays a key role – because it places off limits possible employers with whom the specified lawyers acting in the specified non-representational role may not negotiate for employment. The odd word “involved” covers a potential employer “involved” either “as a party or as attorney for a party” in the matter in which the lawyer seeking employment is then “personally and substantially” participating as a “judge, other adjudicative officer or arbitrator.” Significantly, such lawyers may not negotiate with a “party” – presumably a litigant or other participant in a case or arbitration. So Virginia Rule 1.12(b) clearly covers lawyers looking for jobs at a place other than a law firm or law department. But the term “involved” might extend beyond actual participants in such a case or arbitration. That is unclear.

The prohibition on negotiating for employment also applies to lawyers seeking a job from “any person” who is “involved” as “an attorney” for a party in the matter in which the lawyer is then participating “personally and substantially” as a “judge or other adjudicative officer or arbitrator.” The term “attorney” presumably is synonymous with the term “lawyer” that appears elsewhere in the Virginia Rules, although perhaps the deliberate selection of the word “attorney” was meant to extend beyond persons acting as lawyers – thus applying the employment negotiation prohibition to persons acting as other types of attorneys. That seems unlikely.

To the extent that the term “attorney” is synonymous with “lawyer,” there is an additional issue. If the term “involved” means that the prohibition on employment

negotiation only applies to a lawyer (or “attorney”) who herself is personally “involved” in the “matter,” that seems far too narrow. The term “involved” presumably means that the hiring lawyer might have some more remote role in the “matter” in which the employment-seeking lawyer is participating personally and substantially in a non-representational listed role. For instance, presumably a judge presiding over the case of Acme v. Baker could not avoid the prohibition on negotiating for a job with the law firm representing Acme by haggling over salary and other terms with a lawyer in Acme’s law firm who herself is not acting as counsel of record in the case before that employment-seeking judge. If the purpose of the employment negotiation prohibition is to avoid such judges’ personal conflicts and appearance of partiality in the case, the employment negotiation prohibition presumably should apply to all of the lawyers or staff at Acme’s law firm—not just the lawyers “involved” as counsel of record or directly working on the case. So the term “involved” presumably would apply to all of the lawyers and staff employees of Acme’s law firm.

Fifth, Virginia Rule 1.12(b) uses the term “matter.” That seems like an inappropriate term. As explained above, Virginia Rule 1.12(a) uses the term “proceeding” to denote the “matter” in which lawyer previously acted in a non-representational role (as a judge, etc.). Virginia Rule 1.12(a) uses the term “matter” to denote a later “matter” in which that former judge, etc. may not represent one of the parties to the earlier “proceeding.” So it would be more clear if that Virginia Rule 1.12(b) used the same word “proceeding” to describe the judicial or other process in which the lawyer had acted in the defined non-representational role. That is the term Virginia Rule 1.12(a) uses to describe

that process – using the term “matter” to describe the later event from which such lawyers are disqualified.

As discussed above in connection with Virginia Rule 1.12(a), the term “matter” is ambiguous enough when used properly. Several other Virginia Rules describe the term “matter”’s definition in other contexts.

Sixth, Virginia Rule 1.12(b) uses the term “personally and substantially.” That term also appears in Virginia Rule 1.12(a), and is discussed above in connection with that Virginia Rule provision.

Seventh, Virginia Rule 1.12(b) uses the term “arbitrator.” As discussed above in connection with Virginia Rule 1.12(a), the Virginia Rules address three discrete kinds of arbitrators in several separate and potentially confusing Rules.

Eighth, Virginia Rule 1.12(b) uses the term “law clerk.” Virginia Rule 1.12(b) applies to law clerks who are “participating personally and substantially.” That term also appears in ABA Model Rule 1.11 – which governs all lawyers serving “as a public officer or employee.” In the context of law clerks, presumably the term “personally and substantially” refers to the clerks’ actual involvement in the case, as opposed to some tangential administrative, logistical or other minor involvement.

Virginia Rule 1.12(b) also allows certain “law clerks” to negotiate for employment in the setting described in that Virginia Rule. The “law clerk” exception covers law clerks serving “a judge, other adjudicative officer, or arbitrator.” Unfortunately, for lawyers hoping for clear and complete guidance, they must also check Virginia Rule 1.11(d)(2) – which addresses such employment negotiation for lawyers “serving as a law clerk to a judge, other adjudicative officer, mediator or arbitrator.”

Significantly, Virginia Rule 1.12(b)'s list on its face deliberately excludes law clerks for mediators, even though Virginia Rule 1.11(d)(2) assures that “a lawyer serving as a law clerk to a . . . mediator. . . may negotiate for private employment as permitted by [Virginia] Rule 1.12(b) and subject to the conditions stated in [Virginia] Rule 1.12(b).” The absence of any provision in Virginia Rule 1.12(b) for such mediators' law clerks to seek jobs in that setting presumably renders illusory the assurance in Virginia Rule 1.11(d)(2).

The other law clerks mentioned in Virginia Rule 1.11(d)(2) also appear in Virginia Rule 1.12(b): law clerks working for “a judge, other adjudicative officer, . . . or arbitrator.” Interestingly, arbitrators' law clerks are included in ABA Model Rule 1.11(d)(2)(ii), but not explicitly included in ABA Model Rule 1.12(b).

Virginia Rule 1.12(b) concludes with the condition under which the specified law clerks may negotiate for employment: “only after the lawyer [serving in the clerk position] has notified the judge, other adjudicative officer, or arbitrator.”

**ABA Model Rule 1.12(b)** contains essentially the same language as Virginia Rule 1.12(b), raising many of the same issues described above in connection with Virginia Rule 1.12(b).

But ABA Model Rule 1.12(b) differs from Virginia Rule 1.12(b) in several ways.

First, in contrast to Virginia Rule 1.12(b), ABA Model Rule 1.12(b) also applies the employment-negotiation prohibition to a lawyer acting as a “mediator or other third-party neutral.” That category of lawyer does not appear in Virginia Rule 1.12(b). So ABA Model Rule 1.12(b) has a longer list of those who cannot negotiate for employment.

Second, in contrast to Virginia Rule 1.12(b), ABA Model Rule 1.12(b) contains a smaller list of law clerks who may negotiate for employment with “a party or as lawyer”

for a party in a “matter” in which the law clerk is “participating personally and substantially.” ABA Model Rule 1.12(b) allows such employment negotiation only by law clerks “to a judge or other adjudicative officer.” This contrasts with Virginia Rule 1.12(b), which allows such employment negotiation by law clerks “to a judge, other adjudicative officer, or arbitrator.” One might think that ABA Model Rule 1.12(b)’s exclusion of law clerks for arbitrators recognizes that those lawyers playing that non-representational role do not have “law clerks.” Virginia Rule 1.11(e)(2) specifically mentions arbitrators’ law clerks. Similarly, ABA Model Rule 1.11(d)(2)(ii) specifically identifies lawyers “serving as a law clerk to a[n] . . . arbitrator” “negotiate[ing] for private employment as permitted by [ABA Model] Rule 1.12(b) and subject to the conditions stated in [ABA Model] Rule 1.12(b).” So the ABA Model Rules recognize that lawyers may serve as law clerks for arbitrators. The mismatch between those arbitrators’ law clerks’ supposed freedom to negotiate in ABA Model Rule 1.11(d)(2)(ii) but exclusion from the list in ABA Model Rule 1.12(b) presumably means that such law clerks may not negotiate for employment in the setting described in both of those ABA Model Rules.

ABA Model Rule 1.12(b) concludes with same condition found at the end of Virginia Rule 1.12(b) – allowing lawyers serving as the specified type of law clerks to negotiate for employment “only after the lawyer has notified the judge or other adjudicative officer.” That sentence confirms that the exclusion of law clerks for arbitrators is deliberate, since arbitrators (as well as mediators and other third-party neutrals) are deliberately left out of that concluding sentence’s list of persons to be notified.

### **Virginia Rule 1.12(c)**

Virginia Rule 1.12(c) addresses the imputation of individual lawyers' Virginia Rule 1.12(a)'s prohibition based on a lawyer having "participat[ed] personally and substantially as a judge, other adjudicative officer, arbitrator or law clerk to such a person."

Virginia Rule 1.12(c) also describes ways to avoid that imputation to all such disqualified lawyers' associated law firm colleagues.

Under Virginia Rule 1.12(c), no "associated" lawyer in a law firm hiring such an individually disqualified lawyer under Virginia Rule 1.12(a) "may knowingly undertake or continue representation" in a "matter" described in Virginia Rule 1.12(a). As discussed throughout this document, the Virginia Rules do not define the term "associated" in any useful way. The absence of such a key term's definition is one of the great oversights in the Virginia Rules and in the ABA Model Rules.

Virginia Rule 1.12(c) presumably applies if such a lawyer and the hiring law firm have not obtained the "consent after consultation" under Virginia Rule 1.12(a) from "all parties to the proceeding" – allowing such a lawyer to join the firm and even personally represent someone in connection with the matter in which that lawyer had earlier served as "a judge, other adjudicative officer, arbitrator or a law clerk to such a person." Not surprisingly, parties providing the necessary consent to allow such hiring presumably would condition their consent on the hiring law firm's screening of the former "judge, other adjudicative officer, arbitrator or a law clerk to such a person." But Virginia Rule 1.12(c) allows the hiring law firm to avoid the imputed disqualification by imposing what might be called a "self-help" screen. In other words, the hiring law firm on its own can avoid the imputed disqualification of a recent hire rather than hoping that it can obtain the consent

that would avoid such imputation. This contrasts with Virginia Rule 1.10's imputation standard, which does not allow hiring law firms to impose such a self-help screen to avoid imputed disqualification when they hire an individually disqualified lawyer from the private sector. In other words, law firms hiring private sector lawyers must obtain the individually disqualified lawyer's former client's consent to accept or continue a representation adverse to such former client. ABA Model Rule 1.10 allows such self-help screens in the private-sector context.

Under Virginia Rule 1.12(c), the phrase "undertake or continue" extends the individual lawyer's disqualification's imputation (absent the conditions discussed immediately below) to both: (1) the hiring law firm's representation of a client in a new matter after the individually disqualified lawyer joins the firm; or (2) the law firm's continuation of a representation in an ongoing matter the firm is handling at the time it hires the individually disqualified lawyer. Hiring law firms in that second scenario could obviously face client disappointment, or worse. Hiring an individually disqualified lawyer whose disqualification is imputed to the hiring law firm and requires it to withdraw from an ongoing representation might even subject the firm to a malpractice case.

Virginia Rule 1.12(c) contains two conditions under which hiring law firms may avoid the imputation of an individually disqualified new hire.

First, the individually "disqualified lawyer [must be] timely screened from any participation in the matter" and "apportioned no part of the fee therefrom."

Second, the hiring law firm (or presumably the individually disqualified lawyer) must "promptly" give "written notice" to "the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this Rule." The requirement of

notifying the “appropriate tribunal” is important, and might be overlooked – because a lawyer joining a firm obviously no longer serves on such a tribunal.

**ABA Model Rule 1.12(c)** contains substantially the identical language. But there are several differences.

First, ABA Model Rule 1.12(c) covers all of the lawyers listed in ABA Model Rule 1.12(a). Those listed lawyers include lawyers acting as “mediator or other third-party neutral” – who are not included in Virginia Rule 1.12(a).

Second, in contrast to Virginia Rule 1.12(c), ABA Model Rule 1.12(a) only covers law clerks for “judge or other adjudicative officers” – thus presumably excluding from the prohibition in ABA Model Rule 1.12(a) and the effect of ABA Model Rule 1.12(c) law clerks for “an arbitrator, mediator or other third-party neutral.” Virginia Rule 1.12(a) (and thus Virginia Rule 1.12(c)) covers arbitrators’ law clerks, but not law clerks for mediators or other third-party neutrals.

It is worth noting the possible mismatch between ABA Model Rule 1.12(c)’s imputation rule and an entirely different ABA Model Rule provision – ABA Model Rule 1.10 cmt. [4]. ABA Model Rule 1.10 cmt. [4] explains that the general ABA Model Rule 1.10(a) imputation rule does not “prohibit representation [“by others in the law firm”] if the lawyer is prohibited from acting because of events before the person became a lawyer.” ABA Model Rule 1.10 cmt. [4] then provides an example: “work that a person did as a law student.” ABA Model Rule 1.10 cmt. [4] concludes with a suggestion that “[s]uch persons, however, ordinarily must be screened from any participation in the matter.” Of course, law clerks may not be lawyers. Some of them pass the bar and become fully authorized lawyers before they clerk, while some of them do so after they clerk.

Presumably the more specific ABA Model Rule 1.12(c) screening requirement would trump the general (and totally Comment-based, rather than black letter Rule-based) discretionary screening.

The Virginia Rules do not have this possible mismatch, because no Virginia Rule or Virginia Rule Comment addresses the imputation implications of hiring non-lawyers.

### **Virginia Rule 1.12(d)**

Virginia Rule 1.12 (d) addresses the special disqualification rule governing a certain type of arbitrator.

Virginia Rule 1.12 (d) contains an exception to the general rule in Virginia Rule 1.12(a) that a lawyer “shall not represent anyone in connection with a matter” in which the lawyer had earlier “participated personally and substantially” as an “arbitrator.” Virginia Rule 1.12(d) indicates that a partisan arbitrator may “subsequently” represent a party by whom the arbitrator had been “selected as a partisan” arbitrator of that party and had served “in a multimember arbitration panel.”

This exception presumably also relieves from any imputed disqualification risk a law firm or a party hiring such a partisan arbitrator. But Virginia Rule 1.12(d) on its face does not free such a partisan arbitrator from negotiating (while acting as an arbitrator) for employment under Virginia Rule 1.12(b). That dual approach would make sense under the presumed purpose of Virginia Rule 1.12(b)'s employment negotiation ban.

**ABA Model Rule 11.2(d)** contains the identical language.

## Comment

### Virginia Rule 1.12 cmt. [1]

Virginia Rule 1.12 cmt. [1] addresses the prohibition on former judges and adjudicative officers representing a person in connection with a matter in which the lawyer served as a judge or other adjudicative officer.

Virginia Rule 1.12 cmt. [1] first notes that Virginia Rule 1.12 “generally parallels [Virginia] Rule 1.11.” Virginia Rule 1.11 addresses a former government-employed lawyers’ individual disqualification from later representations – and the imputation of such a lawyer’s individual disqualification.

Virginia Rule 1.12 cmt. [1] next explains that the phrase “personally and substantially” signifies that a judge who was a member of a multimember court . . . is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate.” The word “signifies” seems inapt (although the word also appears in ABA Model Rule 1.12 cmt. [1]). A phrase such as “does not apply to a judge . . .” would have been more appropriate. Such a former judge is not prohibited from representing a client in a matter that was pending before the court on which that judge sat, even if the “judge [had] exercised administrative responsibility” or “exercised remote or incidental administrative responsibility that did not affect the merits.” This discussion provides a useful hint about what the phrase “personally and substantially” means. But given that phrase’s importance, more guidance would have been helpful.

Virginia Rule 1.12 cmt. [1] then points to a Virginia Rule 1.11 Comment, without specifying which one. Virginia Rule 1.11(b) also uses the term “personally and substantially” to define the type of disqualifying role that any former government officer or

employee lawyer faces, but no Virginia Rule 1.11 Comment provides much of an explanation about that term's application in that more general setting. So it is unclear which Virginia Rule 1.11 Comment is referred to in Virginia Rule 1.12 cmt. [1].

Virginia Rule 1.12 cmt. [1] next turns to the term “adjudicative officer” – explaining that the term “includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges.”

Virginia Rule 1.12 cmt. [1] concludes by pointing to several Canons in the Virginia Code of Judicial Conduct that have various restrictions – which “although phrased differently from this Rule . . . correspond in meaning.” Virginia Rule 1.12 cmt. [1] refers to several Virginia Code of Judicial Conduct's “Compliance Canons.” That is not a commonly-used description of the Virginia Code's Canons.

Virginia Rule 1.12 cmt. [1] does not mention the Virginia Rule 1.12(a) exception that would allow such former judges or adjudicative officers to represent someone in connection with a matter in which they had earlier “participated personally and substantially” if “all parties to the proceeding consent after consultation.”

**ABA Model Rule 1.12 cmt. [1]** contains the identical substantive language as Virginia Rule 1.12 cmt. [1], but of course refers to the ABA Model Code of Judicial Conduct Canons rather than the Virginia Code of Judicial Conduct Canons.

And like Virginia Rule 1.12 cmt. [1], ABA Model Rule 1.12 cmt. [1] does not mention the exception under which former judges or adjudicative officers' may later represent a client if “all parties to the proceeding give informed consent, confirmed in writing.”

## **Virginia Rule 1.12 cmt. [2]**

Virginia Rule 1.12 cmt. [2] addresses lawyers who have acted as arbitrators rather as judges.

Virginia Rule 1.12 cmt. [2] explains that Virginia Rule 1.12 “forbids” such former arbitrators from representing “a client in a matter in which the lawyer participated personally and substantially” – “unless all of the parties to the proceeding give their consent after consultation.”

As explained above (and elsewhere, in connection with the appropriate Virginia Rule), the Virginia Rules recognize and treat differently three different types of arbitrators. Virginia Rule 1.12 cmt. [2] clearly does not refer to a “partisan” arbitrator governed by black letter Virginia Rule 1.12(d). It is not as clear from Virginia Rule 1.12 cmt. [2] whether the type of “arbitrators” governed by that Virginia Rule Comment includes non-binding arbitrators. It seems unlikely, because such non-binding arbitration arbitrators are specifically identified as third-party neutrals in Virginia Rule 2.10 cmt. [1], and thus are clearly governed by various Virginia Rule 2.10 provisions. Virginia Rule 2.10(e) addresses such non-binding arbitration arbitrators’ individual disqualification. But Virginia Rule 2.10 does not address such individually disqualified non-binding arbitrators’ disqualification’s imputation to other associated law firm colleagues.

Virginia Rule 1.12 cmt. [2] concludes with a reminder that “[o]ther law or codes of ethics governing these roles may impose more stringent standards of personal or imputed disqualification.” Presumably the phrase “[o]ther law or codes of ethics” includes arbitrator-related statutes, regulations, or professional codes. The phrase does not

explicitly include private arbitration agreements. But parties can always contractually agree to impose more limitations than the ethics rules impose.

**ABA Model Rule 1.12 cmt. [2]** addresses the same issue, but differs from Virginia Rule 1.12 cmt. [2] in several ways.

First, in contrast to Virginia Rule 1.2 cmt. [2], ABA Model Rule 1.12 cmt. [2] also includes “mediators or other third-party neutrals” in the same category as arbitrators. Of course, this parallels the difference between black letter ABA Model Rule 1.12(a) (which also includes those additional categories) and black letter Virginia Rule 1.12(a) (which does not).

Second, in contrast to Virginia Rule 1.12 cmt. [2]’s phrase “give their consent after consultation”, ABA Model Rule 1.12 cmt. [2] uses the standard ABA Model Rule formulation “give their informed consent, confirmed in writing.”

Third, although ABA Model Rule 1.12 cmt. [2] concludes with the same reference as in Virginia Rule 1.12m cmt. [2] to “[o]ther law or codes of ethics,” it also mentions “[o]ther law or code of ethics governing third-party neutrals” (referring to ABA Model Rule 2.4, which addresses “Lawyer Serving as Third-Party Neutral”).

### **Virginia Rule 1.12 cmt. [3]**

Virginia Rule 1.12 cmt. [3] addresses the imputation to associated law firm colleagues under Virginia Rule 1.12(c) of the individual disqualification of “lawyers who serve as judges and arbitrators” under Virginia Rule 1.12(a).

Of course, those lawyers are only a subset of the lawyers covered by Virginia Rule 1.12(a): “judge, other adjudicative officer, arbitrator or a law clerk to such a person.”

Presumably the absence of references in Virginia Rule 1.12 cmt. [3] to those other lawyers playing those non-representational roles is not meant to exclude them from Virginia Rule 1.12(c)'s reach.

Virginia Rule 1.2 cmt. [3] first notes that although “judges and arbitrators do not have information concerning the parties that is protected under [Virginia] Rule 1.6,” they “typically owe the partners an obligation of confidentiality” under “law or codes of ethics governing their roles.”

Virginia Rule 1.12 cmt. [3] concludes by noting that because of that typical obligation, Virginia Rule 1.12(c) imputes such individual lawyers' disqualification “to other lawyers in a law firm unless the conditions of [Virginia Rule 1.12(c)] are met.”

**ABA Model Rule 1.12 cmt. [3]** addresses the same issue, but differs from Virginia Rule 1.12 cmt. [3] in several ways.

First, in contrast to Virginia Rule 1.12 cmt. [3]'s mention of “judges and arbitrators,” ABA Model Rule 1.12 cmt. [3] instead mentions only “third-party neutrals” as not having ABA Model Rule 1.6–protected information – but who nevertheless “typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals.” Presumably ABA Model Rule 1.12 cmt. [2]'s limitation of this analysis to “third-party neutrals” is deliberate—because ABA Model Rule 1.12(a) explicitly lists a number of other categories: “a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral.” It is unclear why ABA Model Rule 1.12 cmt. [3] only refers to third-party neutrals.

Second, ABA Model Rule 1.12 cmt. [3] concludes with the same concept found at the end of the Virginia Rule 1.12 cmt. [3]. But in contrast to Virginia Rule 1.12 cmt. [3]'s

phrase “unless the conditions of paragraph (c) are met,” ABA Model Rule 1.12 cmt. [3] uses the odd phrase “unless the conditions of this paragraph are met” Presumably, ABA Model Rule 1.12 cmt. [3] intended to indicate the same conditions, and should have used the phrase “that paragraph” (referring to ABA Model Rule 1.12 (c)) rather than “this paragraph.”

#### **ABA Model Rule 1.12 Comment [4]**

Virginia did not adopt ABA Model Rule 1.12 cmt. [4].

ABA Model Rule 1.12 cmt. [4] addresses screening. ABA Model Rule 1.12 cmt. [4] refers to ABA Model Rule 1.0(k) as defining the screening requirements. The Virginia Terminology section does not contain such a definition or guidance.

ABA Model Rule 1.12 cmt. [4] next explains that the screening mentioned in ABA Model Rule 1.12(c)(1) “does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.” That understandable formulation is consistent with other ABA Model Rule Comments about screened lawyers’ compensation. For instance, the same language appears in ABA Model Rule 1.10 cmt. [8] as applied to lateral hires, and ABA Model Rule 1.11 cmt. [6] as applied to lawyers who formerly served as government officers or employees.

#### **Virginia Rule 1.12 cmt. [5]**

Virginia Rule 1.12 cmt. [5] addresses the notice required under Virginia Rule 1.12(c)(2).

Virginia Rule 1.12 cmt. [5] requires that such notice must “include[e] a description of the screened lawyer’s representation and of the screening procedures employed.” Also, such notices “generally should be given as soon as practicable after the need for screening becomes apparent.”

Virginia Rule 1.12 cmt. [5] seems much more forgiving than the black letter Virginia Rule 1.12(c)(2) provision – which requires that such a written notice “is promptly given to the parties and any appropriate tribunal.” The black letter language seems more demanding than Virginia Rule 1.12 cmt. [5]’s phrase “generally should be given as soon as practicable.”

**ABA Model Rule 1.12 cmt. [5]** contains essentially the identical language.

# RULE 1.13

## Organization as Client

### Rule

#### Virginia Rule 1.13(a)

Virginia Rule 1.13(a) addresses the client's identify when a lawyer represents a corporation or other organization.

Virginia Rule 1.13(a) explains that “[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”

Virginia Rule 1.13(a) uses several terms that deserve attention.

First, Virginia Rule 1.13 uses the word “lawyer” Virginia Rule 1.13(a)’s reference to a lawyer “employed or retained by an organization” obviously refers both to in-house corporate lawyers and outside lawyers representing the corporation. In the former context, it is worth noting that Virginia Rules Terminology’s word “firm” denotes “a legal department of a corporation or other organization.” In other words, every Virginia Rule that mentions “firm” or “law firm” applies to corporations’ and other organizations’ law departments. But Virginia Rule 1.10 cmt. [1a] warns that in a corporate setting there might be “uncertainty” as to the “identity of the client”. Virginia Rule 1.10 cmt. [1a] additionally notes that “it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed.” ABA Model Rule 1.0(c) also

states that the term “firm” include law departments. ABA Model Rule 1.0 cmt. [3] contains the identical warning about client identity as Virginia Rule 1.10 cmt. [1a].

Second, Virginia Rule 1.13(a) uses the word “organization”. Although the word “organization” obviously includes entities other than corporations, this document generally will use the word “corporation” instead of the more generic “organization” – because most lawyers representing “organizations” represent corporations or their constituents. But lawyers must always remember that their Virginia Rule 1.13 duties apply whenever they represent any organization – not just corporations.

Third, Virginia Rule 1.13(a) uses the term “duly authorized.” Of course, an organization’s bylaws and other governing documents identify which “duly authorized constituents” wield decision-making power – perhaps supplemented (or even trumped by) statutory, regulatory or other extrinsic regulations. In the corporate context, such “duly authorized constituents” normally are members of the corporation’s board of directors. But in some circumstances, a subset of the board such as a special committee or an audit committee (or even an individual independent director) might wield decision-making power.

Other corporate “constituents” may also be “authorized” to direct a corporation’s actions. Officers frequently have such power. And even mid-level employees such as sales personnel may be “authorized” to act on the corporation’s behalf.

It would seem obvious that those “duly authorized constituents” within a corporation normally constitute only a subset of the corporation’s “constituents.” In other words, not every corporate “constituent” is “duly authorized” to direct a corporation’s actions. The point is that Virginia Rule 1.13 does not identify who has such power.

The Virginia Rule 1.13(a) definition of the “client” is essentially the “default” corporate client identification rule. But Virginia Rule 1.13(e) (discussed below) explains that lawyers may also represent an organization’s constituents if the conflicts rules permit that.

Fourth, Virginia Rule 1.13(a) uses the term “constituents” – who are “duly authorized” to act for the organization.

It is worth discussing those various “constituents” with whom a corporation’s in-house or outside lawyers interact. This would be a good opportunity to compare Virginia Rule 1.13’s description of those constituents with ABA Model Rule 1.13’s description of those constituents.

Virginia Rule 1.13 (and ABA Model Rule 1.13, discussed below) contain various lists of corporations’ “constituents” with whom a corporation’s lawyer interacts, or about whom a corporation’s lawyer obtains information.”

Virginia Rule 1.13(b) lists the following persons who might engage in wrongdoing: “officer, employee or other person associated with the organization.” As explained throughout this document, the Virginia Rules’ unfortunate failure to define the term “associated” causes uncertainty about many key ethics issues.

Virginia Rule 1.13(d) lists person with whom corporation’s lawyers might “deal[ ]”: “an organization’s directors, officers, employees, members, shareholders or other constituents.”

Virginia Rule 1.13(e) lists persons corporation’s lawyers might also represent under certain conditions: “any of [the organization’s] directors, officers, employees,

members, shareholders, or other constituents.” So that Virginia rule 1.13(e) black letter provision apparently recognizes “shareholders” as being a corporation’s “constituents.”

Virginia Rule 1.13 cmt. [1] (discussed below) lists persons through whom a corporation acts: “its officers, directors, employees, shareholders and other constituents.” That Virginia Rule 1.13 Comment explains that in the case of organizational clients that are not corporations,” the term “[o]ther constituents” means persons with equivalent positions in those other organizational clients.”

Virginia Rule 1.13 cmt. [5] recognizes that the board of directors or similar governing body” “[o]rdinarily” is “the organization’s highest authority.”

Virginia Rule 1.13 cmt. [9] identifies persons within a governmental client.

Virginia Rule 1.13 cmt. [12] describe lawyers’ possible representation of “individuals within the organization.” It’s unclear whether those individuals are the same as “other person[s] associated with the organization” identified Virginia Rule 1.13(b).

ABA Model Rule 1.13 also contains various lists of persons with whom an organization’s lawyers interact.

ABA Model Rule 1.13(b) addresses conduct by “an officer, employee or other person associated with the organization.” This list is identical to Virginia Rule 1.13(b).

ABA Model Rule 1.13(d) addresses lawyers’ representation of “an officer, employee or other constituent associated with the organization” in defending “against a claim arising out of an alleged violation of law.” Virginia does not have a similar black letter provision.

ABA Model Rule 1.13(f) addresses lawyers’ “dealing with” “an organization’s directors, officers, employees, members, shareholders or other constituents.” That list is

identical to Virginia Rule 1.13(d)'s list. ABA Model Rule 1.13(g) addresses lawyers' representation of an organization's "directors, officers, employees, members, shareholders or other constituents." That list is identical to Virginia Rule 1.13(e)'s list.

ABA Model Rule 1.13 cmt. [1] lists persons who can direct a corporation's actions: "its officers, directors, employees, shareholders and other constituents." That list is identical to Virginia Rule 1.13 cmt. [1]'s list.

ABA Model Rule 1.13 cmt. [3] inexplicably stated list of persons who might engage in wrongdoing: "an officer or other constituent." Similar Virginia Rule 1.13 cmt. [3] does not contain that strange phrase.

ABA Model Rule 1.13 cmt. [5] understandably explains that "ordinarily" an organization's "highest authority" is "the board of directors or similar governing body." That language is essentially identical to Virginia Rule 1.13 cmt. [5]'s language.

ABA Model Rule 1.13 cmt. [7] identifies persons a lawyer might investigate: "an officer, employee or other person associated with the organization." It is unclear whether the term "person associated with the organization" is synonymous with the term "constituent," or whether it includes non-constituents. Virginia Rule 1.13 does not have a similar Comment.

ABA Model Rule 1.13 cmt. [9] describes persons who can direct a government's actions. That ABA Model Rule Comment is similar to but not identical to Virginia Rule 1.13 cmt. [9].

ABA Model Rule 1.13 cmt. [12] identifies persons that an organization's lawyer might also represent: "a principal officer or major shareholder." In contrast, Virginia Rule 1.13 cmt. [12] uses a much broader term: "individuals within the organization."

It is unclear whether all of these references describe the same category of person. Perhaps most importantly, the phrase “shareholders or other constituents” which appears both in ABA Model Rule 1.13(f) and ABA Model Rule 1.13(g) presumably means that shareholders are among the constituents lawyers may defend under ABA Model Rule 1.13(d). Shareholders presumably would also be included in the phrase “or other person associated with the organization,” and is in the introductory phrase of ABA Model Rule 1.13(b) – and triggers the “reporting up” presumption under that ABA Model Rule and the “reporting out” discretion under ABA Model Rule 1.13(c).

As explained above, ABA Model Rule 1.13 contains various lists of corporate constituents with whom the Corporations’ in-house and outside lawyers interact.

**ABA Model Rule 1.13(a)** contains the identical “default” rule language. As explained below, ABA Model Rule 1.13(g) is also identical to Virginia Rule 1.13(e).

### **Virginia Rule 1.13(b)**

Virginia Rule 1.13(b) addresses in-house and outside lawyers’ obligations if they know an employees’ misconduct.

This issue focuses on whether lawyers must report such misconduct to higher authorities in the corporate client. This normally is called “reporting up” – in contrast to corporate lawyers’ reporting the corporate client’s misconduct outside of the corporate client (called “reporting out”).

Virginia Rule 1.13(b) generally takes the older ABA Model Rule approach, which suggests but does not require that such lawyers take affirmative steps to “report up” such employee misconduct.

Under Virginia Rule 1.13(b), the “reporting up” duty or discretion arises only if the lawyer “knows” of the misconduct. The Virginia Rules Terminology defines “knows” as “denot[ing] actual knowledge of the fact in question,” although “[a] person’s knowledge may be inferred from circumstances.” Thus, lawyers must assess their Virginia Rule 1.13 duty or discretion only if they have “actual knowledge” of the employee’s misconduct. Several Virginia Rules contain a far different standard. Virginia Rule 1.10(a) imputes an individual lawyer’s disqualification to all other lawyers “associated in a firm” – if the lawyer “knows or reasonably should know” that colleague could not understate a representation. Virginia Rule 4.4(b) triggers lawyers’ duty when the lawyer “knows or reasonably should know” that he has received a privileged inadvertently transmitted communication. Virginia Rule 8.3(a) requires lawyers to report other lawyers in certain circumstances if the reporting lawyer has “reliable information” as defined in that Rule. These contrast with Virginia Rule 1.13(b)’s “knows” standard.

Virginia Rule 1.13(b) next describes the fairly narrow circumstances that might trigger such lawyers’ “reporting up” duty.

First, the corporate constituents engaging in the misconduct must be “an officer, employee or other person associated with the organization.” As explained above, Virginia Rule 1.13 contains various lists of corporate constituents with whom lawyers interact, and who might engage in the type of wrongdoing that might trigger Virginia Rule 1.13(b)’s duties.

Presumably corporate officers are also corporate employees. There might be some question about whether a corporate director is either an “officer” or “employee,” but presumably they would be covered by the final category – “other person associated with

the organization.” Unfortunately, the Virginia Rules do not define the term “associated,” although that relationship might be critically important in analyzing such disparate rules as this Virginia Rule 1.13 and (especially) the Virginia Rule 1.10 imputed disqualification standard. Presumably corporate directors are “associated with the organization.” It is much less clear if independent contractors who are the “functional equivalent” of employees fall within that definition.

Second, one of those individuals must be “engaged in action, intends to act, or refuses to act.” Thus, Virginia Rule 1.13(b) covers current or future intended action or inaction.

Third, that action or inaction must be “in a matter related to the representation.” This very significant limitation excludes from lawyers’ possible “reporting up” duty or discretion misconduct that the lawyer stumbles upon, or is otherwise unrelated to the lawyer’s representation of the corporation. For instance, a lawyer representing the corporation in a simple auto accident case caused by a corporate sales person might discover that some other sales person is embezzling from the corporation, sexually harassed a colleague, etc. Presumably those wrongful acts would not be in a “matter related to the representation.” In fact, a lawyer representing a corporation in a business transaction might discover that the lawyer’s contact who is largely in charge of the transaction has been sexually harassing a colleague who is not working on the transaction. It would seem that Virginia Rule 1.13(b) would not cover that knowledge, because sexual harassment is not “related to the representation.” Of course, nothing would prevent such a lawyer from “reporting up” the employee’s misconduct – but it presumably would not be governed by Virginia Rule 1.13.

Fourth, the wrongful action must be “a violation of a legal obligation to the organization, or a violation of other law which reasonably might be imputed to the organization.” The former circumstance presumably involves employees’ or others’ violation of their employment, contractual or fiduciary obligations to the corporation. The latter presumably involves illegal activity for which the corporation might be liable under normal respondeat superior liability.

Fifth, the wrongdoing must be “likely to result in substantial injury to the organization.” Thus, the “substantial injury” must be “likely.” That standard obviously falls between a standard such as “possible” or a standard such as “reasonably certain” (which triggers lawyers’ mandatory disclosure of protected client confidential information under Virginia Rule 1.6(c)(1), to prevent someone’s “death or substantial bodily harm.” And the injury must be “substantial.” Perhaps most significantly, the only “substantial injury” that affects lawyers’ analysis is “substantial injury to the organization.” That limitation has been severely criticized, because it explicitly excludes lawyers’ consideration of “substantial injury” (or any injury at all) to the corporation’s customers, neighboring landowners, shareholders, etc.

If all of these conditions are met, Virginia Rule 1.13(b) requires that lawyers “shall proceed as is reasonably necessary in the best interest of the organization.” Presumably this requirement does not automatically require the lawyer to “report up.” Instead, it requires the lawyer to “proceed” in some way – which may result in the lawyer not “reporting up.” And again, the lawyer considering what steps to take must assess whether those steps are “reasonably necessary in the best interest of the organization.” In other

words, the analysis does not consider what might be in “the best interest” of a customer, neighboring landowner, shareholder, etc.

Virginia Rule 1.13(b) then lists various factors to which the corporation’s lawyer “shall give due consideration”: (1) “the seriousness of the violation and its consequences,” (2) “the scope and nature of the lawyer’s representation;” (3) “the responsibility in the organization and the apparent motivation of the person involved;” (4) the organization’s policies “concerning such matters;” and (5) “any other relevant considerations.” Most of those factors make sense, but it is unclear why the lawyer’s decision whether or not to “report up” would be affected by “the scope and nature of the lawyer’s representation.” That assessment obviously would affect whether the corporate constituent’s misconduct is “related to the representation” the lawyer has undertaken, but it would not seem appropriate in assessing the lawyer’s “report up” discretion. That factor would seem irrelevant if lawyers properly focus on clients’ interests rather than their own interests.

Virginia Rule 1.13(b) next articulates yet another limitation on lawyers’ possible “reporting up” duty or discretion – warning lawyers that “[a]ny measures taken shall be designed to” (1) “minimize disruption of the organization”; and (2) “minimize . . . the risk of revealing information relating to the representation to persons outside the organization.” Those limitations also focus on the corporate client’s interests. But they also tend to dampen lawyers’ duty or discretion to “report up” misconduct within the corporate client.

Virginia Rule 1.13(b) then lists some of the measures that the lawyer “may” take: (1) “asking for reconsideration of the matter;” (2) “advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization”;

(3) “referring the matter to higher authority in the organization,” including “referral to the corporation’s highest authority” if such a move is “warranted by the seriousness of the matter.”

Virginia Rule 1.13(b)(3) defines such “highest authority” as authority “that can act in behalf of the organization as determined by applicable law.”

All in all, Virginia Rule 1.13(b) defines a somewhat surprisingly narrow range of circumstances in which lawyers may (but are not required to) “report up” conduct within the corporation. Like the statutorily parallel Sarbanes-Oxley requirements, the Virginia Rule 1.13(b) analysis seems to be too narrow and to a certain degree contrary to Virginia Rule 1.13(a) – which properly identifies the corporate lawyer’s “client” as the entity. Because lawyers owe their duty to the corporate entity, it should come as no surprise that lawyers might have a duty to report to those who make decisions for the corporate client what is going on inside the corporate client. In fact, one might expect there to be a much more expansive duty to “report up.” After all, the “default” position excludes from any attorney-client relationship a wrongdoer, or any other individual person within the corporate client.

It might be fair to predict that most lawyers who represent corporations would routinely and automatically “report up” to the corporation’s management (and even beyond) about what is going on inside the corporation. So in many ways, Virginia Rule 1.13 might be beside the point – and rarely consulted by or relied upon by lawyers representing corporate clients.

**ABA Model Rule 1.13(b)** articulates the ABA Model Rule standard that parallels Virginia Rule 1.13(b).

There are several important similarities. For instance, like Virginia Rule 1.13(b), ABA Model Rule 1.13(b) applies if a lawyer “knows” of a constituent’s misconduct. As explained above, ABA Model Rule 1.13 contains various lists of corporate “constituents” with whom lawyers interact, and who might engage in the type of wrongdoing that might trigger ABA Model Rule 1.13’s duties. And the list of misconduct is the same, although there are some slight variations in the wording.

More importantly, there are significant differences between ABA Model Rule 1.13(b) and Virginia Rule 1.13(b).

First, in contrast to Virginia Rule 1.13(b), ABA Model Rule 1.13(b) does not contain a list of factors lawyers must consider when deciding what steps to take upon knowing of a corporate client’s constituent’s defined misconduct.

Second, in contrast to Virginia Rule 1.13(b), ABA Model Rule 1.13(b) does not contain the warning that any measures the corporation’s lawyer might take “shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization.”

Third, in contrast to Virginia Rule 1.13(b)’s list of three options the lawyer might consider (asking for reconsideration, seeking another legal opinion, or referring the matter up to higher authority), ABA Model Rule 1.13(b) only lists one option – “reporting up.”

Fourth, and perhaps most importantly, under ABA Model Rule 1.13(b), “[u]nless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority, including, if warranted by the circumstances to the highest corporate authority.” Like Virginia Rule 1.13(b), ABA Model Rule 1.13(b) refers to “the highest authority that can act on behalf of

the organization as determined by applicable law” (Virginia Rule 1.13(b) uses the phrase “in behalf of the organization” – which presumably is synonymous).

Thus, ABA Model Rule 1.13(b) essentially contains a rebuttable presumption that lawyers must “report up,” in contrast to Virginia Rule 1.13(b)’s suggestion that “reporting up” might be one option.

### **Virginia Rule 1.13(c)**

Virginia Rule 1.13(c) addresses lawyers’ steps if “reporting up” does not remedy the wrongful situation.

Virginia Rule 1.13(c) describes what lawyers must or can do if despite their efforts “the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization.”

Interestingly, Virginia Rule 1.13(c)’s list of two conditions that might trigger a corporation’s lawyer to take other steps (“clearly a violation of law” and “is likely to result in substantial injury to the organization”) is only a subset of the type of wrongdoing that triggers Virginia Rule 1.13(b)’s possible duty to “report up.” That “report up” rule also includes another type of misconduct: “a violation of a legal obligation to the organization.” Perhaps the absence of that scenario in Virginia Rule 1.13(c) is deliberate – because it is not as serious as “a violation of law.” ABA Model Rule 1.13(c)(2) avoids this mismatch by using the generic term “the violation” – which presumably incorporates both types of misconduct described in ABA Model Rule 1.13(b).

In other words, Virginia Rule 1.13(c) describes lawyers’ duty or discretion if their efforts to remedy the internal corporate wrongdoing have failed – because the

corporation's decision-maker insists on continuing the wrongdoing or refusing to stop it. And as in other Virginia Rule 1.13 provisions, Virginia Rule 1.13(c)'s triggering event is conditioned on the constituent's misconduct being "likely" to result in substantial injury to the organization" – thus focusing on the corporation's well-being, rather than on anyone else's well-being.

Lawyers expecting there to be some blockbuster duty to protect their corporate client from such wrongdoing would be disappointed.

Virginia Rule 1.13(c) explains that in that circumstance the lawyer may: (1) "resign"; or (2) "may decline to represent the client in that matter in accordance with [Virginia] Rule 1.16" (emphasis added). Remarkably, lawyers' choices under Virginia Rule 1.13(c) therefore are to either resign or to "decline to" (or presumably stop) representing the client "in that matter." What amounts to such permissible "backing away" might take place in the face of a corporation's highest decision-makers' refusal to correct or stop wrongdoing that: (1) is clearly "a violation of law;" and (2) "is likely to result in substantial injury to the organization."

Virginia Rule 1.16 addresses lawyers' withdrawal from representations. Virginia Rule 1.16(a) requires such withdrawal if the lawyer cannot handle the representation or is fired. Most importantly, under Virginia Rule 1.16(a)(1), the lawyer must withdraw from a representation if "the representation will result in violation of the Rules of Professional Conduct or other law." Depending on the corporate lawyer's role in the wrongdoing, Virginia Rule 1.16(a)(1) might have a duty to resign under that Rule, in contrast to Virginia Rule 1.13(c)'s permissive "may resign" language. And if the lawyer's continued representation would meet the Virginia Rule 1.16(a)(1) standard, presumably such a

lawyer would have to resign from the entire representation, not just “decline to represent the client in that matter in accordance with [Virginia] Rule 1.16” – listed as one Virginia Rule 1.13(c) option. Virginia Rule 1.16(b) describes several other scenarios in which lawyers may (but are not obligated to) withdraw from a representation – not just a “matter.”

As with Virginia Rule 1.13(b)'s surprisingly narrow and conditional “reporting up” duty, Virginia Rule 1.13(c) thus rarely if ever requires corporate lawyers to “report out.” Other Virginia ethics rules might require that, but one might have expected this to be the Virginia Rule focusing on corporate lawyers’ duties and discretion to mention those.

Other Virginia Rules might apply in a way that could trump Virginia Rule 1.13(c)'s surprisingly limited and meek choices.

For instance, although Virginia Rule 1.13 cmt. [6] mentions Virginia Rule 1.6 (among five other Virginia Rules that might apply), the interplay between Virginia Rule 1.13 and Virginia Rule 1.16 could be critically important. It would have been helpful for Virginia Rule 1.13's Comments to have explained this interplay in more detail – because Virginia Rule 1.6 requires far more disclosure and permits far more disclosure than Virginia Rule 1.13 or ABA Model Rule 1.13 (or, for that matter, ABA Model Rule 1.6).

For example, Virginia Rule 1.6(e)(1) would require (not just allow) a lawyer who represents a corporation to “promptly reveal . . . the intention of [the corporate client], as stated by the client [presumably the corporate constituent] to commit a crime reasonably certain to result in . . . substantial injury to the financial interests or property of another and the information necessary to prevent the crime.” Virginia Rule 1.6(b)(3) allows (but does not require) a lawyer who represents a corporation to disclose (“[t]o the extent [the] lawyer reasonably believes necessary”) “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.” Lawyers representing corporations probably would not be alerted to such mandatory or discretionary disclosure scenarios by Virginia Rule 1.13 cmt. [6]’s inclusion of Virginia Rule 1.6 in its unexplained list of six Virginia Rules.

Similarly, Virginia Rule 1.13 cmt. [6]’s inclusion of Virginia Rule 4.1(b) in that multi-Rule list might not alert a lawyer to her obligations under Virginia Rule 4.1(b): to not “knowingly . . . fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.” It would be fairly easy to envision corporate lawyers’ “report out” duty under this Rule to avoid “assisting” a corporate client’s “criminal or fraudulent act.” That scenario might require a firmer disclosure and action than Virginia Rule 1.13(c)’s two options of either resigning from the representation or declining to represent the corporation in one matter.

At least Virginia Rule 1.13 cmt. [6] provides some additional information about another possibly applicable Virginia Rule: Virginia Rule 1.2(c). That Virginia Rule prohibits lawyers from counseling or assisting a client “in conduct that the lawyer knows is criminal or fraudulent.”

**ABA Model Rule 1.13(c)** addresses the same situation as Virginia Rule 1.13(c).

ABA Model Rule 1.13(c) dramatically differs from Virginia Rule 1.13(c). In sum, ABA Model Rule 1.13(c) allows (but does not require) lawyers to “report out” protected client confidential information in certain circumstances – in contrast to Virginia Rule 1.13(c)’s suggestion that lawyers may resign or “decline to represent the client” in a matter if they learn of some defined corporate constituent’s misconduct that the corporate client’s

decision-makers refuse to stop or remedy. As explained above, ABA Model Rule 1.6 (which would govern lawyers' actions if they represent the corporation) would never require disclosure ("reporting out") of the corporate client's protected client confidential information - in contrast to Virginia Rule 1.16(c)'s required disclosure of such a corporate client's protected client confidential information in certain situations.

ABA Model Rule 1.13(c) describes essentially the same scenario as Virginia Rule 1.13(c), although there are some differences. Lawyers looking for guidance in ABA Model Rule 1.13(c) are those who have complied with ABA Model Rule 1.13(b) and "reported up" corporate misconduct, but are then stymied because "the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner and action, or a refusal to act, there is clearly a violation of law. Thus, in contrast to Virginia Rule 1.13(c)'s limitation to a corporation's highest authority's insistence "upon action, or a refusal to act," ABA Model Rule 1.13(c) includes another scenario – such a highest authority's "fail[ure] to address in a timely and appropriate manner an action . . . that is clearly a violation of law." In other words, under ABA Model Rule 1.13(c)(2), a highest authority's delay might trigger lawyers' ABA Model Rule 1.13(c)(2)'s discretion to "report out." Of course, at some point the highest authority's delay presumably amounts to "a refusal to act." So that extra ABA Model Rule 1.13(c)(2) scenario apparently covers the time period in which the highest authority has not taken an action, but its delay does not amount to a "refusal to act."

ABA Model Rule 1.13(c) also contains a different set of conditions for such corporate lawyer's additional action. Like Virginia Rule 1.13(c), ABA Model Rule 1.13(c)(1) requires that the wrongdoing "is clearly a violation of law." In other words,

corporate lawyers are not obligated to take steps outside the corporation absent that condition.

ABA Model Rule 1.13(c)(2) contains a similar but narrow additional condition. In contrast to Virginia Rule 1.13(c)'s condition that the wrongdoing "is likely to result in substantial injury to the organization," ABA Model Rule 1.13(c)(2) triggers lawyers' discretionary "reporting out" option only if "the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization." That is a more demanding standard than the Virginia Rule 1.13(c) "likely to result in substantial injury to the organization."

If those two conditions are met, ABA Model Rule 1.13(c)(2) explains that "then the lawyer may reveal information relating to the representation whether or not [ABA Model] Rule 1.6 permits such disclosure." In other words, ABA Model Rule 1.13(c)(2) trumps ABA Model Rule 1.6. ABA Model Rule 1.13(c)(2) then adds another condition: "but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization."

This very narrow and heavily conditioned "reporting out" discretionary option is consistent with the ABA Model Rules' strong confidentiality duty. Virginia's less narrower confidentiality duty under Virginia Rule 1.6 might permit corporate lawyers greater latitude to "report out" than lawyers under ABA Model Rule 1.13. As explained above, Virginia Rule 1.6(c)(1) and Virginia Rule 4.1(b) might require "reporting out" of a corporate client's intended serious financial wrongdoing. Perhaps more importantly, one Virginia Rule 1.6 provision permits such "reporting out" even if that disclosure is not required. Under Virginia Rule 1.6(b)(3), lawyers "may reveal" ("[t]o the extent a lawyer a reasonably

believes necessary”) “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.”

As mentioned above, ABA Model Rule 1.13(c) allows lawyers’ disclosure of protected client confidential information “to prevent substantial injury” to the lawyers’ organizational client. Thus, the scenario involves lawyers disclosing client confidences to protect the client. This contrasts sharply with ABA Model Rule 1.6(b)(2)’s and ABA Model Rule 1.6(b)(3)’s various scenarios where the client intends to or has engaged in criminal or fraudulent conduct that harms “another” (not the client). So ABA Model Rule 1.6 involves the client harming another – in contrast to ABA Model Rule 1.13, which involves a non-client (the corporate constituent) harming the client (the corporation).

This additional condition could result in a strange and perhaps unintended prohibition on lawyers’ discretion to disclose protected client confidential information under ABA Model Rule 1.13. If a corporate client would be harmed by lawyers’ “reporting out,” presumably lawyers may not “report out” under ABA Model Rule 1.13(c). Such a scenario might involve a corporate client’s misconduct that no one would ever discover – absent the lawyer’s “reporting out.” In such a situation, a lawyer could not rely on ABA Model Rule 1.13(c)(2) when making such a disclosure outside the corporate client. But if the corporation’s misconduct has or might in the future harm “another,” lawyers presumably could rely on ABA Model Rule 1.6(b)(2) or (3) who disclose protected client confidential information under the conditions described in those ABA Model Rule provisions.

In sum, ABA Model Rule 1.13(b) seems to allow corporations' lawyers to "report out" in more situations than Virginia Rule 1.13(c). But corporations' lawyers governed by the Virginia Rules would also have to check; (1) Virginia Rule 4.1(b) (which requires disclosure if silence would assert "client's' crimes or fraud"; (2) Virginia Rule 1.6 – which requires "reporting out" (Virginia Rule 1.16(c)) and allows "reporting out" (Virginia Rule 1.16(b)) in several possible corporation-related scenarios; (3) perhaps other rules, such as Virginia Rule 3.3, Virginia Rule 8.3, etc., so overall, the Virginia Rules are much more pro-disclosure than ABA Model Rule 1.13.

### **Virginia Rule 1.13(d)**

Virginia Rule 1.13(d) addresses corporate lawyers' interaction with corporate client constituents.

Virginia Rule 1.13(d) describes a scenario in which "it is apparent that the organization's interests are adverse to those of the [corporate] constituents with whom the lawyer is dealing." Virginia Rule 1.13(d) lists those "constituents": "an organization's directors, officers, employees, members, shareholders or other constituents." In other words, the specifically identified list of persons is not exclusive.

In that setting, "a lawyer dealing with such a person shall explain the identity of the client." One would think that Virginia Rule 1.13(d) would require more than simply "explain[ing] the identity of the client." A corporate lawyer telling a corporate constituent "I represent the corporation" does not fully explain the implications of that client identity. First, it does not clearly disclaim a joint representation with the constituent. That negative statement presumably would be more important than the positive client identification statement. Second, merely identifying the corporation as the client would not include the

implications of that relationship – such as the lawyer’s duty to report to corporate decision-makers what she has and will learn from the constituent; her inability to engage in reciprocal disclosure of information to the constituent without the corporation decision-maker’s consent, etc. Perhaps Virginia Rule 1.13(c)’s term “explain” is meant to include such additional explanation. Third, the client’s identity (and absence of an attorney-client relationship with a constituent) obviously affects the attorney-client privilege’s ownership and ability to waive that important protection.

It is somewhat surprising that lawyers must “explain the identity of the client” only in situations “when it is apparent that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing” (emphasis added). One might have thought that the disclosure obligation would arise even if there is no current adversity. For instance, Virginia Rule 1.13(c) might have used a different standard, such as “likely,” “reasonably certain,” etc. Although that is the context in which the explanation becomes most acutely necessary, it would be wise for corporate lawyers to “explain the identity of the client” essentially every time they communicate with a constituent (other than during social niceties).

But Virginia Rule 1.13(d) and ABA Model Rule 1.13(f) (discussed below) only require such disclosure of the client’s identity in “apparent[ly]” adverse situations.

This disclosure of the client’s identity essentially mirrors the so-called Upjohn warning. Under Upjohn Co. v. United States, 449 U.S. 383 (1981), the attorney-client privilege can protect a corporation’s lawyer’s communications with any corporate constituent anywhere in the corporate hierarchy – if that constituent possesses information that the lawyer needs in order to advise her corporate client. Upjohn

abandoned the old “control group” privilege test, which only protected a corporation’s lawyer’s communications with corporate management who acted on the lawyer’s advice. Upjohn correctly focused on corporate clients’ (acting through any constituent) communication to the lawyer – which is the reason the attorney-client privilege exists. In contrast, the old “control group” standard improperly focused on communications going the other way – lawyers to clients. The Upjohn privilege standard applies to all federal question cases, and in most state courts (although some states such as Illinois continue to follow the “control group” standard).

The so-called “Upjohn warning” has two parts, one focusing on ethics and one focusing on privilege. The first half addresses the client’s identity. Lawyers representing a corporation or other organization in dealing with possibly adverse constituents should explain that they represent the corporate organization – and not the constituent. To be safe, corporations’ lawyers often give the Upjohn warning even if there is no possible adversity on the horizon. This assures that the lawyer will not later be found to have jointly represented the corporation and the employee, thus precluding the lawyer from adversity to an employee who unexpectedly becomes adverse in the future.

The second half of the so-called Upjohn warning addresses privilege protection, rather than the ethical issue of client identity (although the client identity obviously affects the privilege). The second half explains that the lawyer is communicating with the corporate constituent because he has information the lawyer needs in order to give legal advice to the lawyer’s corporate client. The second half warning usually also includes a warning that the constituent with whom the lawyer is communicating should not disclose

the communication's substance to anyone else within the corporation who does not have a "need to know" (or without the lawyer's consent).

This second half of the so-called Upjohn warning may become important if the corporation and the employee become adversaries. Employees who become adverse to their employer may not only can try to disqualify the communicating lawyer from representing the corporation adverse to them. Those employees might also claim sole or joint ownership of the attorney client privilege. This may become an issue when the corporation wishes to waive the privilege (as when they want to cooperate with the government). If the corporation solely owns the privilege, it can make that decision. But if a now-adverse employee claims joint ownership of the privilege, he or she might veto such disclosure to the government.

**ABA Model Rule 1.13(f)** addresses the same disclosure duty when corporate lawyers deal with corporate constituents.

ABA Model Rule 1.13(f) contains the same list of constituents as Virginia Rule 1.13(d), the same circumstance involving their adversity ("are adverse," not "may be" adverse) to the organization, and the same required step in those circumstances": "explain[ing] the identity of the client".

In contrast to Virginia Rule 1.13(d)'s explanation that corporate lawyers must take those steps "when it is apparent" that there is such adversity, ABA Model Rule 1.13(f) uses a different standard: "when the lawyer knows or reasonably should know" of such adversity. ABA Model Rule 1.13(f)'s "knows" standard is objective. ABA Model Rule 1.0(f) states that the word "knows" "denotes actual knowledge of the fact in question," but then explains that such knowledge "may be inferred from circumstances." The ABA

Model Rule 1.13(f) phrase “reasonably should know” is presumably a negligence standard, and thus seems to be similar to Virginia Rule 1.13(d)’s phrase “when it is apparent.”

### **ABA Model Rule 1.13(d)**

Virginia did not adopt ABA Model Rule 1.13(d).

ABA Model Rule 1.13(d) addresses lawyers’ obligations when they are investigating possible corporate wrongdoing.

ABA Model Rule 1.13(d) first explains that the permissible “reporting out” permitted by ABA Model Rule 1.13(c)(2) “shall not apply with respect to information relating to”: (1) a lawyer’s investigation of “an alleged violation of law”; or (2) a lawyer’s defense of “the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.”

The phrase “other constituent associated with the organization” is odd. ABA Model Rule 1.13(f) includes “shareholders” in the list of an organization’s “constituents.” So ABA Model Rule 1.13(d) apparently could include lawyers representing shareholders in defending against such claims.

This is a complicated and potentially confusing provision.

The phrase “shall not apply with respect to information” could be clearer. The phrase “shall not apply to information” would have been more precise and less ambiguous. Presumably ABA Model Rule 1.13(d) eliminates lawyers’ discretion under ABA Model Rule 1.13(c) to “report out” if the lawyer has the identified information. And the next phrase “relating to” the two defined lawyer roles is also potentially confusing. Of course, the phrase “relating to” appears throughout the ABA Model Rules. Here, that

term presumably means information “relating to” one of the two representations defined in ABA Model Rule 1.13(d), but that is not clear. Does information “relating to” representations mean information the lawyer has obtained during the representation from the client, or does it also include information about the representation? Such uncertainty could be significant.

The two defined roles are: (1) the lawyer’s “representation of an organization to investigate an alleged violation of law”; and (2) the lawyer’s representation in “defend[ing] the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.” The first role presumably includes lawyers investigating the organization’s “alleged violation of law.” That is not clear from the language, but one can safely assume that, given the second role (which almost certainly involves “a claim arising out of an alleged violation of law” by the organization or constituent being defended by the lawyer).

ABA Model Rule 1.13(d) thus seems to involve three possible scenarios.

First, the lawyer might investigate a corporate client’s alleged violation of law. It seems likely that this is the role that is most likely to bring to a corporate lawyer’s attention the type of information that must be “reported up” under ABA Model Rule 1.13(b) and may be “reported out” under ABA Model Rule 1.13(c). But ABA Model Rule 1.13(d) does not allow the lawyer to “report out” such information even if doing so would “prevent substantial injury to the organization.” That does not make much sense. If a lawyer who stumbles across a corporate client constituent’s sufficiently egregious misconduct related to the lawyer’s representation may “report out” if the corporation does not take appropriate

steps, one must wonder why lawyers investigating the corporation do not have the same discretion.

The second scenario involves a lawyer defending the corporation “against a claim arising out of an alleged violation of law.” That exception makes more sense. Such lawyers are not obligated to “report out,” have no discretion to “report out”, and presumably would not “report out” – because they can report out “only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.” But one would think that lawyers who believe that “reporting out” is necessary to protect the corporate client in that context would have the discretion to do so.

The third scenario involves lawyers “defend[ing] the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law” (emphasis added). This third scenario could be enormously complicated – implicating both dramatic ethics and privilege issues.

If such a lawyer was defending “the organization [and] the constituent against a claim arising out of an alleged violation of law”, that would constitute a joint representation.

Interestingly, ABA Model Rule 1.13 cmt. [12]’s brief guidance on ABA Model Rule 1.13(g) states simply that “a lawyer for an organization may also represent a principal officer or major shareholder.” That could be either a joint representation or a separate representation of such a “principal officer or major shareholder.” But the subheading for ABA Model Rule 1.13 cmt. [12] (“Dual Representation”) would seem to denote a joint representation.

As ABA Model Rule 1.7 and many of its Comments explain, such lawyers must wrestle both with loyalty and information flow issues. Because such a lawyer would have two clients, he would also have to address possible disclosure obligations or discretion under many other ABA Model Rules, including ABA Model Rule 1.6, ABA Model Rule 3.3 and ABA Model Rule 4.1 (among others). Perhaps ABA Model Rule 1.13(d) intends implicitly to acknowledge that all of those other rules govern such a lawyer’s “report out” duty, rather than ABA Model Rule 1.13(c).

But there could be an even more troublesome way to read ABA Model Rule 1.13(d) – which would seem to be more appropriate than a reading describing a joint representation. ABA Model Rule 1.13(d)’s use of the word “or” rather than the word “and” would seem to describe a lawyer’s separate representation of the corporate constituent – rather than a joint representation of the organization and the constituent. And such a lawyer might not represent the organization on unrelated matters. If she did not, then her sole duty would be to the constituent in defending against the claim. In that situation, it makes sense not to incorporate any ABA Model Rule 1.13(c) analysis or discretion.

If the lawyer representing the constituent also simultaneously represented the organization on unrelated matters, that creates its own set of complications. That would not be a joint representation on the same matter. But it would be easy to envision such a lawyer facing a “material limitation” conflict under ABA Model Rule 1.17(a)(2) that could cripple one or the other representation. For instance, suppose that a lawyer represented the corporation in arranging a loan from a bank, while simultaneously representing a constituent in defending against “a claim arising out of an alleged violation of law.” If the constituent was also involved in the bank transaction (and perhaps even if he was not),

the lawyer learning that the constituent was a crook could place the lawyer in the untenable position of knowing that her corporation client's representative in the transaction was a crook – but forbidden from advising the corporation of the constituent's wrongdoing without that constituent's consent.

That scenario may involve an exception to ABA Model Rule 1.13(c), but does not on its face render inapplicable ABA Model Rule 1.6. That is important, because a lawyer representing only “an officer, employee or other constituent associated with the organization” presumably has discretion under ABA Model Rule 1.6(b)(2) and (3) to disclose information “to the extent the lawyer reasonably believes necessary” to prevent or mitigate the lawyer's client's criminal or fraudulent conduct that has or might in the future injure “the financial interests or property of another” (emphasis added). In the ABA Model Rule 1.6 scenario, the “another” is the corporation or other organization. ABA Model Rule 1.13(d)'s third scenario thus differs dramatically from one in which a lawyer represents the organization either during an investigation or in defending the organization from a claim. There, the lawyer is dealing with some wrongdoing that might hurt the lawyer's client – not “another.” Here, the lawyer is dealing with wrongdoing by a client that might hurt “another” – the corporation. In either a joint representation or separate representation, context, the corporation is “another.”

All in all, it is unclear why ABA Model Rule 1.13(d) does not apply ABA Model Rule 1.13(c) in that setting.

### **Virginia Rule 1.13(e)**

Virginia Rule 1.13(e) addresses lawyers' possible representation of other corporate constituents.

Virginia Rule 1.13(e) first explains that an organization’s lawyer “may also represent any of its directors, officers, employee, members, shareholders or other constituents” - if Virginia Rule 1.7 permits it. Virginia Rule 1.7 prohibits lawyers from representing one client against another client, or representing any client if there is a “significant risk” that the lawyer’s judgment on behalf of that client would be materially limited by the lawyer’s responsibilities to another client or a former client, a third person or by the lawyer’s own interest.

Virginia Rule 1.13(e) understandably requires that any consent required from the corporation to represent another constituent in a “dual representation” must be “given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.”

The term “dual representation” is odd. Virginia Rule 1.7 Comments and the parallel ABA Model Rule 1.7 Comments use the term “common representation.” In the privilege context, such multiple representations are usually called “joint representations.” Presumably “dual representation” means the same thing.

Such joint representations carry enormous implications involving loyalty, information flow and other duties. Virginia Rule 1.13(e) apparently does not deal with the possibility that the lawyer could separately represent a corporation and one of its constituents. That probably would be nearly impossible if the joint representation related to a corporate matter. But presumably a corporation’s lawyer could represent a vice president in her house closing, a sale manager in a traffic ticket case, etc. Those types of representations normally would not be joint representations, and would not trigger all of the many significant ethics issues.

**ABA Model Rule 1.13(g)** contains the identical language.

### **ABA Model Rule 1.13(e)**

Virginia did not adopt ABA Model Rule 1.13(e).

ABA Model Rule 1.13(e) addresses lawyers who have been terminated in the midst of dealing with the scenarios described in ABA Model Rule 1.13.

ABA Model Rule 1.13(e) first describes a lawyer's obligation if the lawyer: (1) "reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to" [ABA Model Rule 1.13(b)'s "reporting up" provision or ABA Model Rule 1.13(c)'s "reporting out" provision], or (2) "withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs." The first scenario makes sense. That would involve the perhaps predictable firing of a lawyer about to "blow the whistle" on some corporate wrongdoing.

But the "withdrawal" scenario is more complicated.

The phrase "under circumstances that require or permit" seems odd. Withdrawal would not occur "under" those circumstances – if that means either (1) that the requirement to or discretion to disclose would trigger the "withdrawal," or (2) that the withdrawal would trigger the requirement or discretion for the lawyer to take the specified action. Instead, at most the withdrawal would occur at a time when the lawyer might be required or permitted to take the specified actions.

ABA Model Rule 1.13(e) requires that such discharged or withdrawn lawyers "shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal." In essence, ABA Model Rule 1.13(e) assures that corporate clients' "highest authority" (normally its board

of directors) will know if a lawyer who has or attempted to “report up” or “report out” has been fired for doing so, or has withdrawn in that setting.

## Comment

### Virginia Rule 1.13 cmt. [1]

Virginia Rule 1.13 cmt. [1] addresses lawyers' clients' identity in the corporate context.

Virginia Rule 1.13 cmt. [1] first states the obvious fact that an "organizational client" is a "legal entity" but acts only through its constituents.

Virginia Rule 1.13 cmt. [1] lists persons who can direct the corporation's actions in a non-exclusive list: "its officers, directors, employees, shareholders, and other constituents." Virginia Rule 1.13's various lists of persons identified in Virginia Rule 1.13 is discussed above.

Virginia Rule 1.13 cmt. [1] then explains that Virginia Rule 1.13 duties "apply equally to unincorporated associations." Such "unincorporated associations" are also mentioned in Virginia Rule 1.10 cmt. [1a] and in ABA Model Rule 1.0 cmt. [3]. Presumably there are many other entities that fall under the definition of "organizational client."

Virginia Rule 1.13 cmt. [1] concludes by making the common sense point that in non-corporate entity contexts, the term "[o]ther constituents" "means the positions equivalent to [corporations'] officers, directors, employees and shareholders."

**ABA Model Rule 1.13 cmt. [1]** contains essentially the same language. ABA Model Rule 1.13's various lists of persons is also discussed above. Interestingly, ABA Model Rule 1.13 cmt. [1]'s first two sentences contain the exact same list of a corporate organization's constituents "[o]fficers, directors, employees and shareholders."

### **Virginia Rule 1.13 cmt. [2]**

Virginia Rule 1.13 cmt. [2] addresses confidentiality duties when lawyers communicate with one of the organization's constituents.

Virginia Rule 1.13 cmt. [2] first explains that Virginia Rule 1.6 protects such communications when the constituent is acting in his "organizational capacity." The Virginia Rule Comment provides an example: "if an organizational client requests its lawyers to investigate allegations of wrongdoing, interviews made in the course of that investigation between a lawyer and the client's employees or other constituents are covered by [Virginia] Rule 1.6."

This sounds simple enough, but if a lawyer represents a corporate client's constituent as permitted under Virginia Rule 1.13(e) (discussed below), that constituent may also deserve Virginia Rule 1.6 confidentiality duties. Unfortunately, Virginia Rule 1.13 cmt. [2]'s axiomatic statement does not explain to whom such a lawyer owes Virginia Rule 1.6 confidentiality duties.

If such a lawyer had only represented the organization in the course of those interviews and properly given the interviewee subjects the Upjohn warning described above, then the lawyer would owe Virginia Rule 1.6 duties to the corporation, not to the interviewed constituent" And under Virginia Rule 1.13(d), lawyers only have a duty to "explain the identity of the client" when the constituent's interests "are adverse" to the corporate client's interests. As explained above, this does not include the scenario where the interest "may be" or even likely "are" adverse – but only when the interests "are adverse" (bylaw added).

But such a lawyer might represent the corporation and the constituent. That would presumably constitute a joint representation, under which a lawyer would have to sort out any disclosure obligation among the joint clients under Virginia Rule 1.7, especially Virginia Rule 1.7 cmt. [29] – [32]. The critical attorney-client privilege issues would essentially follow the same pattern.

Virginia Rule 1.13 cmt. [2] then explains that the applicability of Virginia Rule 1.6 protection “does not mean, however, that constituents of an organizational client are the clients of the lawyer.” As explained above, such an interview does not automatically mean that the lawyer represents the constituents. But under Virginia Rule 1.13(e), a lawyer may establish either a separate or a joint attorney-client relationship with such a constituent. So there would be no automatic attorney-client relationship, but there could be a permissible attorney-client relationship – with all of the ethics, privilege and other implications that brings.

Virginia Rule 1.13 cmt. [2]’s use of the term “information relating to the representation” mirrors the broad ABA Model Rule 1.6(a) standard, rather than the more limited Virginia Rule 1.6(a) definition of protected client confidential information: (1) information protected by the attorney-client privilege; (2) information the client has asked to be kept confidential; and (3) information “the disclosure of which would be embarrassing or would be likely to be detrimental to the client.” Thus, Virginia Rule 1.13 cmt. [2] covers a broader range of protected client confidential information than in the standard setting. But Virginia Rule 1.13 cmt. [2]’s reference to confidential information whose disclosure is “otherwise permitted by Rule 1.6” presumably incorporates that Virginia Rule’s narrower Virginia definition of protected client confidential information that

cannot be disclosed. Of course, the limitation on corporations' lawyers disclosing client confidences to corporate constituents follows from the fact that the constituent is not the lawyer's client.

Virginia Rule 1.13 cmt. [2] concludes with a warning that lawyers may not disclose to such constituents "information relating to the representation" of the corporation unless the organizational client "explicitly or impliedly" authorizes such disclosure "in order to carry out the representation or as otherwise permitted by [Virginia] Rule 1.6." Thus, Virginia Rule 1.13 cmt. [2]'s concluding sentence focuses on lawyers' communications to these other people, not communications from them. Of course, that scenario involves a lawyer's representation just of the entity, and not a joint representation of the entity and one of the constituents. In a joint representation scenario, such lawyers may well have a duty to disclose information equally to both of her clients. But if the lawyer represents only the entity, she does not have to address Virginia Rule 1.13(e) issues.

**ABA Model Rule 1.13 cmt. [2]** contains the identical language. As described above, a lawyer representing only the corporate entity and not any corporate constituents does not have to address ABA Model Rule 1.13(g) issues.

### **Virginia Rule 1.13 Comment [3]**

Virginia Rule 1.13 cmt. [3] addresses the steps lawyers may or must take in the face of corporate constituent's wrongdoing.

Virginia Rule 1.13 cmt. [3] first states that a lawyer representing an organization "ordinarily" must accept that organization's constituents' decisions "even if their utility or prudence is doubtful." That approach applies to "[d]ecisions concerning policy and operations," including even "ones entailing serious risk."

Interestingly, Virginia Rule 1.13 cmt. [3] does not distinguish between such corporate client's constituents' internal decision-making powers. Corporations' lawyers presumably have a duty to accept the corporate directors' decisions, absent some rare exceptions. The same probably would be true of upper management. But the same would certainly not be true of a first-day-on-the-job salesperson.

Virginia Rule 1.13 cmt. [3] next turns to situations where the lawyer "knows" that the organizational client "may be substantially injured by action of a constituent that is a violation of law." A situation where a lawyer knows that a corporate client constituent is violating the law in a way that could "substantially injure" that corporate client obviously triggers the most acute scenario in which the lawyer must take some action – such as "reporting up." But oddly, Virginia Rule 1.13 cmt. [3]'s scenario represents only a subset of black letter Virginia Rule 1.13(b)'s situations that may trigger the obligation or discretion to "report up." Thus, Virginia Rule 1.13 cmt. [3] deliberately excludes from its described scenario a corporate constituent's action or refusal to act "that is a violation of a legal obligation to the organization." Presumably Virginia Rule 1.13 cmt. [3] was intended to exclude that type of constituent wrongdoing, although one could easily envision that type of misconduct triggering all the same considerations as a legal violation. In that circumstance, "it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter."

If that constituent does not take a different course, "or if the matter is of sufficient seriousness and importance to the organization," Virginia Rule 1.13 cmt. [3] explains that "it may be reasonably necessary" for the lawyer to report up to a higher authority. Thus, lawyers may "report up" directly to the higher authority in such circumstances – skipping

a request that “the constituent . . . reconsider the matter.” It seems strange that Virginia Rule 1.13 cmt. [3] would essentially limit a lawyer’s “directly reporting up” two scenarios where the constituent does not stop the misbehavior or “the matter is of sufficient seriousness and importance to the organization.” The issue does not even arise unless “the lawyer knows that the organization may be substantially injured by action of a constituent that is in violation of law.” One would think that such a scenario would automatically mean that “the matter is of sufficient seriousness and importance to the organization.”

But Virginia Rule 1.13 cmt. [3] inexplicably warns that “[s]ubstantial justification should exist for seeking review over the head of the constituent normally responsible for it.” This approach is consistent with Virginia Rule 1.13’s theme that lawyers may “report up” as one of the options, in contrast to ABA Model Rule 1.13’s theme that lawyers must “report up” absent unusual circumstances.

One might wonder why a corporate client’s lawyer would need “[s]ubstantial justification” for going over the head of a constituent “normally responsible” for handling a matter. That might hurt the constituent’s feelings, but the lawyer represents the corporate entity, not the constituent.

Virginia Rule 1.13 cmt. [3] points to possible organizational policies that “may define circumstances and prescribe channels for such review.” The Virginia Rule Comment also reminds lawyers that they “should encourage the formulation of such a policy” (presumably if one does not already exist). Such policies presumably include those adopted under Sarbanes-Oxley.

Virginia Rule 1.13 cmt. [3] next explains that even if no such policy exists, “the lawyer may have an obligation to refer a matter to higher authority.” This is not surprising – of course a corporate client’s lawyer “may have an obligation” to report to the corporate client’s decision-makers. Virginia Rule 1.4 (among other rules) would require such communication. Virginia Rule 1.13 cmt. [3] then lists various factors that might influence the lawyer’s obligation to “report up:” “depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at a variance with the organization’s interest.” These factors do not appear in ABA Model Rule 1.13 cmt. [3], but similar factors appear at the beginning of ABA Model Rule 1.13 cmt. [4].

Virginia Rule 1.4 (the core communication duty) presumably would not even include such factors. For instance, under Virginia Rule 1.4(a), lawyers must “keep a client reasonably informed about the status of a matter.” Under Virginia Rule 1.4(b), “[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” That communication duty would seem to trigger a “reporting up” obligation long before Virginia Rule 1.13 cmt. [3]’s articulated factors come into play.

Virginia Rule 1.13 cmt. [3] then describes the “reporting up” process – explaining that “[r]eview by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority.” Of course, that is the “reporting up” process described in Virginia Rule 1.13(b). In contrast to the fairly direct “reporting up” obligation described in ABA Model Rule 1.13(c), one has to look carefully for Virginia Rule 1.13(b)’s references to required (rather than discretionary) “reporting up.” Virginia Rule 1.13(b) states that: “[t]he lawyer shall proceed as is reasonably necessary

in the best interest of the organization” and that “[s]uch measures may include . . . referring the matter to higher authority in the organization”; and “if warranted by the seriousness of the matter, referral to the highest authority” in the organization. Virginia Rule 1.13(b)(3). Thus, there is black letter Virginia Rule 1.13(b) support for Virginia Rule 1.13 cmt. [3]’s reference to lawyers’ “possible required” reporting up to “higher authority,” including the chief executive officer or board of directors.

Virginia Rule 1.13 cmt. [3] concludes with a suggestion that “[a]t some point it may be useful or essential to obtain an independent legal opinion.” Black letter Virginia Rule 1.13(b)(2) mentions that possibility.

**ABA Model Rule 1.13 cmt. [3]** addresses the same basic scenario, but with different language that emphasizes rather than obliquely mentioning lawyers’ “reporting up” obligation in some circumstances.

ABA Model Rule 1.13 cmt. [3] begins with the same language as Virginia Rule 1.3 cmt. [3] – noting that lawyers generally must accept corporate clients’ constituents’ decisions, “even if the utility or prudence is doubtful.

In contrast to Virginia Rule 1.13 cmt. [3]’s general theme that lawyers may but rarely must have to take one of the described steps, ABA Model Rule 1.13 cmt. [3] next bluntly directs that “the lawyer must proceed as is reasonably necessary in the best interest of the organization” “when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization. Thus, unlike Virginia Rule 1.13 cmt. [3], ABA Model Rule 1.13 cmt. [3] describes a scenario where “the organization is likely to be substantially injured by action

of an officer or other constituent that violates a legal obligation to the organization” (a situation that Virginia Rule 1.13 cmt. [3] does not include). Both ABA Model Rule 1.13 cmt. [3] and Virginia Rule 1.13 cmt. [3] mention another scenario having the same impact: “action of an officer or other constituent that . . . is in violation of law.” But ABA Model Rule 1.13 cmt. [3] adds a condition to that scenario – that such “violation of law . . . might be imputed to the organization” (Virginia Rule 1.13 cmt. [3] likewise does not include the imputation factor – although black letter Virginia Rule 1.13(b) includes the imputation factor).

This direction parallels the dramatic difference between Virginia Rule 1.13(b)’s description of such “reporting up” almost as a last resort, and ABA Model Rule 1.13(b)’s description of “reporting up” as the required step, absent unusual circumstances.

ABA Model Rule 1.13 cmt. [3] concludes by reminding lawyers who are considering whether they “know” of the possibility of substantial injury to the organization (thus triggering their “reporting up” obligation) that their “knowledge can be inferred from circumstances,” and that they “cannot ignore the obvious” (referring to ABA Model Rule 1.0(f)). Interestingly, black letter ABA Model Rule 1.0(f) does not include the warning that a lawyer “cannot ignore the obvious” and ABA Model Rule 1.0 does not contain any Comments with that concept. Such a standard seems to fall short of “actual knowledge.” Perhaps a lawyer’s “actual knowledge” can be “inferred from circumstances” if the lawyer ignores the obvious – but that is not clear either.

#### **ABA Model Rule 1.13 Comment [4]**

Virginia did not adopt ABA Model Rule 1.13 cmt. [4].

ABA Model Rule 1.13 cmt. [4] begins with considerations somewhat similar to those described in black letter Virginia Rule 1.13(b): “[t]he lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations.” And also like black letter Virginia Rule 1.13(b)(1), ABA Model Rule 1.13 cmt. [4] states that “it may be appropriate for the lawyer to ask the constituent to reconsider the matter.” In contrast to black letter Virginia Rule 1.13(b)(1), ABA Model Rule 1.13 cmt. [4] provides an example of a scenario in which “it may be appropriate for the lawyer to ask the constituent to reconsider the matter:” “if the circumstances involve a constituent’s innocent misunderstanding of law and subsequent acceptance of the lawyer’s advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority.”

But in contrast to black letter Virginia Rule 1.13(b) and Virginia Rule 1.13 cmt. [3], ABA Model Rule 1.13 cmt. [4] next emphasizes lawyers’ duty to undertake some action in the scenario described. For instance, ABA Model Rule 1.13 cmt. [4] bluntly states that “[o]rdinarily, referral to a higher authority would be necessary,” and that “[if] a constituent persists in conduct contrary to the lawyer’s advice, it will be necessary for the lawyer to take steps” to report up. Thus, this continues ABA Model Rule 1.13’s theme of mandatory lawyer action in the face of knowledge that corporate constituents are engaging in sufficiently egregious misconduct, not just the suggestions of possible actions in that scenario (which is Virginia Rule 1.13’s theme).

ABA Model Rule 1.13 cmt. [4] next explains that even if the lawyer has not first communicated with the pertinent constituent, reporting up “may be necessary” if “the matter is of sufficient seriousness and importance or urgency to the organization.” This language parallels Virginia Rule 1.13 cmt. [3].

ABA Model Rule 1.13 cmt. [4] next understandably acknowledges that any steps lawyers take in that situation should “minimize the risk of revealing information relating to the representation to persons outside the organization.” But even that acknowledgement requires such steps only “to the extent practicable.” This again emphasizes disclosure as the best and possibly necessary choice, in contrast to Virginia Rule 1.13’s theme of disclosure essentially as a last resort.

ABA Model Rule 1.13 cmt. [4] continues this theme in its conclusion, which reminds lawyers that “[e]ven in circumstances where a lawyer is not obligated by [ABA Model] Rule 1.13 to proceed, lawyers “may bring to the attention” of a corporate client’s highest authority matters that the lawyer “reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.”

### **Virginia Rule 1.13 Comment [5]**

Virginia Rule 1.13 cmt. [5] addresses to whom a lawyer should “report up.”

Virginia Rule 1.13 cmt. [5] continues the Virginia Rule 1.13 theme by describing “an extreme case” circumstance where “it may be reasonably necessary for the lawyer to refer the matter to the organization’s highest authority.” This contrasts with ABA Model Rule 1.13’s approach, which essentially requires “reporting up” absent unusual circumstances.

Virginia Rule 1.13 cmt. [5] concludes with an explanation that a corporation's highest authority "ordinarily . . . is the board of directors or similar governing body." But Virginia Rule 1.13 cmt. [5] then wisely notes that "under certain conditions the "highest authority reposes elsewhere; for example, in the independent directors of a corporation." Although Virginia Rule 1.13 cmt. [5] does not provide further guidance. Presumably that scenario might involve lawyers dealing with misconduct by some of the inside directors themselves.

**ABA Model Rule 1.13 cmt. [5]** also addresses to whom lawyers must "report up" under ABA Model Rule 1.13.

Not surprisingly, in contrast to Virginia Rule 1.13 cmt. [5], ABA Model Rule 1.13 cmt. [5] does not contain the introductory phrase "[i]n an extreme case." ABA Model Rule 1.13 cmt. [5] instead points to ABA Model Rule 1.13(b) as describing "when it is reasonably necessary" for the organization to address a matter "in a timely and appropriate manner" – at which point "the lawyer must refer the matter to higher authority."

ABA Model Rule 1.13 cmt. [5] concludes with the same Virginia Rule 1.13 cmt. [5]'s explanation that an organization's highest authority "ordinarily" is the board of directors or "similar governing body" – but that "under certain conditions" the "highest authority" may be "the independent directors."

### **Virginia Rule 1.13 Comment [6]**

Virginia Rule 1.13 cmt. [6] addresses other Virginia Rules that govern lawyers' actions in situations described in Virginia Rule 1.13.

Virginia Rule 1.13 cmt. [6] notes that Virginia Rule 1.13(b) "does not limit or expand the lawyer's responsibility" under several other specified Virginia Rules: Virginia Rule 1.6,

1.8, 1.16, 3.3 and 4.1. Most significantly, Virginia Rule 1.13 cmt. [6]’s list includes Virginia Rule 1.6 (in contrast to ABA Model Rule 1.13 cmt. [6], which deliberately leaves ABA Model Rule 1.6 out of the list).

As discussed above, Virginia Rule 1.6 may require or allow more “reporting out” disclosure of protected client confidential information. So citing Virginia Rule 1.6 would seem to emphasize lawyers’ confidentiality duty (because that is the core Virginia confidentiality rule). But that reference actually incorporates occasional obligations for the lawyer to disclose protected client confidential information (under Virginia Rule 1.6(a)(c) and discretion to disclose protected client confidential information (under Virginia Rule 1.6(b))). The same is true of Virginia Rule 4.1 (as also explained above).

Virginia Rule 1.13 cmt. [6] concludes with specific reference to Virginia Rule 1.2(c), which “can be applicable” “[i]f the lawyer’s services are being used by an organization to further a crime or fraud by the organization.” Virginia Rule 1.2(c) warns that (a) lawyers shall not counsel a client to engage, or assist a client, in conduct that “the lawyer knows is criminal or fraudulent.”

Virginia Rule 1.13 cmt. [6]’s reference to Virginia Rule 1.2(c) is pertinent, but far less likely to apply than two other mandatory disclosure scenarios. Under Virginia Rule 1.6(c)(1), lawyers “shall promptly reveal . . . the intention of a client, as stated by the client, to commit a crime reasonably certain to result in . . . substantial injury to the financial interests or property of another “subject to certain conditions). And under Virginia Rule 4.1(b), lawyers “shall not knowingly . . . fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.” Those scenarios seem more likely to arise than the situation articulated in Virginia Rule 1.2(c) – which involves lawyers’

active participation in their clients' criminal or fraudulent acts, rather than lawyers' learning of (but not participating in) their clients' future wrongful acts.

**ABA Model Rule 1.13 cmt. [6]** addresses the same issue as Virginia Rule 1.13 cmt. [6].

ABA Model Rule 1.13 cmt. [6] contains the same introductory statement, and the same rules mentioned in Virginia Rule 1.13 cmt. [6] – with one significant exception.

ABA Model Rule 1.13 cmt. [6] does not include ABA Model Rule 1.6. Instead, ABA Model Rule 1.13 cmt. [6] more specifically explains that ABA Model Rule 1.13(c) “supplements [ABA Model] Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation.” As explained above, black letter ABA Model Rule 1.13(c)(2) allows (but does not require) lawyers to “reveal information relating to the representation” under that Rule’s conditions – “whether or not [ABA Model] Rule 1.6 permits such disclosure.” Not surprisingly, lawyers may disclose such information under ABA Model Rule 1.13(b)(2) “only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.”

Although ABA Model Rule 1.13 cmt. [6] explains that ABA Model Rule 1.13(c) “supplements” ABA Model Rule 1.6(b), the only reference to such a “supplement” is fairly vague. ABA Model Rule 1.6 and its Comments only makes a passing reference to ABA Model Rule 1.13. ABA Model Rule 1.6 cmt. [7]’s last sentence contains a “[s]ee also” reference to ABA Model Rule 1.13(c) – followed by a description of ABA Model Rule 1.13(c): “which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.” That vague reference at the very end of ABA Model Rule 1.6 cmt. [7] does a poor job of highlighting a key issue

– that ABA Model Rule 1.13(c) “supplements [ABA Model] Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information to the representation.” One would have thought that either this “additional basis” for disclosing protected client confidential information would have been included in black letter ABA Model Rule 1.6(c), or at least that ABA Model Rule 1.6 cmt. [7] would have made it clear that ABA Model Rule 1.13(c) creates another grounds for permissible disclosure.

To be sure, ABA Model Rule 1.6(b)’s cmt. [3] allow lawyers to disclose their client’s ABA Model Rule 1.6(a) protected client confidential information only in certain circumstances in which the client “has used or is using the lawyer’s services.” (ABA Model Rule 1.6(b)(2) “or” has used lawyer’s services (ABA Model Rule 1.6(b)(3). This contrasts with Virginia Rule 1.6(b)(3), which does not require that the client have used or is using the lawyer’s services. Virginia Rule 1.6(c)’s mandatory disclosure does not contain that condition.

ABA Model Rule 1.13 cmt. [6] then explains that under ABA Model Rule 1.13(c) “the lawyer may reveal such information only when the organization’s highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law.”

This contrasts with Virginia Rule 1.13(c)’s explanation that in such circumstances the lawyer “may resign or may decline to represent the client in that matter.” But as explained above, Virginia Rule 1.6 provisions may require or permit lawyers representing a corporation or other organization to disclose its protected client confidential information in certain circumstances – which might arise in the type of scenarios described in Virginia Rule 1.13. As explained above, Virginia Rule 1.6(b)’s discretionary disclosure provision

and Virginia Rule 1.6(c)'s mandatory disclosure provision do not require that the client have used or is using the lawyer's services.

As explained above in the discussion of black letter ABA Model Rule 1.13(c)(2), lawyers may "report out" "only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization." If disclosure would in fact harm the corporation rather than prevent harm to the corporation, presumably lawyers do not have such discretion. Thus, in a theoretical situation where the corporation is engaging in a "perfect crime" that will never be uncovered, a lawyer's disclosure would harm the corporation by revealing a crime that would never otherwise be discovered. That would seem to fail one of the conditions allowing such disclosure.

ABA Model Rule 1.13 cmt. [6] describes another condition to lawyers "reporting out" – the matter must be "related to the lawyer's representation of the organization." On the other hand, "[i]t is not necessary that the lawyer's services be used in furtherance of the violation."

ABA Model Rule 1.13 cmt. [6] then correctly notes that ABA Model Rule 1.6(b)(2) and ABA Model Rule 1.6(b)(3) "may permit the lawyer to disclose confidential information" if "the lawyer's services are being used by an organization to further a crime or fraud by the organization."

### **ABA Model Rule 1.13 Comment [7]**

Virginia did not adopt ABA Model Rule cmt. [7].

ABA Model Rule 1.16 cmt. [7] addresses ABA Model Rule 1.13(d), which explains that ABA Model Rule 1.13(c)'s provisions do not apply "with respect to information relating to" lawyers investigating corporate clients' "alleged violation of law" or defending claims

against the corporate client or its constituents “arising out of an alleged violation of law.” As explained above (in connection with black letter ABA Model Rule 1.13(d)), it is surprising lawyers investigating a corporation or defending a corporation do not have discretion under ABA Model Rule 1.13(c) to disclose such information outside the corporation. After all, they may do so “only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.”

ABA Model Rule 1.13 cmt. [7] concludes by describing the rationale for this prohibition: “[t]his is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.” So those lawyers will have to look to ABA Model Rule 1.13 and to ABA Model Rule 1.6 in determining the circumstances in which they have discretion to disclose protected client confidential information to third parties.

### **ABA Model Rule 1.13 Comment [8]**

Virginia did not adopt ABA Model Rule 1.13 cmt. [8].

ABA Model Rule 1.13 cmt. [8] addresses ABA Model Rule 1.13(e), which describes lawyers’ duty if they are discharged or withdraw under the circumstances described in ABA Model Rule 1.13(e). In essence, ABA Model Rule 1.13(e) requires such lawyers to “report up” as if they were still employed or retained by the corporation. ABA Model Rule 1.13 cmt. [8] explains that such lawyers “must proceed if the lawyer reasonably believes necessary to assure that the organization’s highest authority is informed of the lawyer’s discharge or withdrawal.” The phrase “must proceed if the lawyer reasonably believes necessary to assure” seems to require the lawyer’s exercise of judgment about the logistics, but not about the bottom line – such a discharged or withdrawn lawyer must

“assure” a “reporting up.” This prevents corporations from silencing their lawyers by firing them, or if the lawyer “withdraws in circumstances that require or permit the lawyer to take action” under ABA Model Rule 1.13(b) or (c). Significantly, that scenario only permits lawyers to “report up” after they have been fired or withdrawn, not “report out” under ABA Model Rule 1.13(c).

Of course, once the corporation is a former client because its lawyer has been fired or has withdrawn, ABA Model Rule 1.9 governs. ABA Model Rule 1.9(c) allows disclosure of protected client confidential information “relating to the representation” as the ABA Model Rules “would permit or require with respect to a [current] client.” So presumably ABA Model Rule 1.6(b)(2) or (3) might permit disclosure (although not require it).

### **Virginia Rule 1.13 Comment [9]**

Virginia Rule 1.13 cmt. [9] addresses Virginia Rule 1.13’s application to government organizations.

Virginia Rule 1.13 cmt. [9] explains that because “public business is involved,” “when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified.”

After noting the possibility that statutes and regulations may apply in the government or military setting, Virginia Rule 1.13 cmt. [9] then warns that in the government context that it “may be more difficult” to “defin[e] precisely the identity of the client and prescrib[e] the resulting obligations of such lawyers.”

Virginia Rule 1.13 cmt. [9] explains that “[g]overnment lawyers, in many situations are asked to represent diverse client interests.” The word “diverse” is not defined, so it is

unclear whether that term describes the degree of adversity that would otherwise possibly present a Virginia Rule 1.7(a)(2) “material limitation” conflict or some other impediment. Virginia Rule 1.13 cmt. [9]’s first paragraph concludes with a strange sentence – explaining that “[t]he government lawyer may be authorized by the organization to represent subordinate, internal clients in the interest of the organization subject to the other [Virginia] Rules relating to conflicts.” The term “organization” is undefined, but presumably refers to one of the numerous government entity descriptions contained in the Virginia Rules (perhaps most acutely in Virginia Rule 1.13 cmt. [9]’s second paragraph discussed below). Similarly, the term “subordinate, internal clients” is undefined. Presumably that means a government entity’s constituent. The word “internal” seems odd – the Virginia Rules do not seem to use that term when describing corporate constituents. And explaining that a government lawyer may represent other government entity constituents “in the interest of the organization” also seems inapt. If those constituents are clients, government lawyers owe those clients all of the loyalty, confidentiality and other duties that all clients deserve.

Virginia Rule 1.13 cmt. [9]’s second paragraph explains that in the government setting the client is “generally the government as a whole,” “[a]lthough in some circumstances the client may be a specific agency.” Virginia Rule 1.13 cmt. [9] then contains the same inexplicable confusing hodge-podge of governmental entity names that appears in ABA Model Rule 1.13 cmt. [9] discussed below. After mentioning the possibility that a lawyer ordinarily represents “the government as a whole” but might represent a “specific agency,” Virginia Rule 1.13 cmt. [9] describes a scenario that involves two other possible clients: “if the action or failure to act involves the head of a

bureau, either the department of which the bureau is a part or the government as a whole may be the client for purposes of this Rule.” It is unclear whether a “bureau” or a “department” is the same as an “agency.” Having explicitly used the term “agency” in the preceding sentence, one might have expected Virginia Rule 1.13 cmt. [9] to either use the same word in the example, or at least explain whether a “bureau” and a “department” in the example are the same as an “agency.”

Virginia Rule 1.13 cmt. [9] next notes that government lawyers “may have authority to question such conduct [a government constituent’s “action or failure to act”] more extensively than that of a lawyer for a private organization in similar circumstances.” Virginia Rule 1.13 cmt. [9] then assures that “[t]his Rule does not limit that authority.”

Virginia Rule 1.13 cmt. [9] concludes with an inexplicable reference: “See note on Scope.” It is unclear what that means. The Virginia Scope section does not have any “notes.” Presumably the reference is to the fifth paragraph in Virginia’s Scope section, which addresses government lawyers.

**ABA Model Rule 1.13 cmt. [9]** also addresses lawyers’ duties when representing the government.

ABA Model Rule 1.13 cmt. [9] acknowledges the “different balance” between confidentiality and corrective action that also appears in Virginia Rule 1.13 cmt. [9] but does so later in the ABA Model Rule Comment.

ABA Model Rule 1.13 cmt. [9] also acknowledges that it “may be more difficult in the government context” to “precisely” identify the client. ABA Model Rule 1.13 cmt. [9] refers to ABA Model Rule Scope cmt. [18]. ABA Model Rule Scope cmt. [18] parallels the fifth Virginia Scope paragraph – addressing government lawyers’ ethics.

ABA Model Rule 1.13 cmt. [9] also adds yet another possible “client” of government lawyers. As explained above, Virginia Rule 1.13 cmt. [9] mentions that a government lawyer’s client might either be a “specific agency” or “a government as a whole.” ABA Model Rule 1.13 cmt. [9] indicates that the government lawyer’s client might be: (1) “a specific agency;” (2) “a branch of government, such as the executive branch;” or (3) “the government as a whole.”

But like Virginia Rule 1.13 cmt. [9], ABA Model Rule 1.13 cmt. [9] then gives an example that introduces two other entities: “if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule.” But unlike Virginia Rule 1.13 cmt. [9]’s explanation that in that example either the “department” or “the government as whole” might be the “client,” ABA Model Rule 1.13 cmt. [9] notes that either the “department” or “the relevant branch of government” may be the “client.” Thus, ABA Model Rule 1.13 cmt. [9] does not take the Virginia Rule 1.13 cmt. [9] approach that “generally the government as a whole” is or may be the client.

The rest of ABA Model Rule 1.13 cmt. [9] essentially follows Virginia Rule 1.13 cmt. [9]’s language and meaning – also referring to the ABA Model Rules Scope, but without the odd preface “note on . . . .”

### **Virginia Rule 1.13 Comment [10]**

Virginia Rule 1.13 cmt. [10] addresses lawyers’ duty to explain their client’s identity when dealing with corporate constituents with apparently adverse interests.

Virginia Rule 1.13 cmt. [10] goes beyond black letter Virginia Rule 1.13(d)’s need to explain the client’s identity. As explained above, black letter Virginia Rule 1.13(d)

requires lawyers to “explain the identity of the client when it is apparent that the organization’s interests are adverse to those of the constituents.”

Virginia Rule 1.13 cmt. [10] contains an odd mixture of scenarios where adversity exists or may exist. Virginia Rule 1.13 cmt. [10]’s first sentence addresses a scenario where the organization’s “interest may be or become adverse to those of one or more of its constituents.” Virginia Rule 1.13 cmt. [10] explains that a lawyer in that setting “should advise” any constituent – “whose interest the lawyer finds adverse to that of the organization” – “of the conflict or potential conflict of interest.” This is a remarkable scenario: (1) it begins with a scenario where the corporate client’s interest “may be or become adverse” to that of a corporate constituent; then (2) switches to a scenario in which a lawyer “finds” a constituent’s interest to be “adverse to that of the organization.” So the new scenario is quite different from the beginning description. The corporate client’s interests which were first described as “may be or [may] become adverse” to a constituent’s interest are now clearly adverse – because the lawyer “finds” adversity. Presumably this would satisfy the “when it is apparent” standard contained in black letter Virginia Rule 1.13(d).

Under black letter Virginia Rule 1.13(d), the lawyer in such a circumstance “shall explain the identity of the client.” But Virginia Rule 1.13 cmt. [10] does not mention that required disclosure. Instead, Virginia Rule 1.13 cmt. [10] states that such a lawyer “should advise” such a constituent (whose interest the lawyer “finds adverse” to that of the organization) of “the conflict or potential conflict of interest.” But black letter Virginia Rule 1.13 does not really address conflicts. It would not be a conflict (other than perhaps a

Virginia Rule 1.7(a)(2) “material limitation” conflict) if a lawyer only represents the organization, and does not also represent one of the referenced constituents.

All of this is internally inconsistent. And it also seems inconsistent with black letter Virginia Rule 1.13(d)’s requirement that “a lawyer shall explain the identity of the client” in that circumstance.

Thus, Virginia Rule 1.13 cmt. [10] (in just its first sentence) mentions: (1) the possibility of adversity (“may be . . . adverse,” “potential conflict of interest”); (2) possible future adversity (“may . . . become adverse”); and (3) actual adversity (“the lawyer finds adverse”; “the conflict”). In the next sentence, Virginia Rule 1.13 cmt. [10] again mentions actual adversity (“when there is such adversity of interest”).

Virginia Rule 1.13 cmt. [10]’s confusion continues in its description of what such a lawyer must disclose. The Virginia Rule Comment states that a lawyer in that situation “should advise” the constituent: (1) “of the conflict or potential conflict of interest”; (2) “that the lawyer cannot represent such constituent” (which Virginia Rule 1.13 cmt. [10] mentions at the end of one sentence and repeats at the beginning of the next sentence); (3) “that such person may wish to obtain independent representation;” and (4) “that discussions between the lawyer for the organization and the individual may not be privileged.”

Ironically, Virginia Rule 1.13 cmt. [10]’s list of disclosures (which lawyers “should” or “must” make, depending on the sentence) does not include the one disclosure required by black letter Virginia Rule 1.13(d): “the identity of the client.” Presumably that disclosure would be incorporated into one of the other disclosures listed in Virginia Rule 1.13 cmt. [10], but that could be clearer.

Virginia Rule 1.13 cmt. [10]’s concluding sentence repeats the same disclosure that “the lawyer for the organization cannot provide legal representation for that constituent individual”) – but this time saying that “[c]are must be taken to assure that the individual understands” that point – in contrast to the previous sentence’s guidance that lawyers “should” provide such a disclosure. And those two sentences use three different terms to describe the same person: “constituent;” “person;” “individual.”

Overall, Virginia Rule 1.13 cmt. [10] is a mishmash of scenarios that differ from black letter Virginia Rule 1.13 itself.

Virginia Rule 1.13 cmt. [10]’s odd final warning is that lawyers “must take care” to assure that such adverse constituents understand that “discussions between the lawyer for the organization and the individual may not be privileged.” Lawyers properly giving such a constituent the Upjohn warning (identifying the client and explaining why communication may deserve privilege) avoid the risk that the individual constituent thinks that she owns the privilege. And such communications may in some circumstances deserve privilege protection - which belong to the corporate client, and not to the constituent. If adversity is clear, a communication may not deserve privilege protection.

**ABA Model Rule 1.13 cmt. [10]** contains essentially the same language as Virginia Rule 1.13 cmt. [10].

ABA Model Rule 1.13 cmt. [10] contains all of the same problems as Virginia Rule 1.13 cmt. [10], described above. In fact, in three sentences, ABA Model Rule 1.13 cmt. [10] describes a spectrum of scenarios involving possible future and actual conflicts, the spectrum of duties (indicating both that lawyers “should” and “must” make certain disclosures), repeats one disclosure in successive sentences, uses three words to

describe the same person, and yet fails to mention the one disclosure required by black letter ABA Model Rule 1.13(f) – “the identity of the client”.

### **Virginia Rule 1.13 Comment [11]**

Virginia Rule 1.13 cmt. [11] contains the common-sense explanation whether lawyers should give “such a warning” to “any constituent individual” “may turn on the facts of each case.” The term “constituent individual” is strange. The preceding Virginia Rule 1.13 cmt. [2] uses the term “constituent” and the term “individual,” but not in combination. Presumably the term “such a warning” refers to the various warnings described in the preceding Virginia Rule 1.13 cmt. [10]. The singular “a warning” is strange – because Virginia Rule 1.13 cmt. [10] mentions four “warnings” (two of which are repeats). The singular “warning” probably refers to the warning “that the lawyer cannot represent such constituent.” That “warning” presumably entails the lawyer explaining “the identity of the client” – which is the “warning” actually mandated by Virginia Rule 1.13(d).

**ABA Model Rule 1.13 cmt. [11]** contains the identical language.

### **Virginia Rule 1.13 cmt. [12]**

Virginia Rule 1.13 cmt. [12] addresses the possibility described in Virginia Rule 1.13(e) of the organization’s lawyer also representing “individuals within the organization.”

Virginia Rule 1.13(e) contains a list of such individuals: “directors, officers, employees, members, shareholders or other constituents.” The inclusion of shareholders in the list seems inapt. Under corporate law, shareholders do not seem to be “individuals within the organization.”

Virginia Rule 1.13 cmt. [12] next describes a scenario “[w]hen an organization’s lawyer is assigned or authorized to represent such an individual” – “within the organization.” The term “assigned” seems inappropriate. A corporation or other organization cannot impose a lawyer upon one of its constituents – so lawyers cannot be “assigned” to represent another client. The term “authorized” seems more appropriate.

Virginia Rule 1.13 cmt. [12] then notes that in such circumstances “the lawyer has an attorney-client relationship with both that individual and the organization,” and is thus subject to the Virginia Rules’ “confidentiality and conflicts provisions.” The term “attorney-client relationship” is one of several variations that the Virginia Rules use for the relationship between a client and a lawyer. Other Virginia Rules or Comments use other presumably synonymous terms: “client-lawyer relationship” “lawyer-client relationship,” “client-attorney relationship.”

Virginia Rule 1.13(e) uses the phrase “dual representation,” which is also the heading for Virginia Rule 1.13 cmt. [12]. This term differs from the phrase “common representation” used in Virginia Rule 1.7 cmt. [29] and elsewhere. It also differs from the more commonly used phrase “joint representation.” All of those phrases seem to describe a joint representation of multiple clients on the same matter, which implicate conflicts, communication (such as a “no secrets” or “keeping secrets” approach,) and many other ethics rules.

The phrase “dual representation” presumably excludes the possibility that a lawyer could simultaneously represent the corporation and the constituent on unrelated matters (such as the latter’s house purchase, traffic ticket, etc.). Those types of “dual representation” clearly implicate conflicts issues, but normally do not implicate the

confidentiality choices such as “no secrets” or “keep secrets.” When lawyers simultaneously represent clients on separate matters, the lawyer must keep the separate clients’ confidences from the other, absent consent or some other rule. Virginia Rule 1.13 cmt. [12] clearly describes a joint representation of the organization and the constituent, with all of the implications joint representations carry under several Virginia rules.

**ABA Model Rule 1.13 cmt. [12]** also addresses a corporate lawyer’s representation of constituents rather than just the organization.

In contrast to Virginia Rule 1.13 cmt. [12]’s reference to “also represent[ing] individuals within the organization” (although not mentioning any type of such constituents), ABA Model Rule 1.13 cmt. [12] recognizes that under ABA Model Rule 1.13(g) an organization’s lawyer “may also represent a principal officer or major shareholder.”

It seems strange that ABA Model Rule 1.13 cmt. [12] would list just those two individuals. ABA Model Rule 1.13(g) lists several categories of corporate constituents whom an organization’s lawyer may also represent: “directors, officers, employees, members, shareholders or other constituents.” Interestingly, black letter ABA Model Rule 1.13(g) list does not limit such other representations to “principal” officers or “major” shareholders. In other words, those adjectives do not appear in black letter ABA Model Rule 1.13(g).

In contrast to Virginia Rule 1.13 cmt. [12], ABA Model Rule 1.13 cmt. [12] does not mention the resulting joint representation status, and its confidentiality and conflicts implications. But ABA Model Rule 1.13 cmt. [12]’s heading is “Dual Representation” – so

presumably ABA Model Rule 1.13 cmt. [12] describes joint representation of the organization and one of those two types of individuals.

### **Virginia Rule 1.13 Comment [13]**

Virginia Rule 1.13 cmt. [13] addresses derivative actions.

Virginia Rule 1.13 cmt. [13] first notes that corporations' shareholders or members may bring derivative actions "[u]nder generally prevailing law." The Virginia Rule Comment next explains that such derivative suits are designed "to compel the directors to perform their legal obligations in the supervision of the organization." Virginia Rule 1.13 cmt. [13] then adds that unincorporated association members have "essentially the same right."

Virginia Rule 1.13 cmt. [13] concludes with an explanation that such a derivative action "may be brought nominally by the organization," but actually is "a legal controversy over management of the organization."

**ABA Model Rule 1.13 cmt. [13]** contains the identical language.

### **Virginia Rule 1.13 Comment [14]**

Virginia Rule 1.13 cmt. [14] addresses derivative actions.

Virginia Rule 1.13 cmt. [14] first recognizes that "[t]he question can arise whether counsel for the organization may defend such [a derivative] action." Presumably that question arises because those actions normally focus on management's misconduct, negligence or other malfeasance.

Virginia Rule 1.13 cmt. [14] next explains that "[m]ost derivative actions" may be "defended by the organization's lawyer like any other suit," because they are "a normal

incident of an organization’s affairs.” But Virginia Rule 1.13 cmt. [14] then warns that Virginia Rule 1.7 “governs who should represent the directors and the organization” in derivative actions involving “serious charges of wrongdoing by those in control of the organization” – because in that situation “a conflict may arise between the lawyer’s duty to the organization and the lawyer’s relationship with the board.”

In recent years, most authorities have concluded that in nearly every situation the same lawyer should not represent the organization in a derivative action (as the nominal defendant) and the corporation’s constituents (usually the board) accused of mismanaging or injuring the corporation.

**ABA Model Rule 1.13 cmt. [14]** contains identical language.

# RULE 1.14

## Client With Impairment

ABA Model Rule 1.14 has a different title that is more politically correct, and appropriately reflects a spectrum of incapacity: “Client with Diminished Capacity.”

### Rule

#### Virginia Rule 1.14(a)

Virginia Rule 1.14(a) addresses lawyers’ primary duty when dealing with impaired clients.

Virginia Rule 1.14(a) defines impairment as circumstances “[w]hen a client’s capacity to make adequately considered decisions in connection with a representation is diminished.” The Virginia Rule mentions several possible causes of the diminishment: “minority, mental impairment or some other reason.”

Virginia Rule 1.14(a) requires that in such circumstances “shall . . . maintain a normal client-lawyer relationship” - “as far as reasonably possible.”

Virginia Rules use a variety of phrases to describe the relationship between a client and a lawyer: “client-lawyer relationship;” “lawyer-client relationship;” “attorney-client relationship.” All of those terms presumably are meant to be synonymous.

**ABA Model Rule 1.14(a)** contains identical language.

### **Virginia Rule 1.14(b)**

Virginia Rule 1.14(b) addresses lawyers' permissible actions when impaired clients might be at risk.

Virginia Rule 1.14(b) describes that situation as when a lawyer “reasonably believes” that because of “diminished capacity,” a client “is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client’s own interest.” In those circumstances, lawyers “may take reasonably necessary protective action.” Notably, Virginia Rule 1.14(b) uses the term “may” instead of “must.” Virginia Rule 1.14(b) then lists examples of such possible protective action: (1) “consulting with individuals or entities that have the ability to take action to protect the client;” (2) “in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian”. It should come as no surprise that Virginia Rule 1.14(b) describes lawyers' permissible actions “in appropriate cases.” That is true of all lawyers' actions when they deal with any clients – impaired or not.

Virginia Rule 1.14's Comments provide further guidance on these permissible actions.

**ABA Model Rule 1.14(b)** contains identical language.

### **Virginia Rule 1.14(c)**

Virginia Rule 1.14(c) addresses lawyers' treatment of protected client confidential information when dealing with impaired clients.

Virginia Rule 1.14(c) first confirms that Virginia Rule 1.6's confidentiality duty protects “[i]nformation relating to the representation of a client with diminished capacity.”

Thus, Virginia Rule 1.14(c) uses the expansive ABA Model Rule definition of protected client confidential information (“relating to the representation of a client”) rather than the narrower Virginia Rule 1.6 definition of protected client confidential information.

Virginia Rule 1.14(c) then assures that lawyers taking permissible Virginia Rule 1.14(b) actions are “impliedly authorized under [Virginia] Rule 1.6(a) to reveal information about the client” – but only “to the extent reasonably necessary to protect the client’s interests.” Virginia Rule 1.6(a) allows (but does not require) lawyers to disclose current clients’ protected confidential information if such disclosures “are impliedly authorized in order to carry out the representation.”

This essentially moots the distinction between the narrower Virginia Rule 1.6 confidential client information protection and the more expansive ABA Model Rule 1.6 formulation. Under the Virginia Rule 1.6(a) definition, lawyers in that situation could point to the Virginia Rule 1.6(a)’s narrower protection – which (among other things) allows disclosure of protected client confidential information if disclosure is “impliedly authorized in order to carry out the representation. And lawyers in that situation could also point to Virginia Rule 1.6(a)’s language that does not protect information “gained in the professional relationship”: if (1) the information does not deserve attorney-client privilege protect “under applicable law;” (2) the client has not asked that the information “be held inviolate” or (3) if the disclosure would not “be embarrassing or would be likely to be detrimental to the client.”

**ABA Model Rule 1.14(c)** contains the identical language.

## Comment

### Virginia Rule 1.14 Comment [1]

Virginia Rule 1.14 cmt. [1] addresses the rationale for Virginia Rule 1.14's list of duties and discretion when lawyers deal with impaired clients.

Virginia Rule 1.14 cmt. [1] first explains that “[t]he normal client-lawyer relationship is based upon the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters.”

This understandable axiom is inconsistent with a strange Virginia Rule 1.4 cmt. [5] explanation that lawyers should provide their clients “sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued” – “to the extent the client is willing and able to do so.” If the client is unwilling or unable to do so, Virginia Rule 1.14 might apply – but Virginia Rule 1.4 cmt. [5] inexplicably fails to mention Virginia Rule 1.14 or even to mention the concept that clients might be unwilling or unable to make necessary decisions.

Virginia Rule 1.14 cmt. [1] next warns that lawyers may not be able to maintain “the ordinary client-lawyer relationship” in “all respects” if the client is “a minor or suffers from a diminished mental capacity.” The Virginia Rule Comment provides an example: “an incapacitated person who may have no power to make legally binding decisions.” Presumably that is one of the most acute examples of impaired clients.

Virginia Rule 1.14 cmt. [1] explains that even in that circumstance, such clients may “have the ability to understand, deliberate upon, and reach conclusions” about their “own well-being.” The Virginia Rule Comment mentions two examples: (1) “children as

young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.”

Virginia Rule 1.14 cmt. [1] concludes with another example: “some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.” Thus, Virginia Rule 1.14 cmt. [1] acknowledges that clients with limited impairment may make some type of decisions, but not other types of major decisions. In other words, Virginia Rule 1.14 cmt. [1] recognizes a spectrum of diminished capacity.

**ABA Model Rule 1.14** cmt. [1] contains the identical language.

### **Virginia Rule 1.14 Comment [2]**

Virginia Rule 1.14 cmt. [2] addresses the same basic issue.

Virginia Rule 1.14 cmt. [2] first explains that lawyers must “treat the client with attention and respect,” even if the client “suffers a disability.” It is unclear what the term “disability” means. Presumably the term defines a condition that results in “diminished capacity.” Black letter Virginia Rule 1.14(a) explains that clients’ capacity could be diminished “because of minority, mental impairment or some other reason.” Perhaps the term “disability” focuses on the second or third of the reasons for “diminished capacity.”

Virginia Rule 1.14 cmt. [2] next explains that if such a client “has no guardian or legal representative, the lawyer often must act as a de facto guardian.” It seems odd and unnecessary that Virginia Rule 1.14 cmt. [2] would use a term such as “de facto guardian.” As explained below, ABA Model Rule 1.14 cmt. [2] does not use that phrase. The label “guardian” might have implications for a lawyer undertaking that role, including possibly

statutory, regulatory, licensing, liability, and even insurance implications. It probably would have been preferable for Virginia Rule 1.14 cmt. [2] just to describe the lawyer's actions, rather than assigning a label.

Virginia Rule 1.14 cmt. [2] concludes with an explanation that even if the client “has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.” It is unclear what the phrase “accord the represented person the status of client” means. The person still is a client. “Status” should not matter as much as the lawyer's conduct. At least Virginia Rule 1.14 cmt. [2] mentions one attribute of an attorney-client relationship – lawyers' duty to communicate with the client. Virginia Rule 1.4 describes lawyers' core communication duty.

**ABA Model Rule 1.14 cmt. [2]** contains language identical to that in Virginia Rule 1.14 cmt. [2]. But in contrast to Virginia Rule 1.14 cmt. [2], ABA Model Rule 1.14 cmt. [2] does not contain the Virginia Rule Comment's second sentence about a lawyer sometimes acting as a “de factor guardian.”

### **ABA Model Rule 1.14 Comment [3]**

Virginia did not adopt ABA Model Rule 1.14 cmt. [3].

ABA Model Rule 1.14 cmt. [3] addresses diminished capacity clients' lawyers' interaction with the clients' family members.

ABA Model Rule 1.14 cmt. [3] first understandably notes that such clients “may wish to have family members or other persons participate in discussions with the lawyer.” ABA Model Rule 1.14 cmt. [3] then turns to a substantive issue, assuring that the

participation of “family members or other persons” in lawyer-client communications “generally does not affect the applicability of the evidentiary attorney-client privilege – when their presence is “necessary to assist in the representation.”

Normally the ABA Model Rules and states’ ethics rules avoid such statements about legal issues. To be sure, ABA Model Rule 1.6 cmt. [3] acknowledges that the evidentiary attorney-client privilege and the work product doctrine involve the “principle of client-lawyer confidentiality” – along with the ethics rules. Virginia Rule 1.6 cmt. [3] explains the same thing. But those ABA Model Rule Comments (and Virginia Rule Comments) generally just acknowledge the evidentiary rules, without stating their application. So it seems unusual for ABA Model Rule 1.14 cmt. [3] to include a statement about the effect of family members’ and others’ presence on the evidentiary attorney-client privilege.

ABA Model Rule 1.14 cmt. [2]’s statement is accurate. All or nearly all courts protect as privileged communications between clients and their lawyers in the presence of client agents who are necessary for the transmission of those communications. The same is true of direct communications between such persons and the client or the lawyer – as long as those communications are primarily motivated by the client’s request for legal advice or the lawyer’s providing of such advice. The types of outsiders generally considered inside privilege protection in all of those circumstances is quite narrow – normally extending only to outsiders such as translators or interpreters. But another classic example is a trusted family member assisting a diminished capacity relative in communicating with a lawyer. Still, it seems out of place for an ethics rule comment to opine on an evidentiary protection. Perhaps ABA Model Rule 1.14 cmt. [2]’s inclusion of

the general assurance of privilege protection is intended to encourage lawyers to include such family members and others in important communications with their diminished capacity clients.

ABA Model Rule 1.14 cmt. [3] concludes with a warning that “the lawyer must keep the client’s interests foremost,” and must “look to the client, and not family members to make decisions on the client’s behalf” – “except for protective action authorized” under ABA Model Rule 1.14(b).

As explained above, Virginia Rule 1.14(b) is identical to ABA Model Rule 1.14(b).

#### **Virginia Rule 1.14 Comment [4]**

Virginia Rule 1.14 cmt. [4] addresses lawyers’ interaction with diminished capacity client’s representatives.

Virginia Rule 1.14 cmt. [4] begins with the common sense view that “[i]f the client has a legal representative, the lawyer should ordinarily look to the representative for decision on behalf of the client.” The Virginia Rule Comment then turns to the opposite situation – when the client has no “legal representative.” In that situation, “the lawyer should seek such an appointment where it would serve the client’s best interests.” Virginia Rule 1.14 cmt. [4] then provides an example: such a legal representative “ordinarily” must be appointed if a “disabled client has substantial property that should be sold for the client’s benefit.” Virginia Rule 1.14 cmt. [4] next warns that “in many circumstances . . . appointment of a legal representative may be expensive or traumatic for the client.” Lawyers therefore use their “professional judgment” in “[e]valuation of these considerations.”

Virginia Rule 1.14 cmt. [4] concludes by explaining that if a lawyer “represents the guardian as distinct from the ward and is aware that the guardian is acting adversely to the ward’s interest, the lawyer may have an obligation to prevent or rectify the guardian’s misconduct (referring to Virginia Rule 1.2(d)). Virginia Rule 1.2(d) allows lawyers to “take such action on behalf of the client as is impliedly authorized to carry out the representation.”

Lawyers representing guardians who are “acting adversely to the ward’s interests” might have other duties or discretion to take appropriate steps. For instance, to the extent such a lawyer “reasonably believes necessary” under Virginia Rule 1.6(b)(3), the lawyer “may reveal . . . such [protected client confidential] information which clearly establishes that the [guardian] client has, in the course of the representation, perpetrated upon a third party [the ward] a fraud related to the subject matter of the representation.” In more extreme situations, lawyers may even have a duty to disclose protected client confidential information about “the intention of a [guardian] client, as stated by the client, to commit a crime reasonably certain to result in . . . substantial injury to the financial interest or property of [the ward].” Virginia Rule 1.6(c)(1). In equally acute situations, “a lawyer shall not knowingly . . . fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a [guardian] client. Virginia Rule 4.1(b). Several other Virginia ethics rules might also allow or even require disclosure of protective client confidential information in such unusual circumstances.

**ABA Model Rule 1.14 cmt. [4]** is similar to the Virginia Rule 1.14 cmt. [4].

ABA Model Rule 1.14 cmt. [4] includes Virginia Rule 1.14 cmt. [4]’s common sense notion that if the client has a legal representative, lawyers should “ordinarily look to the

representative for decisions on behalf of the client.” ABA Model Rule 1.14 cmt. [4] concludes with the same guidance contained in Virginia Rule 1.14 cmt. [4] about lawyers representing a guardian “acting adversely to the ward’s interest.”

But there are differences. In contrast to Virginia Rule 1.14 cmt. [4], ABA Model Rule 1.14 cmt. [4] takes the understandable view that “[i]n matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor.”

Other items contained in Virginia Rule 1.14 cmt. [4] appear instead in ABA Model Rule 1.14 cmt. [7], discussed immediately below.

**ABA Model Rule 1.14 cmt. [7]** (which Virginia did not adopt) contains language similar to Virginia Rule 1.14 cmt. [4].

ABA Model Rule 1.14 cmt. [7] first suggests “the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client’s interests” – “[i]f a legal representative has not been appointed.” ABA Model Rule 1.14 cmt. [7] then provides the same example as Virginia Rule 1.14 cmt. [4] of a client with “substantial property” that must be sold – although describing “a client with diminished capacity” rather than Virginia Rule 1.14 cmt. [4]’s phrase “a disabled client.”

ABA Model Rule 1.14 cmt. [7] also contains the same warning found in Virginia Rule 1.14 cmt. [4] about the expense and trauma of appointing a legal representative, and the obvious guidance that lawyers should use their “professional judgment” in considering that action.

In contrast to Virginia Rule 1.14 cmt. [4], ABA Model Rule 1.14 cmt. [7] notes that “rules of procedure in litigation sometimes provide minors or persons with diminished

capacity must be represented by a guardian or next friend if they do not have a general guardian.” Also in contrast to Virginia Rule 1.14 cmt. [4], ABA Model Rule Comment 1.14 cmt. [7] concludes by noting that “[i]n considering alternatives . . . the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.”

### **ABA Model Rule 1.14 Comment [5]**

Virginia did not adopt ABA Model Rule 1.14 cmt. [5].

ABA Model Rule 1.14 cmt. [5] addresses lawyers’ appropriate actions if their diminished capacity client is at risk.

ABA Model Rule 1.14 cmt. [5] explains that lawyers may “take protective measures deemed necessary” if they “reasonably believe[ ]: (1) “that a client is at risk of substantial physical, financial or other harm unless action is taken,” and (2) because the “client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation.”

ABA Model Rule 1.14 cmt. [5] then provides several examples of such protective measures: (1) “consulting with family members;” (2) “using a reconsideration period to permit clarification or improvement of circumstances;” (3) “using voluntary surrogate decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or individuals or entities that have the ability to protect the client.”

Some of these possible steps are unexplained and difficult to understand. For instance, it is unclear what second possible protective measure means: “using a

reconsideration period to permit clarification or improvement of circumstances.” Presumably it means that the lawyer can wait to see if her diminished capacity client improves or otherwise makes wiser decisions after thinking them over.

When undertaking such protective actions, lawyers “should be guided by such factors as:” (1) “the wishes and values of the client to the extent known;” (2) “the client’s best interests;” (3) “the goals of intruding into the client’s decisionmaking autonomy to the least extent feasible”; (4) “maximizing client capacities;” and (5) “respecting the client’s family and social connections.”

As with ABA Model Rule 1.14 cmt. [5]’s list of possible protective measures, the ABA Model Rule Comment’s list of factors guiding lawyers’ consideration of protective measures contains some undefined actors.” For instance, it is unclear what the phrase “maximizing client capacities” means. The term “capacity” presumably means the clients’ ability to make informed decisions.

Elsewhere in ABA Model Rule 1.14 (and Virginia Rule 1.14), the term “capacity” seems to denote the client’s condition, over which lawyers presumably have little or no control. So suggesting that lawyers consider the factor of “maximizing client capacities” seem to erroneously assume that lawyers have some control over clients’ capacity.

### **ABA Model Rule 1.14 Comment [6]**

Virginia did not adopt ABA Model Rule 1.14 [6].

ABA Model Rule 1.14 cmt. [6] addresses lawyers’ evaluation of their clients’ diminishment.

ABA Model Rule 1.14 cmt. [6] explains that such lawyers should look at several factors “[i]n determining the extent of the client’s diminished capacity.” The list of factors that such lawyer should “consider and balance” include: (1) “the client’s ability to articulate reasoning leading to a decision;” (2) the client’s “variability of state of mind and ability to appreciate consequences of a decision;” (3) the “substantive fairness of a decision;” and (4) “the consistency of a decision with the known long-term commitments and values of the client.”

Most of those factors make sense.

ABA Model Rule 1.14 cmt. [6] concludes by noting that “[i]n appropriate circumstances” such lawyers “may seek guidance from an appropriate diagnostician.” Virginia Rule 1.14 cmt. [8] contains the identical language about lawyers possibly seeking “guidance from an appropriate diagnostician.

### **ABA Model Rule 1.14 Comment [7]**

ABA Model Rule 1.14 cmt. [7] contains some but not all of the concepts discussed in Virginia Rule 1.14 cmt. [4]. For this reason, ABA Model Rule 1.14 cmt. [7] is discussed above.

### **Virginia Rule 1.14 Comment [8]**

Virginia Rule 1.14 cmt. [8] addresses lawyers’ disclosures when dealing with “impaired clients.”

Virginia Rule 1.14 cmt. [8] first notes that “[c]ourt [r]ules generally provide that minors or persons suffering mental disability shall be represented by a guardian or next

friends if they do not have a guardian.” This is essentially the same concept that appears in ABA Model Rule 1.14 cmt. [7] (although that ABA Model Rule Comment uses the term “general guardian” rather than “guardian”). Presumably this refers to courts’ insistence that such diminished capacity litigants have a court participant protecting their interests.

Virginia Rule 1.14 cmt. [8] then warns that “disclosure of the client’s disability” could “adversely affect the client’s interests” – and could “in some circumstances, lead to proceedings for involuntary commitment.” Virginia Rule 1.14 [8] acknowledges the obvious in an unhelpful axiom – that such lawyers’ “position in such cases is an unavoidably difficult one.”

Virginia Rule 1.14 cmt. [8] concludes by noting that such lawyers “may seek guidance from an appropriate diagnostician. ABA Model Rule 1.14 cmt. [6] contains the same concept.

**ABA Model Rule 1.14 cmt. [8]** also addresses lawyers’ disclosures when dealing with diminished capacity clients.

ABA Model Rule 1.14 cmt. [8] begins with the same warning as Virginia Rule 1.14 cmt. [8] about the risk to clients of disclosing their “diminished capacity” (although Virginia Rule 1.14 cmt. [8] uses the more specific and presumably more limited term “disability”).

Like Virginia Rule 1.14 cmt. [8], ABA Model Rule 1.14 cmt. [8] notes the possibility that such disclosure could “lead to proceedings for involuntary commitment.”

ABA Model Rule 1.14 cmt. [8] then states that information relating to the representation deserves ABA Model Rule 1.6 protection. That principle appears both in black letter ABA Model Rule 1.14(c) and black letter Virginia Rule 1.14(c). But ABA Model Rule 1.14 cmt. [8] notes that under ABA Model Rule 1.14(b), lawyers are “impliedly

authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary.” That important concept appears in black letter Virginia Rule 1.14(c) but that Virginia Rule does not contain the significant phrase found in ABA Model Rule 1.14 cmt. [8]: “even when the client directs the lawyer to the contrary.” Obviously it is quite rare for lawyers to ignore their clients’ direction. They obviously must do so if their client directs them to engage in unethical or unlawful conduct. That should go without saying. But ABA Model Rule 1.14 cmt. [8] addresses a more subtle situation – when clients direct their lawyers to take some lawful action that the lawyer does not believe is in the client’s best interests. Not surprising, lawyers generally must defer to their clients to make that assessment.

ABA Model Rule 1.14 cmt. [8] next warns that “given the risks of disclosure,” ABA Model Rule 1.14(c) “limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative” – including “determin[ing] [beforehand] whether it is likely that the person or entity consulted with will act adversely to the client’s interests.”

ABA Model Rule 1.14 cmt. [8] concludes with the same obvious (and unhelpful) point contained in Virginia Rule 1.14 cmt. [8] - that lawyers’ “position in such cases is an unavoidably difficult one.”

### **ABA Model Rule 1.14 Comment [9]**

Virginia did not adopt ABA Model Rule 1.14 cmt. [9], although the Virginia Rules do not indicate that.

ABA Model Rule 1.14 cmt. [9] addresses one of the strangest concepts anywhere in the ABA Model Rules – lawyers taking measures to protect non-clients. ABA Model Rule 1.14 cmt. [9] provides lawyers guidance in “emergency” situations “where the health, safety or a financial interest of “a person with seriously diminished capacity is threatened with imminent and irreparable harm.” Neither Virginia Rule 1.14 nor its Comments address such emergencies.

ABA Model Rule 1.14 cmt. [9] is remarkable mostly because lawyers may be authorized to act even though the person is unable to establish an attorney-client relationship or to make or express considered judgments about the matter. Even more surprisingly, lawyers may at times take action to protect such non-clients even when those non-clients do not seek it – but instead “when . . . another acting in good faith on that person’s behalf has consulted with the lawyer.” In other words, when a non-client consults with a lawyer about taking emergency protective actions to assist another non-client.

ABA Model Rule 1.14 cmt. [9] explains that lawyers in that situation “may take legal action on behalf of such a [non-client] person.”

ABA Model Rule 1.14 cmt. [9] next warns that a lawyer facing such an emergency situation “should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available.” And such lawyers should likewise only take “legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. Thus, lawyers facing this extraordinary situation may only take very limited protective measures – maintaining the “status quo” or avoiding “imminent and irreparable harm.” An example might include the lawyer’s neighbor asking her to take protective measures to prevent the

neighbor's schizophrenia or impaired son from taking his own life, giving away all of the family's property, etc.

ABA Model Rule 1.14 cmt. [9] concludes with an implied reminder that such a “person” is not a client – explaining that “[a] lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.”

### **ABA Model Rule 1.14 Comment [10]**

Virginia did not adopt ABA Model Rule 1.14 cmt. [10], although the Virginia Rules do not indicate that.

ABA Model Rule 1.14 cmt. [10] addresses lawyers handling such non-client persons' confidences. Presumably ABA Model Rule 1.14 cmt. [10] addresses lawyers' dealings “on behalf of a person with seriously diminished capacity in an emergency.

ABA Model Rule 1.14 cmt. [10] next states that lawyers should treat those persons' confidences “as if dealing with a client,” thus disclosing such persons' confidences “only to the extent necessary to accomplish the intended protective action.”

ABA Model Rule 1.14 cmt. [10] then states that such lawyers “should:” (1) “disclose to any tribunal involved and to any other counsel involved [the lawyer's] relationship with the person;” and “should” (2) “take steps to regularize the relationship or implement other protective solutions as soon as possible.”

The latter an odd suggestion. ABA Model Rule 1.14 cmt. [9] and [10] describe a scenario where a person requiring emergency assistance is unable to establish an attorney-client relationship. Perhaps the ABA Model Rule 1.14 cmt. [10] suggestion about

regularizing the relationship envisions such persons' temporary inability to establish a normal attorney-client relationship. The other ABA Model Rule 1.14 cmt. [10] suggestion to "implement other protective solutions as soon as possible" makes sense. Those presumably might include the appointment of a guardian or other legal representative.

ABA Model Rule 1.14 cmt. [10] concludes with statement that "normally" such lawyers "would not seek compensation for such emergency actions taken."

The situation described in ABA Model Rule 1.14 cmt. [9] and [10] involves an odd and perhaps unique context. Most ABA Model Rules and state ethics rules address lawyers' duties when representing clients, or having represented clients. But ABA Model Rule 1.14 cmt. [9] and [10] address a situation that the black letter ABA Model Rule 1.4 does not even mention – lawyers' possible duties to protect a "person" who is not a client, and who apparently has no prospect of becoming a client. In fact, ABA Model Rule 1.14 cmt. [9] acknowledges that lawyers may have client-like duties to such non-clients even when the lawyer has not even been consulted by such a person – but instead has been consulted by someone else, "acting in good faith on that person's behalf." Presumably this unusual arrangement involves a person incapable of establishing a normal attorney-client relationship because of the diminished capacity. But the scenario undoubtedly implicates enormously complicated and uncharted duties that the ethics rules do not address elsewhere.

# RULE 1.15

## Safekeeping Property

### Rule

#### Virginia Rule 1.15(a)(1)

Virginia Rule 1.15 addresses lawyers' handling of clients' and the third persons' funds and other property. Among other things, Virginia Rule 1.15 contains extensive trust account creation, reconciliation, and reporting requirements.

Virginia Rule 1.15(a)(1) addresses lawyers' treatment of funds received from clients or third persons.

Virginia Rule 1.15(a)(1) requires that lawyers deposit into “one or more identifiable trust accounts” “[a]ll 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.” Thus, there are three contexts in which lawyers must know Virginia Rule 1.15's requirements. First, lawyers might hold “funds...on behalf of a client.” Second, clients might hold “funds...on behalf of...a third party.” The term “third party” obviously means “third person.” In litigation-related contexts (such as Virginia Rule 4.2), the word “third party” might be confusing. There is less likely to be confusion in this non-litigation context. But ABA Model Rule 1.15(a) uses the term “third persons,” which would seem preferable to “third party.” Third, lawyers might hold funds “as a fiduciary.” As explained below, many of the logistical rules governing lawyers' handling of funds deal only with the first or third context.

Virginia Rule 1.15(a)(1) contains an exception for “reimbursement of advances for costs and expenses.” The exception for such clients’ reimbursement makes sense. Just as with clients’ payment of their bills, those reimbursement amounts belong to lawyer – and therefore must be placed in the lawyer’s operating account. In fact, keeping them in a trust account presumably would be unethical, because it would amount to improper “commingling” (described elsewhere in Virginia Rule 1.15(a)(3)).

Virginia Rule 1.15(a)(1) next states that lawyers “should” (emphasis added) place “as soon as practicable” “all other property held on behalf of a client” in “a safe deposit box or other place of safekeeping.” Virginia Rule 1.15(a)(1)’s word “should” seems inappropriately discretionary. One would think that lawyers “must” or at least “ordinarily should” place such property in some “place of safekeeping” “as soon as practicable.” The Virginia Supreme Court recently seemed to acknowledge this requirement, by deleting the discretionary word “should” in Virginia Rule 1.15 [cmt. 1] and replacing it with the mandatory word “must.” But for some reason, the Virginia Supreme Court did not change the black letter rule. And as the Virginia Rules Scope’s first paragraph explains, “[c]omments do not add obligations to the [Virginia] Rules but provide guidance for practicing in compliance with the [Virginia] Rules.”

Interestingly, the Virginia Rule 1.15(a)(1) does not expressly address lawyers holding “property” “on behalf of...a third party” or “as a fiduciary.” Presumably, Virginia Rule 1.5(a)(1) would require lawyers to similarly safeguard “property” they hold on behalf of a third person or “as a fiduciary.”

**ABA Model Rule 1.15(a)** addresses the same basic scenarios.

But ABA Model Rule 1.15(a) contains a broader concept. ABA Model Rule 1.15 (a) begins with a requirement that lawyers “shall hold property of clients or third persons that is in a lawyer’s possession in connection with a representation separate from the lawyer’s own property” (emphases added). Thus, ABA Model Rule 1.15(a) describes lawyers as holding property “of clients or third persons,” in contrast to Virginia Rule 1.15(a)(1)’s failure to address lawyers’ handling of property on behalf of “a third party.”

ABA Model Rule 1.15(a) also requires that “[o]ther property shall be identified as such and appropriately safeguarded.”

### **Virginia Rule 1.15(a)(2)**

Virginia Rule 1.15(a)(2) addresses the financial institutions with which Virginia lawyers may deal when handling Virginia Rule 1.5(a)(1) funds.

Virginia Rule 1.15(a)(2) explains that unless “otherwise expressly directed in writing by the client for whom the funds are being held,” Virginia-based lawyers and law firms must maintain their trust accounts “only at a financial institution approved by the Virginia State Bar.”

Virginia Rule 1.5(a)(2) raises two issues. First, although Virginia Rule 1.15(a)(2) only mentions clients’ direction to the contrary, presumably “a third party” mentioned in Virginia Rule 1.15(a)(1) could give similar direction. Second, there is no explicit requirement that lawyers maintain “other property” in a Virginia-based or Virginia State Bar-approved financial institution’s “safe deposit box or other place of safekeeping.” This presumably allows lawyers to maintain such property in their own possession.

**ABA Model Rule 1.15(a)** also addresses places where lawyers may set up their trust accounts.

Similar to Virginia Rule 1.15(a)(2), ABA Model Rule 1.15(a) states that such funds (presumably a subset of the term “property” mentioned earlier in ABA Model Rule 1.15(a)) “shall be kept” either (1) “in a separate account maintained in the state where the lawyer’s office is situated” or (2) “elsewhere with the consent of the client or third person.”

Thus, in contrast to Virginia Rule 1.15(a)(2), ABA Model Rule 1.15(a) recognizes that third persons may provide the same type of direction as clients in allowing lawyers to use trust accounts in states other than where the lawyer’s law firm is located.

### **Virginia Rule 1.15(a)(3)**

Virginia Rule 1.15(a)(3) addresses the general prohibition on commingling.

Virginia Rule 1.15(a)(3) starts with the blunt statement that “[n]o funds belonging to the lawyer or law firm shall be deposited or maintained” in trust accounts described in Virginia Rule 1.5(a)(2).

Virginia Rule 1.15(a)(3) next describes the narrow circumstances when lawyers may deposit or maintain “funds belonging to the lawyer or law firm” in a trust account.

Virginia Rule 1.15(a)(3)(i) contains three exceptions. The first two exceptions allow commingling of funds (“no more than necessary”): (1) “reasonably sufficient to pay service or other charges or fees imposed by the financial institution”; or (2) required “to maintain a required minimum balance to avoid the imposition of service fees”.

Virginia Rule 1.15(a)(3)’s third exception involves a more substantive issue. Virginia Rule 1.15(a)(3)(ii) applies to “funds in which two or more persons (one of whom may be the lawyer) claim an interest.” In that circumstance, such disputed funds must “be held in the trust account until the dispute is resolved and there is an accounting and severance of their interests.” Not surprisingly, lawyers facing that scenario must withdraw “promptly from the trust account” any funds “finally determined to belong to the lawyer or

law firm.” This withdrawal requirement ensures that there is no commingling of lawyers’ money and trust account money.

Virginia Rule 1.15(a)(3)(ii) does not address the possibility that “two or more persons” might claim an interest in property rather than in funds. It is not difficult to envision a lawyer holding property such as jewelry or art works in which multiple persons claim competing interests. The absence of any guidance for such scenarios mirrors other Virginia Rule 1.5 provisions that focus on funds rather than property.

**ABA Model Rule 1.15(b)** also addresses the general prohibition on commingling.

ABA Model Rule 1.15(b) contains a similar but much simpler provision than Virginia Rule 1.15(a)(3)(i). ABA Model Rule 1.15(b)’s permissible commingling allows lawyers to “deposit the lawyer’s own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose” (emphasis added).

In contrast to Virginia Rule 1.15(a)(3)(i), ABA Model Rule 1.15(b) thus does not on its face allow lawyers to comingle their own money in a trust account in order to “avoid service fees.”

**ABA Model Rule 1.15(e)** addresses lawyers’ handling of trust account property subject to a dispute over ownership (covered in Virginia Rule 1.15(a)(3)(ii)).

ABA Model Rule 1.15(e) properly provides guidance to lawyers holding property rather than just funds. As explained above, Virginia Rule 1.15 provisions frequently take too narrower view of lawyers’ trust accounts – mentioning only “funds” rather than the broader term “property.”

ABA Model Rule 1.15(e) explains that “[w]hen in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved.”

ABA Model Rule 1.15(e) concludes by stating that lawyers in that situation “shall promptly distribute all portions of the property as to which the interests are not in dispute.”

### **Virginia Rule 1.15(b)(1)**

Virginia Rule 1.15(b)(1) addresses lawyers’ duties upon receiving funds or other property subject to Virginia Rule 1.15.

Virginia Rule 1.15(b)(1) requires lawyers to “promptly notify a client of the receipt of the client’s funds, securities, or other properties” (emphasis added). Virginia Rule 1.15(b)(1) thus contains the word “properties” in the plural. Virginia Rule 1.5(b)(2), (3) and (4) also contain the plural word “properties.” These contrast with the singular word “property” contained in Virginia Rule 1.5(a)(1) and Virginia Rule 1.15(b)(5).

Oddly, Virginia Rule 1.15(b)(i) does not contain a similar requirement that lawyers notify a third person of the lawyer’s receipt of “funds received...on behalf of...a third party” under Virginia Rule 1.15(a)(1)).

**ABA Model Rule 1.15(d)** also addresses lawyers’ notification requirements.

ABA Model Rule 1.15(d) requires that lawyers “promptly notify the client or third person” “[u]pon receiving funds or other property in which a client or third person has an interest.”

Thus, in contrast to Virginia Rule 1.15(b)(1)’s limit to lawyers’ notification duty upon their receipt of client funds or property, ABA Model Rule 1.15(d) also covers third persons’ “funds or other property.”

Interestingly, ABA Model Rule 1.15(d) is also more expansive than Virginia Rule 1.15(b)(1) in describing such third persons’ “funds or other property” – describing them as those “in which a client or third person has an interest” (emphasis added). This description represents a more subtle reference to possessory interests than Virginia Rule 1.15(b)(1)’s sole reference to “the client’s funds, securities, or other properties” (which presumably limits coverage to such assets the client solely owns).

### **Virginia Rule 1.15(b)(2)**

Virginia Rule 1.15(b)(2) addresses lawyers’ treatment of trust account funds or other property.

Virginia Rule 1.15(b)(2) requires lawyers to “promptly upon receipt” “identify and label securities and properties of a client, or those held by a lawyer as a fiduciary.” Virginia Rule 1.15(b)(2) thus covers the first and third scenarios described in Virginia Rule 1.15(a)(1). But it inexplicitly does not require lawyers to undertake similar steps when they receive “funds...on behalf of...a third party” under Virginia Rule 1.15(a)(1).

**ABA Model Rule 1.15** does not contain a similar specific provision.

### **Virginia Rule 1.15(b)(3)**

Virginia Rule 1.15(b)(3) addresses lawyers’ record-keeping requirements.

Virginia Rule 1.15(b)(3) requires lawyers to (1) “maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer;” and (2) “render appropriate accountings to the client regarding them.”

Virginia Rule 1.15(b)(3) inexplicitly does not similarly require such “complete records” in the second and third scenarios of the three scenarios described in Virginia Rule 1.15(a)(1) – in which lawyers; receive funds “on behalf of...a third party;” or hold funds “by a lawyer as a fiduciary.”

Virginia Rule 1.15(b)(3) does not require that clients (or, presumably, third persons) ask for an accounting. Presumably lawyers holding funds “as a fiduciary” would have an independent duty to maintain records, and be prepared to render “appropriate accountings” to someone.

**ABA Model Rule 1.15(d)** also addresses lawyers’ accounting requirements.

ABA Model Rule 1.15(d) requires that lawyers “shall promptly render a full accounting regarding such property” “in which a client or third person has an interest.”

In contrast to Virginia Rule 1.15(b)(3), ABA Model Rule 1.15(d) requires lawyers to promptly render such a “full accounting regarding such property” only “upon request by the client or third person.”

#### **Virginia Rule 1.15(b)(4)**

Virginia Rule 1.15(b)(4) addresses lawyers’ duties to disburse trust account funds or other property the lawyer holds.

Virginia Rule 1.15(b)(4) requires lawyers to “promptly pay or deliver to the client or another as requested by such person” any “funds, securities, or other properties in the possession of the lawyer that such person is entitled to receive” (emphasis added).

Thus, unlike Virginia Rule 1.15(b)’s previous three subparts, Virginia Rule 1.15(b)(4) addresses funds or property held by a lawyer “on behalf of...a third party” (which is one of the three scenarios described in Virginia Rule 1.15(a)(1)). As explained above, Virginia Rule 1.15(b)(1)’s notice requirement does not include such third person’s funds or other property. Virginia Rule 1.15(b)(2)’s identification and labeling requirement does not include third persons’ funds or other property, unless the lawyer holds them “as a fiduciary.” Virginia Rule 1.15(b)(3)’s recordkeeping requirement does not include such third persons’ funds or other property.

The word “another” seems odd – one would have thought that Virginia Rule 1.15(a)(4) would contain the term “third party” (which is used in Virginia Rule 1.15(a)(1)), or the better term “third person.” But at least Virginia Rule 1.15(b)(4) addresses lawyers’ duties to such third persons, not just their clients.

**ABA Model Rule 1.15(d)** contains a similar requirement.

In contrast to Virginia Rule 1.15(b)(4)’s inapt word “another,” ABA Model Rule 1.15(d) contains the term “third person.”

Also in contrast to Virginia Rule 1.15(b)(4), ABA Model Rule 1.15(d) contains an exception: “[e]xcept as stated in this Rule or otherwise permitted by law or by agreement with the client.”

### **Virginia Rule 1.15(b)(5)**

Virginia Rule 1.15(b)(5) addresses lawyers’ handling of trust account funds or property about which there is a dispute.

Virginia Rule 1.15(b)(5) states that a lawyer may 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. .”

Virginia Rule 1.15(b)(5)’s focus on lawyers “disburs[ing] funds...of a client or third party” makes sense. But the prohibition on lawyers “us[ing] property of a client or third party” seems odd. It is difficult for a lawyer to “use” property being held in trust. Perhaps that reference refers to a lawyer vacationing or living in a ski condo being held in trust, driving a car held in trust, etc.

The reference to tribunal direction also seems inapt. Conversion is a wrongful tort. While disbursement or use might be “directed by a tribunal,” no tribunal would direct lawyers to “convert funds or property of a client or third party” (emphasis added).

Virginia Rule 1.15(b)(5)'s prohibition on conversion would be much more clear if it was at the end of that provision – as a flat prohibition without any exceptions (either client consent or tribunal direction).

### **Virginia Rule 1.15(c)**

Virginia Rule 1.15(c) addresses lawyer's detailed trust account record-keeping requirements.

Virginia Rule 1.15(c) contains detailed and expansive record-keeping requirements (updated on March 15, 2020). This document will not summarize those requirements).

Among other things, Virginia Rule 1.15(c)(4) requires lawyer to preserve records required under Virginia Rule 1.15 “for at least five calendar years after termination of the representation or fiduciary responsibility.”

**ABA Model Rule 1.15(a)** requires that lawyers maintain “[c]omplete records of such account funds and other property” (covered by ABA Model Rule 1.15(a)) for a certain period after “termination of the representation.” ABA Model Rule 1.15(a) suggests “[five years]” – the brackets presumably indicates that states may select a different duration.

### **ABA Model Rule 1.15(c)**

ABA Model Rule 1.15(c) addresses lawyers' obligation to place into their trust account clients' payments to cover future bills – commonly called “retainers”.

ABA Model Rule 1.15(c) requires lawyers to “deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.”

Virginia Rule 1.15 did not adopt ABA Model Rule 1.15(c). But presumably Virginia Rule 1.15 has other provisions that would require lawyers to follow the same process.

### **Virginia Rule 1.15(d)**

Virginia Rule 1.15(d) addresses other trust account requirements.

Virginia Rule 1.15(d) contains additional requirements for “minimum trust accounting procedures” applicable to trust accounts. These include insufficient fund reporting (Virginia Rule 1.15(d)(1)); handling of mixed trust and non-trust funds (Virginia Rule 1.15(d)(2)), reconciliations at specific required intervals (Virginia Rule 1.15(d)(3)), and a requirement that “trust journals and ledgers” fully explain and support “all receipts and disbursements of trust funds” (Virginia Rule 1.15(d)(4)).

**ABA Model Rule 1.15** does not contain a similar catch-all provision.

## Comment

### Virginia Rule 1.15 Comment [1]

Virginia Rule 1.15 cmt. [1] addresses lawyers' initial handling of funds or other property that must be held in trust.

Virginia Rule 1.15 cmt. [1] begins by explaining that lawyers “must hold property of others with the care required of a professional fiduciary.”

Virginia Rule 1.15 cmt. [1] next focuses on one type of property – warning that “[s]ecurities must be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances.” Interestingly, in late 2021 the Virginia Supreme Court deleted the discretionary word “should” in this sentence, and replaced it with the mandatory word “must.” But the Virginia Supreme Court did not similarly change black letter Virginia Rule 1.15(a)(1)'s parallel statement. The word “should” might have made sense here, because a safe deposit box is one of several acceptable options, given the circumstances. The increasing use of electronic data rather than hard-copy securities renders this requirement somewhat obsolete.

Virginia Rule 1.15 cmt. [1] then defines “fiduciary” as “includ[ing] personal representative, trustee, receiver, guardian, committee, custodian, and attorney-in-fact.”

Virginia Rule 1.15 cmt. [1] then changes direction – stating the general principle that lawyers “must” keep clients' or third parties' property “separate from the lawyer's business and personal property.”

Virginia Rule 1.15 cmt. [1]'s reference to “property of clients or third persons” acknowledges the latter type of property (emphasis added). As explained above, third

persons’ “property” is not covered by the duties listed on the face of black letter Virginia Rule 1.15(b)(1), (2), or (3).

The term “third persons” is better than Virginia Rule 1.15(a)(1)’s term “third party,” (also contained in Virginia Rule 1.15(b)(5)), and much better than Virginia Rule 1.15(b)(4)’s word “another”.

Virginia Rule 1.15 cmt. [1] concludes with an explanation that lawyers may keep separate trust accounts “when administering estate funds or acting in similar fiduciary capacities.”

**ABA Model Rule 1.15 cmt. [1]** also addresses general trust account principles.

ABA Model Rule 1.15 cmt. [1] contains several provisions similar to Virginia Rule 1.15 cmt. [1].

For instance, ABA Model Rule 1.15 cmt. [1] begins by indicating that lawyers “should hold the property of others with the care required of a professional fiduciary.” The word “must,” or at least the phrase “ordinarily should,” would be more appropriate.

ABA Model Rule 1.15 cmt. [1]’s second sentence understandably states that securities “should be kept in a safe deposit box.” ABA Model Rule 1.15 cmt. [1]’s third sentence properly states that lawyers “must” keep their property separate from clients’ and third persons’ property.

Like Virginia Rule 1.15 cmt. [1], ABA Model Rule 1.15 cmt. [1] then acknowledges that “[s]eparate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.”

In contrast to Virginia Rule 1.15 cmt. [1], ABA Model Rule 1.15 cmt. [1] concludes by suggesting that lawyers “should maintain on a current basis books and records in

accordance with generally accepted accounting practice “referring to the” ABA Model Rules for Client Trust Account Records.”

ABA Model Rule 1.15 cmt. [1]’s concluding sentence states that lawyers “should... comply with any recordkeeping rules established by law or court order.” The last “should” seems the most inappropriate. Of course lawyers must “comply with any recordkeeping and rules established by law or court order.”

### **Virginia Rule 1.15 Comment [2]**

Virginia Rule 1.15 cmt. [2] addresses the rationale for Virginia Rule 1.15’s prohibition on commingling.

Virginia Rule 1.15 cmt. [2] notes that lawyers’ obligation to avoid commingling their funds and their clients’ funds “not only serves to protect the client but also avoids even the appearance of impropriety.”

Like some of the black letter Virginia Rule 1.15 provisions discussed above, Virginia Rule 1.15 cmt. [2] only mentions “funds of a client.” Thus, it does not account for “funds received...by a lawyer...on behalf of...a third party” – as described in Virginia Rule 1.15(a)(1).

The phrase “appearance of impropriety” seems odd, because elsewhere the Virginia Rules have abandoned the “appearance of impropriety” standard in dealing with lawyers’ ethical obligations or discipline.

Virginia Rule 1.15 cmt. [2] concludes by warning that “commingling of [“funds of a client” and “those of the lawyer”] should be avoided” (emphasis added). It would have made more sense for Virginia Rule 1.15 cmt. [2] to say that commingling “must” be

avoided, except in those very limited circumstances authorized by black letter Virginia Rule 1.15(a)(3) (discussed above).

**ABA Model Rule 1.15 cmt. [2]** also addresses commingling issues.

ABA Model Rule 1.15 cmt. [2] begins by noting that it is “normally... impermissible to commingle the lawyer’s own funds with clients’ funds.” ABA Model Rule 1.15 [2] next acknowledges that commingling “is permissible when necessary to pay bank service charges on that account.”

ABA Model Rule cmt. [2]’s term “normally impermissible” is a better formulation than Virginia Rule 1.15 cmt. [2]’s suggestion that “commingling...should be avoided.”

ABA Model Rule 1.15 cmt. [2] concludes by requiring that “[a]ccurate records must be kept regarding which part of the funds are the lawyer’s.”

### **Virginia Rule 1.15 Comment [2a]**

Virginia Rule 1.15 cmt. [2a] addresses Virginia Rule 1.15(b)(5)’s prohibition on lawyers’ “disburs[ing] funds or us[ing] property of a client or third party without their consent” or a tribunal’s direction.

Virginia Rule 1.15 cmt. [2a] begins by explaining that in assessing lawyers’ conduct under Virginia Rule 1.15(b)(5), consent “can be inferred from the engagement agreement or any consequential agreement between the lawyer and the client regarding the disbursement of fees” (emphases added). Both of those situations seem oddly phrased.

First, it would make more sense to say that clients must give such consent in writing (or at least have the consent “memorialized” in writing). For instance, Virginia Rule 1.15(a)(2) allows lawyers and law firms located in Virginia to maintain trust accounts in financial institutions other than those approved by the Virginia State Bar – if “expressly

directed in writing by the client for whom the funds are being held.” Such a written requirement would make sense in Virginia Rule 1.15 cmt. [2a]’s context too. An “engagement agreement” (which itself is an odd rarely-used term) normally includes explicit provisions indicating lawyers’ and clients’ responsibilities – precisely to avoid any issue of “inference”.

Second, the word “consequential” seems inapt in describing an agreement. That word normally means “significant” or “important.” Using a word like “later” would have seemed more appropriate.

Virginia Rule 1.15 cmt. [2a] next provides examples of such an inference or “consequential” agreement: (1) “when earned fees are routinely withdrawn from the lawyer’s trust account upon an accounting to the client;” (2) “when costs and expenses of litigation are routinely withdrawn;” (3) “when other fees/costs or expenses are agreed upon in advance.”

The first reference to lawyers’ routinely “withdraw[ing] from the lawyer’s trust account” does not explicitly indicate that the client has consented to such withdrawals. Lawyers do not “routinely” withdraw their earned fees or expenses from trust accounts because their clients’ consent is “inferred” or because the withdrawal is agreed upon by the client. Lawyers must withdraw those amounts because Virginia Rule 1.15 requires such a withdrawal. Retaining those amounts in a trust account presumably would result in unethical commingling of the client’s money and the lawyer’s money (which has been earned as fees or to which the lawyer is entitled as a reimbursement after having advanced expenses). Perhaps Virginia Rule 1.15 cmt. [2a] intends to describe a course

of dealing that would allow such withdrawals. But given the very strict trust account rules, lawyers would not be wise not to rely on a “course of dealing.”

Interestingly, the second and third examples do not involve an “accounting to the client.”

The third scenario involving clients and lawyers who have “agreed upon in advance” to such withdrawal – obviously would be the safest course for lawyers to follow.

**ABA Model Rule 1.15** does not contain a similar Comment.

ABA Model Rule 1.15(c) indicates that lawyers “shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.”

### **Virginia Rule 1.15 Comment [3]**

Virginia Rule 1.15 cmt. [3] addresses lawyers’ duties when they “receive funds from third parties from which the lawyer’s fee will be paid.”

As explained above, the term “third parties” is probably not confusing in this non-litigation setting. But “third persons” would clearly be a better term. Virginia Rule 1.15 cmt. [1] wisely contains the term “third persons” rather than “third parties.”

Virginia Rule 1.15 cmt. [3] begins by explaining that lawyers are “not required to remit the portion from which the fee is to be paid” “[i]f there is risk that the client may divert the funds without paying the fee.” Presumably such a scenario includes insurance companies settlement payments to the plaintiff’s lawyers, etc. If such lawyers had arranged for a contingent fee, they are not required to pay their clients the entire settlement amount, and then later try to collect the client.

Virginia Rule 1.15 cmt. [3] next warns that lawyers “may not hold funds to coerce a client into accepting the lawyer’s contention” (emphasis added). Presumably that refers to a lawyer’s “contention” that she is entitled to the fee. Virginia Rule 1.15 cmt. [3] might be more clear if it contained the phrase “the lawyer’s claim of an interest” rather than the phrase “the lawyer’s contention.”

Virginia Rule 1.15 cmt. [3] then explains that “[t]he disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration or mediation “(emphasis added).

As with Virginia Rule 1.15 cmt. [2a], Virginia Rule 1.15cmt. [3] seems to improperly use the word “should” when describing lawyers’ conduct if “disputed” funds are being held in trust. Under black letter Virginia Rule 1.15(a)(3)(ii), “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” (emphasis added). The second “should” in that sentence presumably is appropriate – addressing suggested ADR means to resolve a dispute.

Virginia Rule 1.15 cmt. [3] concludes with a requirement that “the undisputed portion of the funds shall be promptly distributed.” That requirement matches black letter Virginia Rule 1.15(a)(3)(ii) and black letter Virginia Rule 1.15(b)(4). Virginia Rule 1.15 cmt. [3]’s concluding sentence’s deliberate use of the word “shall” supports the conclusion that Virginia Rule 1.15 cmt. [3]’s presumably equally deliberate repeated use of the word “should” elsewhere was inexplicably intentional.

**ABA Model Rule 1.15 cmt. [3]** addresses a situation similar to that addressed in as Virginia Rule 1.15 cmt. [3].

But there are several differences between ABA Model Rule 1.15 cmt. [3] and Virginia Rule 1.15 cmt.[3].

In contrast to Virginia Rule 1.15 cmt. [3], ABA Model Rule 1.15 cmt. [3] does not explicitly refer to third persons providing money to the lawyer that will be used to pay the lawyer for representing the client. Instead, ABA Model Rule 1.15 cmt. [3] simply states that “[l]awyers often receive funds from which the lawyer’s fee will be paid.” ABA Model Rule 1.15 cmt. [3] thus presumably involves funds paid by clients themselves or by third persons.

In contrast to Virginia Rule 1.15 cmt. [3], ABA Model Rule 1.15 cmt. [3] relieves lawyers of the obligation to “remit to the client” funds “that the lawyer reasonably believes represent fees owed” – without mentioning the scenario mentioned in Virginia Rule 1.15 cmt. [3]: “[i]f there is risk that the client may divert the funds without paying the fee.” But perhaps that risk goes without saying.

In contrast to Virginia Rule 1.15 cmt. [3]’s apparently erroneous statement that “[t]he disputed portion of the funds should be kept in trust” (emphasis added) – which seems contrary to black letter Virginia Rule 1.15(a)(3)(ii) requirement that disputed funds “shall be held in the trust account” (emphasis added) – ABA Model Rule 1.15 cmt. [3] correctly states that “[t]he disputed portion of the funds must be kept in a trust account” (emphasis added).

Like Virginia Rule 1.15 cmt. [3], ABA Model Rule 1.15 cmt. [3] then explains that in such a situation “the lawyer should suggest means for prompt resolution of the dispute, such as arbitration.” The use of the word “should” seems appropriate here, because that is a suggestion rather than a mandate. In contrast to Virginia Rule 1.15 cmt. [3], ABA

Model Rule 1.15 cmt. [3] mentions only arbitration as a dispute resolution process – and does not mention the possibility of mediation.

ABA Model Rule 1.15 cmt. [3] concludes with a statement also found in Virginia Rule 1.15 cmt. [3] – requiring lawyers to “promptly” distribute any “undisputed portion of the funds.”

#### **Virginia Rule 1.15 Comment [4]**

Virginia Rule 1.15 cmt. [4] addresses lawyers’ duties when third parties may have a claim on funds held in trust accounts.

As with other Virginia Rule 1.15 provisions, Virginia Rule 1.15 cmt. [4] seems to apply only to client funds or property held by the lawyer in trust. For instance, the second and third sentences seem limited to that type of fund or property. Thus, as in connection with several other Virginia Rule 1.15 provisions, Virginia Rule 1.15 cmt. [4] seems to ignore “funds received...by a lawyer...on behalf of...a third party,” as envisioned in Virginia Rule 1.5(a)(1).

Virginia Rule 1.15 cmt. [4] begins with a general statement that Virginia Rule 1.15 does “not impose an obligation upon the lawyer to protect funds on behalf of the client’s general creditors who have no valid claim to an interest in the specific funds or property in the lawyer’s possession.” But then Virginia Rule 1.15 cmt. [4] mentions some situations in which lawyers may have such a duty: (1) the lawyer possesses property or funds subject to the client’s previous lawyer’s lien on the client’s recovery; (2) a third person’s claim that property “was taken or withheld unlawfully from that person.”

Virginia Rule 1.15 cmt. [4] also mentions lawyers’ possible “duty under applicable law to protect such third-party claims against wrongful interference by the client.”

The term “third party” might make sense here, because such a third person might become a litigant or other participant in some formal dispute. This contrasts with the term “third party” used in Virginia Rule 1.15(a)(1) and elsewhere – when referring to a third person who provides funds or property to a lawyer to be held in trust. In Virginia Rule 1.15 cmt. [4]’s scenario involving “applicable law,” lawyers “may refuse to surrender the property to the client.” Virginia Rule 1.15 cmt. [4] provides an example: lawyers with “actual knowledge of a third party’s lawful claim to an interest in the specific funds held on behalf of a client” – “by virtue of a statutory lien (e.g., medical, workers’ compensation, attorneys’ lien, a valid assignment executed by the client, or a lien on the subject property created by a recorded deed of trust).” In those situations, lawyers have “a duty to secure the funds claimed by the third party.”

Virginia Rule 1.15 cmt. [3] points to Virginia Rule 1.15(b)(4) and (b)(5) as requiring such lawyers to either: (1) “deliver the funds or property to the third party”, or (2) “to safeguard the contested property or funds until the dispute [about the “third party’s claim”] is resolved.”

Virginia Rule 1.15 cmt. [4] next warns that lawyers “cannot release those funds without the agreement of all parties involved or a court determination” (“such as [in] an interpleader action”) – “[i]f the client has a non-frivolous dispute with the third party’s claim.”

Virginia Rule 1.15 cmt. [4] concludes with the assurance that lawyers do not violate Virginia Rule 1.15(b)(4)’s or (b)(5)’s provisions if they have “acted reasonably and in good faith to determine the validity of a third-party’s claim or lien.” Thus, in essence lawyers must keep in trust accounts any funds subject to a legitimate “non-frivolous” dispute

between their client and a third party. Virginia Rule 1.15 cmt. [4]’s examples include fairly specific scenarios in which there is a serious dispute based on a third party’s claim on the trust funds – statutory lien, client assignment, recorded deed of trust, etc. In other words, there must be more than a third party’s unsupported claim on the funds. Lawyers act somewhat at their own risk in determining that some third party’s claim on trust funds is frivolous, so the safest course for lawyers is to maintain the money in trust until the dispute is resolved.

An extensive and widely-accepted Virginia legal ethics opinion addresses lawyers’ responsibilities in such situations. Virginia LEO 1805 (11/10/12).

**ABA Model Rule 1.15 cmt. [4]** addresses the same scenario.

But ABA Model Rule 1.15 cmt. [4] contains a much less extensive discussion of lawyers’ duties where facing some dispute about funds they are holding in trust.

ABA Model Rule 1.15 cmt. [4] first contains the example of “a client’s creditor who has a lien on funds recovered in a personal injury action.” ABA Model Rule 1.15 cmt. [4] explains that such a lawyer “may have a duty under applicable law to protect such third-party claims against wrongful interference by the client.”

ABA Model Rule 1.15 cmt. [4] next warns that lawyers in such situations “must refuse to surrender the property to the client until the claims are resolved” – when “the third-party claim is not frivolous under applicable law.”

ABA Model Rule 1.15 cmt. [4] concludes with an explanation not found in Virginia Rule 1.15 cmt. [4]. ABA Model Rule 1.15 cmt. [4] explains that lawyers “may file an action to have a court resolve the dispute,” when “there are substantial grounds for dispute as to the person entitled to the funds” – but that lawyers “should not unilaterally assume to

arbitrate a dispute between the client and the third party” (emphases added). It seems odd to indicate that lawyers “should not unilaterally assume to arbitrate” a dispute between the client and a third party. Presumably clients would be part of that process, and lawyers would not be able to “unilaterally” initiate such an arbitration.

#### **Virginia Rule 1.15 Comment [5]**

Virginia Rule 1.15 cmt. [5] addresses reconciliations of lawyers’ trust accounts.

Virginia Rule 1.15 cmt. [5] explains that black letter Virginia Rule 1.15(d)(3)’s reconciliations “must include an explanation of an discrepancy discovered and how it was corrected” – which “must be approved by the lawyer who approves the reconciliation.” In other words, lawyers presumably cannot delegate to some other lawyer or non-lawyer an explanation of any discrepancy.

**ABA Model Rule 1.15** does not contain a similar Comment.

#### **Virginia Rule 1.15 Comment [6]**

Virginia Rule 1.15 cmt. [6] addresses pertinent legal duties other than those imposed by Virginia Rule 1.15.

Virginia Rule 1.15 cmt. [6] begins by explaining that lawyers’ obligations under Virginia Rule 1.15 are “independent of those arising from activity other than rendering legal services.” Virginia Rule 1.15 cmt. [6] provides the example of a lawyer “who serves as an escrow agent,” and is therefore governed by “the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.”

That is an odd phrasing. It should seem obvious that a lawyer who “serves as an escrow agent” would be governed by the applicable law governing escrow agents. That should be true whether the lawyer serves as an escrow agent in addition to acting as the

lawyer (which is a possibility under Virginia Rule 1.15 cmt. [6]) or if the lawyer “only” serves as an escrow agent (which is the situation described in ABA Model Rule 1.15 cmt. [5] (discussed below). So it does not seem necessary to make the common sense point that lawyers acting as escrow agents must follow the applicable law governing escrow agents – “even though the lawyer does not render legal services in the transaction.” In fact, it seems more likely that lawyers acting as escrow agents would be governed by the applicable law governing escrow agents in that setting – because lawyers not rendering legal services in a transaction do not face any arguable inconsistent duties governing their representational role.

**ABA Model Rule 1.15 cmt. [5]** is essentially the same as Virginia Rule 1.15 cmt. [6].

In contrast to Virginia Rule 1.15 cmt. [6], ABA Model Rule 1.15 cmt. [5] provides the example of “a lawyer who serves only as an escrow agent” (emphasis added). ABA Model Rule 1.15 cmt. [5]’s articulation makes more sense than Virginia Rule 1.15 cmt. [6]’s explanation, described above.

#### **ABA Model Rule 1.15 Comment [6]**

Virginia Rule 1.15 did not adopt ABA Model Rule 1.15 cmt. [6]

ABA Model Rule 1.15 cmt. [6] addresses “[a] lawyers’ fund for client protection” – which “provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer.”

ABA Model Rule cmt. [6] then states the obvious point that lawyers “must participate” in such a fund where their participation is mandatory.

ABA Model Rule cmt. [6] concludes by suggesting that that lawyers “should participate” even when the fund is only voluntary.

### **Virginia Rule 1.15 Comment [7]**

Virginia Rule 1.15 cmt. [7] addresses lawyers’ use of “electronic checking for his trust account” (emphasis added). The Virginia Rules and their Comments generally strive to avoid using the word “his” – by generically describing lawyers or using the plural.

Virginia Rule 1.15 cmt. [7] begins by noting the increasing use of electronic transfers, and confirms the common sense requirement that lawyers relying on that process must comply with Virginia Rule 1.15. Among other things, such lawyers must “assure that complete and accurate records of the receipt and disbursement of entrusted property are maintained in accordance with this rule.”

Virginia Rule 1.15 cmt. [7] concludes with detailed requirements for such electronic funds transfers.

**ABA Model Rule 1.15** does not contain a similar Comment.

# RULE 1.16

## Declining Or Terminating Representation

### Rule

#### Virginia Rule 1.16(a)

Virginia Rule 1.16 addresses when lawyers must or may end attorney-client relationships, and their duties when doing so.

Virginia Rule 1.16(a) addresses lawyers' inability to represent clients. Virginia Rule 1.16(a) identifies three situations in which lawyers: (1) "shall not represent a client"; or (2) "shall withdraw from the representation of a client." In other words, lawyers may not start to represent a client in these three situations, and must withdraw from any ongoing representations in the three described situations.

The three situations in which lawyers may not start a representation, or must withdraw from an existing representation are: (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"; (3) the client discharges the lawyer.

The first of those situations makes sense, although one might think that the lawyer could take steps to assure that a representation will not result in an ethics violation. Most obviously, one might think that the lawyer could simply refuse to take some action that will result in the violation. So presumably this situation involves the client's unilateral

action, not the lawyer’s action or inaction. If the lawyer can talk the client out of some action that is not yet occurred, that would be another way to preserve the lawyer’s ability to continue the representation. So it would seem that this scenario involves some action that the client has already taken (or some client intransigence about some future action or inaction – which the lawyer cannot convince the client to abandon). The reference to “other law” presumably incorporates all extrinsic law.

The second situation involves the lawyer’s competence, thus implicating Virginia Rule 1.1’s competence requirement.

The third situation highlights clients’ power to discharge their lawyer at any time and for any reason.

Virginia Rule 1.16(a) refers to Virginia Rule 1.16(c) for exceptions to this preclusion of representation or required withdrawal. That provision is discussed below.

**ABA Model Rule 1.16(a)** contains essentially the identical language. ABA Model Rule 1.16(c) (discussed below) contains language similar to Virginia Rule 1.16(c).

### **Virginia Rule 1.16(b)**

Virginia Rule 1.16(b) addresses situations where lawyers may, but are not required to, withdraw from an ongoing representation.

Virginia Rule 1.16(b) identifies eight situations in which lawyers may – rather than must – withdraw from representing a client (subject to any necessary court approval, as explained in Virginia Rule 1.16(c)). Thus, Virginia Rule 1.16(b) focuses on withdrawal, in contrast to Virginia Rule 1.16(a)’s prohibition on beginning a representation or continuing

a representation. But this difference is understandable, because Virginia Rule 1.16(b) focuses on clients' action or inactions during an ongoing representation.

First, Virginia Rule 1.16(b) describes the first situation in which lawyers may withdraw from a representation: "if withdrawal can be accomplished without material adverse effect on the interests of the client." Thus, lawyers may withdraw from representing clients at any time, as long as the withdrawal would not prejudice the client. For instance, lawyer handling a transactional matter for a client may ethically withdraw from representing the client if there is a lull in the activity, and the client has the time and the opportunity to retain successor counsel. As long as the lawyer receives court approval under Virginia Rule 1.16(c), the same would be true for a litigator representing a client during a lull in that litigation activity.

However, such lawyers might face the so-called essentially court-created "hot potato" rule if they withdraw from a representation in order to turn a current client into a former client in order to gain the more advantageous former client conflicts standard in Virginia Rule 1.9 – rather than current client Virginia Rule 1.7's per se conflict standard prohibiting lawyers from being adverse to current clients on any matter. Many if not most courts rely on the "hot potato" rule to impose the current-client Rule 1.7 standard if the lawyer's withdrawal was motivated by the desire to immediately or quickly take a matter adverse to the now-former client.

As explained in the analysis of Virginia Rule 1.9, one might understandably think that such a withdrawal should be governed by Virginia Rule 1.16(b) standard – thus allowing the withdrawal if there is no "material adverse effect" on the client. And logically one would judge the "material adverse effect" on the client in the matter from which the

lawyer withdraws. Virginia Rule 1.16(b) on its face seems to focus on that type of adversity – rather than any adversity that might exist in the lawyer’s new representation.

But courts have essentially created the “hot potato” rule based on lawyers’ duty of loyalty to their clients. Many courts conclude that the withdrawal from a representation with the impure motive to quickly become adverse to the now-former client is itself disloyal, and thus impermissible (and maybe even unethical). To be sure, Virginia Rule 1.3(b) states that “[a] lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services.” But that prohibition is immediately followed by exception: “but may withdraw as permitted under [Virginia] Rule 1.16.” And as for the arguable adversity to the client from the withdrawal, Virginia Rule 1.3(c) states that “[a] lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship” (subject to some stated exceptions). So Rule 1.3 analyzes the prejudice “during the course of the professional relationship,” not following the withdrawal from such a representation that Virginia Rule 1.16(b) explicitly permits. The Virginia Rules (and the ABA Model Rules) could have prohibited withdrawal in what courts call a “hot potato” scenario, but they did not.

Virginia Rule 1.16(b) then lists (in numbered paragraphs) other situations in which lawyers “may withdraw” from a representation. Significantly, the list implicitly includes withdrawals that will materially adversely affect the client. Of course, clients complaining about such a material adverse effect might claim malpractice or assert some other cause of action against the withdrawing lawyer, even if other rules explicitly permit the withdrawal in spite of such ill effects on the client.

**ABA Model Rule 1.16(b)** uses the identical language, but in ABA Model Rule 1.16(b)(1) rather than in ABA Model Rule 1.16(b)'s introductory language.

### **Virginia Rule 1.16(b)(1)**

Virginia Rule 1.16(b)(1) addresses the second situation in which lawyers may, but are not required to, withdraw from a representation.

Under Virginia Rule 1.16(b)(1), lawyer may withdraw if the client “persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is illegal or unjust.”

The word “persists” seems to indicate that client has already undertaken such a “course of action.” This phrase differs from the clearly past-tense “has used” in Virginia Rule 1.16(b)(2) (discussed below). Virginia Rule 1.16(b)(3) (also discussed below) deliberately uses a different phrase: “a client insists on pursuing.” That phrase would appear to describe when has not yet happen – but which the client insists should happen in future.

The phrase “involving the lawyer’s services” obviously describes some connection between the lawyer’s actions and the client’s persistence in the “illegal or unjust” “course of action.” However, Virginia Rule 1.16(b)(1) could have used the word “using,” which would have described a more direct connection between the lawyer’s services and the client’s course of action. The next Virginia Rule (Virginia Rule 1.16(b)(2)) contains the term “used” to describe clients’ use of lawyers’ services in the past. Virginia Rule 1.16(b)(4) uses another phrase to describe a connection with lawyer’s services – allowing lawyers to withdraw from a representation if clients fail to fulfill an obligation to the lawyer

“regarding the lawyer’s services.” That presumably denotes an agreement about the lawyer’s services, but not the substance of those services (for instance, a fee agreement). So it is unclear whether the phrase “involving the lawyer’s services” in Virginia Rule 1.16(b)(1) denotes such a direct use of the lawyer’s services.

Virginia Rule 1.16(b)(1) applies if “the lawyer reasonably believes” the client’s persistent course of action “is illegal.” That seems like an odd subjective standard. Being a lawyer, presumably the client’s lawyer could determine whether the client’s persistence “in a course of action . . . is illegal.” So whether the lawyer “believes” such a course of action is illegal seems irrelevant. It contrasts with Virginia Rule 1.16(a)(1), which uses an objective standard: “the representation will result in violation of . . . other law.” In several other places, the Virginia Rules use an objective rather than a subjective standard in prohibiting or requiring lawyers’ action based on violations of other law.

Virginia Rule 1.2(e) requires lawyers to “consult with the client regarding the relevant limitations on the lawyer’s conduct” – “[w]hen a lawyer knows that a client expects assistance not permitted by the [Virginia] Rules of Professional Conduct or other law.” That duty might arise in the situation described in Virginia Rule 1.16(b)(1).

Virginia Rule 1.16(b)(1) also allows lawyers to withdraw if the client persists in a course of action “that the lawyer reasonably believes is . . . unjust.” In that scenario, a subjective rather than objective standard makes sense. The term “unjust” is not defined. Similarly, it differs from objectives that “the lawyer considers repugnant or imprudent,” which constitute another grounds for permissible withdrawal under Virginia Rule 1.16(b)(3), discussed below.

**ABA Model Rule 1.16(b)(2)** articulates the same concept, but uses a different standard – allowing, but not requiring, lawyers’ withdrawal if “the client persists in a course of action involving the lawyer’s services that the lawyer believes is criminal or fraudulent.” Like Virginia Rule 1.16(b)(1), ABA Model Rule 1.16(b)(2) thus has the same “persists,” “involving the lawyer’s services” and the subjective “reasonably believes” issues discussed above.

But there are differences. In contrast to Virginia Rule 1.16(b)(1)’s phrase “illegal or unjust,” ABA Model Rule 1.16(b)(2) uses the phrase “criminal or fraudulent.” The term “illegal” would seem to equate to the term “criminal.” But Virginia Rule 1.16(b)(1)’s term “unjust” does not seem to be an exact match with the ABA Model Rule’s term “fraudulent.” The Virginia Rule term seems to have more of a moral rather than a legal connotation. One could envision conduct that is fraudulent but not unjust – such as using fraudulent tactics to uncover invidious housing discrimination. The ABA Model Rule term “fraudulent” seems based on substantive law. Significantly, determining if clients’ “course of action” is “criminal or fraudulent” is objectively provable, because both of those are defined legal terms – unlike “unjust.” So ABA Model Rule 1.16(b)(2)’s “reasonably believes” objective standard seems more out of place there than in the parallel Virginia Rule 1.16(b)(1).

### **Virginia Rule 1.16(b)(2)**

Virginia Rule 1.16(b)(2) addresses the third situation in which lawyers may, but are not required to, withdraw from a representation.

Under Virginia Rule 1.16(b)(2), lawyers may withdraw if the “client has used the lawyer’s services to perpetuate a crime or fraud.” This backward looking situation obviously involves lawyers learning that their clients have already used the lawyer’s services to commit such a specified wrongdoing. This Virginia Rule provision uses the term “fraud,” which Virginia Rule 1.16(b)(1) deliberately avoided (but which appears in ABA Model Rule 1.16(b)(2)). As mentioned above, determining if a client has committed “a crime or fraud” is objectively provable (in contrast to the subjective “unjust” reference in Virginia rule 1.16(b)(1)).

Not surprisingly, Virginia Rule 1.6 issues might arise if a lawyer’s client “has used the lawyer’s services to perpetrate a crime or fraud.” If the client has already committed a crime or fraud using the lawyer’s services, Virginia Rule 1.6(b)(3) allows – but does not require – the lawyer to reveal (“[t]o the extent [the] lawyer reasonably believes necessary”) “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.” If the client has committed a tribunal-related “crime or fraud,” Virginia Rule 3.3 may require the lawyer’s disclosure of that crime or fraud to the tribunal.

**ABA Model Rule 1.16(b)(3)** uses the identical language. ABA Model Rule 1.16(b)(3)’s reference to “crime or fraud” matches the ABA Model Rule 1.16(b)(2) formulation.

### **Virginia Rule 1.16(b)(3)**

Virginia Rule 1.16(b)(3) addresses the fourth situation in which lawyers may, but are not required to, withdraw from a representation.

Under Virginia Rule 1.16(b)(3), lawyers may withdraw from a representation if the client “insists upon pursuing an objective that the lawyer considers repugnant or imprudent.” The phrase “insists on pursuing” sounds like the action is not yet commenced. It certainly differs from the phrase “persists in” (which obviously refers to ongoing misconduct) or “has used” (which obviously refers to past conduct). Use of the term “objective” also has forward-looking nature to it. Unlike the ABA Model Rule 1.16(b)(4) (discussed below), Virginia Rule 1.16(b)(3) focuses on “client’s” objective rather than on the client’s or the lawyer’s actions. It addresses a representation’s end, not its means. And unlike phrases that import substantive law (such as “illegal,” “crime,” or “fraud”), the terms “repugnant” and “imprudent” are subjective and ill-defined. Thus, lawyers have great discretion to withdraw under such a standard, which focuses on the lawyers’ value judgments and sensitivities. This is not to say that the clients will not claim that the withdrawal is malpractice, but Virginia Rule 1.16(b)(3) explicitly provides lawyers such ethical leeway.

Lawyers in this situation might find some guidance in a parallel scenario – described in Virginia Rule 6.2(c). That Virginia Rule allows lawyers to “seek to avoid an appointment” to represent a client if “the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer’s ability to represent the client.”

**ABA Model Rule 1.16(b)(4)** is similar to Virginia Rule 1.16(b)(3), but has several significant differences.

First, ABA Model Rule 1.16(b)(4) allows lawyers to withdraw if “the client insists upon taking action” of a certain type. This contrasts with Virginia Rule 1.16(b)(3)’s focus

on the client's insistence "upon pursuing an objective." Thus, the ABA Model Rule looks at means, not ends.

Second, ABA Model Rule 1.16(b)(4) allows lawyers' withdrawal if the client "insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement." The term "repugnant" also appears in the Virginia Rule. Presumably the ABA Model Rule phrase "with which the lawyer has a fundamental disagreement" is essentially synonymous with the Virginia Rule's term "imprudent."

### **Virginia Rule 1.16(b)(4)**

Virginia Rule 1.16(b)(4) addresses the fifth situation in which lawyers may, but are not required to, withdraw from a representation.

Under Virginia Rule 1.16(b)(4), lawyers may withdraw if the "client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services." The phrase "regarding the lawyer's services" differs from the phrase "involving the lawyer's services" which appears in Virginia Rule 1.16(b)(1), and the phrase "used the lawyer's services" which appears in Virginia Rule 1.16(b)(2). The phrase "regarding" seems to focus on the existence of the services rather than on the substance of the services.

This discretionary withdrawal provision also contains a condition: the client must have "been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled." In a sense, this requires the lawyer to give the client a chance to cure any failure "to fulfill an obligation to the lawyer regarding the lawyer's services." Although stated generally and presumably applicable generally, this is the provision that allows lawyers to withdraw from a representations if they are not paid. The notice provision

essentially requires lawyers to give delinquent clients a chance to “cure” the delinquency by paying their bills. The Virginia Rule does not provide any guidance about what is a “reasonable” warning.

**ABA Model Rule 1.16(b)(5)** contains the identical language.

### **Virginia Rule 1.16(b)(5)**

Virginia Rule 1.16(b)(5) addresses the sixth and seventh situation in which lawyers may, but are not required to, withdraw from a representation.

Under Virginia Rule 1.16(b)(5), lawyers may withdraw if “the representation will result in an unreasonable financial burden on the lawyer.” This may or may not cover scenarios in which clients are not paying the lawyer’s bills. Theoretically the previous provision (discussed above) could cover clients’ failure to pay even a small amount of a contractually required payment of the lawyer’s bill – and thus not trigger “an unreasonable financial burden on the lawyer.” The lawyer or law firm may be so well-off financially that even the client’s failure to pay a larger bill would not result in such an “unreasonable financial burden.”

Also under Virginia Rule 1.16(b)(5), lawyers may withdraw if the representation “has been rendered unreasonably difficult by the client.” This provision smacks of the sort of divorce-related “irreconcilable differences” mostly subjective rather than objective standard. Examples might include clients’ failure to communicate with or respond to their lawyers, failure to gather documents when requested by the lawyer, failure to provide the necessary facts to the lawyer, angry or irrational treatment of the lawyers, etc.

**ABA Model Rule 1.16(b)(6)** contains the identical language describing the same two scenarios.

### **Virginia Rule 1.16(b)(6)**

Virginia Rule 1.16(b)(6) addresses the eighth situation in which lawyers may, but are not required to, withdraw from a representation.

Under Virginia Rule 1.16(b)(6) lawyers may withdraw if “other good cause for withdrawal exists.” This obviously represents an open-ended opportunity for lawyers to withdraw for reasons not included in the specific Virginia Rule 1.16(b) list.

**ABA Model Rule 1.16(b)(7)** contains the identical language.

### **Virginia Rule 1.16(c)**

Virginia Rule 1.16(c) addresses lawyers’ withdrawal in a tribunal setting.

Under Virginia Rule 1.16(c), “counsel of record shall not withdraw [“[i]n any court proceeding”] except by leave of court” – “after compliance with notice requirements pursuant to applicable Rules of Court.”

Both of these requirements are unremarkable. Lawyers acting as “counsel of record” have been officially designated by tribunals as the client’s representative before the tribunal, and therefore owe duties to the tribunals and not just to their clients. Of course, counsel of record cannot withdraw without the court’s permission, and without satisfying whatever notice requirement the court imposes.

Although Virginia Rule 1.16(c) does not discuss it, such lawyers may withdraw as counsel of record but continue to represent the client otherwise – even in connection with litigation in which they had been counsel of record. Or such lawyers may withdraw as

counsel of record while also withdrawing entirely from the representation. Virginia Rule 1.16 (c) seems to address the latter situation. Virginia Rule 1.16(c) does not use the phrase “shall not withdraw as counsel of record.” Instead, the Virginia Rule just uses the term “withdraw,” which would seem to imply total withdrawal from the representation.

Virginia Rule 1.16(c)'s second sentence starts with the phrase: “[i]n any other matter.” It is unclear what that phrase means. As explained below, it does not appear in the parallel ABA Model Rule. It could refer to a scenario in which the court does not allow the lawyer to withdraw as counsel of record. In that situation, obviously lawyers must continue as counsel of record (absent unusual circumstances). Or it could be a much more generic statement about lawyers who have not sought to withdraw as counsel of record. In fact, it could refer to lawyers ordered to continue representing clients even if those lawyers are not serving as counsel of record. One would have thought that both sentences in Virginia Rule 1.16(c) would have dealt with lawyers acting as counsel of record in “in any court proceeding.” But that ambiguous phrase starting the second sentence contains the word “other.” So on its face that sentence seems to address situations other than those in which lawyers are acting as counsel of record in a court proceeding. So the meaning is unclear.

Virginia Rule 1.16(c) then understandably indicates that “when ordered to do so by a tribunal,” “a lawyer shall continue representation.” Between those two phrases, Virginia Rule 1.16(c) contains a superfluous phrase that should go without saying: “notwithstanding good cause for terminating the representation.” If ordered by tribunal to continue a representation, lawyers must do so.

**ABA Model Rule 1.16(c)** also describes a tribunal related context, although it seems to equate the counsel of record role and the representational role.

Under ABA Model Rule 1.16(c), “[a] lawyer must comply with applicable law regarding notice to or permission of a tribunal when terminating a representation.” This clearly poses a much more open-ended termination than Virginia Rule 1.16(c).

ABA Model Rule 1.16(c)’s second sentence requires lawyers to “continue representation notwithstanding good cause for terminating a representation” – “[w]hen ordered to do so by a tribunal.” This mandate seems to describe a lawyer’s possible inability to withdraw from the entire representation, not just withdrawal as counsel of record. The sentence seems to tie back into the first sentence – describing a scenario in which a lawyer has unsuccessfully sought to obtain the tribunal’s consent to “terminating a representation.” Thus, in contrast to the ambiguous Virginia Rule 1.16(c), ABA Model Rule 1.16(c)’s two sentences both clearly describe a tribunal scenario. The ABA Model Rule does not contain the vague and undefined phrase that appears in the Virginia Rule: “[i]n any other matter”- which seems to describe a different scenario from the first sentence’s focus on a tribunal context.

### **Virginia Rule 1.16(d)**

Virginia Rule 1.16(d) addresses lawyers’ duties “[u]pon termination of representation.”

Under Virginia Rule 1.16(d), lawyers in that situation “shall take steps to the extent reasonably practicable to protect a client’s interests.” Virginia Rule 1.16(a) then provides some examples: (1) “giving reasonable notice to the client;” (2) “allowing time for

employment of other counsel;” (3) “refunding any advance payment of fee that has not been earned;” (4) “handling records as indicated in [Virginia Rule 1.16(e)]”.

Although Virginia Rule 1.16(a) does not explicitly indicate as much, these duties apply (1) when a lawyer terminates an ongoing representation as required in Virginia Rule 1.16(a); (2) when a lawyer exercises discretion to withdraw under any of the Virginia Rule 1.16(b) permissible scenarios; or (3) when the client discharges the lawyer under Virginia Rule 1.16(a)(3).

Situations in which this provision might apply include lawyers tempted to withdraw on the eve of trial because they have not been paid, lawyers fired by an angry client in the midst of tense contract negotiations with a counterparty, etc. In every circumstance, lawyers required or choosing to withdraw from representations must take “reasonably practicable” steps to protect their now-former clients’ interests. Complying with these duties may be challenging emotionally for lawyers who have been mistreated, but lawyers nevertheless must do so.

**ABA Model Rule 1.16(d)** contains the same basic duty to take “reasonably practicable” steps to protect clients “[u]pon termination of representation.” ABA Model Rule 1.16(d) contains some of the same examples as Virginia Rule 1.16(d): (1) “giving reasonable notice to the client”; (2) “allowing time for employment of other counsel.”

But ABA Model Rule 1.16(d) differs in several ways from Virginia Rule 1.16(d).

First, in contrast to Virginia Rule 1.16(d)’s requirement to “refund[ ] any advanced payment of fee that has not been earned,” ABA Model Rule 1.16(b) also requires lawyers to “refund[ ] any . . . expense that has not been . . . incurred.” Virginia Rule 1.16(d) does not contain any reference to expenses.

Second, in contrast to Virginia Rule 1.16(d)'s reference to Virginia Rule 1.16(e)'s unique client file provision (discussed below), ABA Model Rule 1.16(d) simply states that lawyers' "reasonably practicable" steps protecting their former client include "surrendering papers and property to which the client is entitled." Of course, this begs the question of what "papers and property" the client is entitled to receive from the lawyer.

Significantly, ABA Model 1.16(d) does not require former clients to request the surrender of papers and property to which they are entitled. So presumably the ABA Model Rules automatically require such "surrendering" even absent the former client's request. As a practical matter, perhaps that distinction is not important. If the former client does not request the papers, it is difficult to imagine the lawyer being punished for violating the ethics rule and not automatically turning them over. In contrast, Virginia Rule 1.16(e) (discussed below) contains the phrase "upon request" when addressing categories of documents lawyers must turn over to former clients (albeit with different requirements as to payment for copies).

ABA Model Rule 1.16(d) concludes with another reference to papers – assuring lawyers that they "may retain papers relating to the client to the extent permitted by other laws." As mentioned above and discussed below, a unique Virginia Rule 1.16(e) provides detailed guidance about what papers lawyers must relinquish and may retain when terminating a representation. The ABA Model Rule 1.16(d) reference to lawyers' retention of client papers "to the extent permitted by other law" does not explain either the source or the substance of client's entitlement to papers and property, or the source or substance of "other law" that permits lawyers to retain some papers. Presumably, ABA Model Rule 1.16(d)'s formulation refers to traditional lawyer liens that some states recognize –

allowing lawyers to retain former clients’ “papers” until they are paid. This is commonly referred to as a “retaining lien,” and varies from state to state.

Interestingly, ABA Model Rule 1.16(d) requires lawyers to surrender “papers and property to which the client is entitled,” but allows lawyers only to “retain papers related to the client to the extent permitted by other law.” Perhaps this different formulation reflects limits on lawyers’ right to retain client “property.”

### **Virginia Rule 1.16(e)**

Unique Virginia Rule 1.16(e) (which does not appear in ABA Model Rule 1.16) addresses lawyers’ duty to provide their file to clients and former clients.

Virginia Rule 1.16(e) contains a lengthy provision explaining what documents lawyers must provide to their former clients, and what document they may decline to relinquish.

Virginia Rule 1.16 addresses lawyers’ duty upon terminating a representation, and several portions of Virginia Rule 1.16(e) contain the phrase “upon termination of the representation.” But presumably lawyers have the same duties described in Virginia Rule 1.16(e) if their current clients request a document from the files. And of course if there was any question about that, current client always possesses the right to terminate the representation – thus triggering lawyers’ Virginia Rule 1.16(e) duties.

This elaborate Virginia Rule contrasts sharply with the terse requirement in ABA Model Rule 1.16(d) that lawyers must “surrender[] papers and property to which the [former] client is entitled,” but “may retain papers relating to the client to the extent permitted by other law.” As explained above, ABA Model Rule 1.6(d) requires lawyers to

relinquish specified property and papers to former clients, even without them requesting that. And as also explained below, that ABA Model Rule (unlike the Virginia Rule) focuses only on lawyers' ethics requirements to relinquish property and papers. Former clients or even third parties might rely on discovery to seek those documents – which involves different issues.

Virginia Rule 1.16(e) essentially addresses three different categories of documents that lawyers normally possess while representing a client: (1) the client's original documents that clients give to the lawyer; (2) documents lawyers create while representing the client, substantively related to the matter; and (3) internal law firm documents related logistically (rather than substantively) to the representation.

First, Virginia Rule 1.16(e) requires that “within a reasonable time” after a representation's termination, lawyers must – “upon request” – provide the former client or the former client's “new counsel” specified types of documents. Virginia Rule 1.16(e) uses the phrase “returned . . . to the client or the client's new counsel.” Of course, documents can be returned to the client, but would not be “returned” to the client's new counsel. It would have been better for the sentence to say “returned . . . to the client or provided to the client's new counsel.” But the meaning seems clear.

Lawyers' duty covers “[a]ll original, client-furnished documents and any originals of legal instruments or official documents which are in the lawyer's possession” – which the Virginia Rule describes as “property of the client.” Virginia Rule 1.16(e) then provides examples: “wills, corporate minutes, etc.”

Virginia Rule 1.16(e) next explains that lawyers must relinquish those documents “whether or not the client has paid the fees and costs owed the lawyer.” In other words,

those types of identified documents cannot be withheld under what some states still recognize as a “retaining lien.”

Virginia Rule 1.16(e) next states that lawyers must “incur the cost of duplication” if the lawyer “wants to keep a copy of such original documents.” This Virginia Rule provision seems to assume that lawyers may freely make and keep a copy of the materials, but without mentioning the client’s possible right to object to such copying. One might envision clients objecting to their former lawyers’ copying and retaining such copies of their “original documents.” Former clients (and even current clients) might worry about documents in their lawyer’s possession being leaked or otherwise becoming public – embarrassing the clients. A more sinister explanation might be clients’ worry that documents in their lawyers’ files might incriminate the client in some wrongdoing. Those clients might want the only copies of those documents returned to them, perhaps to destroy them. Several legal ethics opinions from other states have dealt with this issue, most of which have indicated that lawyers may copy and retain copy of files (mostly for self-defense), even over the client’s objection.

Second, Virginia Rule 1.16(e) states that lawyers must – “upon request” – provide the former clients copies of the second category of documents from the lawyer’s files, “whether or not the client has paid the fees and costs owed the lawyer.” Those are documents lawyers create while representing the client, substantially related to the matter. Most significantly, unlike the first category of documents, Virginia Rule 1.16(e) requires lawyers to provide “copies” of the specified documents unlike the originals in the first category of documents. Like the first category of documents, lawyers must provide copies of these documents to their former clients (and presumably their current clients)

“within a reasonable time.” Unlike the first category of documents, Virginia Rule 1.16(e) does not refer to these documents as being “returned” – because these are copies of lawyer-created documents. Also unlike the first category of documents, Virginia Rule 1.16(e) does not mention lawyers sending copies of these documents to “the client’s new counsel.”

This second category of documents are identified as follows: (1) “lawyer/client . . . communications;” (2) “lawyer/third-party communications;” (3) “the lawyer’s copies of client-furnished documents (unless the originals have been returned to the client pursuant to this paragraph” [discussed above]); (4) “transcripts;” (5) “pleadings;” (6) “discovery responses;” (7) “working . . . drafts of legal instruments;” (8) “final drafts of legal instruments;” (9) “working . . . drafts of . . . official documents;” (10) “final drafts of . . . official documents;” (11) “working . . . drafts of . . . investigative reports;” (12) “final drafts of . . . investigative reports;” (13) “working . . . drafts of . . . legal memoranda;” (14) “final drafts of . . . legal memoranda;” (15) “other attorney work product documents prepared . . . for the client in the course of the representation;” (15) “other attorney work product documents . . . collected for the client in the course of the representation;” (16) “research materials;” and (17) “bills previously submitted to the client.”

This extensive list makes it clear that Virginia follows the “entire” file approach to lawyers’ duty to provide files to their former clients. Some states take the opposite approach – requiring lawyers to turn over to their former clients only the “finished product” of their representation (the final version of briefs, memoranda, etc.) An ABA Legal Ethics Opinion – took this admittedly minority approach. ABA LEO 471 (7/1/15).

In contrast to the first category of “original” and “client-furnished” documents which lawyers may copy at their own expense, Virginia Rule 1.16(e) takes a different approach to copying of this second category of documents. The Virginia Rule indicates that lawyers “may bill and seek to collect from the client the costs associated with making a copy of these materials.” But significantly, lawyers may not withhold the documents requested by the client based on “the client’s refusal to pay for such materials.”

Third, Virginia Rule 1.16(e) then describes a third category of documents – essentially internal law firm documents. The Virginia Rule explains that lawyers are not required under Virginia Rule 1.16(e) “to provide: “copies of billing records and documents intended only for internal use.” The Virginia Rule provides some examples of the latter: (1) “memoranda prepared by the lawyer discussing conflicts of interest;” (2) “memoranda prepared by the lawyer discussing . . . staffing considerations;” (3) “memoranda prepared by the lawyer discussing . . . difficulties arising from the lawyer/client relationship.” Even states adopting the “entire file” standard generally take the same approach to such purely internal law firm documents.

Lawyers breathing a sigh of relief because Virginia Rule 1.16(e) does not require them to turn over such potentially embarrassing internal documents should remember that Virginia Rule 1.16(e) describes lawyers’ duty to turn over such documents “upon request.” Clients (and perhaps even third parties in unusual circumstances) might be able to obtain these purely internal law firm documents through discovery.

Virginia Rule 1.16(e) then deals with logistics. The Virginia Rule explains that lawyers have met their obligation under Virginia Rule 1.16(e) “by furnishing these items

one time at client request upon termination.” To make it clear, the Virginia Rule then states that “provision of multiple copies is not required.”

But Virginia Rule 1.16(e) also warns that a lawyer “has not met his or her obligation under this paragraph by the mere provision of copies of documents on an item-by-item basis during the course of the representation.” This Virginia Rule 1.16(e) provision presumably does not apply to client-supplied original documents or to purely internal law firm logistical documents. Lawyers would not have supplied those to the client during the representation. In other words, lawyers cannot turn down a former client’s request for the second category of documents (the lawyer’s work product) by explaining that the client should have received copies as the lawyer provided them on an ongoing basis during the representation. Instead, the lawyer must provide (“upon request”) one copy of such documents to the former client when the representation ends.

Virginia Rule 1.16(e) represents a dramatically more explicit and detailed description of lawyers’ duty to provide documents to former clients than the ABA Model Rule and other states’ rules. But lawyers and their clients should remember that Virginia Rule 1.16(e)’s elaborate description of documents’ categories, and the lawyer’s duties related to each category, apply only to former (or presumably current) clients’ request for those documents. Although Virginia Rule 1.6(e) understandably focuses only on the ethics issues that arise upon a representation’s termination, lawyers should remember that their obligation to relinquish copies of the files address those duties upon the former clients’ request. In other words, clients trigger their former lawyers’ Virginia Rule 1.6(e) duties just by asking for files (or perhaps by not even having to ask). These scenarios differ from formal discovery that might occur later – if clients sue their former lawyers,

lawyers sue their former clients, or (in very unusual circumstances) third parties seek discovery of such documents. In those scenarios, normal discovery rules apply. Depending on relevance, burden, etc., lawyers may have to produce during such discovery purely internal law firm documents – which are excluded by Virginia Rule 1.6(e) from lawyers' ethical duty to relinquish some documents in their file to clients upon request.

## Comment

### Virginia Rule 1.16 Comment [1]

Virginia Rule 1.16 cmt. [1] addresses the conditions under which lawyers may not accept or continue representations.

Virginia Rule 1.16 cmt. [1] warns that lawyers should not “accept or continue representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.” Thus, Virginia Rule 1.16 cmt. [1] incorporates the duty of competence (Virginia Rule 1.2), promptness (Virginia Rule 1.3(a)) and conflict-free completion (Virginia Rule 1.7 and 1.9).

**ABA Model Rule 1.16 cmt. [1]** contains the identical language. It also includes a description (not found in Virginia Rule 1.16 cmt. [1]) of when representations “[o]rdinarily” are completed – “when the agreed-upon assistance has been concluded.”

That ABA Model Rule 1.16 cmt. [1] refers to ABA Model Rule 1.2(c), ABA Model Rule 6.5 and ABA Model Rule 1.13 cmt. [4]. ABA Model Rule 1.2(c) addresses limits on the scope of a representation, which meets ethical standards if the limitation is “reasonable” and the client consents to the limitation. ABA Model Rule 6.5 addresses “short-term limited legal services” under nonprofit and court-annexed limited legal services programs. ABA Model Rule 1.3 cmt. [4] explains that lawyers normally should “carry through to conclusion all matters undertaken for a client.” That ABA Model Rule Comment also repeats the concept in ABA Model Rule 1.16 cmt. [1] that normally “the relationship terminates when the matter has been resolved.” ABA Model Rule 1.3 Comment [4] explains that lawyers should advise their clients about a continuing attorney-client relationship if there is any doubt about it, providing as an example the lawyer’s

possible representation of the client in an appeal of a matter in which the lawyer represented the client.

### **Virginia Rule 1.16 Comment [2]**

Virginia Rule 1.16 cmt. [2] addresses the scenario described in black letter Virginia Rule 1.16(a)(1).

Virginia Rule 1.16(a)(1) requires lawyers to refrain from representing or withdraw from representing a client “if . . . the representation will result in violation of the Rules of Professional Conduct or other law.” Presumably the term “illegal” is synonymous with the phrase “violates . . . other law.” One might wonder why Virginia Rule 1.16 cmt. [2] contains what seems to be a repetitive reference like that.

Virginia Rule 1.16 cmt. [2] does not exactly match that black letter Virginia Rule. Instead, Virginia Rule 1.16 cmt. [2] distinguishes between a scenario where: (1) “the client demands that the lawyer engage in conduct that is illegal or violates the [Virginia Rules] or other law”; and (2) a scenario where “the client suggests such a course of conduct.” It is understandable that a lawyer may wish to turn down such a client’s representation or withdraw from such a representation if it has already begun. But if the lawyer explains to the client or would-be client who “demands” such misconduct that the lawyer will not do so, presumably the lawyer may accept or continue the representation. If the lawyer refuses to undertake such conduct, then of course the representation will not “result in violation of the Rules of Professional Conduct or other law” (which is the Virginia Rule 1.16(a)(1) standard). Perhaps that is why Virginia Rule 1.16 cmt. [2] states that

lawyers “ordinarily” must decline to represent or withdraw from representing a client making such a “demand” or “suggest[ion].”

Virginia Rule 1.16(a)(1) and Virginia Rule 1.16 cmt. [2] thus contain an odd trilogy of improper conduct.

First, black letter Virginia Rule 1.16(a)(1) describes a scenario where a representation “will result in violation of the Rules of Professional Conduct or other law.”

Second, Virginia Rule 1.16 cmt. [2] describes a scenario where the client “demands” that the lawyer “engage in conduct that is illegal or violates the Rules of Professional Conduct or other law.”

Third, Virginia Rule 1.16 cmt. [2] then describes another scenario – in which a client merely “suggests such a course of conduct” rather than demanding it. In that situation, “[t]he lawyer is not obliged to decline or withdraw simply because the client” makes such a suggestion. As explained above, one would think a lawyer could similarly accept a representation as long as the lawyer has explained to the client that the lawyer will not take improper conduct that the client has “demand[ed].” Of course, if the client decides to hire a more pliable lawyer with less scruples, the proposed representation never begins.

Virginia Rule 1.16 cmt. [2] concludes with an explanation of why a client might “suggest” such an improper course of conduct: “a client may make such a suggestion in hope that a lawyer will not be constrained by a professional obligation.” Presumably this means that the lawyer’s rejection of the suggestion allows the lawyer to take on the representation or continue the representation. Of course, a lawyer may similarly reject a client demand.

**ABA Model Rule 1.16 cmt. [2]** contains the identical language.

### **Virginia Rule 1.16 Comment [3]**

Virginia Rule 1.16 cmt. [3] addresses lawyers' possible withdrawal from court-appointed representations.

First, Virginia Rule 1.16 cmt. [3] explains that “ordinarily” lawyers “appointed to represent a client” must obtain the appointing authority’s approval before withdrawing from representing the client. Virginia Rule 1.16 cmt. [3] refers to Virginia Rule 6.2. Virginia Rule 6.2 explains that lawyers “should not seek to avoid appointment by a tribunal to represent a person except for good cause” – providing several examples of such “good cause.” Virginia Rule 6.2 does not deal with lawyers’ possible withdrawal from a representation that they had accepted.

Virginia Rule 1.16 cmt. [3] next understandably explains that “[d]ifficulty may be encountered if withdrawal is based on the client’s demand that the lawyer engage in unprofessional conduct that is illegal or violates” the Virginia ethics Rules. The term “unprofessional conduct” that appears in Virginia Rule 1.16 cmt. [3] (and ABA Model Rule 1.6 cmt. [3]) may refer to civil or discourteous conduct, rather than unethical conduct. The previous Virginia Rule Comment and parallel ABA Model Rule Comment explicitly refers to clients’ demands that their lawyers engage in conduct that “violates the Rules of Professional Conduct or other law.” Thus, it would seem that Virginia Rule 1.16 cmt. [3] would have used the same reference to the ethics rules if it meant to refer to unethical conduct. However, perhaps Virginia Rule 1.16 cmt. [3]’s reference to “unprofessional conduct” is synonymous with unethical conduct.

Under either standard, court-appointed lawyers may have an ethical obligation to withdraw under Virginia Rule 1.16(a)(1) or perhaps some other provision. In that scenario, “[t]he court may wish an explanation for the withdrawal.” Virginia Rule 1.16 cmt. [3] warns that lawyers seeking such appointing authority’s approval to withdraw upon a client’s demand that lawyers engage in “unprofessional conduct” “may be bound to keep confidential the facts that would constitute such an explanation.”:

Virginia Rule 1.16 cmt. [3]’s phrase that a “court may wish an explanation” seems inapt. Courts do not “wish” for things. The parallel ABA Model Rule 1.16 cmt. [3] uses the more accurate phrase “[t]he court may request an explanation.”

Virginia Rule 1.16 cmt. [3] concludes with a statement more appropriately addressed to the “appointing authority” than to the lawyer: “[t]he lawyer’s statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.” In other words, Virginia Rule 1.16 cmt. [3] indicates that tribunals normally should take appointed lawyers at their word if they advise the tribunal that there is an ethical reason for their filing a motion for leave to withdraw.

Virginia Rule 1.16 cmt. [3]’s focus on court-appointed lawyers seems too narrow. All lawyers who appear as counsel of record and who seek to withdraw from such a role under Virginia Rule 1.16(c) might have, and probably will have, the identical “difficulty” when seeking to withdraw from the counsel of record role. The court may ask for an explanation, because such lawyers’ withdrawal might disrupt the court’s docket, create additional work for the court, prejudice the client and adverse party in some way, etc. To be sure, courts who had appointed a lawyer to represent a client may feel more invested in those lawyers’ continued representation than a court overseeing lawyers who had

entered appearances as counsel of record, but those lawyers face the same basic confidentiality dilemma.

**ABA Model Rule 1.16 cmt. [3]** contains essentially the same language as Virginia Rule 1.6 cmt. [3]. But there are several differences.

First, in contrast to Virginia Rule 1.16 cmt. [3], ABA Model Rule 1.16 cmt. [3] also deals with normal litigation representations, warning lawyers that “[s]imilarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation.” Virginia Rule 1.16(c) recognizes this reality, but for some reason does not address it in Virginia Rule 1.16 cmt. [3].

Second, in contrast to Virginia Rule 1.16 cmt. [3]’s recognition that a court “may wish an explanation,” ABA Model Rule 1.16 cmt. [3] more accurately explains that the court “may request an explanation.”

Third, in contrast to Virginia Rule 1.16 cmt. [3], ABA Model Rule 1.16 cmt. [3] concludes with a sentence that does not appear in Virginia Rule 1.16 cmt. [3] – stating that lawyers “should be mindful of their obligations to both clients and the court under [ABA Model Rule] Rule 1.6 and 3.3.” The former ABA Model Rule focuses on confidentiality, and the latter ABA Model Rule focuses on lawyers’ duty of candor toward tribunals.

#### **Virginia Rule 1.16 Comment [4]**

Virginia Rule 1.16 cmt. [4] addresses clients’ discharge of their lawyers.

Virginia Rule 1.16 cmt. [4] first confirms the universally-accepted rule that clients have “a right to discharge a lawyer at any time, with or without cause.” The Virginia Rule

Comment then suggests that “it may be advisable to prepare a written statement reciting the circumstances” – “[w]here future dispute about the withdrawal may be anticipated.”

Virginia Rule 1.16 cmt. [4]’s first sentence correctly recognizes that clients can discharge their lawyers at any time. The second sentence mentions “withdrawal.” To be sure, Virginia Rule 1.16(a)(3) requires lawyers to withdraw from a representation if “the lawyer is discharged.” But using the word “discharge” rather than “withdrawal” would have seemed more appropriate in describing an “anticipated” “future dispute.” Perhaps Virginia Rule 1.16 cmt. [4] deliberately chose different terms, for a reason discussed immediately below.

Virginia Rule 1.16 cmt. [4] does not explain who should “prepare a written statement reciting the circumstances.” Presumably, the lawyer would do so. So perhaps Virginia Rule 1.16 cmt. [4]’s second sentence’s suggestion that it may be “advisable” for lawyers to contemporaneously memorialize “the circumstances” envisions the possibility of a dispute between a lawyer and a client about whether the lawyer voluntarily withdrew or was discharged. Of course, that would protect the lawyer in such a dispute. For instance, a contingent fee lawyer might have a financial interest in establishing that she was discharged rather than withdrew. The distinction might also be important in malpractice cases or other scenarios. A “future dispute” might also focus on the discharge, not the resulting withdrawal.

**ABA Model Rule 1.16 cmt. [4]** contains the identical language.

In contrast to Virginia Rule 1.16 cmt. [4], ABA Model Rule 1.16 cmt. [4] also contains a condition on the client’s right to “discharge a lawyer at any time with or without cause” – “subject to liability for payment for the lawyer’s services.”

### **Virginia Rule 1.16 Comment [5]**

Virginia Rule 1.16 cmt. [5] addresses clients' discharge of "appointed counsel."

Virginia Rule 1.16 cmt. [5] first explains that "applicable law" determines such clients' ability to discharge their appointed lawyers, and suggests that such clients "be given a full explanation of the consequences."

That sentence presumably suggests that lawyers appointed to represent a client warn the client about the risks the client undertakes in discharging the lawyer. This sounds self-serving, but the next sentence explains that such a warning actually may ultimately assist the client by deterring the termination. Among those consequences, Virginia Rule 1.16 cmt. [4] explains that the "appointing authority" might conclude that "appointment of successor counsel is unjustified, thus requiring the client to proceed pro se."

**ABA Model Rule 1.16 cmt. [5]** contains the identical language, other than using the phrase "thus requiring self-representation by the client" instead of the Virginia Rule 1.16 cmt. [5] phrase "thus requiring the client to proceed pro se."

### **Virginia Rule 1.16 Comment [6]**

Virginia Rule 1.16 cmt. [6] focuses on "mentally incompetent" clients.

Virginia Rule 1.16 cmt. [6] warns that such clients may "lack the legal capacity to discharge the lawyer," and that any discharge "may be seriously adverse to the clients' interests." Virginia Rule 1.16 cmt. [6] suggests that such lawyers should "make special effort" to explain the consequences, and then notes that "in an extreme case" such

lawyers “may initiate proceedings for a conservatorship or similar protection of the client” (referring to Virginia Rule 1.14, which addresses impaired clients).

**ABA Model Rule 1.16 cmt. [6]** contains the same explanation. But in contrast to Virginia Rule 1.16 cmt. [6]’s use of the term “mentally incompetent,” ABA Model Rule 1.16 cmt. [6] uses the term “severely diminished capacity.”

### **Virginia Rule 1.16 Comment [7]**

Virginia Rule 1.16 cmt. [7] addresses lawyers’ optional withdrawal (in contrast to the earlier Virginia Rule Comments’ discussion of mandatory withdrawal or discharge).

Virginia Rule 1.16 cmt. [7]’s second sentence repeats the standard in the introductory sentence of Virginia Rule 1.16(b) – explaining that a lawyer “has the option to withdraw if it can be accomplished without material adverse effect on the client’s interests.”

Virginia Rule 1.16 cmt. [7]’s third sentence matches the standard in black letter Virginia Rule 1.16(b)(1) – which focuses on clients’ persistence “in a course of action that the lawyer reasonably believes is illegal or unjust.” But that sentence has a possible mismatch with the black letter Virginia Rule. The second half of that Virginia Rule 1.16 cmt. [7] sentence explains that “a lawyer is not required to be associated with such conduct [“that the lawyer reasonably believes is illegal or unjust”] even if the lawyer does not further it.” Black letter Virginia Rule 1.16(b)(1) indicates that lawyers may withdraw if “the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is illegal or unjust” (emphasis added). So the black letter Virginia Rule involves lawyers’ services “involved” in the “course of action” the lawyer “reasonably

believes is illegal or unjust.” That presumably means that the lawyers’ services are furthering that “course of action.” Virginia Rule 1.16(b)(1)’s phrase “involving the lawyer’s services” differs from Virginia Rule 1.16(b)(2)’s phrase “used the lawyer’s services” and Virginia Rule 1.16(b)(4)’s phrase “regarding the lawyer’s services.” Perhaps Virginia Rule 1.16(b)(1)’s phrase “involving the lawyer’s services” covers the client’s improper use of those services – in contrast to Virginia Rule 1.16 cmt. [7]’s phrase “even if the lawyer does not further it.” The latter might denote the same situation in which a client uses a lawyer’s services to engage in the specified improper conduct – but without the lawyer’s participation, urging or involvement. In other words, the lawyer may find that her services have been used by the client to engage in improper activities – which have “involv[ed]” the lawyer’s services, but which the lawyer has not “furthered.”

Either way, black letter Virginia Rule 1.16(b)(1) understandably allows lawyers to withdraw under such a circumstance.

Virginia Rule 1.16 cmt. [7]’s fourth sentence explains that lawyers’ “[w]ithdrawal is also permitted if the lawyer’s services were misused in the past even if that would materially prejudice the client.” That presumably focuses on the scenario described in black letter Virginia Rule 1.16(b)(2). But that black letter Virginia Rule describes a setting where “the client has used the lawyer’s services” for a specific identified type of wrongdoing – “to perpetrate a crime or fraud.” This is much narrower than Virginia Rule 1.16 cmt. [7]’s generic phrase “if the lawyer’s services were misused in the past.” Presumably the black letter Virginia Rule 1.16(b)(2) formulation applies, rather than the more general Virginia Rule 1.16 cmt. [7] formulation.

It is also odd that Virginia Rule 1.16 cmt. [7]’s fourth sentence concludes with the statement that lawyers’ withdrawal in such a generic situation is permissible “even if that would materially prejudice the client.” That term seems superfluous, because all of the Rule 1.16(b) discretionary withdrawal situations involve possible “material adverse effect on the interests of the client.” That is also true under the scenario described in the preceding sentence, and in the following sentence. Those sentences do not include that assurance. All of the scenarios described in black letter Virginia Rule 1.16(b)(1) – (6) allow lawyers to withdraw even if there is “material adverse effect on the interests of the client.”

Virginia Rule 1.16 cmt. [7]’s concluding fifth sentence parallels black letter Virginia Rule 1.16(b)(3) – allowing withdrawal “where the client insists on pursuing an objective that the lawyer considers repugnant or imprudent.”

**ABA Model Rule 1.16 cmt. [7]** addresses the same scenarios where lawyers may, but are not required to, withdraw.

ABA Model Rule 1.16 cmt. [7] reflects the slightly different formulations in ABA Model Rule 1.16 from those contained in Virginia Rule 1.16(b).

Like Virginia Rule 1.16 cmt. [7], ABA Model Rule 1.16 cmt. [7]’s second sentence matches black letter ABA Model Rule 1.16(b)(1)’s provision allowing lawyers to withdraw if that “can be accomplished without material adverse effect on the interests of the client.” ABA Model Rule 1.16 cmt. [7]’s third sentence focuses on black letter ABA Model Rule 1.16(b)(2)’s provision allowing lawyers to withdraw if the client “persist in a course of action . . . that the lawyer reasonably believes is criminal or fraudulent.” As explained above, ABA Model Rule 1.16(b)(2)’s “criminal or fraudulent” formulation contrasts with

Virginia Rule 1.16(b)(1)'s "illegal or unjust" formulation. ABA Model Rule 1.16(b)(2)'s term "criminal" presumably is synonymous with the Virginia Rule's term "illegal." But the ABA Model Rule term "fraudulent" is quite different from the Virginia Rule word "unjust." The word "fraudulent" clearly refers to substantive law, while the Virginia Rule word "unjust" presumably involves personal beliefs – not substantive law.

Like Virginia Rule 1.16 cmt. [7], ABA Model Rule 1.16 cmt. [7]'s third sentence ends with an explanation of why lawyers may be allowed to withdraw in that setting: "for a lawyer is not required to be associated with such conduct even if the lawyer does not further it." But like Virginia Rule 1.16 cmt. [7], ABA Model Rule 1.16 cmt. [7]'s explanation creates an arguable mismatch with black letter ABA Model Rule 1.16(b)(2). That black letter ABA Model Rule provision describes a scenario where "the client persists in a course of action . . . that the lawyer reasonably believes is criminal or fraudulent" – if it is "a course of action . . . involving a lawyer's services." So the black letter ABA Model Rule presumably envisions the lawyers' services furthering the criminal or fraudulent course of action that the client persists in pursuing. As explained above, ABA Model Rule 1.16(b)(2)'s phrase "involving the lawyer's services" differs from ABA Model Rule 1.16(b)(3)'s phrase "used the lawyer's services" and ABA Model Rule 1.16(b)(5)'s phrase "regarding the lawyer's services."

Like Virginia Rule 1.16 cmt. [7], ABA Model Rule 1.16 cmt. [7]'s fourth sentence explains that lawyers may withdraw "if the lawyer's services were misused in the past." That is a much more general statement than the specific black letter ABA Model Rule 1.16(b)(3) scenario – in which "the client has used the lawyer's services to perpetuate a crime or fraud." Presumably the more restrictive black letter ABA Model Rule 1.16(b)(3)

scenario (where the client has used the lawyer’s services “to perpetuate a crime or fraud”) trumps ABA Model Rule 1.16 cmt. [7]’s much more general phrase “misused in the past.”

Also like Virginia Rule 1.16 cmt. [7], ABA Model Rule 1.16 cmt. [7] ends that fourth sentence with the phrase “even if that would materially prejudice the client.” That is true, but that condition is also true of the preceding sentence and the next sentence. So while accurate, the inclusion of that phrase in just one of those three successive sentences might be confusing.

ABA Model Rule 1.16 cmt. [7]’s fifth sentence focuses on black letter ABA Model Rule 1.16(b)(4). That sentence explains that “[t]he lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.” As explained above, black letter ABA Model Rule 1.16(b)(4) contrasts with black letter Virginia Rule 1.16(b)(3) (and the parallel Virginia Rule 1.16 cmt. [7]) in two ways.

First, in contrast to Virginia Rule 1.16(b)(3)’s description of a scenario where the client “insists upon pursuing an objective that the lawyer considers repugnant or imprudent,” ABA Model Rule 1.16 cmt. [7]’s last sentence describes a scenario where “the client insists upon taking action that the lawyer considers repugnant or with which the lawyer as a fundamental disagreement.” Thus, the ABA Model Rule focuses on means (“action”), while the Virginia Rule focuses on ends (“objective”).

Second, while both ABA Model Rule 1.16(b)(4) and Virginia Rule 1.16(b)(3) use the same term “repugnant,” ABA Model Rule 1.16(b)(4) and ABA Model Rule 1.16 cmt. [7] use the phrase “fundamental disagreement” – in contrast to Virginia Rule 1.16(b)(4)’s

and Virginia Rule 1.16 cmt. [7]’s use of the term “imprudent.” Those probably are synonymous.

### **Virginia Rule 1.16 Comment [8]**

Virginia Rule 1.16 cmt. [8] addresses lawyers’ ability to withdraw “if the client refuses to abide by the terms of an agreement relating to the representation.” That matches up with black letter Virginia Rule 1.16(b)(4) – which allows lawyers to withdraw if “the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled.”

Virginia Rule 1.16 cmt. [8] provides two examples: (1) “such as an agreement concerning fees or court costs;” or (2) an agreement limiting the objectives of the representation.” The reference to clients’ failure to abide by an “agreement concerning fees or court costs” is easy to understand. In most situations, that involves the client’s failure to pay the lawyer’s bills. Virginia Rule 1.16 cmt. [8]’s reference to “court costs” seems odd. Those are usually a tiny subset of the lawyer’s expenses incurred during litigation. The broader term “or expenses” would have been more appropriate. The other client failure – refusing to abide by “an agreement limiting the objectives of the representation” is not defined, and is difficult to understand. If the client pushes the lawyer to go beyond the limits on the “objectives of the representation” that the client had earlier agreed to, presumably the lawyer can simply refuse. If the client keeps pushing, the lawyer can withdraw under that provision. But at that point, the representation

presumably “has been rendered unreasonably difficult by the client” – thus justifying the lawyer’s withdrawal under Virginia Rule 1.16(b)(5).

Virginia Rule 1.16 cmt. [8] does not include a significant condition contained in black letter Virginia Rule 1.16(b)(4) – allowing such withdrawal only if the client “has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled.” As described above, that essentially requires lawyers to provide their client an opportunity to “cure” before they may withdraw. But of course the black letter condition trumps Virginia Rule 1.16 cmt. [8]’s unconditional language.

**ABA Model Rule 1.16 cmt. [8]** contains the identical language.

### **Virginia Rule 1.16 Comment [9]**

Virginia Rule 1.16 cmt. [9] addresses lawyers’ continuing obligation to protect clients even when withdrawing from representing them.

Virginia Rule 1.16 cmt. [9] first reminds lawyers that they “must take all reasonable steps to mitigate the consequences to the client” – even if the client has “unfairly discharged” the lawyer.

Virginia Rule 1.16 cmt. [9] next addresses organizational clients’ lawyers. The Virginia Rule Comment explains that the Virginia Rules do not give such lawyers any guidance on whether or not (“under certain unusual circumstances”) they “have a legal obligation to the organization after withdrawing or being discharged by the organization’s highest authority.” Virginia Rule 1.13 does not require lawyers who have been fired by or withdrawn from representing an organizational client (usually a corporation) to notify the organization’s highest authority about the representation’s termination. This contrast with

ABA Model Rule 1.13(e), which explicitly requires a lawyer “who reasonably believes that he or she has been discharged because of the lawyer’s actions [taken under earlier ABA Model Rule 1.13 provisions], or who withdraws under circumstances that require or permit the lawyer to take action under either of those [earlier ABA Model Rule 1.13] paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization’s highest authority is informed of the lawyer’s discharge or withdrawal.” In essence, ABA Model Rule 1.13(e) prevents a corporate client constituent from discharging the lawyer before she has a chance to fulfill her ABA Model Rule 1.13 obligation to “report up” to the corporation’s “highest authority” (presumably over the head of the misbehaving corporate constituent). That ABA Model Rule 1.13 provision is consistent with ABA Model Rule 1.13’s theme normally requiring corporations’ lawyers’ “reporting up” of some corporate constituent misconduct. The ABA Model Rule 1.13 approach contrasts with Virginia Rule 1.13’s recognition only that such “reporting up” might be appropriate in certain circumstances.

**ABA Model Rule 1.16 cmt. [9]** contains the identical language requiring lawyers to “take all reasonable steps to mitigate the consequences to the client” – even if the client has “unfairly discharged” the lawyer.

But ABA Model Rule 1.16 cmt. [9] differs from Virginia Rule 1.16 cmt. [9] in several ways.

First, in contrast to Virginia Rule 1.16 cmt. [9], ABA Model Rule 1.16 cmt. [9] does not contain the sentence disclaiming any guidance on an organization’s former lawyer’s legal obligation upon the representation’s termination. As explained above, ABA Model Rule 1.13(e) requires an obligation (which may not technically be a “legal obligation”) to

alert the organization’s “highest authority” of “the lawyer’s discharge or withdrawal” if the lawyer reasonably believes” that she was discharged or withdrew because of her actions in pursuant to ABA Model Rule 1.13’s provisions.

Second, in contrast to Virginia Rule 1.16 cmt [9], ABA Model Rule 1.16 cmt. [9] concludes with a statement that lawyers “may retain papers as security for a fee only to the extent permitted by law,” referring to ABA Model Rule 1.15. That seems like an inapt citation. ABA Model Rule 1.15 addresses lawyers’ duty to safeguard client “property,” and does not seem to provide any guidance on lawyers’ retention of papers as security for a fee.

ABA Model Rule 1.16 cmt. [9] refers to such retention as “security for a fee,” in contrast to the black letter ABA Model Rule 1.16(d)’s reference to lawyers’ generic recognition that “[t]he lawyer may retain papers relating to the client to the extent permitted by other law.” It is unclear whether ABA Model Rule 1.16 cmt. [9] allows lawyers to “retain papers” the client gave to the lawyer, or that the lawyer created – or both.

Not surprisingly, Virginia Rule 1.16 cmt. [9] does not contain a reference to lawyers retaining papers “as security for a fee.” As explained above, unique Virginia Rule 1.16(e) explicitly prohibits lawyers from retaining “papers” (either clients’ papers or the lawyers’ papers) because the client has not paid the lawyer. Thus, Virginia rejects lawyers’ assertion of a “retaining lien” in such circumstances.

### **Virginia Rule 1.16 Comment [10]**

Virginia Rule 1.16 cmt. [10] addresses Virginia’s unique Virginia Rule 1.16(e) – which provides detailed guidance on what files lawyers must relinquish to former (and

presumably current) clients upon request, and which files lawyers are not obligated to relinquish.

Virginia Rule 1.16 cmt. [10] explains that Virginia Rule 1.16(e)'s comprehensive and specific guidance as to different types of documents in the lawyer's files "eschews a 'prejudice' standard in favor of a more objective and easily-applied rule governing specific kinds of documents in the lawyer's files." The "prejudice" standard undoubtedly refers to earlier Virginia legal ethics opinions that analyzed lawyers' obligations to relinquish files to former clients based on prejudice to those former clients if the lawyers retained the files.

**ABA Model Rule 1.16** does not contain a similar Comment, and does not refer to a "prejudice" standard."

### **Virginia Rule 1.16 Comment [11]**

Virginia Rule 1.16 cmt. [11] provides an additional explanation about unique Virginia Rule 1.16(e) – unsurprisingly warning that its requirements "should not be interpreted to require disclosure of materials where the disclosure is prohibited by law."

**ABA Model Rule 1.16** does not contain a similar Comment.

# RULE 1.17

## Sale of Law Practice

### Rule

#### Introduction: Rule 1.17 Terms

Before turning to Virginia Rule 1.17's and ABA Model Rule 1.17's terms, it is worth addressing a confusing list of undefined terms that appear in both Virginia Rule 1.17 and ABA Model Rule 1.17. Those terms define what a lawyer or a law firm might sell (and thus transfer to the purchasing lawyer or law firm).

First, Virginia Rule 1.17 uses the term "practice" (or a synonym) in Virginia Rule 1.17's introductory sentence, in Virginia Rule 1.17(a) and (b), and in Virginia Rule 1.17 cmts.: [1], [2], [4], [5], [6], [11], and [13]. ABA Model Rule 1.17 uses the same term (or a synonym) in ABA Model Rule 1.17's introductory sentence, and ABA Model Rule 1.17(b), and in ABA Model Rule 1.17 cmts: [1], [2], [4], [5], [6], [11], [13].

Second, Virginia Rule 1.17 and ABA Model Rule 1.17 use the term "area of practice" (or a synonym) in several places. Presumably that term denotes a subset of a lawyer's "practice." Virginia Rule 1.17 uses the term "area of practice" (or a synonym) in Virginia Rule 1.17's introductory sentence, in Virginia Rule 1.17(a), (b) and in Virginia Rule 1.17 cmts: [5], [6]. ABA Model Rule 1.17 uses the term "area of practice" (or a synonym) in ABA Model Rule 1.17's introductory sentence, ABA Model Rule (a) and (b), and in ABA Model Rule cmts.: [2], [4], [5], [6], [11].

Third, Virginia Rule 1.17 and ABA Model Rule 1.17 use the term “representation.” Virginia Rule 1.17 uses the term “representation” in Virginia 1.17(d) and in Virginia Rule 1.17 cmts.: [1], [7], [8], [9], [11]. ABA Model Rule 1.17 uses the term “representation” in ABA Model Rule 1.17(c)(3) and in ABA Model Rule 1.17 cmts.: [1], [7], [9].

Although undefined, the term “representation” would seem to denote a lawyer’s attorney-client relationship. Presumably the term would be synonymous with “practice” if the lawyer represented only one client. Otherwise, the term “representation” presumably denotes a subset of a lawyer’s “practice” or “area of practice.” But a lawyer’s “representation” of a client might involve more than one “area of practice.” For example, a lawyer might handle an estate matter and a litigation matter for the same client. So that lawyer’s “representation” of that client would involve two areas of practice.

Fourth, Virginia Rule 1.17 and ABA Model Rule 1.17 use the terms “matter” and its plural form “matters.” The singular term “matter” or its plural form “matters” presumably are synonyms for the term “representation” (or its plural) if a lawyer represents a client on only one “matter.” But if the lawyer represents a client on several matters, then the term “matter” or its plural form called “matters” presumably denotes a subset of such lawyer’s “representation” of a client.

The term “matter” appears several times in the ethics rules. For instance, Virginia Rule 1.9 cmt. [2] explains that the scope of a “matter” for purposes of that former-client conflict rule “may depend on the facts of a particular situation or transaction.” The term “matter” is defined in Virginia Rule 1.11(f)(1) in the context of former and current government lawyers as: “any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation,

arrest or other particular matter involving a specific party or parties.” That definition seems narrower than the normal definition of “matter” in a non-governmental setting.

Virginia Rule 1.17 uses the singular term “matter.” Virginia 1.7(c)(3), Virginia 1.17(c)(5), Virginia Rule 1.7(d) and in Virginia Rule cmts.: [5], [6], [12]. ABA Model Rule 1.7 uses the singular term “matter” in ABA Model 1.17 cmts.: [5], [6], [12]. Virginia Rule 1.7 uses the plural term “matters” in Virginia Rule 1.17 cmts.: [2], [5], [6]. ABA Model Rule 1.17 uses the plural term word “matters” in ABA Model Rule 1.17 cmts.: [2], [5], [6].

Fifth, Virginia Rule 1.17 and ABA Model Rule 1.17 use the singular term “file” and its plural form “files” in several places. The term “file” seems to denote a hard copy or electronic collection of documents and communications. But lawyers also use the term colloquially to refer to a client’s “matter,” although probably not to a “representation.” Virginia Rule 1.17 uses the singular term “file” in Virginia Rule 1.17 (c)(4), Virginia Rule 1.17(d), and in Virginia Rule 1.17 cmts.: [7], [8]. ABA Model Rule 1.17 uses the singular term “file” in ABA Model Rule 1.17(c)(2), ABA Model Rule 1.17(c)(3) and in ABA Model Rule 1.17 cmts.: [7], [8]. Virginia Rule 1.17 uses the plural term “files” in Virginia Rule 1.17 cmt [8]. ABA Model Rule 1.17 uses the plural term “files” in ABA Model Rule 1.17(c)(3) and in ABA Model Rule 1.17 cmt [8].

Virginia Rule 1.17’s and ABA Model Rule 1.17’s use of this array of undefined terms is more than linguistically unfortunate. Both sets of Rules use the terms interchangeably, as if they are synonymous. But common usage and common sense indicates otherwise. Taking these various terms in decreasing order of size, it is fair to say that a lawyer’s “practice” consists of all of her representations, matters and files. An “area of practice” denotes a subset of such a “practice.” The term “representation”

presumably denotes a lawyer's relationship with a client. It could refer either to a lawyer's relationship on all of the matters that the lawyer is handling, or a subset of that relationship. A "representation" could include several "matters" (although those terms might also be synonyms). The term "file" might be synonymous with "matter" (and perhaps even with "representation"). But the term might also denote a physical collection of documents – in which case a "matter" might generate more than one "file."

This terminology confusion could have real consequences. For instance, a former client may need access to a closed "file" at some point in the future – as with estate planning files or contract files containing original documents that might affect the client's future rights. That former client might want the "file" transferred from a retired lawyer to a lawyer who will continue practicing, and therefore retain possession of the closed file – perhaps with the hope that the client will need future work on that matter or some other matter. So there may be situations in which a file will be transferred, but an active "matter" or a full "representation" will not be transferred – because there is nothing going on in the "matter," and the "representation" is currently dormant.

Virginia Rule 1.17 and ABA Model Rule 1.17 also use the potentially confusing and also undefined terms "geographic area," "geographical area" and "jurisdiction." ABA Model Rule 1.17 cmt. [4] also uses the undefined term "locale."

Other Virginia Rules also use some of these terms ways that might create some confusion. For instance, Virginia Rule 5.8 addresses the implications of lawyers leaving their firms or their firms dissolving. Those processes can obviously affect clients' relationship with the lawyer or law firm. Among other things, such changes in personnel might result in clients changing law firms or lawyers, with the resulting transfer of

responsibility and physical files. Virginia Rule 5.8 cmt. [1] uses the term “representation” and “file.” Virginia Rule 5.8 cmt. [3] uses the term “matters.” Virginia Rule 5.8 cmt. [4] uses the term “representation” and “file.” Unfortunately, none of these terms are defined in Virginia Rule 1.17 or ABA Model Rule 1.17.

### **Virginia Rule 1.17**

Virginia Rule 1.17 addresses the conditions under which “a lawyer or a law firm may sell or purchase a law practice, partially or in its entirety, including good will.”

Lawyers have always been able to sell their tangible property, such as desks, file cabinets, etc. But a law practice’s value rests primarily on relationships between the lawyer and clients. Traditionally, lawyers could not extract the value of such “good will.” This reluctance to allow monetization presumably rested on the legal profession’s understandable but somewhat haughty view of itself as more than just a mere “business” (reflected in Virginia Rule 1.17 cmt. [1], discussed below) Virginia Rule 1.17 allows lawyers to extract value for such “good will” under certain very limited conditions.

The word “partially” in the context of selling a “law practice” could either mean: (1) “an area of law practice” (the term used in ABA Model Rule 1.17, and also in several Virginia Rule 1.17 Comments), or (2) a subset of a law practice – not necessarily based on a discrete topical area. For instance, “partially” selling a law practice could involve relinquishing certain real estate clients in return for money, but retaining other real estate clients: relinquishing real estate clients in Southwest Virginia, but retaining other real estate clients in Northern Virginia, etc. So Virginia Rule 1.17(a)’s use of the word “partially” is somewhat ambiguous. As explained below, Virginia Rule 1.17’s other provisions make it clear that Virginia Rule 1.17’s use of the term “partially” is essentially the same thing as

the ABA Model Rule 1.17 term “area of law practice.” This identical meaning is made clear in Virginia Rule 1.17(b) and in Virginia Rule 1.17 cmt. [6] – which is similar to ABA Model Rule 1.17 cmt. [5].

Virginia Rule 1.17 includes many conditions and logistical requirements.

**ABA Model Rule 1.17** contains similar steps, but does not use the identical language.

ABA Model Rule 1.17 explains that “a lawyer or a law firm may sell or purchase a law practice, or an area of a law practice, including “good will.”

As explained above the ABA Model Rule 1.17 phrase “an area of law practice” is not necessarily synonymous with the Virginia Rule 1.17 term “partially.” An “area of law practice” probably denotes a discrete type of legal focus, involving a particular statutory or common law subject, and requiring a specific type of legal skill to handle. Some examples might be a trusts and estates practice, a litigation practice, an intellectual property practice, a real estate practice, etc.

### **Virginia Rule 1.17(a)**

Virginia Rule 1.17(a) addresses the first necessary condition for the sale of a law practice.

The seller must (1) “cease[ ] to engage in the private practice of law” – presumably entirely, or (2) “cease[ ] to engage in the private practice of law ... in the area of practice that has been sold.”

Under either option, the seller must stop practicing law (either entirely, or in a certain “area of practice”) “in the geographic area in which the practice has been conducted.” That language (which also appears in ABA Model Rule 1.17(a)), seems

superfluous. Lawyers can only cease practicing law where they previously had been practicing law.

Virginia Rule 1.17(a) then contains two exceptions that allow the selling lawyer to continue practicing law in the “geographic area” in which she had practiced before selling all or part of her law practice: First, “the lawyer may practice law while on staff of a public agency or legal services entity which provides legal services to the poor.” The word “poor” has become somewhat politically incorrect. Virginia Rule 6.1 (which addresses pro bono services) uses the somewhat less derogatory terms: “those unable to pay” (Virginia Rule 6.1 cmt. [1]); “people who do not have the financial resources to compensate a lawyer” or have “insufficient resources to compensate counsel” (Virginia Rule 6.1 cmt. [2]); “individuals . . . unable to afford to compensate counsel” (Virginia Rule 6.1 cmt. [7]); “those unable to pay” (Virginia Rule 6.1 cmt. [9]). ABA Model Rule 6.1 uses similar terms.

Second, the lawyer may practice law “as in-house counsel to a business.” The term “business” is not defined, but presumably includes corporations, sole proprietorships, etc. Virginia Rule 1.13 uses the more generic term “organization.” So the more specific term “business” seems inappropriate. For instance, the definition apparently does not include lawyers working in-house for a college, a labor union, etc. And that also seems like an odd and overly narrower description.

**ABA Model Rule 1.17(a)** also describes the first necessary condition for the sale or purchase of “a law practice or an area of practice.”

The ABA Model Rule 1.17 (a) language parallels the Virginia formulation, up to a point. The selling lawyer must: (1) “cease[ ] to engage in the private practice of law” –

presumably entirely; or (2) “cease[ ] to practice” “in the area of practice that has been sold” in a specified physical area.

In contrast to Virginia Rule 1.7(a)’s use of the term “geographic area,” ABA Model Rule 1.7(b) provides states a choice of what physical area where such lawyer must stop practicing law: “[in the geographic area] [in the jurisdiction] (a jurisdiction may elect either version) in which the practice has been conducted.” Thus, the ABA Model Rule (like the Virginia Rule) uses the word “area” to refer either: (1) to an area of legal practice, or (2) to a geographic area. That dual use may have been unavoidable, and does not seem to generate any confusion. The same is also true of ABA Model Rule 1.7(a)’s truism that selling lawyers must stop practicing in an “area” (however defined) “in which the practice has been conducted.” As explained above, that is the only place in which lawyers can stop practicing.

But ABA Model Rule 1.17(a) has other terminology problems. As mentioned above, ABA Model Rule 1.17(a) gives two options that states may choose from in describing the geographic area in which the seller must stop practicing: (1) “in the geographic area” (the choice Virginia made) or (2) “in the jurisdiction.” The former refers to an area of land, while the latter refers to political entity. But black letter ABA Model Rule 1.17(a) option does not explain whether the term “jurisdiction” refers to a state, county, city, etc.

Both the term “geographic” and the term “jurisdiction” are undefined. The United States is a “jurisdiction,” but so is Fairfax County, Virginia. North America is a “geographic area,” but so is Northern Virginia. And there is a further inconsistency in ABA Model Rule 1.17(a)’s description of a physical area. ABA Model Rule 1.17(a) offers states the option

of using the term “geographic” – but ABA Model Rule 1.17 cmts. [4] and [5] use the slightly different (but presumably synonymous) “geographical.” One would have expected the ABA Model Rules to use a consistent term.

ABA Model Rule 1.17(a) does not include the two exceptions that appear in Virginia Rule 1.17 which allow lawyers to keep practicing law after selling all or part of the law practice. But those exceptions appear in essentially the same form in ABA Model Rule 1.17 cmt. [3], discussed below.

### **Virginia Rule 1.17(b)**

Virginia Rule 1.17(b) describes the second necessary condition under which a lawyer or firm may sell all or part of a law practice: “[t]he entire practice, or the entire area of practice, is sold to one or more lawyers or law firms.” Presumably this condition reflects the term “partially”, which is one of the options offered in Virginia Rule 1.17’s introductory sentence.

**ABA Model Rule 1.17(b)** contains the identical language.

This matches the ABA Model Rule approach articulated in ABA Model Rule 1.17’s introductory sentence.

### **Virginia Rule 1.17(c)**

Virginia Rule 1.17(c) describes the third necessary condition (essentially logistical) under which a lawyer or firm may sell all or part of a law practice.

Virginia Rule 1.17(c) introduces an elaborate list of notices, consents and presumptions. Virginia Rule 1.17(c)’s introductory sentence requires that the seller give “[a]ctual written notice” to each of her clients – “as defined by the terms of the proposed sale” – with specified information.

Presumably, the term “each of the seller’s clients” refers to those whose matters are for sale. But it would be easy to imagine that selling lawyers would also have to alert all of their clients in certain situations – even those clients who would not be directly affected by the sale. Under Virginia Rule 1.4(a), lawyers “shall keep a client reasonably informed about the status of a matter.” Other ethics rules and lawyers’ fiduciary duties also require lawyers to essentially keep all of their clients up to date on material events. Even clients that a selling lawyer intends to keep representing might deserve to know that the lawyer intends to stop practicing law in certain geographic areas or certain areas of practice. Clients might decide to switch lawyers because they justifiably worry that their lawyer is phasing out of her practice. Clients might not want to wait until the lawyer sells their representations, or ceases to practice entirely. Virginia Rule 1.7 does not address that issue.

**ABA Model Rule 1.17(c)** contains essentially the same language.

There are two insignificant differences. First, in contrast to Virginia Rule 1.17(a), the term “actual” appears in ABA Model Rule 1.17 cmt. [7] rather than in black letter ABA Model Rule 1.17(c). Second, in contrast to Virginia Rule 1.17(c), ABA Model Rule 1.17(c) does not contain the phrase “as defined by the terms of the proposed sale.”

### **Virginia Rule 1.17(c)(1)**

Virginia Rule 1.17(c)(1) requires that the written notice describe “the proposed sale and the identity of the purchaser.”

**ABA Model Rule 1.17(c)(1)** only mentions “the proposed sale.” ABA Model Rule 1.17 cmt. [7] (discussed below) requires that seller must disclose “the identity of the purchaser” (among other things).

### **Virginia Rule 1.17(c)(2)**

Virginia Rule 1.17(c)(2) requires that the seller's written notice to her clients include "any proposed change in the terms of the future representation including the fee arrangement."

**ABA Model Rule 1.17(c)** does not contain a similar requirement. ABA Model Rule 1.17(c)(2) is discussed below.

### **Virginia Rule 1.17(c)(3)**

Virginia Rule 1.17(c)(3) requires that the seller's written notice to her clients include: (1) an assurance of "the client's right to consent or to refuse to consent to the transfer of the client's matter," and (2) notice "that said right must be exercised within ninety (90) days of receipt of the notice."

As explained in Virginia Rule 1.17(c)(5), the "right" that clients must exercise within ninety days is actually the "right" to consent to the transfer of his matter to the purchasing lawyer – because the absence of a client's response within ninety days of receiving the seller's written notice results in the client's matter not being transferred to the purchasing lawyer. In other words, clients' silence in response to sellers' written notice means that their representation will not be sold. Significantly, ABA Model Rule 1.7(c)(3) has the opposite effect.

**ABA Model Rule 1.17(c)(3)** also addresses information that sellers must provide to their clients, and the effect of clients' silence.

ABA Model Rule 1.17(c)(3) requires that the seller's written notice to her clients explain that "if the client does not take any action or does not otherwise object with ninety

(90) days of receipt of the notice,” the “client’s consent to the transfer of the client’s files will be presumed.”

This provision contrasts dramatically with the Virginia Rule 1.17 approach – in several ways.

First, under Virginia Rule 1.17(c)(3), clients can either consent or refuse to consent to their lawyers’ transfer of a “matter” to the purchaser. Although Virginia Rule 1.17(c)(3) states that “the client’s right” to either “consent or refuse to consent” must be exercised within 90 days of the client’s receipt of the required notice, the passage of that time without the client’s selection results in a presumed refusal to consent to the transfer (under Virginia Rule 1.17(c)(5)). ABA Model Rule 1.17(c)(3) contains essentially the opposite presumption – a client’s failure to respond or object within 90 days of receiving the seller’s written notice will result in the “transfer of the client’s files” under ABA Model Rule 1.17(c)(3).

Second, Virginia Rule 1.17(c)(3) refers to “transfer of the client’s matter.” ABA Model Rule 1.17(c)(3) refers to “transfer of the client’s files.” The confusing use of these different terms as discussed above.

#### **Virginia Rule 1.17(c)(4)**

Virginia Rule 1.17(c)(4) describes additional information that must be included in the seller’s written notice to her clients: “the client’s right to retain other counsel and/or take possession of the file.”

Virginia Rule 1.17(c)(4)’s use of the term “file” seems inconsistent with the use of the term “matter” in Virginia Rule 1.17(c)(3) and (5). As explained above, perhaps the

terms “file” and “matter” are meant to be synonymous, although it is easy to see that they could refer to very different things.

Virginia Rule 1.17(c)(e)(4)’s use of the phrase “and/or” also seems strange. The word “or” would be more appropriate – allowing clients to either (1) “retain other counsel” (who presumably would take possession of the “file”, and also presumably take over representation on the “matter”); or (2) “take possession of the file” himself. It would seem odd for the client to retain other counsel “and” also take possession of the file himself (rather than allowing or directing that the file go to successor counsel).

**ABA Model Rule 1.17(c)(2)** is similar to Virginia Rule 1.7(c)(4).

In contrast to Virginia Rule 1.17(c)(4), ABA Model Rule 1.17(c)(2) explains that the written notice must include two options: (1) “the client’s right to retain other counsel “or (2) “to take possession of the file.” The ABA Model Rule 1.7(c)(2)’s use of the word “or” makes more sense than the Virginia Rule 1.7(c)(4)’s use of the phrase “and/or.”

### **Virginia Rule 1.17(c)(5)**

Virginia Rule 1.17(c)(5) describes additional significant information that must be included in the seller’s written notice to her clients: “that the client’s refusal to consent to the transfer of the client’s matter will be presumed if the client does not take any action or does not otherwise consent” to the client’s matter’s transfer “within ninety (90) days of receipt” of the written notice. In other words, the client’s “matter” will not be transferred to the purchasing lawyer unless the client affirmatively consents to the transfer.

As if the Virginia Rules’ use of these different undefined terms was not confusing enough, Virginia Rule 1.17(c)(5) interestingly it uses the singular “matter,” while the parallel ABA Model Rule 1.17(c)(3) uses the plural term “files.”

**ABA Model 1.17(c)(3)** contains the opposite presumption.

Under ABA Model Rule 1.17(c)(3), the seller's written notice to each of her clients must include "the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice."

Thus, under Virginia Rule 1.17(c)(5) a client's failure to respond to the seller's written notice creates a presumption that the client refuses "to the transfer of the client's matter." Under ABA Model Rule 1.7(c)(3), a client's failure to take any action within ninety days means "that the client's consent to the transfer of the client's files will be presumed." As explained above under ABA Model Rule 1.17, a transfer of the client's file presumably is synonymous with transfer of the client's matter.

Interestingly, ABA Model Rule 1.17(c)(2) uses the singular "the file," while ABA Model Rule 1.17(c)(3) uses both the plural "client's files," and the singular "a file."

### **Virginia Rule 1.17(d)**

Virginia Rule 1.17(d) address the situation if a client "cannot be given notice."

On its face, Virginia Rule 1.17(a) limits the effect of that inability to provide the required notice to a client "involved in a pending matter." The meaning of that term (which does not appear in the ABA Model Rules) is unclear in this context. The dictionary definition of "pending" includes the concept that there is some decision or action to be taken. Perhaps the term "pending" is meant to be synonymous with "active." But a client matter might be dormant, yet ultimately will become active at some point in the future. Virginia Rule 1.17(d) does not explain what happens in that situation.

Under Virginia Rule 1.17(d), if a client involved in “a pending matter” cannot be given notice, only a court order may direct transfer of “the representation of that client” to the purchasing lawyer. The Virginia Rule explains that only a “court having jurisdiction” may enter such an order – which should go without saying.

In the court process envisioned in Virginia Rule 1.17(d), the selling lawyer may disclose “information relating to the representation”. But the seller’s disclosure: (1) must be made to the court in camera; and (2) may only include information “to the extent necessary to obtain an order authorizing the transfer of a file.”

Thus, Virginia Rule 1.17(d) therefore refers both to the transfer of a “representation” and the transfer of a “file.” This continues the confusing use of the trilogy of things that can be transferred: representations, matters, or files. Both Virginia Rule 1.17 and ABA Model Rule 1.17 and their respective Comments use those terms interchangeably – even though common usage and common sense define them as very different things.

**ABA Model Rule 1.17(c)(3)**’s second paragraph addresses the situation in which a client “cannot be given notice.”

In contrast to Virginia Rule 1.17(d), ABA Model Rule 1.17(c)(3) provision presumably covers all clients, not just a client “involved in a pending matter” (the phrase that appears in Virginia Rule 1.17(d)). Other than that difference, ABA Model Rule 1.7(c)(3) contains the same language as Virginia Rule 1.7(d). Like Virginia Rule 1.7(d), ABA Model Rule 1.7(c)(3) describes the transfer of “the representation” of the client, and disclosure in camera to a court “only to the extent necessary to obtain an order authorizing the transfer of a file.”

But unlike Virginia Rule 1.17(c)(3) and Virginia Rule 1.17(c)(5) (both of which describe the transfer of a client’s “matter”), ABA Model Rule 1.17(c)(3) refers to the transfer of a client’s “files” or “file” and transfer of the client’s “representation.” As with Virginia Rule 1.17’s confusing use of three things that might be transferred, the ABA Model Rule’s identification of two things that might be transferred is only slightly less confusing.

### **Virginia Rule 1.17(e)**

Virginia Rule 1.17(e) describes the final necessary condition for the sale of a law practice: “[t]he fees charged clients shall not be increased by reason of the sale.”

**ABA Model Rule 1.17(d)** contains the identical language.

## Comment

### Virginia Rule 1.17 Comment [1]

Virginia Rule 1.17 cmt. [1] addresses the rationale for permitting lawyers to sell all of part of their law practice.

Virginia Rule 1.17 cmt. [1] first explains that “[t]he practice of law is a profession, not merely a business.” This haughty implicit criticism of “business” is unbecoming of the legal profession. It also is ironic. Virginia Rule 1.17(a) explicitly allows lawyers who have sold all or part of their law practice to continue practicing law in only one of two circumstances: (1) helping the “poor” while working “on staff a public agency or legal services entity;” or (2) as “in-house counsel to a business.”

Virginia Rule 1.17 cmt. [1] then continues this theme – stating that “(c)lients are not commodities that can be purchased and sold at will.”

Virginia Rule 1.17 cmt. [1]’s recognition that “(c)lients are not commodities that can be purchased and sold at will” is somewhat inconsistent with unique Virginia Rule 5.8. Among other things, Virginia Rule 5.8(d) indicates that a client “shall be deemed a client of the law firm until the client advises otherwise or until the law firm terminates the engagement in writing.” Virginia Rule 5.8(e) similarly explains that a client “shall be deemed to remain a client of the lawyer” under certain conditions.

Virginia Rule 1.17 cmt. [1] next assures that lawyers or law firms “may obtain compensation for the reasonable value of the practice” – when “a lawyer or an entire firm ceases to practice and another lawyer or law firm takes over the representation.”

Virginia Rule 1.17 cmt. [1] concludes by comparing selling lawyers to withdrawing partners of law firms,” who may also “obtain compensation for the reasonable value of the practice” (referring to Virginia Rule 5.4 and Virginia Rule 5.6.)

Virginia Rule 5.4 explains that lawyers may not share legal fees with a non-lawyer, except for (among other things) an agreement in which “the lawyer’s firm, partner or associate” may pay “a lawyer’s estate” or “one or more specified persons” a “payment of money” after the lawyer dies. Virginia Rule 5.4(a)(1). Of course, that situation does not involve the sale of a practice, but rather the payment of money to the lawyer’s estate or others of an agreed-upon amount of money representing the late lawyer’s interest in a law firm. Virginia Rule 5.6 prohibits lawyers from offering or making agreements restricting a lawyer’s right to practice after termination of a partnership or employment relationship – “except an agreement concerning benefits upon retirement.” Virginia Rule 5.6(a). And as with Virginia Rule 5.4, Virginia Rule 5.6 does not involve sale of a law practice. So the reference to these other rules is interesting, but seems somewhat out of place. But those Virginia Rule’s provisions helpfully provide other examples of ways that lawyers can monetize their law practice’s value.

**ABA Model Rule 1.17 cmt. [1]** also addresses the rationale for lawyers’ ability to sell their law practice.

ABA Model Rule 1.7 cmt. [1] begins with the same language as Virginia Rule 1.17 cmt. [1] about the practice of law being a “profession, not merely a business.” As with the similar introductory sentence in Virginia Rule 1.17 cmt. [1], the implicit criticism of business is inappropriate. And it is also ironic – because ABA Model Rule 1.17 cmt. [3]

parallels black letter Virginia Rule 1.17(a) in explicitly allowing lawyers who have sold all or part of their law practice to continue practicing law as “in-house counsel to a business.”

But the ABA Model Rule 1.17 cmt. [1] differs from Virginia Rule 1.17 cmt. [1] in two ways.

First, in contrast to Virginia Rule 1.17 cmt. [1]’s description of a lawyer or law firm that “ceases to practice,” ABA Model Rule 1.17 cmt. [1] uses the phrase “ceases to practice in an area of law.” ABA Model Rule 1.17 cmt. [1]’s phrase is more consistent with black letter Virginia Rule 1.17(a) than Virginia Rule 1.17 cmt. [1]’s broader phrase “ceases to practice” – black letter Virginia Rule 1.17(a) explains that lawyers may sell their practice if they cease to practice entirely or cease to practice “in the area of practice that has been sold.”

Second, ABA Model Rule 1.17 cmt. [1] describes in the plural who might purchase the selling lawyer’s or law firm’s practice (describing “other lawyers or firms”). Virginia Rule 1.17 cmt. [1] uses the singular phrase “another lawyer or firm.” That linguistic difference might not be significant. Interestingly, both Virginia Rule 1.17 cmt. [1] and ABA Model Rule 1.17 cmt. [1] describe transfer of “the representation” – not a “matter” or a “file.”

ABA Model Rule 1.17 cmt. [1] concludes with references to ABA Model Rule 5.4 and 5.6. Relevant portions of those ABA Model Rules are the same as the parallel Virginia Rules discussed above.

### **Virginia Rule 1.17 Comment [2]**

Virginia Rule 1.17 cmt. [2] addresses the possibility of lawyers selling all or part of their law practice and then returning to private practice.

Virginia Rule 1.17 cmt. [2] begins with a statement that clients' decision "not to be represented by the purchaser" but instead to "take their matters elsewhere" does "not result in a violation." The plural "matters" seems to support the common sense view that a "representation" could consist of more than one "matter."

The reference to a "violation" seems odd. Virginia Rule 1.17 is permissive – allowing lawyers to sell all or part of their law practice under certain conditions. Presumably the term "violation" refers to lawyers' failure to comply with the specified conditions. But it is self-evidently obvious that clients' decision to "take their matters elsewhere" would not violate Virginia Rule 1.17. How could a lawyer violate any rule based on a client's right to switch lawyers – unless the spurned lawyer makes some improper action as a result of the client's decision: the reference to "a violation" would be much more clear if Virginia had included an introductory sentence that appears in the ABA Model Rule 1.17 cmt. [2] – explaining that selling lawyers satisfy the requirement to sell their entire law practice or "an area of law practice" if they "in good faith" make an effort to do so. In other words, their failure to sell their entire practice or an entire area of practice does not violate ABA Model Rule 1.17 if they try their best, but fall short.

Virginia Rule 1.17 cmt. [2] next explains that there similarly is no "violation" if the selling lawyer "return[s] to private practice after the sale as a result of an unanticipated change in circumstances." This assurance presumably means that a lawyer who in good faith sells her entire practice or a portion of her practice can start practicing again in the same geographic or practice area after the sale – if her re-entry into the profession results from some "unanticipated change in circumstances." It is unclear whether a lawyer's reentry into practice other than because of "unanticipated change in circumstances" run

afoul of Virginia Rule 1.17. Presumably, it would not – but Virginia Rule 1.17 cmt. [2] creates that ambiguity.

Virginia Rule 1.17 cmt. [2] concludes with an example: a lawyer who becomes a judge after selling his practice does not violate “the requirement that the sale be attendant to cessation of practice” if the lawyer later leaves the bench and “resumes private practice.”

This is an odd example, and contrasts with ABA Model Rule 1.7 cmt. [2]’s judge-based example discussed below. A judge’s decision to step down from the bench and return to private practice might be a totally voluntary decision – not triggered by “an unanticipated change in circumstances.” For instance, some judges return to private practice when their children start planning for college. Such college tuition payments certainly are not “unanticipated.” However, a judge whose child suddenly requires special medical needs might step down from the bench based on that “unanticipated” event. As explained above, it is unclear whether Virginia Rule 1.17 cmt. [2] “unanticipated change in circumstance” is a prerequisite to a lawyer’s permissible reentry into private practice. ABA Model Rule 1.17 cmt. [2] (discussed below) eliminates that possible requirement by mentioning a judge’s possible resignation.

**ABA Model Rule 1.17 cmt. [2]** contains essentially the same language as Virginia Rule 1.17 cmt. [2].

Interestingly, the ABA Model Rule Comment’s use of the term “matters” seems inconsistent with black letter ABA Model Rule 1.17’s repeated use of the term “file” or “representation,” rather than “matter.”

ABA Model Rule 1.17 cmt. [2] differs from Virginia Rule 1.17 cmt. [2] in three ways.

First, in contrast to Virginia Rule 1.17 cmt. [2], ABA Model Rule 1.17 cmt. [2] begins with an explanation that a selling lawyer can satisfy “[t]he requirement that all of the private practice, or all of an area of practice, be sold” if he “in good faith makes the entire practice, or the area of practice, available for sale to the purchasers.” This puts in context the reference to a possible “violation” that appears in the next sentence of the ABA Model Rule Comment. In essence, selling lawyers do not violate ABA Model Rule 1.17 if they try their best to sell all of their practice or all of an area of practice, but fail to do so. This presumably is also the intent of Virginia Rule 1.17 cmt. [2], discussed above.

Second, ABA Model Rule 1.17 cmt. [2]’s second reference to a “violation” is somewhat more limited than the Virginia Rule 1.17 cmt. [2] reference. In contrast to Virginia Rule 1.17 cmt. [2]’s statement that “[n]either does the seller’s return to private practice after the sale as a result of an unanticipated change in circumstances result in a violation,” ABA Model Rule 1.7 cmt. [2] explains that such a return “does not necessarily result in a violation.” That is much less reassuring.

Third, in contrast to Virginia Rule 1.17 cmt. [2]’s example of a judge returning to private practice “upon leaving the office,” ABA Model Rule 1.17 cmt. [2] is more detailed - describing a hypothetical judge who resumes private practice “upon being defeated in a contested or a retention election for the office or resigns from a judiciary position.” Of course, Virginia’s selection of judges by the legislature rather than by public election accounts for the absence of that phrase in Virginia Rule 1.17 cmt. [2]. This ABA Model Rule 1.17 cmt. [2] example is much better than the parallel Virginia Rule 1.17 cmt. [2] example – discussed above. For instance, ABA Model Rule 1.17 cmt. [2] mentions the possibility of a judge permissibly reentering private practice after her resignation from

judicial office. Such a resignation would not necessarily be “a result of an anticipated change in circumstances.”

### **Virginia Rule 1.17 Comment [3]**

Virginia Rule 1.17 cmt. [3] addresses – in an odd way – exceptions to the general requirement that lawyers cease practicing when they sell all or a portion of their law practice.

Virginia Rule 1.17 cmt. [3] simply states that “Comment (3) to ABA Model Rule 1.17 substantially appears in paragraph (a) of this Rule.”

This is a strange Comment, and seems more suitable as a Committee Commentary. Black letter Virginia Rule 1.17(a) provides an exception to the requirement that a selling lawyer cease to engage in the private practice of law – if the selling lawyer later works either as a lawyer “on staff of a public agency or legal services entity which provides legal services to the poor, or as in-house counsel to a business.”

**ABA Model Rule 1.17 cmt [3]** explains that lawyers who have “cease[d] to engage in the private practice of law” may ethically practice: (1) “as a lawyer on the staff of a public agency or a legal services entity that provides legal services to the poor;” or (2) “as in-house counsel to a business.”

ABA Model Rule 1.17 cmt. [3]’s phrase “on the staff” seems more appropriate than the black letter Virginia Rule 1.17(a) phrase “on staff,” but they obviously are meant to describe the same scenario. As explained above in the discussion of black letter Virginia Rule 1.17(a), the permissible post-sale practice of law as an in-house lawyer “to a business” presumably does not include such in-house service for a college, a labor union, etc.

## **Virginia Rule 1.17 Comment [4]**

Virginia Rule 1.17 cmt. [4] addresses lawyers' sale of their entire practice.

Virginia Rule 1.17 cmt. [4] first explains that Virginia Rule 1.17 “permits a sale of an entire practice attendant upon retirement from the private practice of law within the jurisdiction.” Of course, that describes one of many scenarios in which a lawyer may sell her practice. Lawyers may also sell their practice if they move, sell one area of practice but continue to practice in other areas of practice, etc.

The rarely-used pretentious word “attendant” presumably is synonymous with the more common word “occurring.”

Virginia Rule 1.17 cmt. [4] raises two issues. First, the Virginia Rule Comment uses the word “jurisdiction,” rather than the term “geographic area” which appears in Virginia Rule 1.17(a). As discussed above, ABA Model Rule 1.17(a) proposed that states could either adopt the phrase “in the geographic area” or the phrase “in the jurisdiction.” The Virginia Rules chose to use the phrase “in the geographic area” in black letter Virginia Rule 1.17(a). But Virginia Rule 1.17 cmt. [4] inexplicably uses the other phrase. One would have thought that the Virginia Rule would have been consistent in using the phrase “geographic area” in its Comments. Virginia’s choice of the “jurisdiction” option in Virginia Rule 1.17 cmt. [4] rather than the “geographic area” option in black letter Virginia Rule 1.17(a) seems harmless, because the Virginia Rule Comment simply explains one possible scenario - rather than a limitation or a requirement.

And the next Virginia Rule Comment (Virginia Rule Comment 1.17 [5]) inexplicably uses both choices when addressing the implications of “a lawyer who leaves a jurisdiction or geographic area.” This mixed use of both terms may not be significant, because neither

term is defined, and both terms are inherently ambiguous. So there probably is no additional confusion by Virginia Rule 1.17's use of both terms.

Second, Virginia Rule 1.17 cmt. [4] addresses lawyers "retirement from the private practice of law." That term is not defined either. One logically might think that the term distinguishes "private practice of law" from practice in the government. But Virginia Rule 1.11 cmt. [5] mysteriously explains that some circumstances a lawyer representing "an agency of one government" should treat that agency "as a private client." Virginia Rule 1.17(a) describes exceptions to lawyers' withdrawal from "the private practice of law:" service on a public agency or legal services entity that helps "the poor, or acting as a business's in-house lawyer. Those examples give some insight into what "the private practice of law" means.

**ABA Model Rule 1.17 cmt. [4]** contains the identical language, and much more (discussed below).

In contrast to Virginia Rule 1.17 cmt. [4], ABA Model Rule 1.17 cmt. [4] explains that lawyers may sell their entire practice "on the occasion of moving to another state." The ABA Model Rule Comment then expands on that point, noting that "[s]ome states are so large that a move from one locale therein to another is tantamount to leaving the jurisdiction in which the lawyer has engaged in the practice of law." So ABA Model Rule 1.17 cmt. [7] introduces yet another reference to a place that lawyers practice law: "locale." As explained above, ABA Model Rule 1.17(a) suggests that states can choose either the term "in the geographic area" or "in the jurisdiction." Virginia adopted the former for black letter Virginia Rule 1.17, but uses both choices in the Virginia Rule Comments. ABA Model Rule 1.17 cmt. [4] uses the word "jurisdiction" three times, and the term

“geographic area” once. And that ABA Model Rule Comment introduces a third concept: “locale.”

ABA Model Rule 1.17 cmt. [4]’s deliberate introduction of the new term called “locale” presumably demonstrates that the other two possible terms (“geographic area” and “jurisdiction”) were not appropriate in that context.

None of these trilogy of terms is defined. Although “geographic area” and “jurisdiction” clearly have different definitional meanings, it is unclear how the differences would play out in the real world. First, the term “jurisdiction” might be a state as big as Texas, a county, a city, an enclave jurisdiction within a city, etc.

Second, the term “geographic area” is even more ambiguous – because it does not include any notion of size. North America is a “geographic area,” but so is lower Manhattan. Third, a jurisdiction can include one or more geographic areas, but once a “jurisdiction” is defined it is clear what those geographic areas are. But, a “geographic area” can clearly include multiple jurisdictions. For instance, the greater New York City “geographic area” includes portions of three state jurisdictions, let alone numerous local jurisdictions. The word “locale” seems to denote a smaller geographic area or jurisdiction, but that is equally unclear.

The ABA Model Rule 1.17 cmt. [4] continues this explanation by inviting states to “permit the sale of the practice when the lawyer leaves the geographical area rather than the jurisdiction.” This certainly implies that the term “geographical area” denotes a smaller area than the term “jurisdiction” – because a lawyer can leave the former but still be in the latter.

But ABA Model Rule 1.17 cmt. [4] then compounds the confusion that already exists between use of the term “geographic area” and “jurisdiction” – by not using the proper word. ABA Model Rule 1.17 cmt. [4]’s term “geographical area” differs slightly from the term “geographic area” – one of the two options in black letter ABA Model Rule 1.17(a). One would have thought that ABA Model Rules would use the same term throughout black letter ABA Model Rule 1.17 and its Comments. Those terms presumably are synonymous, but the linguistic inconsistency seems odd.

ABA Model Rule 1.17 cmt, [4] concludes with an invitation to select one of those two phrases listed in ABA Model Rule 1.17(a): “in the geographic area” or “in the jurisdiction.” ABA Model Rule 1.17 cmt, [4] explains that “[t]he alternative desired should be indicated by [the state] selecting one of the two provided for in [ABA Model] Rule 1.17(a). That is ironic – because the ABA Model Rule Comment itself does not consistently use one of the terms that ABA Model Rule 1.17(a) offers to states.

### **Virginia Rule 1.17 Comment [5]**

Virginia Rule 1.17 cmt. [5] addresses lawyers’ sale of an area of their practice rather than their entire practice.

As explained above, Virginia Rule 1.17’s introductory sentence uses the word “partially”. That word presumably is intended to be synonymous with the phrase “an area of law practice” that appears in ABA Model Rule 1.17’s introductory sentence.

Virginia Rule 1.17 cmt. [5] first explains that Virginia Rule 1.17 “also” permits a lawyer or law firm “to sell an area of practice.” The word “also”, presumably refers back to the previous Virginia Rule Comment – which explains that a retiring lawyer can sell an “entire practice.” Virginia Rule 1.17 cmt. [4].

Virginia Rule 1.17 cmt. [5] then explains that a lawyer remaining “in the active practice of law” after selling “an area of practice” must “cease accepting any matters in the area of practice that has been sold.” The Virginia Rule Comment describes one such type of impermissible continuation: “either as counsel or co-counsel [sic].” In other words, lawyers who have their sole their entire practice or a practice area may not tip-toe back into the practice of law or that particular practice of law by teaming up with another lawyer.

Virginia Rule 1.17 cmt. [5] then describes another prohibited action by a lawyer who has sold an area of practice: “by assuming joint responsibility for a matter in connection with the division of a fee with another lawyer as would otherwise be permitted by [Virginia] Rule 1.5(e).” That phrase is not erroneous – but seems out of place in Virginia Rule 1.17 cmt. [5]. In contrast to ABA Model Rule 1.5(e) (which allows fee-splitting only if either: (1) the split is in proportion to the lawyers’ respective work; or (2) each lawyer assumes “joint responsibility” for the representation), Virginia Rule 1.5(b) does not require either option – instead allowing what could be called a “pure” referral fee. To be sure, nothing in Virginia Rule 1.15(e) prohibits lawyers who are splitting a fee from both assuming “joint responsibility.” So the Virginia Rule 1.17 cmt. [5] prohibition on lawyers doing so after selling that area of practice makes sense. But Virginia Rule 1.17 cmt. [5] does not explain whether lawyers would similarly engage in improper conduct by accepting a “pure” referral fee for having been retained by a client in that practice area, and then totally referring that client to another lawyer. The answer is probably “no.” It seems likely that Virginia Rule 1.17 cmt. [5] simply parrots the similar ABA Model Rule 1.17 cmt. [5], which correctly identifies the prerequisite to an ABA Model Rule 1.5(e) fee-split, but not the dramatically different permissible Virginia Rule 1.5(e) fee-split.

Virginia Rule 1.17 cmt. [5] next provide an example of what a selling lawyer may or may not do after selling an area of practice. The Virginia Rule Comment example describes a lawyer with “a substantial number of estate planning matters and a substantial number of probate administration cases.” Presumably the “substantial number” aspect of the scenario is immaterial. If “estate planning” and “probate administration” are separate practice areas, lawyers should be able to sell both of those practice areas whether they have a “substantial number” of matters or just a few. Presumably the reference to “estate planning matters” and “probate administrative cases” is not meant to introduce yet another term – “cases” – something that can be sold. Still, it would have been less potentially ambiguous if Virginia Rule 1.7 cmt. [5] had used the phrase “probate administration matters” rather than “cases.”

Virginia Rule 1.17 cmt. [5] explains that the hypothetical estate planning and probate administration lawyer “may sell the estate planning portion of the practice” while continuing to practice law “by concentrating on probate administration.” However, that hypothetical lawyer “may not thereafter accept any estate planning matters.”

This example provides some insight into Virginia Rule 1.17 (a)’s definition of an “area of practice.” Considering “estate planning” to be a different “area of practice” from “probate administration” probably makes sense to lawyers concentrating in those areas, but other lawyers might see that as essentially the same practice area. These examples tend to demonstrate that the term “practice area” can be very specific.

Virginia Rule 1.17 cmt. [5] next notes that a lawyer who “leaves a jurisdiction or geographical area typically would sell the entire practice.” Using the phrase “jurisdiction or geographical area” seems odd. As explained above, ABA Model Rule 1.17(a) invites

states to choose between “geographic area” and “jurisdiction.” Virginia chose “geographic area” – at least for Virginia Rule 1.17(a). But Virginia Rule 1.17 cmt. [5] uses both terms – sort of. The term “geographical area” differs from the term “geographic area” used in Virginia Rule 1.17(a) and suggested as one of two options in ABA Model Rule 1.17(a) – but presumably is synonymous with that term.

Virginia Rule 1.17 cmt. [5] explains that such a lawyer could “limit the sale to one or more areas of the practice,” thus “preserving the lawyer’s right to continue practice in the areas of the practice that were not sold.” This is a strange scenario. One may wonder why a lawyer who leaves a jurisdiction or a geographic area would want to preserve the right to practice in any area of the law – the lawyer will no longer practice there. It is certainly possible that a lawyer complying with Virginia Rule 5.5’s multijurisdictional practice (and perhaps other ethics rules implicated by long-distance practice) could ethically leave a jurisdiction or geographic area but continue to practice there. But that example would seem to be a tiny subset of likely scenarios for lawyers selling their practice or part of their practice. A more common scenario would focus on a lawyer who does not leave the jurisdiction or geographic area.

**ABA Model Rule 1.7 cmt. [5]** contains the identical language as Virginia Rule 1.17 cmt. [5]. Thus, the ABA Model Rule Comment has all of the same oddities as Virginia Rule 1.12 cmt. [5] – using both the term “jurisdiction” and “geographical area,” using the word “geographical” rather than the word “geographic” from ABA Model Rule 1.17(a), etc.

ABA Model Rule 1.17 cmt. [5]’s description of the prohibition on lawyers who have sold an area of practice assuming a “joint responsibility” for a matter in that area of practice as a prerequisite to a fee-split makes more sense in the ABA Model Rule

Comment, because that is one of the conditions for lawyers splitting fees on a matter under ABA Model Rule 1.5(e) (in contrast to Virginia Rule 1.5(e)'s fee-split rule).

### **Virginia Rule 1.7 Comment [6]**

Virginia Rule 1.7 cmt. [6] addresses Virginia Rule 1.17's requirement that lawyers sell their entire practice or an entire area of practice.

Virginia Rule 1.17 cmt. [6] first explains that lawyers must either sell their "entire practice" or "an entire area of practice." This statement tends to confirm that the introductory language in Virginia Rule 1.17 describing lawyers or law firms "partially" selling a law practice does not allow the "partial" sale of an area of practice. That interpretation also seems clear from Virginia Rule 1.17(b).

Virginia Rule 1.17 cmt. [6] next explains that the requirement of lawyers selling their entire practice or "an entire area of practice" protects clients "whose matters are less lucrative" and who therefore "might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters." Thus, purchasers "are required to undertake all client matters in the practice or practice area" – although that requirement is subject to "client consent," and also subject to the possible inability to take on "a particular client matter because of a conflict of interest." Thus, selling lawyers may not offer and purchasing lawyers may not purchase "cherry-picked" lucrative matters in a particular area of the law. In essence, the sale and purchase transaction must include all matters in that area of practice – large or small, lucrative or not.

**ABA Model Rule 1.17 cmt. [6]** contains the identical language.

## **Virginia Rule 1.17 Comment [7]**

Virginia Rule 1.17 cmt. [7] addresses the confidentiality implications of negotiations between the sellers and purchasers of a law practice (or an area of practice), and the logistical requirements.

Virginia Rule 1.17 cmt. [7] first assures selling and purchasing lawyers that they do not violate Virginia Rule 1.6's confidentiality provisions by negotiating the sale or purchase of all or part of a law practice "prior to disclosure of information relating to a specific representation of an identifiable client."

Absent some unusual circumstances, it would seem unlikely that the sellers and purchasers of a law practice would seriously negotiate without exchanging at least some "information relating to a specific representation of an identifiable client." It seems far more likely that purchasers would be interested in the identity of and probably even the fees paid by the sellers' largest clients. So the scenario described in Virginia Rule 1.17 cmt. [7] seems unrealistic. Of course, clients can consent to such disclosure.

But Virginia Rule 1.17 cmt. [7] then equates such acceptable negotiation information exchange to the likewise acceptable "preliminary discussions concerning the possible association of any lawyer or mergers between firms, with respect to which client consent is not required." As explained below, ABA Model Rule 1.17 cmt. [7] understandably refers to ABA Model Rule 1.6(b)(7). That provision explicitly permits certain limited exchange of information in those settings – essentially lateral hires and law firm mergers.

But Virginia did not adopt that ABA Model Rule or any similar rule. So the analogy seems inapt. But it might not be inaccurate. Under Virginia's unique Virginia Rule 1.6

confidentiality provision, lawyers may not (absent client consent) disclose: privileged “information,” (presumably meaning communications containing such information); (2) information the client has asked to be kept confidential; and (3) information “the disclosure of which would be embarrassing or would be likely to be detrimental to the client.” As long as the information exchanged in such sale and purchase negotiations described in Virginia Rule 1.7 cmt. [7] do not involve the exchange of such protected information, client consent would be unnecessary. But the accuracy of the analogy is likely to have been almost coincidental. Virginia’s explicit decision not to adopt a parallel to ABA Model Rule 1.6(b)(7) probably should have deterred Virginia from using such an analogy.

Virginia Rule 1.17 cmt. [7] then explains that clients must consent before sellers can “[p]rovide the purchaser access to client-specific information relating to the representation and to the file.” Virginia Rule 1.17 cmt. [7]’s confirmation that clients must consent to sellers’ providing such access to “the file” tends to confirm that the word “file” denotes a physical or electronic collection of documents, rather than used as a synonym for “client matter.” This in turn tends to confirm that the Virginia Rules wisely use the term “matter” in Virginia Rule 1.17(c)(3) and (5) – in contrast to ABA Model Rule 1.17(c)(3)’s use of the word “files” – apparently as a synonym for “matters.”

Virginia Rule 1.7 cmt. [7]’s requirement of client consent before sellers can provide purchasers access to any “client-specific information relating to the representation and to the file” actually seems more demanding than Virginia Rule 1.6’s confidentiality provision. Under Virginia Rule 1.6, the seller could provide the purchaser (or presumably anyone else) access to “client-specific information relating to the representation” if it did not fall within one of the three protected categories: (1) privileged “information”; or (2) information

the client has asked to be kept confidential; or (3) information “the disclosure of which would be embarrassing or would be likely to be detrimental” to the client. It is unlikely that this specific Comment to a Rule not primarily dealing with confidentiality would realistically impose a stricter limit on disclosure of client confidences than the main confidentiality provision in Virginia Rule 1.6. It seems more likely that the Virginia Rule 1.17 cmt. [7] language was simply adopted from the ABA Model Rule Comment without taking into account the very different Virginia Rule 1.6 confidentiality provision.

Virginia Rule 1.17 cmt. [7] next explains that before sellers can provide purchasers access to protected “client-specific information,” the client “must be given actual written notice of the contemplated sale, including the identity of the purchaser and any proposed change in the terms of future representation.” The Virginia Rule Comment’s requirement that sellers include such information in the written notice comes from black letter Virginia Rule 1.17(c)(2).

Virginia Rule 1.17 cmt. [7] then explains that the sellers’ clients must also be told that “the decision to consent or to make other arrangements must be made within 90 days.” Virginia Rule 1.17 cmt. [7] concludes with an odd sentence: “[i]f nothing is heard from the client within that time [90 days], the client’s refusal to consent to the sale is presumed.” The effect of that portion of Virginia Rule 1.17 cmt. [7] is clear, and differs dramatically from the ABA Model Rule’s presumption (discussed below).

But Virginia Rule 1.17 cmt. [7]’s explanation that sellers’ written notice to the clients must warn those clients to decide within 90 days whether to “consent or to make other arrangements” is different from the choice articulated in black letter Virginia Rule 1.17(c)(3). Virginia Rule 1.17 cmt. [3] explains that within 90 days of receiving the

sellers' notice, clients have the "right to consent or to refuse to consent to the transfer of the client's matter." Presumably, clients who choose the "refusal" option must make "other arrangements." But one would think that the options described in Virginia Rule 1.17 cmt. [7] would match the options in the pertinent black letter Virginia Rule. The Virginia Rule 1.17 cmt. [7] options actually make more sense than the black letter Virginia Rule 1.17(c)(3) options. A client refusing to consent to the "transfer of the client's matter" might not understand what that means. Such a client might justifiably think that his refusal to consent to the matter's transfer means that the lawyer will keep representing the client. So Virginia Rule 1.17 cmt. [7]'s alternative choice of a transfer or the client's making "other arrangements" would seem to be a much better requirement – because it would alert the refusing client that he must take some other step to assure that another lawyer will pick up the client's matter when the selling lawyer abandons the matter.

Still, a client hearing from a Virginia lawyer that she is leaving the practice (or an area of practice) must either affirmatively consent to the purchaser's acquisition of the client's representation/matter/file, "make other arrangements," or be left stranded absent a court order (discussed in Virginia Rule 1.17 cmt. [8]. Virginia Rule 1.17 cmt. [8], discussed below, describe courts' role in the event that a lawyer leaves the practice of law or stops practicing in a practice area– without her client's guidance about the handling of the client's matters.

Virginia Rule 1.7 cmt. [7] concludes with a presumption that is exactly the opposite of ABA Model Rule's 1.17 cmt. [2]'s presumption. Under Virginia Rule 1.17 cmt. [7], a client's silence after 90 days from the date the client received the seller's written notice means that "the client's refusal to consent to the sale is presumed."

**ABA Model Rule 1.17 cmt. [7]** also addresses the confidentiality implications of negotiations between the sellers and purchasers of a law practice (or an area of practice).

ABA Model Rule 1.17 cmt. [7] begins with the same description as in Virginia Rule 1.17 cmt. [7] of an implausible scenario in which sellers and purchasers of a law practice or area of practice negotiate without the disclosure of any information “relating to a specific representation of an identifiable client.” As explained above, the ABA Model Rule Comment’s analogy to a lateral hire or merger scenario makes sense, because ABA Model Rule 1.6(b)(7) describes those scenarios as an exception to the overly-broad ABA Model Rule 1.6(a) definition of client confidential information. Like several other states, Virginia has not adopted ABA Model Rule 1.6(b)(7)’s confidentiality exception for lateral hiring and law firm mergers.

ABA Model Rule 1.17 cmt. [7] then explains the need for client consent before sellers can disclose more detailed information. Unfortunately, ABA Model Rule 1.17 cmt. [7] continues the ABA Model Rule’s confusing references to both representations and files. ABA Model Rule 1.17 cmt. [7] uses the phrase “such as the client’s file,” in contrast to Virginia Rule 1.17 cmt. [7]’s phrase “and to the file.” That difference seems insignificant.

ABA Model Rule 1.17 cmt. [7] next warns that before sellers can provide such protected client confidential information to purchasers (which requires “client consent”), sellers must give the client “actual written notice of the contemplated sale, including the identity of the purchaser.” In addition, sellers must advise clients “that the decision to consent or make other arrangements must be made within 90 days.” This choice makes sense in the ABA Model Rules context, because of what the next sentence says.

Most importantly, ABA Model Rule 1.17 cmt. [7] concludes with an explanation that under ABA Model Rule 1.17(c)(3), a client's silence in response to the notice of a possible sale creates the exact opposite presumption as that in Virginia Rule 1.17 cmt. [3]: Under ABA Model Rule 1.17 cmt. [7], "[i]f nothing is heard from the client within [90 days of her receipt of the seller's written notice], consent to the sale is presumed." This contrasts sharply with Virginia Rule 1.17(c)(5)'s and Virginia Rule 1.17 cmt. [7]'s warning that "[i]f nothing is heard from the client within [90 days], the client's refusal to consent to the sale is presumed."

### **Virginia Rule 1.17 Comment [8]**

Virginia Rule 1.17 cmt. [8] addresses the fate of clients who "cannot be given actual notice of the proposed purchase." Although the meaning presumably is clear, it would seem to make more sense for the client to be given notice that his representation/matter/file is being "sold" – not purchased.

Virginia Rule 1.17 cmt. [8] begins by stating the understandable principle that lawyers and law firms "cannot be required to remain in practice" because some clients "cannot be given actual notice of the proposed purchase." The Virginia Rule Comment then explains that because those clients cannot consent to or otherwise provide direction as to "disposition of their files," selling lawyers must obtain a court order "authorizing their transfer or other disposition." It is unclear whether the word "their" refers to the clients' files or the clients themselves. The sentence contains the phrase "their files," which seems to indicate that the word "their" refers to the clients rather than to the files. But the end of that same sentence describes a court order "authorizing their transfer or other disposition." The word in that phrase presumably refers to the files – clients aren't

transferred or disposed of. Use of the word “files” implicates the terminology confusion that appears throughout Virginia Rule 1.17 and ABA Model Rule 1.17 – which interchangeably refers to “files,” “matters” and “representations.”

Virginia Rule 1.17 cmt. [8] then understandably predicts that courts “can be expected to determine” whether the seller has exhausted “reasonable efforts” to locate such clients, and whether authorizing “transfer of the file” so that the purchaser may continue the representation” serves “the absent client’s legitimate interest.”

Among other things, that sentence seems to equate “file” possession with continued “representation”. That may answer one question about the references to “representations” and “files” appearing throughout Virginia Rule 1.17 and its Comments (and throughout the ABA Model Rule parallels). But of course former clients who no longer have an active “representation” may also have an interest in proper preservation of their closed files. So Virginia Rule 1.17 cmt. [8] language may be under-inclusive, because it only addresses clients with a continuing need for a “representation.”

Virginia Rule 1.7 cmt. [8] concludes with requirement that a petition seeking a court order concerning the files must be “considered in camera” to preserve client confidences.

**ABA Model Rule 1.17 cmt. [8]** contains essentially the same language (although it does not improperly capitalize “Court” in the second sentence, as does the Virginia Rule Comment).

ABA Model Rule 1.17 cmt. [8] involves all of the same issues as Virginia Rule 1.17 cmt. [8]: use of the term “purchase” instead of the more logical word “sale;” the possible mismatch between transfer of “files” and transfer of a “representation”, and (especially) the possibility that a client might be interested in the fate of her old files, while not needing

the purchaser to “continue” a representation that has now temporarily paused or permanently ended.

In contrast to Virginia Rule 1.17 cmt. [8], ABA Model Rule 1.17 cmt. [8] concludes with a parenthetical sentence not found in the Virginia Rule Comment – noting that jurisdictions which have not established such an in camera procedure for addressing a law practice or practice area sale “need[s]” to establish such an in camera procedure. It is difficult to imagine that any American jurisdictions have not established procedures for handling matters “in camera.”

### **Virginia Rule 1.17 Comment 9**

Virginia Rule 1.17 cmt. [9] addresses clients’ continuing rights after the sale of their representation/matter/file.

Virginia Rule 1.17 cmt. [9] assures that “[a]ll the elements of client autonomy” “survive the sale of the practice.” Virginia Rule 1.17 cmt. [9] provides examples: “the client’s absolute right to discharge a lawyer and transfer the representation to another.” The phrase “transfer the representation” continues the terminology confusion.

For some reason, Virginia Rule 1.17 cmt. [9] does not assure clients that they also retain those identified rights after the sale of an area of practice rather than the entire practice. ABA Model Rule 1.17 cmt. [9] uses the more expansive phrase “survive the sale of the practice or area of practice.”

Because Virginia Rule 1.17 also envisions the sale of an “area of practice” rather than an entire practice, presumably Virginia would give the same assurance in situations in which the seller only sells an “area of practice”.

**ABA Model Rule 1.17 cmt. [9]** contains essentially the same provision.

In contrast to Virginia Rule 1.17 cmt. [9], ABA Model Rule 1.17 cmt. [9] indicates that those rights also “survive the sale of . . . [an] area of practice.”

### **Virginia Rule 1.17 Comment 10**

Virginia Rule 1.17 cmt. [10] addresses the fee implications of lawyers’ sale or purchase of a practice or an area of practice.

Virginia Rule 1.17 cmt. [10] first explains that “[t]he sale may not be financed by increases in fees charged the clients of the practice.” One would think that the “purchase” rather than the “sale” would be financed.

Virginia Rule 1.17 cmt. [10] also requires that the purchaser of a law practice or practice area must honor all “[e]xisting agreements between the seller and the client as to fees and the scope of work” – unless the client consents after consultation.”

Virginia Rule 1.17 cmt. [10]’s requirement that the purchasing lawyer honor the selling lawyer’s “scope of work” highlights the possible confusion triggered by Virginia Rule 1.17’s use of several inconsistent and undefined terms. Presumably, the purchasing lawyer’s honoring of the selling lawyer’s “scope of work” must be assessed on a matter-by-matter basis. If a purchasing lawyer only buys one client matter (perhaps because it is within the practice area being sold) but not all of the client’s matters, then obviously the purchasing lawyer’s “scope of work” for that client will change – because the purchasing lawyer will not be handling all of the other matters outside the area of practice that she purchased. Presumably the client would consent to that change.

Virginia Rule 1.17 cmt. [9] concludes with an understandable exception: “unless the client consents after consultation.”

**ABA Model Rule 1.17 cmt. [10]** contains essentially the same language.

As mentioned above, the term “sale” in both Virginia Rule 1.17 cmt. [10] and ABA Model Rule 1.17 cmt. [10] seems wrong – one would think that the purchase would be financed, not the sale. But the meaning seems clear.

In contrast to Virginia Rule 1.17 cmt. [10], ABA Model Rule 1.17 cmt. [10] does not contain an exception for client consent. But presumably clients can consent to any change in the fee or scope of work arrangements, as long as the new arrangements satisfy ABA Model Rule 1.2, ABA Model Rule 1.5 and all other ABA Model Rules.

### **Virginia Rule 1.17 Comment [11]**

Virginia Rule 1.17 cmt. [11] addresses the applicability of other Virginia Rules in the context of the sale of a law practice or area of practice.

Virginia Rule 1.17 cmt. [11] first reminds lawyers “participating in the sale of a law practice” that they must comply with “the ethical standards applicable to involving another lawyer in the representation of a client.” Because Virginia Rule 1.17 also allows the sale of an “area of practice,” it is surprising that a phrase such as “or practice area” does not appear in Virginia Rule 1.17 cmt. [11] (as it does in ABA Model Rule 1.17 cmt. [11]). But presumably the absence of the phrase does not change the standard.

Virginia Rule 1.17 cmt. [11] next provides several examples: (1) selling lawyers’ “obligation to assure that the purchaser [lawyer or law firm] is qualified to assume the practice and the purchaser’s obligation to undertake the representation competently” (referring to Virginia Rule 1.1); (2) “the obligation to avoid disqualifying conflicts”; (3) “the obligation to...secure client consent after consultation for those conflicts which can be agreed to” (citing Virginia Rule 1.7); (4) “the obligation to protect information relating to the representation” (citing Virginia Rule 1.6 and Virginia Rule 1.9).

As in other Virginia Rule 1.17 and ABA Model Rule 1.17 black letter provisions and Comments, some words and phrases complicate matters. For instance, presumably the term “assume the practice” and “undertake the representation” are intended to be synonymous. Virginia Rule 1.17 cmt. [11] contains an awkward phrase referring to “client consent . . . for those conflicts which can be agreed to.” Clients do not “agree to” conflicts. However, the meaning seems clear.

The phrase “information relating to the representation” mimics the very broad ABA Model Rule 1.6(a) formulation as applied to current clients, rather than the more limited and rational definition of protected client confidences in Virginia Rule 1.6(a). Virginia Rule 1.9 contains that broader ABA Model Rule definition. Presumably this Virginia Rule 1.17 cmt. [7] language does not change Virginia lawyers’ confidentiality duty articulated in Virginia Rule 1.6.

**ABA Model Rule 1.17 cmt. [11]** takes essentially the same approach as Virginia Rule 1.17 cmt. [11]. As explained above, the phrase “conflicts which can be agreed to” seems awkward.

ABA Model Rule 1.17 cmt. [11] differs from Virginia Rule 1.17 cmt. [11] in three ways.

First, in contrast to Virginia Rule 1.17 cmt. [11]’s reference to “the sale of a law practice,” the ABA Model Rule 1.17 cmt. [11] uses the broader phrase “sale of a law practice or a practice area.” As mentioned above, the Virginia Rule Comment presumably includes the sale of an “area of practice” in its reach, despite the absence of that phrase.

Second, in contrast to Virginia Rule 1.17 cmt. [11], ABA Model Rule 1.17 cmt. [11] contains a slightly different formulation for some of the examples. For instance, in contrast

to the Virginia Rule 1.17 cmt. [11]’s obligation to “assure that the purchaser is qualified” in various ways, ABA Model Rule 1.17 cmt. [11] refers to the seller’s obligation to “exercise competence in identifying a purchaser” with such qualifications. That difference does not seem material.

Third, as in many other places, ABA Model Rule 1.17 cmt. [11] uses the standard ABA Model Rule formulation “informed consent” rather than the standard Virginia Rule formulation “consent after consultation.”

### **Virginia Rule 1.17 Comment [12]**

Virginia Rule 1.17 cmt. [12] addresses the substitution of lawyers in a tribunal setting after a sale/purchase transaction.

Virginia Rule 1.17 cmt. [12] reminds lawyers that they “must obtain” any pertinent tribunal’s “approval of the substitution of the purchasing attorney for the selling attorney” before “the matter can be included in the sale.” Virginia Rule 1.17 cmt. [12] uses the term “attorney” rather than “lawyer.” Of course those terms are synonymous, but elsewhere black letter Virginia Rule 1.17 and other Virginia Rule Comments use the less pretentious term “lawyer”. Virginia Rule 1.7 cmt. [12]’s use of the term “matter” is appropriate in the case of a discrete case or analogous issue pending in a tribunal. Virginia Rule 1.17 cmt. [12] refers to Virginia Rule 1.16, which prohibits counsel of record in a court proceeding from withdrawing “except by leave of court.” Virginia Rule 1.16(c).

**ABA Model Rule 1.17 cmt. [12]** contains essentially the same language.

In contrast to Virginia Rule 1.17 cmt. [12], ABA Model Rule cmt. [12] uses the term “lawyer” in both places – rather than the more grandiose term “attorney.”

### **Virginia Rule 1.17 Comment [13]**

Virginia Rule 1.17 cmt. [13] addresses the sale and purchase of “a deceased, disabled or disappeared lawyer[‘s]” law practice.

Virginia Rule 1.17 cmt. [13] first notes that Virginia Rule 1.17 “applies to the sale of a law practice by a representative of a deceased, disabled or disappeared lawyer.” For some reason, Virginia Rule 1.17 cmt. [13] apparently does not envision the possibility that such lawyers’ practice would be sold piecemeal – the Virginia Rule Comment refers to “the sale of a law practice,” and does not mention the possibility of a partial sale of a law practice.

Virginia Rule 1.17 cmt. [13] explains that if such a “representative” of a seller is not a lawyer, both that representative “as well as the purchasing lawyer shall see to it” that Virginia Rule 1.17’s requirements “are met.”

**ABA Model Rule 1.17 cmt. [13]** contains similar language.

Like Virginia Rule 1.17 cmt. [13], ABA Model Rule 1.17 cmt. [13] refers only to “the sale of a law practice” – not the piecemeal sale of areas of practice. Interestingly, ABA Model Rule 1.17 cmt. [11]’s first sentence explicitly refers to either “the sale of a law practice or a practice area.” So the absence of the phrase “or a practice area” just two Comments later would seem to be deliberate. As explained above, the possible sale of a practice area rather than an entire practice does not appear in either Virginia Rule 1.17 cmt. [11] or Virginia Rule 1.17 cmt. [13].

In contrast to the Virginia Rule 1.17 cmt. [13]’s requirement that both a non-lawyer selling “representative” and the purchasing lawyer “shall see to it that [Virginia Rule 1.17’s requirements] are met,” ABA Model Rule 1.17 [13] predicts that those persons “can be

expected to see to it that they are met.” Thus, somewhat oddly, ABA Model Rule 1.17 cmt. [13] forecasts compliance with ABA Model Rule 1.17 rather than requiring it.

### **Virginia Rule 1.17 Comment [14]**

Virginia Rule 1.17 cmt. [14] addresses similar-sounding arrangements that Virginia Rule 1.17 does not govern.

Virginia Rule 1.17 cmt. [14] explains that Virginia Rule 1.17 does not govern transactions that “do not constitute a sale or purchase” of a law practice or an area of practice. The Virginia Rule Comment provides examples: (1) “[a]dmission to or retirement from a law partnership or professional association”; (2) “retirement plans and similar arrangements”; (3) “a sale of tangible assets of a law practice.” The third of those examples is interesting, because that type of transaction was the only permissible way that lawyers formerly could monetize any part of their law practice before ABA Model Rule 1.17 and state parallels allowed them to sell non-tangible good will.

**ABA Model Rule 1.17 cmt. [14]** contains the identical language.

### **Virginia Rule 1.17 Comment [15]**

Virginia Rule 1.17 cmt. [15] addresses other transactions not governed by Virginia Rule 1.17.

Virginia Rule 1.17 cmt. [15] explains that Virginia Rule 1.17 does not apply “to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice.” Virginia Rule 1.17 cmt. [15] does not provide any explanation or examples of such “transfers unrelated to the sale of a practice.” Perhaps the phrase denotes a lawyer’s withdrawal with a client’s consent, and replacement by another lawyer.

In that case, no money would change hands. Virginia Rule 1.17 cmt. [15] does not mention transfer of “an area of practice.”

Virginia Rule 1.17 Comment continues the confusing use of the word “representation.” As explained above, neither Virginia Rule 1.17 nor ABA Model Rule 1.17 carefully explains the differences between a “representation,” a “matter,” and a “file.”

**ABA Model Rule 1.17 cmt. [15]** contains essentially the identical language.

In contrast to Virginia Rule 1.17 cmt. [15]’s reference solely to “the sale of a practice,” ABA Model Rule 1.17 cmt. [15] also contains the phrase “or an area of practice.” Interestingly, ABA Model Rule 1.17 cmt. [11]’s and ABA Model Rule 1.17 cmt. [15]’s explicit mention of a practice area’s sale supports the possible conclusion that the absence of such an explicit reference in ABA Model Rule 1.17 cmt. [13] (discussed above) was deliberate.

# RULE 1.18

## Duties to Prospective Client

### Rule

#### Virginia Rule 1.18(a)

Virginia Rule 1.18 addresses the definition of “prospective client,” to whom a lawyer owes confidentiality duties and limited loyalty duties.

Under Virginia Rule 1.18(a), a “prospective client” is “[a] person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter.” (emphasis added).

The word “discusses” presumably describes a dialogue of some sort - rather than a unilateral or (especially) an unsolicited communication from a would-be client to a lawyer. Of course, if such a discussion results in creation of an actual attorney-client relationship, the person is then properly characterized as a “client” rather than as a “prospective client”. Thus, the “prospective client” category falls somewhere between a would-be client and a full client. The former receive essentially no loyalty or confidentiality rights (discussed below), and the latter receive all the duties that clients normally receive from their lawyers.

As explained immediately below, ABA Model Rule 1.18(a) contains the more generic word “consults” rather than the word “discusses.”

**ABA Model Rule 1.18(a)** is essentially the same as Virginia Rule 1.18(a), with one substantive difference and one stylistic difference.

ABA Model Rule 1.18(a) defines as a “prospective client” a person “who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter” (emphases added). ABA Model Rule 1.18(a) formerly contained the word “discusses” (which Virginia Rule 1.18(a) still contains). Presumably ABA Model Rule 1.18(a) replaced the word “discusses” with the word “consults,” because the latter clearly encompasses electronic communications – in contrast to the word “discusses,” which brings to mind an oral conversation. Thus, ABA Model Rule 1.18(a)’s word “consults” more accurately describes the increasingly common means of communication clients and lawyers use to propose, negotiate and consummate an attorney-client relationship.

ABA Model Rule 1.18(a)’s additional word “about” does not change ABA Model Rule 1.18(a)’s substantive meaning.

### **Virginia Rule 1.18(b)**

Virginia Rule 1.18(b) addresses lawyers’ duties to a “prospective client” who does not form an attorney-client relationship with a lawyer.

Virginia Rule 1.18(b) describes a scenario “when no client-lawyer relationship ensues” despite a discussion between a lawyer and a would-be client sufficient to categorize that would-be client as a “prospective client”. Virginia Rule 1.18(b) describes the duties of “a lawyer who has had discussions with a prospective client.” At first blush, that description seems superfluous, because the would-be client would not be categorized as a “prospective” in absence of such discussions (per Virginia Rule 1.18(a), discussed above). As addressed below, presumably the key part of this description is the

identity of the lawyer herself – who is treated differently from her associated colleagues in the absence of an attorney-client relationship.

Such a lawyer “shall not use or reveal information learned in the consultation, except as [Virginia] Rule for 1.9 would permit with respect to information of a former client” (emphasis added). Thus, Virginia Rule 1.18(b) refers both to a “discussion” between a prospective client and a lawyer and a “consultation” to essentially describe the same communications. As explained above, ABA Model Rule 1.18(a) contains the terms “consults” instead of Virginia Rule 1.18(a)’s word “discusses.”

Virginia Rule 1.18(b) essentially requires a lawyer who has had “discussions” with a “prospective client” but who does not ultimately represent that “prospective client” in the matter they discussed to treat the “prospective client” as a former client for information-related purposes.

Virginia Rule 1.9(c)(1) describes lawyers’ limits on a lawyer’s “use” of a former client’s protected client confidential information. Under Virginia Rule 1.9(c)(1) “[a] lawyer who has formerly represented a client in a matter. . . shall not thereafter . . . use information relating to or gained in the course of the representation to the disadvantage of the former client” except as [Virginia] Rule 1.6 or [Virginia] Rule 3.3 would permit or require with respect to a client, or when the information has become generally known (emphasis added).” This document’s summary, analysis and comparison of Virginia Rule 1.9(c) provides a detailed analysis of that Virginia Rule provision.

In sum, Virginia Rule 1.9(c)(1) prohibits lawyers from using their former client’s protected client confidential information to the former client’s disadvantage, with essentially three exceptions: (1) as Virginia Rule 1.6 or Virginia Rule 3.3 “would permit;”

(2) as Virginia Rule 1.6 or Virginia Rule 3.3 “would . . . require;” or (3) when the information has become “generally known.”

Virginia Rule 1.6 is the Virginia Rules’ core confidentiality duty. Virginia Rule 3.3 focuses on lawyer’s duty of disclosure to tribunals under specified circumstances. Virginia Rule 1.18(b)’s phrase “except as [Virginia] Rule 1.9 would permit” presumably focuses on both permitted disclosures and required disclosures referred to in Virginia Rule 1.9(c)(1).

In essence, Virginia Rule 1.18(b) applies the same standard to “information learned in the consultation” (that does not ripen into a full attorney-client relationship” as to a lawyer’s prohibition on using “information relating to or gained in the course of the representation.”

Virginia Rule 1.18(b) also prohibits lawyers who have had “discussions” with a “prospective client” from “revealfing] information learned in the consultation, except as [Virginia] Rule 1.9 would permit with respect to information of a former client” (emphasis added). Virginia Rule 1.9(c)(2) explains that “[a] lawyer who has formerly represented a client in a matter . . . shall not thereafter . . . reveal information relating to the representation except as [Virginia] Rule 1.6 or [Virginia] Rule 3.3 would permit or require with respect to a client.” So in essence Virginia Rule 1.18(b) requires lawyers who have acquired information from a “prospective client” to treat the information as if it had come from a “former client” – which Virginia Rule 1.19(c)(2) treats as if she were a current client.

Thus, as with a lawyer’s “use” of a former client’s information, Virginia Rule 1.9(c)(2) looks to Virginia Rule 1.16 and Virginia Rule 3.3 for the prohibition on a lawyer’s disclosure of a former client’s protected client confidential information. And as with such

information's "use," presumably Virginia Rule 1.18(b)'s reference to permissible disclosure under Virginia Rule 1.9 includes such lawyer's possible required disclosure under Virginia Rule 1.9(c)(2). In other words, if such disclosure would be required under Virginia Rule 1.6 or Virginia Rule 3.3, it would therefore be permissible under Virginia Rule 1.18(b).

The bottom line is that an individual lawyer who has engaged in a dialogue with a would-be client sufficient to categorize that would-be client as a "prospective client" must treat the "prospective client" as if it were a "former client" for confidentiality purposes.

**ABA Model Rule 1.18(b)** also addresses lawyer's information-based duties if such lawyers do not contemplate an attorney-client relationship despite consulting with a would-be client about doing so.

ABA Model Rule 1.18(b) contains essentially the same language as Virginia Rule 1.18(b), with one difference. In contrast to Virginia Rule 1.18(b)'s fairly generic phrase "a lawyer who has had discussions with a prospective client," ABA Model Rule 1.18(b) describes "a lawyer who has learned information from a prospective client." As a practical matter, this different language may not have a different effect. Virginia Rule 1.18(b) governs lawyer's use or disclosure of "information learned in the consultation" (which, as mentioned above, presumably is intended to be synonymous with the word "discussion"). Thus, Virginia Rule 1.18(b) clearly applies to information the lawyer has learned during discussions with a "prospective client" – which matches ABA Model Rule 1.18(b)'s language.

ABA Model Rule 1.18(b)'s reference to ABA Model Rule 1.19's duties to former clients incorporates the same concepts contained in ABA Model Rule 1.19(c) – which essentially are the same as those contained in Virginia Rule 1.19(c).

### **Virginia Rule 1.18(c)**

Virginia Rule 1.18(c) addresses loyalty duties a lawyer and her colleagues have to a “prospective client” who does not become a full client.

Virginia Rule 1.18(c) first describes the loyalty duties owed to such a “prospective client if the lawyer has received information from the prospective client that “could be significantly harmful to that person in the matter.” The word “person” seems inapt. The word clearly intends to refer to the “prospective client” with whom the lawyer had discussions. So the term “that prospective client” would have been preferable to the term “that person.”

In ABA LEO 492 (6/9/20), the ABA addressed the “significantly harmful” “issue”. The ABA explained that the term “significantly harmful” does not include “information that causes embarrassment or inconvenience,” but includes “information relating to ‘[c]ivil or criminal liability.’” Examples of “significantly harmful” information include: “views on various settlement issues including price and timing;” “personal accounts of each relevant event [and the prospective client’s] strategic thinking concerning how to manage the situation;” an outline of “potential claims;” “specifics as to amount of money needed to settle the case;” “the underlying facts and legal theories about [a] proposed lawsuit;” “‘sensitive personal information’ in a divorce case;” “premature possession of the prospective client’s financial information;” “knowledge of ‘settlement position;”” “a ‘prospective client’s personal thoughts and impressions regarding the facts of the case

and possible litigation strategies” “the possible terms and structure of a proposed bid’ by one corporation to acquire another.”

A lawyer who has received such “significantly harmful information” “shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter.” Of course, that is the Virginia Rule 1.9 former-client standard for a lawyer’s possible representation of another client adverse to a former client. But Virginia Rule 1.18(c)’s loyalty duty applies only to lawyers who have had “discussions” with a “prospective client” and have obtained a certain category of information from such a “prospective client” – “information from the prospective client that could be significantly harmful” to him. Thus, a lawyer who has had such discussions and has not obtained such “significantly harmful” information presumably may freely “represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter.”

But significantly, such a lawyer must still comply with her Virginia Rule 1.18(b) information-based duty to such a “prospective client” (discussed above). So such a lawyer “shall not use or reveal information learned in the consultation” (with the Virginia Rule 1.9 exceptions discussed above) – even information that could not be “significantly harmful” to the prospective client. In other words, a lawyer who has not obtained such “significantly harmful” information from a “prospective client” must treat what harmless information she obtained from the “prospective client” as if the “prospective client” was a former client (per Virginia Rule 1.18(b)), but may nevertheless represent an adversary of the “prospective client” under Virginia Rule 1.18(d)(1), discussed below (essentially, with consents).

Virginia Rule 1.18(c) then turns to a totally different issue – the firm-wide imputation of the individual disqualification of a lawyer who “is disqualified from representation under this paragraph [Virginia Rule 1.18(c)].” As explained above, the individual lawyer is disqualified under Virginia Rule 1.18(c) only if she had received “significantly harmful information” from such a “prospective client.” In that scenario, “no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in [Virginia Rule 1.18(d)].”

As explained throughout this document, the Virginia Rules’ (and the ABA Model Rules’) failure to define the word “associated” could generate confusion. On its face, Virginia Rule 1.18(c) indicates that “no lawyer in a firm with which [the individually disqualified] lawyer is associated” may represent the former (and now adverse) prospective client” – except under certain conditions. Thus, the imputation only occurs if the individually disqualified lawyer is “associated” with a firm. Although the word “associated” creates confusion, it seems clear beyond doubt that some lawyers in a law firm are “associated” with or in that firm, and other lawyers are not. So under Virginia Rule 1.18(c) the individual disqualification of a lawyer who is not “associated” in the firm would not trigger a disqualification imputation. If the individually disqualified is “associated” in the firm, then “no lawyer in [that] firm...may knowingly undertake or continue [the] representation.” Thus, the imputed disqualification applies to all lawyers, not just lawyers “associated” in the firm. This means that an associated lawyer is the source of the imputed disqualification, but that associated lawyers are not the only targets of the imputed disqualification.

Significantly, this imputed disqualification only applies to law firm colleagues who “knowingly undertake or continue a representation in such a matter” (emphasis added). It is possible to envision an individually disqualified lawyer’s colleague “unknowingly” undertaking a representation from which that colleague would be disqualified under Virginia Rule 1.18(c). For instance, the colleague might not know that her partner down the hall had met with and obtained “significantly harmful” information from a “prospective client” - because the partner had not entered such information in the firm’s conflicts database, etc. But Virginia Rule 1.18(c)’s application to such a colleague “continu[ing] representation in such a matter” presumably means that at some point the colleague would know of her individually disqualified colleague’s inability to represent the prospective client’s adversary, and thus be imputably disqualified as well. In other words, at some point the individual lawyer’s disqualification would catch up with all of her colleagues. That would require her withdrawal, absent the exception described in Virginia Rule 1.18(d) (discussed below).

**ABA Model Rule 1.18(c)** also addresses the same individual lawyer’s disqualification and possible imputation of that individual lawyer’s disqualification.

ABA Model Rule 1.18(c) is identical to Virginia Rule 1.18(c). Thus, under ABA Model Rule 1.18(c), presumably there would be no imputed disqualification if the individually disqualified lawyer is not “associated” in the firm. If the individually disqualified lawyer is “associated” in the firm, her individual disqualification is imputed to all lawyers in the firm – not just lawyers “associated” in the firm. Thus, an “associated” lawyer can be the source of the imputed disqualification, but the targets of the imputed disqualification are all lawyers in the firm.

### **Virginia Rule 1.18(d)**

Virginia Rule 1.18(d) addresses two scenarios in which a lawyer or her colleagues may represent the adversary of a “prospective client” from whom the lawyer “has received disqualifying information.”

**ABA Model Rule 1.18(d)** contains the identical language.

### **Virginia Rule 1.18(d)(1)**

Virginia Rule 1.18(d)(1) addresses a scenario in which an individual lawyer may represent the adversary of a “prospective client” even if the lawyer herself received “disqualifying information” from a “prospective client” who did not retain that lawyer.

Such a lawyer may undertake an adverse representation “if . . . both the affected client and the prospective client have given informed consent, confirmed in writing.”

The “affected client” refers to the client to be represented by the lawyer who received “significantly harmful” information from the prospective client, and who’s “interests [are] materially adverse to those of a prospective client in the same or a substantially related matter” about which the lawyer “discussed with [the] prospective client.”

The “informed consent” standard contrasts with the usual Virginia Rules formulation for required consents: “consent after consultation.” Virginia’s core current client conflicts (Virginia Rule 1.7) contains the “consent[ ] after consultation” standard in Virginia Rule 1.7(b), and Virginia’s core former-client conflict rule (Virginia Rule 1.9) contains that “consent after consultation” standard in Virginia 1.9(b). That standard also appears in other Virginia Rules.

The Virginia Rules' Terminology section describes the word "consultation" (which is part of the Virginia Rules' standard formulation for consent) as "denot[ing] communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question."

The "informed consent" standard represents the ABA Model Rule formulation. But presumably it is intended to be synonymous with Virginia's standard "consent after consultation" formulation.

Interestingly, Virginia Rule 1.18(d)(1)'s requirement requires that both the "affected client and the prospective client give informed consent, confirmed in writing" (emphases added). This also contrasts with the standard Virginia Rule consent requirement.

ABA Model Rule 1.0(e) defines "informed consent" as "denot[ing] the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." ABA Model Rule 1.0 cmts. [6]-[7] provides additional guidance on that term's meaning.

The core Virginia Rules current client conflicts rule (Virginia Rule 1.7) requires only that the required consent "is memorialized in writing"). Virginia Rule 1.7(b)(4). The core Virginia Rules former-client rule (Virginia Rule (1.9)) does not contain a writing requirement. The Virginia Rules miscellaneous conflict provision (Virginia Rule 1.8) requires that clients with whom a lawyer engages in a business transaction must "consent in writing thereto" (Virginia Rule 1.8(a)(3)).

ABA Model Rule 1.0(b)'s definition of "confirmed in writing" is more elaborate and arguably more demanding: when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person transmitting it in oral informed consent, "(although)" [i]f it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter." ABA Model Rule 1.0 cmt. [1] provides additional guidance on that term's meaning.

**ABA Model Rule 1.18(d)(1)** contains identical language.

### **Virginia Rule 1.18(d)(2)**

Virginia Rule 1.18(a)(2) addresses the circumstance under which an individually disqualified lawyer's colleagues may represent the adversary of a "prospective client" from whom the individually disqualified lawyer had received "significantly harmful" information that prevents her from representing the adversary.

As explained above, on its face Virginia Rule 1.18(c) only imputes the disqualification of an individual lawyer who is "associated" with the firm. If an "associated" individual lawyer is disqualified, that disqualification is imputed to all lawyers in the firm – not just lawyers "associated" in the firm.

An individually disqualified lawyer's colleagues may undertake a representation under four conditions.

Virginia Rule 1.18(d)(2) describes the first condition: "the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine what was necessary to determine whether to represent the prospective client." Of course, the term "disqualifying

information” refers to “information from the prospective client that could be significantly harmful to that person in the matter” (Virginia Rule 1.18(c)).

Virginia Rule 1.18(d)(2) thus examines the circumstances under which the lawyer “discuss[ed]” with [a prospective client] the possibility of forming a client-lawyer relationship with respect to a matter” (Virginia Rule 1.18(a)). In other words, the lawyer must have taken “reasonable” steps to limit those preliminary discussions in a way that would minimize any information that the lawyer received from the prospective client. Of course, in many situations “such reasonable measures” would result in the lawyer not receiving such disqualifying “significantly harmful” information from the prospective client. For instance, a lawyer receiving a communication from a would-be client about representing him in a business transaction that might initially just ask for the counterparty’s identity. A quick conflict search might determine that the lawyer or her firm already represents the counterparty, who never consents to adversity. That would end the “discussion” between the lawyer and the prospective client, and avoid the lawyer receiving the type of “significantly harmful” information that would disqualify the lawyer herself.

But in other scenarios, a lawyer would be required to inquire further of such a would-be client, and in certain scenarios it is inevitable that the lawyer would receive such “significantly harmful” information before determining not to represent the would-be client (who had by then become a “prospective client”). For instance, in a divorce scenario, the lawyer discussing “the possibility of forming a client-lawyer relationship” with a would-be client might learn intimate facts about the would-be client’s marital conduct, which could

be “significantly harmful” if the individual lawyer declines to represent the would-be (now “prospective”) client and instead now wishes to represent the spouse.

Interestingly, there seem to be few disqualification cases based on this first condition. Presumably this is because a lawyer normally could justify exploring the “possibility of forming a client-lawyer relationship” with a would-be client for determining whether to represent that client - based either on the absence of a conflict, or on the facts that might lead the lawyer to turn down the representation.

But Virginia Rule 1.18(d)(2)’s condition serves as a useful reminder for all lawyers to carefully tiptoe into a discussion about “the possibility of forming a client-lawyer relationship” with any would-be client.

**ABA Model Rule 1.18(d)(2)** contains the identical language.

### **Virginia Rule 1.18(d)(2)(i)**

Virginia Rule 1.18(d)(2)(i) addresses the second and the third condition under which an individually disqualified lawyer’s colleagues may represent a “prospective client’s” adversary despite the individually disqualified lawyer’s receipt of the type of “significantly harmful” information that resulted in her individual disqualification.

Under Virginia Rule 1.18(d)(i), the second condition is that “the disqualified lawyer is timely screened from any participation in the matter.” Unfortunately, the Virginia Rules Terminology section does not provide any guidance about the type of effective “screen” that would pass muster under the Virginia Rules. This absence is somewhat surprising, because Virginia Rule 1.11(b)(1) contains essentially the same phrase: “the disqualified lawyer is screened from any participation in the matter” – which allows a hiring law firm

to represent a client despite its hiring of an individually disqualified former government lawyer. And Virginia Rule 1.12(c)(1) requires the “timely” screening of a former judge, etc.

It is unfortunate that the Virginia Rules fail to provide any guidance on the identity of an effective screen - either in the context of Virginia Rule 1.18(d)(2)(i), Virginia Rule 1.11(b)(1), Virginia Rule 1.12(c)(1) or other contexts. This is ameliorated somewhat by the ABA Model Rules’ fairly elaborate discussion of ethically effective screens (discussed below).

Virginia Rule 1.18(d)(2)(i) also contains the third condition under which an individually disqualified lawyer’s colleagues can represent a “prospective client’s” adversary.

Under Virginia Rule 1.18(d)(2)(i), such a disqualified lawyer’s colleagues may undertake such a representation if “the disqualified lawyer reasonably believes that the screen [the second condition for such a representation, discussed above] would be effective to sufficiently protect information that could be significantly harmful to the prospective client.” Of course, this goes to the mechanism and the enforcement of the “screen,” and presumably would be a necessary component of any screen – such as those other Virginia Rule screens mentioned above. The ABA Model Rules’ provisions and guidance on such “screens” (discussed below) do not contain such an explicit condition of an effective “screen,” but the individually disqualified lawyer’s “reasonabl[e] belie[f]” presumably is a necessary element of any screen.

**ABA Model Rule 1.18(d)(2)(i)** contains similar language.

Thus, ABA Model Rule 1.18(d)(2)(i) requires screening of the individually disqualified lawyer.

Unlike the Virginia Rules, the ABA Model Rules give guidance about the elements of an effective screen.

ABA Model Rule 1.0(k) defines “screened” as “denot[ing] the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these [ABA Model] Rules or other law.” ABA Model Rule 1.0 cmts. [8] – [10] provide additional guidance.

There are two differences between ABA Model Rule 1.18(d)(2)(i) and Virginia Rule 1.18(d)(2)(i).

First, ABA Model Rule 1.18(d)(2)(i) does not contain the additional requirement contained in Virginia Rule 1.18(d)(2)(i) – requiring that the disqualified lawyer “reasonably believes that the screen would be effective to sufficiently protect information that could be significantly harmful to the prospective client.”

Second, in contrast to Virginia Rule 1.18(d)(2)(i), ABA Model Rule 1.18(d)(2)(i) also contains another specific screen requirement: “the disqualified lawyer . . . is apportioned no part of the fee therefrom.” ABA Model Rule 1.18 cmt. [7] (discussed below) provides further guidance on this financial “screen” component. The ABA Model Rule 1.18(d)(2)(i) is a bit linguistically awkward – because it starts with the affirmative word “apportioned” rather than the negative impact of the provision. Beginning that phrase with the negative (such as “is not apportioned . . .”) might be more clear – although the affirmative opening portion is not likely to cause any confusion.

### **Virginia Rule 1.18(d)(2)(ii)**

Virginia Rule 1.18(d)(2)(ii) addresses the fourth condition under which an individually disqualified lawyer's colleagues may represent the adversary of a "prospective client."

Under Virginia Rule 1.18(d)(2)(ii), such a colleague may undertake such a representation if "written notice that includes a general description of the subject matter about which the lawyer was consulted and the screening procedures employed is promptly given to the prospective client."

Virginia Rule 1.18(d)(2)(ii) uses the word "consulted" – like Virginia Rule 1.18(b). This word presumably is intended to be synonymous with the word "discusses" contained in Virginia Rule 1.18(a) and Virginia Rule 1.18(b). As explained above, ABA Model Rule 1.18(a) originally used the word "discusses" rather than "consults," but changed to the latter word because it more accurately describes the more common electronic form of communication (in contrast to the word "discusses," which seemingly refers to an oral conversation).

Several Virginia Rule 1.18 Comments provide guidance about Virginia Rule 1.18(d)(2)(ii)'s requirements (discussed below).

**ABA Model Rule 1.18(d)(2)(ii)** contains a shorter but similar provision: "written notice is promptly given to the prospective client." ABA Model Rule 1.18(c) cmt. [9] (discussed below) contains the additional elements that Virginia Rule 1.18(d)(2)(ii) includes in its black letter provision.

## Comment

### Virginia Rule 1.18 Comment [1]

Virginia Rule 1.18 cmt. [1] addresses the scenario in which lawyers are considering representing would-be clients, and the limited duties such lawyers owe would-be clients if they do not represent them.

Virginia Rule 1.18 cmt. [1] begins by acknowledging that “[p]rospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer’s custody, or rely on the lawyer’s advice.” Interestingly, Virginia Rule 1.18 cmt. [1] begs the question of what renders a would-be client a “[p]rospective client[.]” To a certain extent, Virginia Rule 1.18 cmt. [2] (discussed below) describes the status of would-be clients who do not become “prospective clients.” A “prospective client” who “rel[ies] on the lawyer’s advice” may seem to have become an actual client. And of course lawyers who provide such “advice” upon which a “prospective client” relies might be subject to a malpractice claim under the pertinent state’s malpractice standard.

Virginia Rule 1.18 cmt. [1]’s phrase “documents or other property” describing what would-be prospective clients may “place...in the lawyer’s custody” contrasts with the odd phrase “valuables or papers” contained in Virginia Rule 1.18 cmt [9] (discussed below).

Virginia Rule 1.18 cmt. [1] next describes the normally shallow and preliminary-type communications that lawyers and would-be clients engage in: “[a] lawyer’s discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further.” That certainly describes the first two of the three examples described in the

preceding sentence. It would not seem to include the third example – the lawyer providing advice to the would-be client.

Virginia Rule 1.18 cmt. [1] then addresses the loyalty component of a possible attorney-client relationship in the context of a would-be client’s initial interactions and later disengagement from a lawyer. Thus, “[t]he principle of loyalty diminishes in importance if the sole reason for an individual lawyer’s disqualification is the lawyer’s initial consultation with a prospective new client with whom no client-lawyer relationship is formed, either because the lawyer detected a conflict of interest as a result of an initial consultation, or for some other reason (e.g., the prospective client decided not to retain the firm).”

That is an odd way of saying that an individual lawyer might be free to represent another client adverse to a would-be client who does not hire that lawyer. The “principle of loyalty” might “diminish[ ] in importance” under the described circumstances. But the “principle of loyalty” does not change. It still applies to such a lawyer, but under the conditions specified in Virginia Rule 1.18. The principle of loyalty might or might not apply to the individual lawyer.

This Virginia Rule 1.18 cmt. [1]’s sentence also seems odd by focusing on “an individual lawyer [ ]” rather than on both the individual lawyer and the lawyer’s colleagues. If the “[t]he principle of loyalty diminishes in importance” under the described scenario, the same principle of loyalty presumably would apply to the lawyer’s colleague as apply to the individual lawyer exploring the possibility of representing the would-be client.

Virginia Rule 1.18 cmt. [1] concludes with an understandable description of a lawyer’s limited duty to a prospective client: “[h]ence, prospective clients should receive

some but not all of the protection afforded clients.” It is unclear whether this description covers the loyalty duty (which is Virginia Rule 1.18 cmt. [1]’s focus), as well as the confidentiality duty (which also is more limited in the prospective client context).

**ABA Model Rule 1.18 cmt. [1]** addresses the same prospective client scenario, but is more limited than Virginia Rule 1.18 cmt. [1].

All of ABA Model Rule 1.18 cmt. [1]’s language is also contained in Virginia Rule 1.18 cmt. [1]. Thus, ABA Model Rule 1.18 cmt. [1] contains the phrase “documents or other property,” which contrasts with the phrase “valuables or papers” contained in ABA Model Rule 1.18 cmt. [9].

But in contrast to Virginia Rule 1.18 cmt. [1], ABA Model Rule 1.18 cmt. [1] does not describe the diminishment of lawyers’ loyalty duty.

### **Virginia Rule 1.18 Comment [2]**

Virginia Rule 1.18 cmt. [2] addresses would-be clients who do not meet the “prospective client” standard (and thus presumably are not entitled to any of the loyalty or information duties that lawyers owe to a “prospective client”).

Virginia Rule 1.18 cmt. [2] begins with the blunt statement that “[n]ot all persons who communicate information to a lawyer are entitled to protection under this [Virginia Rule 1.18].” Virginia Rule 1.18 cmt. [2] then provides an example: “[a] person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a ‘prospective client’ within the meaning of [Virginia Rule 1.18(a)].” This presumably covers would-be clients or others who unilaterally send an unsolicited email or texts to a

lawyer about forming an attorney-client relationship, leaves an unsolicited voicemail message on the lawyer's phone about that possibility, etc.

But Virginia Rule 1.18 cmt. [2] describes a threshold that many such would-be clients or other persons may not fall below. For instance, a would-be client who emails or texts a lawyer based on that lawyer's website bio probably does not do so "without" "any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship." One would think that such a would-be client's expectation is that the lawyer advertises herself precisely because she is "willing to discuss the possibility of forming a client-lawyer relationship" with such a would-be client. In other words, as everyone increasingly shops for products and hires service providers of all sorts electronically, it might be difficult for a lawyer to successfully argue that a would-be client who reaches out to a lawyer electronically does so "without any reasonable expectation" as described in Virginia Rule 1.18 cmt. [2]. But a pre-Rule 1.18 legal ethics opinion (Virginia LEO 1842 (9/30/08)) explained that even in that circumstance such a would-be client does not become a "prospective client" absent some dialogue with a lawyer. So the bottom line is that would-be clients in that increasingly common situation do not become "prospective clients" without the lawyer having to establish that such would-be clients had no "reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship. If lawyers were called upon to do so, presumably they might have trouble.

Interestingly, and as discussed below, Virginia Rule 1.18 cmt. [2] does not contain the example of a would-be client who communicates with lawyers in a cynical ploy to

disqualify the lawyer – even though a Virginia LEO described that very scenario and reached the same conclusion. Virginia LEO 1794 (6/30/04).

**ABA Model Rule 1.18 cmt. [2]** addresses the same situation as Virginia Rule 1.18 cmt. [2], but is much more elaborate.

ABA Model Rule 1.18 cmt. [2] includes as its penultimate sentence Virginia Rule 1.18 cmt. [2] second sentence. But there are many differences between ABA Model Rule 1.18 cmt. [2] and Virginia Rule 1.18 cmt. [2].

First, in contrast to Virginia Rule 1.18 cmt [2]'s first sentence (noting that “[n]ot all persons who communicate information to a lawyer are entitled to protection under this Rule”), ABA Model Rule 1.18 cmt. [2] does not contain a similar explicit statement.

Second, in contrast to Virginia Rule 1.18 cmt. [2], ABA Model Rule 1.18 cmt. [2] contains a very detailed discussion of circumstances in which a would-be client might or might not have a “reasonable expectation that the lawyer is willing to discuss the possibility of forming a lawyer-relationship.” ABA Model Rule 1.18 cmt. [2] begins by essentially repeating black letter ABA Model Rule 1.18(a) – using the word “consults” rather than the word “discusses,” as in the previous version of ABA Model Rule 1.18(a) - and in contrast to Virginia Rule 1.18(a)'s use of that word.

ABA Model Rule 1.18 cmt. [2] next acknowledges “[w]hether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances.” ABA Model Rule 1.18 cmt. [2] then provides examples: “[f]or example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer’s advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable

warnings and cautionary statements that limit the lawyer’s obligations, and a person provides information in response” (pointing to ABA Model Rule 1.18 cmt. [4] discussed below). ABA Model Rule 1.18 cmt. [2] contrasts that scenario with the following: “a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer’s education, experience, areas of practice, and contact information, or provides legal information of general interest.” Thus, ABA Model Rule 1.18 cmt. [2] essentially allows lawyers to preclude a would-be client from becoming a “prospective client” by placing warnings in their advertising (or more likely on their websites).

This lawyer-focused analysis contrasts somewhat with the client-focused next sentence (also appearing in Virginia Rule 1.18 cmt. [2]) that examines whether a would-be client has a “reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship.” But at least ABA Model Rule 1.18 cmt. [2] offers a suggestion of how lawyers might demonstrate the lack of such would-be client’s “reasonable expectation” to that effect.

One might question the strength of such an argument – because a reasonable layperson reviewing a typical lawyer’s normal website bio and description touting the lawyer’s expertise and implicitly seeking business arguably would have such a “reasonable expectation,” which would not be diminished by some website warning on another page. But the disqualification analysis seem to follow the ABA Model Rule 1.18 cmt. [2] approach, rather than allow a would-be client to make a case for having such a “reasonable expectation” based on the ordinary type of lawyer advertising (especially on websites).

Third, in contrast to Virginia Rule 1.18 cmt. [2], ABA Model Rule 1.18 cmt. [2] concludes with another scenario in which a would-be client will not be considered a “prospective client:” “[m]oreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a ‘prospective client.’” As mentioned above, Virginia Rule 1.18 cmt. [2] does not contain that understandable explanation, despite a Virginia LEO 1794 (6/3/04) reaching the same conclusion years before Virginia Rule 1.18 or ABA Model Rule 1.18 (or any of its legal ethics opinion predecessors).

This scenario reaches an understandable conclusion, but it is difficult to imagine how such a cynical would-be client’s scheme would ever be discovered. Before the advent of electronic communications, a would-be client hoping to preclude a planned adversary from (for instance) hiring a talented divorce lawyer might personally visit all of the talented divorce lawyers in town – thus essentially blocking the spouse from hiring one of them. That is the scenario described in Virginia LEO 1794 (6/30/04). Of course, with the advent of electronic communications such a cynical ruse would be much easier – only requiring the clever spouse to send the same information-laden email or text to every talented divorce lawyer in town. But in either the older in-person scenario or the more recent electronic scenario, one cannot help but wonder how the strategem would be discovered. Presumably the spouse would have suspicions when he or she visited or emailed all of the talented divorce lawyers in town upon learning of the divorce action – and being turned away by all of them based on a conflict triggered by the sneaky spouse’s earlier contacts. But all of those lawyers would have to preserve the confidences of the devious spouse, so there must be some way that the victim spouse could penetrate those

lawyers' ethics confidentiality duty and the devious spouse's attorney client privilege. In any event, the basic principle makes sense.

### **Virginia Rule 1.18 Comment [3]**

Virginia Rule 1.18 cmt. [3] addresses the information duty a lawyer owes to a “prospective client.”

Virginia Rule 1.18 cmt. [3] begins with the understandable acknowledgement that “[i]t is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about the formation of a client-lawyer relationship.”

Virginia Rule 1.18 cmt. [3] next points to the client's incentive to disclose information to a lawyer the client considers retaining: “[t]he client may disclose such information as part of the process of determining whether the client wishes to form a client-lawyer relationship.”

Virginia Rule 1.18 cmt. [3] then turns to another reason for a “prospective client” to disclose information to a lawyer during an initial consultation: “[t]he lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake.”

Virginia Rule 1.18 cmt. [3] reminds lawyers that Virginia Rule 1.18(b) prohibits them “from using or revealing that information, except as permitted by [Virginia] Rule 1.9, even if the client or lawyer decides not to proceed with the representation.” That statement essentially matches black letter Virginia Rule 1.18(b).

Virginia Rule 1.18 cmt. [3] concludes with a warning that “[t]he duty [to protect such information] exists regardless of how brief the initial conference may be.” That warning

makes sense, because a client might disclose significantly harmful information in his or her first sentence of such a consultation or in an email.

But the term “may be” seems inapt. The word “was” might be more appropriate.

**ABA Model Rule 1.18 cmt. [3]** contains the identical language.

But in contrast to Virginia Rule 1.18 cmt. [3], ABA Model Rule 1.18 cmt. [3] does not contain Virginia Rule 1.18 cmt. [3]’s second sentence – which explains that clients “may disclose such information as part of the process of determining whether the client wishes to form a client-lawyer relationship.”

#### **Virginia Rule 1.18 Comment [4]**

Virginia Rule 1.18 cmt. [4] addresses steps a lawyer in such a situation may take to avoid receiving disqualifying information during a consultation with a “prospective client.”

Virginia Rule 1.18 cmt. [4] begins by suggesting that “[i]n order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose.” The “purpose” presumably is to determine whether the lawyer should or should not “undertake a new matter.”

Virginia Rule 1.18 cmt. [4] next understandably explains that “the lawyer should . . . inform the prospective client or decline the representation” – “[w]here the information indicates that a conflict of interest or other reason for non-representation exists.” At first blush, that seems like an awkward pair of alternatives: (1) “the lawyer should so inform the prospective client”; or (2) “decline the representation.” But the lawyer might be required to decline the representation without “inform[ing] a prospective client” of the

reason – because of the lawyer’s duty to another client to keep its confidences, etc. And the lawyer’s discovery of a conflict might not require the client to “decline the representation” – if the client could proceed with required consents.

Virginia Rule 1.18 cmt. [4] concludes by explaining that “[i]f the prospective client wishes to retain the lawyer, and if consent is possible under [Virginia] Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.” That certainly is an accurate statement. But Virginia Rule 1.7 addresses current-client conflicts. If the previous representation of a “former” client presents a conflict, the lawyer would have to comply with Virginia Rule 1.9 – “the Virginia Rules” core “former” client conflict rule.

**ABA Model Rule 1.18 cmt. [4]** contains the identical language.

### **Virginia Rule 1.18 Comment [5]**

Virginia Rule 1.18 cmt. [5] addresses the possibility of lawyers obtaining a prospective client’s consent to represent an adversary, despite the lawyer’s receipt from the prospective client of otherwise disqualifying “significantly harmful information.”

Virginia Rule 1.18 cmt. [5] begins by assuring “[a] lawyer may condition conversations with a prospective client on the person’s informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter.”

Virginia Rule 1.18 cmt. [5]’s word “conversations” reflects the now-largely archaic traditional form of communication between lawyers and prospective clients. Thus, it is consistent with Virginia Rule 1.18(a)’s term “discussion.” Although Virginia Rule 1.18 and its Comments also contain the word “consultation,” the Virginia Rule and its Comments

have not followed the ABA Model Rule’s abandonment of those oral conversation-sounding words, and replacement with “consultation” concepts throughout.

Virginia Rule 1.18 cmt. [5]’s term “informed consent” is discussed above. As explained there, the term “informed consent” is the standard ABA Model Rule formulation for consent – in contrast to the Virginia Rules’ standard formulation of “consent after consultation.” But presumably the terms are intended to be synonymous.

Virginia Rule 1.18 cmt. [5]’s proposed prospective consent might not pass muster if presented to a prospective client in those terms. It would be easy to question the effectiveness of a prospective consent under which the prospective client agrees in advance that her sharing of information with the lawyer would not “prohibit the lawyer from representing a different client in the matter” (emphasis added). It seems likely that the prospective consent would have to explicitly indicate to the prospective client supplying the prospective consent that the “different client” would be (or at last might be) adverse to the prospective client in that matter.

Virginia Rule 1.18 cmt. [5] concludes with the possibility of such a prospective consent also covering information: “[i]f the agreement expressly so provides, the prospective client may also consent to the lawyer’s subsequent use of information received from the prospective client.” That prospective consent provision differs from the provision allowing the lawyer to represent an adversary of the prospective consent which focusing on the loyalty issue, rather than on the information issue.

Both of these prospective consent concepts appear only in Virginia Rule 1.18. In other words, Virginia Rule 1.7 does not explicitly acknowledge the possibility that lawyers may obtain prospective consents from their clients (either addressing the loyalty issue or

the information issue). In contrast, ABA Model Rule 1.7 cmt. [22] explicitly addresses such permissible prospective consents. This is not to say that the Virginia Bar would not acknowledge the ethical propriety of such a prospective consent, or that a Virginia court would not enforce such a prospective consent. But it seems unusual that the only prospective consent explicitly acknowledged in the Virginia Rules covers “prospective” clients.

**ABA Model Rule 1.18 cmt. [5]** contains essentially the same language as Virginia Rule 1.18 cmt. [5].

Thus, ABA Model Rule 1.18 cmt. [5] also describes a prospective consent that advises the “prospective client” only that the lawyer’s receipt of information from the prospective client will not “prohibit the lawyer from representing a different client in the matter” (which on its face does not explicitly include the more complete and accurate disclosure that the “different client” is or may be adverse to the “prospective client” granting the prospective consent).

But there are several differences...

First, not surprisingly, in contrast to Virginia Rule 1.18 cmt. [5]’s reference to “conversations between a lawyer and a prospective client,” ABA Model Rule 1.18 contains the word “consultation.”

Second, ABA Model Rule 1.18 cmt. [5] understandably refers to ABA Model Rule 1.0(e) “for the definition of informed consent.” It is worth noting that ABA Model Rule 1.0 cmt. [6] – [7] provides additional ABA Model Rule guidance on such an “informed consent.”

### **Virginia Rule 1.18 Comment [6]**

Virginia Rule 1.18 cmt. [6] addresses the individual lawyer's ability to represent a "prospective client's" adversary if the "prospective client" does not retain the lawyer.

Virginia Rule 1.18 cmt. [6] begins by explaining that "[e]ven in the absence of an agreement" (presumably the type of prospective consent described in preceding Virginia Rule 1.17 cmt. [5]), Virginia Rule 1.18(c) indicates that "the lawyer is not prohibited from representing a client with interest adverse to those of the prospective client in the same or a substantially related matter" – "unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter." This essentially parrots the black letter Virginia Rule 1.18(c) provision allowing the lawyer herself to represent another client adverse to the "prospective client" in the same or substantially related matter that they discussed – as long as the lawyer did not obtain such "significantly harmful" information.

**ABA Model Rule 1.18 cmt. [6]** contains the identical language.

### **Virginia Rule 1.18 Comment [7]**

Virginia Rule 1.18 cmt. [7] addresses Virginia Rule 1.18(d)'s provisions allowing law firms to avoid imputation of an individually disqualified lawyer.

Virginia Rule 1.18 cmt. [7] begins with another reference to Virginia Rule 1.18(c). After warning that "the prohibition in this [Virginia Rule 1.18] is imputed to other lawyers as provided in [Virginia] Rule 1.10," Virginia Rule 1.18 cmt. [7] explains that under Virginia Rule 1.18(d)(1), "imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients."

Virginia Rule 1.18 cmt. [7] next addresses the scenario in which an individually disqualified lawyer's colleagues may represent such an adversary. Virginia Rule 1.18 cmt. [7] explains that “[i]n the alternative, imputation may be avoided if the conditions of [Virginia Rule 1.18(d)(2)] are met.” Virginia Rule 1.18 cmt. [7] then repeats those necessary steps: (1) “all disqualified lawyers are timely screened”; (2) “written notice is promptly given to the prospective client”; and (3) “the lawyer reasonably believes that an effective screen will protect the confidential information of the prospective client.” Those steps essentially parrot black letter Virginia Rule 1.18(d)(2).

Virginia Rule 1.18 cmt. [7] concludes with a topic black letter Virginia Rule 1.18 does not address – the disqualified lawyer's or lawyers' ability to share in the fees earned from the representation from which the lawyer or lawyers are screened. Thus, Virginia Rule 1.18 cmt. [7] explains that Virginia Rule 1.18(d)(2)(i) “does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.”

This provision makes sense, and matches similar language in ABA Model Rule 1.18 cmt. [7]. But in contrast to ABA Model Rule 1.18(d)(2)(i)'s explicit reference to the screened lawyer not receiving any part of the fee (as discussed above), black letter Virginia Rule 1.18 does not address the fee issue at all. And because (as also explained above) no Virginia Rule or Virginia Comment addresses the elements of a screen, Virginia Rule 1.18 cmt. [7] describes an exception to the prohibition that does not appear in black letter Virginia Rule 1.18 or anywhere else in the Virginia Rules or the Virginia Comments. This seems inconsistent with the first Virginia Scope's paragraph last sentence – which

explicitly assures that “[c]omments do not add obligations to the [Virginia] Rules but provide guidance for practicing in compliance with the [Virginia] Rules.”

**ABA Model Rule 1.18 cmt. [7]** contains the identical language.

Thus, ABA Model Rule 1.18 cmt. [7] includes the same financial screening and exception in its last sentence as Virginia Rule 1.18 [7]’s last sentence. But ABA Model Rule 1.18 cmt. [7]’s provision makes sense, because ABA Model Rule 1.18(d)(2)(i) explicitly indicates that a disqualified lawyer may undertake a representation of the prospective client’s adversary under certain conditions, including the condition that “the disqualified lawyer . . . is apportioned no part of the fee therefrom.” As explained above, black letter Virginia Rule 1.18(d)(2)(i) does not contain such a prohibition.

ABA Model Rule 1.18 cmt. [7] differs from Virginia Rule 1.18 cmt. [7] in two ways.

First, in contrast to Virginia Rule 1.18 cmt. [7]’s ABA Model Rule 1.18 cmt. [7] does not include the conditional requirement that “the [individually disqualified] lawyer reasonably believes that an effective screen will protect the confidential information of the prospective client.”

Second, in contrast to Virginia Rule 1.18 cmt. [7], ABA Model Rule 1.18 cmt. [7] understandably refers to ABA Model Rule 1.0(k) for “requirements for screening procedures.” As explained above, the black letter Virginia Rules and the Virginia Comments do not deal with such screening procedures.

### **Virginia Rule 1.18 Comment [8]**

Virginia Rule 1.18 cmt. [8] addresses Virginia Rule 1.18(d)(2)(ii)’s notice requirement.

Virginia Rule 1.18 cmt. [8] explains that “[n]otice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.”

The notice’s content explanation parallels black letter Virginia Rule 1.18(d)(2)(ii), but there is an arguable mismatch between Virginia Rule 1.18 cmt. [8]’s suggestion that such a notice “generally should be given as soon as practicable after the need for screening becomes apparent” (emphasis added) and black letter Virginia Rule 1.18(d)(2)(ii)’s requirement that such “written notice” . . . is promptly given to the prospective client” (emphasis added).

This mismatch has two components: First, black letter Virginia Rule 1.18(d)(2)(iii) does not suggest that written notice be given – it explicitly requires that it be given in the described circumstances. This seems to contrast with Virginia Rule 1.18 cmt. [8]’s soft suggestion that such notice “generally should be given.”

The term “generally should be given” would not be troublesome if it refers to timing of the notice rather than to whether notice should be given. If former harmless interpretation was intended, the sentence could have been better stated.

Second, in contrast to black letter Virginia 1.18(d)(2)(ii)’s requirement that “the specified written notice . . . is promptly given to the prospective client” (emphasis added), Virginia Rule 1.18 cmt. [8] explains that such notice “generally should be given as soon as practicable after the need for screening becomes apparent” (emphasis added). That timing seems somewhat odd, because black letter Virginia Rule 1.18(d)(2)(ii) describes when the notice must be “promptly given” – when the disqualified lawyer’s colleagues

begin to represent the prospective client's adversary. Like the potentially confusing phrase "generally should be given," the phrase "as soon as practicable" has an uncertain meaning.

**ABA Model Rule 1.18 cmt. [8]** contains the identical language, and thus involves the identical mismatch with black letter ABA Model Rule 1.18(d).

### **Virginia Rule 1.18 Comment [9]**

Virginia Rule 1.18 cmt. [9] addresses two other issues lawyers might confront when dealing with a prospective client.

First, Virginia Rule 1.18 cmt. [9] refers to Virginia Rule 1.1 "[f]or the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client."

Second, Virginia Rule 1.18 cmt. [9] refers to Virginia Rule 1.15 "[f]or a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care" (emphasis added).

This is a strange under-inclusive provision. Virginia Rule 1.15 addresses lawyers' duties when they receive the following from clients, and in some situations from non-clients: (1) "funds" (e.g., Virginia Rule 1.15(a)(1)); (2) "other property" (e.g., Virginia Rule 1.15(a)(1)); and (3) "securities" (e.g., Virginia Rule 1.15(b)(1)). So ironically, Virginia Rule 1.15 (to which Virginia Rule 1.18 cmt. [9] refers lawyers) does not contain the word "valuables" or the word "papers." And of course a client or a non-client might give the lawyer property that could not accurately be described as "valuable."

**ABA Model Rule 1.18 cmt. [9]** contains the identical language.

Thus, ABA Model Rule 1.18 cmt. [9] also contains the odd couplet “valuables or papers,” followed by a reference to ABA Model Rule 1.15. ABA Model Rule 1.15 does not contain the words “valuables or papers.” And one could expect that some property a prospective client entrusts to a lawyer might include property that is not valuable.

Also like Virginia Rule 1.18 cmt. [9], ABA Model Rule 1.18 cmt. [9]’s terms “valuables or papers” is a mismatch with ABA Model Rule 1.18 cmt. [1]’s different terms “documents or other property.”

# RULE 2.1

## Advisor

### Rule

#### Virginia Rule 2.1

Virginia Rule 2.1 addresses lawyers' role as an advisor, rather than as a legal representative solely advising about the law.

Virginia Rule 2.1 first explains that “[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice.” Virginia Rule 2.1 then describes the type of other advice lawyers provide when “representing a client.” In addition to referring “to law”, lawyers may refer... to other considerations. Virginia Rule 2.1 provides examples: “such as moral, economic, social and political factors” – “that may be relevant to the client’s situation.”

**ABA Model Rule 2.1** contains the identical language.

## Comment

### Virginia Rule 2.1 Comment [1]

Virginia Rule 2.1 cmt. [1] addresses lawyers' advice, including unpleasant advice.

Virginia Rule 2.1 cmt. [1] first notes that clients are "entitled to straightforward advice expressing a lawyer's honest assessment." The Virginia Rule Comment then acknowledges that such "[l]egal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront."

Virginia Rule 2.1 cmt. [1] next notes that a lawyer "presenting advice" "endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits." This presumably involves lawyers "putting a positive spin" on what might be bad news or unwelcome advice.

Virginia Rule 2.1 cmt. [1] concludes with an explanation that "a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client." In other words, lawyers should provide realistic advice even if the client will not like hearing it.

**ABA Model Rule 2.1 cmt. [1]** contains identical language.

### Virginia Rule 2.1 Comment [2]

Virginia Rule 2.1 cmt. [2] addresses the occasional inadequacy of purely legal advice.

Virginia Rule 2.1 cmt. [2] begins by noting that "[a]dvice couched in narrowly legal terms may be of little value to a client." The Virginia Rule Comment contends that this situation is likeliest to occur especially where practical considerations, such as "costs or

effects on other people, are predominant.” It is difficult to imagine that either “costs or effects on other people” would predominate by trumping legal advice. But Virginia Rule 2.1 cmt. [2] relies on this analysis to assert that “[p]urely technical legal advice... can sometimes be inadequate.”

Virginia Rule 2.1 cmt. [2] continues this point by claiming that “[i]t [presumably “[p]urely technical legal advice”] could also ignore... the relational or emotional factors driving a dispute” – “to the client’s disadvantage.”

Virginia Rule 2.1 cmt. [2] concludes by suggesting that “[i]n such a case, advice may include the advantages, disadvantages and availability of other dispute resolution processes that might be appropriate under the circumstances. This ADR theme appears throughout the Virginia Rules. For instance, unique Virginia Rule 1.2 cmt. [1] mandates that “a lawyer shall advise the client about the advantages, disadvantages, and availability of dispute resolution processes that might be appropriate in pursuing these [client-selected] objectives.”

**ABA Model Rule 2.1 cmt. [2]** contains the identical language addressing the occasional inadequacy of purely legal advice.

In contrast to Virginia Rule 2.1 cmt. [2], and ABA Model Rule 2.1 cmt. [2] does not mention “the emotional factors driving a dispute.” Also in contrast to Virginia Rule 2.1 cmt. [2], ABA Model Rule 2.1 cmt. [2] does not as clearly describe possible ADR advice (although ABA Model Rule 2.1 cmt. [5] contains a similar concept).

ABA Model Rule 2.1 cmt. [2] concludes with language identical to Virginia Rule 2.1 cmt. [2a], discussed below.

### **Virginia Rule 2.1 Comment [2a]**

Virginia Rule 2.1 cmt. [2a] also addresses lawyers' non-legal advice.

Virginia Rule 2.1 cmt. [2a] starts by noting that [i]t is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. After acknowledging that “a lawyer is not a moral adviser as such,” Virginia Rule 2.1 cmt. [2a] asserts that such “moral and ethical considerations impinge upon most legal questions” and therefore, “may decisively influence how the law will be applied.” The word “impinge” usually, if not always, has a negative connotation. That is included in the dictionary definition. So, it seems inappropriate to generally state that “moral and ethical considerations” negatively affect “most legal questions.” A more neutral verb would have been more appropriate.

**ADA Model Rule 2.1** does not contain a Comment similar to Virginia Rule Comment [2a]. But the last two sentences of ABA Model Rule 2.1 cmt. [2] contain the identical language.

### **Virginia Rule 2.1 Comment [3]**

Virginia Rule 2.1 cmt. [3] addresses the role a client's experience plays in fashioning lawyers' legal advice.

Virginia Rule 2.1 cmt. [3] begins by acknowledging that clients “may expressly or impliedly ask the lawyer for purely technical advice.” Presumably the word “technical” describes the type of legal advice clients seek – rather than non-legal scientific or mechanical advice, etc.

Virginia Rule 2.1 cmt. [3] differentiates between requests for “purely technical advice” from “a client experienced in legal matters” (which “the lawyer may accept . . . at face value”) and requests from “a client inexperienced in legal matters.” In the latter

situation, “the lawyer’s responsibility as advisor may include indicating that more may be involved than strictly legal considerations.”

It seems odd to say that a lawyer “may accept [a request] at “face value.” One normally does not refer to “accepting” a request – lawyers and others receiving such a request respond to the request, not “accept it.”

Virginia Rule 2.1 cmt. [3] also seems to have a mismatch between the phrase “purely technical advice” contained at the end of the first sentence and the phrase “strictly legal considerations” contained at the end of the third sentence. Presumably those are meant to be synonymous. But it might have been more clear if Virginia Rule 2.1 cmt. [3] had used the same terms in both places.

**ABA Model Rule 2.1 cmt. [3]** contains the identical language.

#### **Virginia Rule 2.1 Comment [4]**

Virginia Rule 2.1 cmt. [4] addresses other professionals’ advice.

Virginia Rule 2.1 cmt. [4] begins by noting that “[m]atters that go beyond strictly legal questions may also be in the domain of another profession.” The Virginia Rule Comment provides examples: (1) “[f]amily matters” (which “can involve problems within the professional competence of psychiatry, clinical psychology or social work”; and (2) “business matters” (which “can involve problems within the competence of the accounting profession or of financial specialists”).

Virginia Rule 2.1 cmt. [4] then suggests that “the lawyer should make such a recommendation” of other professional consultation – “[w]here consultation with a professional in another field is itself something a competent lawyer would recommend.” That seems obvious. It should go without saying that if “a competent lawyer” would

recommend such other consultation, the lawyer “should make such a recommendation.” In fact, if a “competent lawyer” would do so, it might have been better to say that the lawyer “must” (not just “should”) make such a recommendation.

Virginia Rule 2.1 cmt. [4] concludes by contending that “a lawyer’s advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.” That seems like a dubious statement. The word “often” seems overdone. A word such as “occasionally” would almost surely have been more appropriate.

### **Virginia Rule 2.1 Comment [5]**

Virginia Rule 2.1 cmt. [5] addresses the timing of non-legal advice.

Virginia Rule 2.1 cmt. [5] begins by focusing on timing – explaining that “[i]n general, a lawyer is not expected to give advice until asked by the client.” The Virginia Rule Comment describes an exception: “lawyers’ duty to the client under [Virginia] Rule 1.4 may require that the lawyer act” if: (1) “the client’s course of action is related to the representation”; and (2) the “lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal, moral or ethical consequences to the client or to others.” Virginia Rule 1.4 addresses lawyers’ basic communication duty. In other words, lawyers may speak up if they see such a situation, rather than wait for clients to request their advice about the clients’ proposed course of action. Virginia Rule 2.1 cmt. [5]’s use of the word “act” seems odd. ABA Model Rule 2.1 cmt. [5] uses the term “offer advice”.

Virginia Rule 2.1 cmt. [5] then says essentially the same thing a different way. The Virginia Rule Comment explains that “a lawyer may initiate advice to a client when doing

so appears to be in the client’s interest” – although “[a] lawyer ordinarily has no duty to initiate investigation of a client’s affairs or to give advice that the client has indicated is unwanted.”

**ABA Model Rule 2.1 cmt. [5]** contains essentially the identical language as Virginia Rule 2.1 cmt. [5]. But there are some differences.

First, in contrast to Virginia Rule 2.1 cmt. [5]’s explanation that Virginia Rule 1.4 “may require that the lawyer act” if a client proposes a course of action “that is likely to result in substantial adverse legal, moral or ethical consequences to the client or others,” ABA Model Rule 2.1 cmt. [5] explains that lawyers may “offer advice” (not “act”) if clients propose a course of action that “is likely to result in substantial adverse legal consequences” (not “adverse legal, moral or ethical consequences”) to “the client” (not “to the client or to others”).

Second, in contrast to Virginia Rule 2.1 cmt. [2]’s discussion of ADR processes, ABA Model Rule 2.1 cmt. [5] includes a similar concept: “[w]hen a matter is likely to involve litigation, it may be necessary under [ABA Model] Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation.” As explained above, Virginia Rule 1.2 cmt. [1] requires lawyers to advise clients about ADR possibilities “that might be appropriate.”

# RULE 2.3

## Evaluation For Use By Third Persons

### Rule

#### Virginia Rule 2.3(a)

Virginia Rule 2.3(a) addresses lawyers' role as "evaluator."

Virginia Rule 2.3(a) explains that a lawyer "acts as an evaluator by examining a client's legal affairs and reporting about them to the client or to others." In other words, this role involves lawyers providing an evaluation rather than acting as an advocate, and may involve lawyers providing that evaluation to third persons. That differs dramatically from lawyers providing confidential private advice as advocates to their clients, and also has attorney-client privilege waiver implications.

**ABA Model Rule 2.3** does not contain a similar provision. As explained below, ABA Model Rule 2.3(a) is similar to Virginia Rule 2.3(b).

#### Virginia Rule 2.3(b)

Virginia Rule 2.3(b) addresses the process of lawyers' acting as evaluators.

Virginia Rule 2.3(b) explains that lawyers "may undertake an evaluation of a matter affecting a client for the use of someone other than the client," under certain specified conditions.

Somewhat surprisingly, Virginia Rule 2.3(b)'s role differs from the role defined in Virginia Rule 2.3(a). Virginia Rule 2.3(b) role is both narrower and possibly broader than the Virginia Rule 2.3(a) role.

First, under Virginia Rule 2.3(a), lawyers only examine “a client’s legal affairs.” A Virginia Rule 2.3(b) evaluation does not necessarily focus only on the client’s “legal affairs” or other client-centric matters. Instead, Virginia Rule 2.3(b) describes lawyers providing an “evaluation of a matter affecting a client.” Presumably, that would include any legal or non-legal matter – internal to the client or only “affecting” the client.

Second, a Virginia Rule 2.3(a) evaluation report might go to “the client or to others.” A Virginia Rule 2.3(b) evaluation goes to “someone other than the client.”

As explained below, Virginia Rule 2.3(b) allows lawyers to undertake such an evaluation under two conditions.

Virginia Rule 2.3 contains inconsistent definitions of what matters are covered by the lawyer/evaluator rule. Virginia Rule 2.3(a) describes lawyer/evaluators looking into “a client’s legal affairs.” That sounds internal. But Virginia Rule 2.3(b)’s introductory sentence describes lawyer/evaluators looking into “a matter affecting a client.” That seems to describe a much broader range of matters – and matches ABA Model Rule 2.3(a)’s use of the same phrase “a matter affecting a client.”

It can be useful to focus on the two actions that lawyer/evaluators undertake: (1) creation of the evaluation; and (2) disclosure of the evaluation to third parties. Virginia Rule 2.3(a) deals with both of those: lawyer/evaluators: (1) examine (and presumably create an evaluation of) “a client’s legal affairs”; and (2) “report[] about [the “legal affairs”] to “the client or to others.”

Virginia Rule 2.3(b) also combines those two actions. First, Virginia Rule 2.3(b)’s introductory sentence states that lawyers may “undertake” an evaluation (although using the different but presumably synonymous word “making” in Virginia Rule 2.3(b)(1)).

Second, Virginia Rule 2.3(b)'s introductory sentence makes it clear that such a lawyer's evaluation is created "for the use of someone other than the client" – which presumably means that the lawyer or the client will disclose the evaluation to the third party. Virginia Rule 2.3(b)(2) requires that clients consent to both the creation and the disclosure of the evaluation.

### **Virginia Rule 2.3(b)(1)**

Virginia Rule 2.3(b)(1) addresses the first condition under which "[a] lawyer may undertake an evaluation in a matter affecting a client for the use of someone other than the client."

Under Virginia Rule 2.3(b)(1), lawyers may undertake such an evaluation only if the lawyer "reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client." That compatibility condition makes sense, and is consistent with lawyers' general duties to their clients. Interestingly, Virginia Rule 2.3(b)(1) uses the phrase "making the evaluation," in contrast to Virginia Rule 2.3(b)'s introductory phrase "undertake an evaluation." Presumably, those two terms are intended to be synonymous.

**ABA Model Rule 2.3(a)** contains similar language as Virginia Rule 2.3(b)(1).

Like Virginia Rule 2.3(b)(1), ABA Model Rule 2.3(a) explains that lawyers may "provide" such an evaluation "for the use of someone other than the client" only if "the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client."

## **Virginia Rule 2.3(b)(2)**

Virginia Rule 2.3(b)(2) describes the second condition in which “[a] lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client.”

Under Virginia Rule 2.3(b)(2), the client must “consent[ ] after consultation.” The phrase “consents after consultation” represents the standard Virginia Rule formulation, which contrasts (at least in terminology) from the ABA Model Rule standard formulation “informed consent.” Presumably those two phrases are intended to be synonymous.

Virginia Rule 2.3(b)(2)’s client’s consent requirement seems critical, because a Virginia Rule 2.3(b) evaluation is designed “for the use of someone other than the client.” Lawyers normally provide advice and evaluations only to their client. It would also seem odd to require client’s consent to a lawyer “undertaking” an evaluation report. Clients would direct lawyers to do so, not “consent” to their doing so. So a consent requirement would seem appropriate only in the context of lawyers providing evaluations to third parties.

Virginia Rule 2.3(b) is potentially confusing. Virginia Rule 2.3(b)’s introductory sentence covers both the making (using the term “undertaking”) and the providing (“for the use of someone other than the client”) of a report. Virginia Rule 2.3(b)(1) focuses on the “making” – which lawyers may do if that is compatible with the lawyer’s duties to the client. Virginia Rule 2.3(b)(2) requires client consent, apparently both to the “making” (which should be obvious) and to the “providing” (which comes from the introductory sentence’s term “for the use of someone other than the client”).

**ABA Model Rule 2.3(a)** also addresses lawyers’ “evaluation of a matter affecting a client for the use of someone other than the client.”

In contrast to Virginia Rule 2.3(b)’s phrase “undertake an evaluation,” ABA Model Rule 2.3(a) uses the phrase “provide an evaluation.” Presumably these terms are not intended to be synonymous. A lawyer may “undertake” an evaluation without “provid[ing]” the evaluation to “someone other than the client.” Of course, the lawyer may provide the evaluation to the client as well.

In contrast to Virginia Rule 2.3(b)(2)’s requirement of client consent to lawyers’ “undertak(ing) an evaluation of a matter affecting a client for the use of someone other than the client,” ABA Model Rule 2.3(a) does not contain a client consent requirement. Instead, ABA Model Rule 2.3(b) contains a consent requirement in certain limited circumstances (discussed below).

Perhaps significantly, ABA Model Rule 2.3(a) describes two different lawyer actions: “provid[ing]” an evaluation and “making” an evaluation. One would have thought that the “making” would have come first, because that is a prerequisite for “providing” an evaluation “for the use of someone other than the client.” It is unclear whether ABA Model Rule 2.3(a) intends to differentiate between the “provid(ing)” and the “making.” And to make things somewhat more confusing, lawyers can “provide” evaluations to their client or the third parties. Presumably they would do the former before they do the latter. It would be strange to require client “consent” to do the former – lawyer-created documents or oral communications to their clients are required under ABA Model Rule 1.4 (among other rules).

**ABA Model Rule 2.3(b)** addresses client consent.

ABA Model Rule 2.3(b) requires clients' "informed consent" to lawyers "provid[ing] the evaluation" described in ABA Model Rule 2.3(a) – "[w]hen the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely."

ABA Model Rule 2.3(b) uses the standard ABA Model Rule formulation "informed consent" (which contrasts with the standard Virginia Rule phrase "consent after consultation").

This contrasts with Virginia Rule 2.3(b)(1)'s requirement that clients consent "after consultation" to such lawyers' evaluation of any type and at any time, not just when such evaluations may "materially and adversely" affect the clients' interests.

ABA Model Rule 2.3(b) seems inconsistent with ABA Model Rule 2.3(a). The latter describes circumstances in which lawyers may provide evaluations for some third party's use – only "if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client." That would seem to exclude a situation when the lawyer "knows or reasonably should know" that the evaluation "is likely to affect the client's interests materially and adversely."

Although ABA Model Rule 2.3(b) apparently permits such evaluations if the client consents, that type of harmful evaluation would seem to be entirely out of bounds – because such an evaluation would not be "compatible with other aspects of the lawyer's relationship with the client." Presumably the client's consent under ABA Model Rule 2.3(b) means that such evaluations would be "compatible" with other aspects of the lawyer's relationship with the client. If that were the meaning, one would have thought

that ABA Model Rule 2.3(a) would have mentioned the consent exception – instead of including the consent exception in a different ABA Model Rule provision.

It would have been clearer if ABA Model Rule 2.3(a) referred just to the “making,” and ABA Model Rule 2.3(b) referred just to the “providing.”

ABA Model Rule 2.3 deals separately with the creation and the disclosure, but in a confusing way. ABA Model Rule 2.3(a) begins with the explanation that lawyers may “provide” an evaluation (“for the use of someone other than the client” – thus presumably involving the disclosure of the evaluation to that third person) if the lawyer reasonably believes that “making the evaluation” is compatible with the lawyer’s relationship with the client. That seems to put the cart before the horse. It seems to say that lawyers may disclose the evaluation to a third party if creating the evaluation is compatible with the relationship with that client.

But ABA Model Rule 2.3(b) focuses only on the disclosure – which seems to have been addressed in ABA Model Rule 2.3(a). ABA Model Rule 2.3(b) explains that lawyers may not disclose their evaluation to third parties if it will adversely affect the client – unless the client consents. Unlike Virginia Rule 2.3, ABA Model Rule 2.3 does not require the client’s consent to the lawyer’s creation of the evaluation, but does require the clients’ consent to disclosing the evaluation to any third party – not just if the disclosure would harm the clients.

### **Virginia Rule 2.3(c)**

Virginia Rule 2.3(c) addresses confidentiality treatment of evaluation-related information.

Virginia Rule 2.3(c) explains that “information relating to the evaluation is . . . protected by [Virginia] Rule 1.6” – “[e]xcept as disclosure is required in connection with a report of an evaluation.”

The term “required” seems wrong. Lawyers are not “required” to provide their evaluations “for the use of someone other than the client.” They may do so only with the client’s consent under Virginia Rule 2.2(b)(2). Although the client’s consent might amount to “consent” to send the evaluation report (thus “requiring” the lawyer to follow the client’s direction. The word “authorized” (which ABA Model Rule 2.3(c) uses) is much more appropriate).

It also seems somewhat strange that Virginia Rule 2.3(c) would state that Virginia Rule 1.6’s confidentiality provision protects “information relating to the evaluation” except for required disclosure. One would think that Virginia Rule 1.6 would define whether such information deserves protection under that Virginia Rule. Some of it may, and some of it may not. But Virginia Rule 2.3(c) serves as a reminder that lawyers must always consider the Virginia Rule 1.6 confidentiality protection for “information gained in the professional relationship” (as defined in Virginia Rule 1.6(a)).

**ABA Model Rule 2.3(c)** contains essentially the same language as Virginia Rule 2.3(c).

In contrast to Virginia Rule 2.3(c)’s description of disclosure as “required,” ABA Model Rule 2.3(c) refers to disclosure that is “authorized.” ABA Model Rule 2.3(c)’s term seems more appropriate. Virginia Rule 2.3(b) and ABA Model Rule 2.3(a) do not require the lawyer to disclose the evaluation report – it simply “authorize[s]” the disclosure.” The client has the ultimate authority to require or prohibit such disclosure.



## Comment

### Virginia Rule 2.3 Comment [1]

Virginia Rule 2.3 cmt. [1] addresses lawyers' preparation of evaluations for disclosure to non-clients.

Virginia Rule 2.3 cmt. [1] begins by explaining that “[a]n evaluation may be performed at the client’s direction but for the primary purpose of establishing information for the benefit of third parties.”

This is the third description of what lawyers do during such evaluations. Virginia Rule 2.3(b)'s introductory sentence uses the phrase “undertake an evaluation.” Virginia Rule 2.3(b)(1) uses the phrase “making the evaluation.” Virginia Rule 2.3 cmt. [1] uses the phrase “evaluation may be performed.” All of those terms presumably are intended to be synonymous, but linguistic consistency would have made more sense.

The word “but” seems somewhat inappropriate. Its use seemed to signify some inconsistency between a client-directed evaluation’s creation and the evaluation’s “primary purpose of establishing information for the benefit of third parties.” But there is no inherent inconsistency. Clients direct their litigation lawyers to prepare court filings and other papers for disclosure to third parties, and clients direct their transaction lawyers to prepare proposed deal documents and supporting persuasive material. ABA Model Rule 2.3 cmt. [1] does not use this arguably inappropriate word “but.”

Virginia Rule 2.3 cmt. [1] then provides several examples: (1) “an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser,” (2) “an opinion concerning the title of property rendered...at the behest of a borrower for the information of a perspective lender;” (3) “an opinion

concerning the legality of the securities registered for sale under securities laws” (which “may be required by a government agency”); (4) “evaluation” . . . required by a third person, such as a purchaser of a business.”

**ABA Model Rule 2.3 cmt. [1]** contains similar language, and all of the same examples contained in Virginia Rule 2.3 cmt. [1]. But there are several differences.

First, in contrast to Virginia Rule 2.3 cmt. [1], ABA Model Rule 2.3 cmt. [1] does not contain the inappropriate word “but” in its first sentence (discussed above).

Second, in contrast to Virginia Rule 2.3 cmt. [1], ABA Model Rule 2.3 cmt. [1] states that evaluations may be performed either “at the client’s direction” or “when impliedly authorized in order to carry out the representation.” ABA Model Rule 2.3 cmt. [1] refers to ABA Model Rule 1.2, which states that lawyers “may take such action on behalf of the client as impliedly authorized to carry out the representation.” ABA Model Rule 1.2(a). Virginia Rule 2.3 cmt. [1] does not contain that implied authorization provision.

### **Virginia Rule 2.3 Comment [1a]**

Virginia Rule 2.3 cmt. [1a] addresses government lawyers’ formal legal opinions.

Virginia Rule 2.3 cmt. [1a] first explains that such government lawyers “may be called upon to give a formal opinion on the legality of contemplated government agency action.” Virginia Rule 2.3 cmt. [1a] then notes that when “making such an evaluation” (using one of the three terms Virginia Rule 2.3 uses to describe that process), a government lawyer “acts at the behest of the government as the client” – “but for the purpose of establishing the limits of the agency’s authorized activity.” As in Virginia Rule 2.3 cmt. [1], the term “but” seems inappropriate here. There is nothing inherently

inconsistent with the government (as the client) asking for a “formal opinion” that addresses a government agency’s limited “authorized activity.”

Still, it is unclear why a government lawyer would give a formal opinion “for the purpose of a establishing the limits of the agency’s authorized activity.” It would have been helpful if Virginia Rule 2.3 cmt. [1a] had provided examples.

Virginia Rule 2.3 cmt. [1a] next notes that such formal opinions are “to be distinguished from confidential legal advice given agency officials.”

Virginia Rule 2.3 cmt. [1a] concludes by noting that “[t]he critical question is whether the opinion is to be made public.” Presumably “legal advice given agency officials” is not to be made public, while “a formal opinion on the legality of contemplated government agency action” will be made public.

**ABA Model Rules 2.3** does not contain a similar provision.

### **Virginia Rule 2.3 Comment [2]**

Virginia Rule 2.3 cmt. [2] addresses the basic nature of evaluations, who orders them and who relies on them.

Virginia Rule 2.3 cmt. [2] begins by distinguishing a “legal evaluation” from “an investigation of a person with whom the lawyer does not have a client-lawyer relationship.” The Virginia Rules use various phrases to describe the relationship between a client and a lawyer: “client-lawyer relationship;” “lawyer-client relationship;” “attorney-client relationship.” Presumably all of those phrases are intended to be synonymous.

Virginia Rule 2.3 cmt. [2] then introduces additional confusion by using the word “investigation.” It is unclear whether an “investigation” is the same as a “legal evaluation.”

Normally, the lawyer’s investigation results would not be shared with a third person – but rather used to support the lawyer’s advice to her client.

Virginia Rule 2.3 cmt. [2] then provides an example: “a lawyer retained by a purchaser to analyze a vendor’s title to property does not have a client-lawyer relationship with the vendor.” That may be true, but seems to be a non sequitur. Although it is not very clearly stated, presumably that scenario (in which a purchaser retains a lawyer to analyze the vendor’s title) contrasts with the scenario in Virginia Rule 2.3 cmt. [1] – in which the vendor retains a lawyer to render an opinion about its own title that can be provided to the prospective purchaser. Virginia Rule 2.3 cmt. [2] does not explain the significance of that contrasting scenario.

The example would have made more sense if the scenario described in Virginia Rule 2.3 cmt. [1] and in Virginia Rule 2.3 cmt. [2] had the same client – the vendor. The vendor’s retention of a lawyer to provide an evaluation/opinion of its own title would fall under Virginia Rule 2.3 cmt. [1]. The vendor’s retention of a lawyer to investigate the prospective purchaser’s title would fall under Virginia Rule 2.3 cmt. [2]. Thus, Virginia Rule 2.3 cmt. [2]’s example of the purchaser’s lawyer analyzing the vendor’s property title misses the point. The Virginia Rule Comment should have explained whether such analysis is the sort of “evaluation” covered by Virginia Rule 2.3. The fact that the purchaser’s lawyer “does not have a client-lawyer relationship with a vendor” is a different issue.

Virginia Rule 2.3 cmt. [2] next mentions another example of an investigation that should be distinguished from a legal evaluation: “an investigation into a person’s affairs by a government lawyer, or by special counsel employed by the government.”

Virginia Rule 2.3 cmt. [2], explains that such an investigation “is not an evaluation as that term is used in this [Virginia] Rule [2.3].” Virginia Rule Comment then gets to the point: “[t]he question is whether the lawyer is retained by the person whose affairs are being examined.” If so, “the general rules concerning loyalty to client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else.” That seems to go without saying.

Virginia Rule 2.3 cmt. [2] concludes by emphasizing that “it is essential to identify the person by whom the lawyer is retained” – which “should be made clear not only to the person under examination but also to others to whom the results are to be made available.”

Virginia Rule 2.3 cmt. [2] (and the parallel ABA Model Rule 2.3 cmt. [2]) both seem to miss the most important point. The key issue would not seem to be “by whom the lawyer is retained,” but rather to whom the lawyer will provide the evaluation. Take the case of a property vendor and purchaser. A vendor can hire the lawyer to evaluate its own title. That lawyer would owe the loyalty and preservation of confidences that lawyers owe their clients. Or the vendor (the client) can retain the lawyer to analyze the vendor’s title for the benefit of the non-client purchaser. That seems to be the scenario described in Virginia Rule 2.3 cmt. [1]. All of the examples in Virginia Rule 2.3 (and ABA Model Rule 2.3) involve clients retaining lawyers to evaluate “a matter affecting a client” – in other words, the client.

Of course, Virginia Rule 2.3(a) contains another scenario not found in ABA Model Rule 2.3 – clients retaining lawyers to evaluate the client’s “legal affairs.” Under Virginia Rule 2.3(a), those evaluations can be provided to the client or to a non-client.

So contrary to Virginia Rule 2.3 cmt. [2]’s statement, the key question does not seem to be “whether the lawyer is retained by the person whose affairs are being examined.” Under Virginia Rule 2.3, that is always the client. If Virginia Rule 2.3 cmt. [2] was intended to describe completely different scenarios in which clients hire lawyers to investigate third parties, it could have been much clearer. And Virginia Rule 2.3 cmt. [2] should have avoided the whole purchaser/vendor scenario examples.

**ABA Model Rule 2.3 cmt. [2]** contains the identical language.

### **Virginia Rule 2.3 Comment [3]**

Virginia Rule 2.3 cmt. [3] addresses lawyers’ possible duties to the third person for whom the evaluation “is intended” or who may use the evaluations.

Virginia Rule 2.3 cmt. [3] first acknowledges that whether “a legal duty to that person may or may not arise” is a “legal question . . . beyond the scope of this Rule.”

Virginia Rule 2.3 cmt. [3] then makes the obvious point that “careful analysis of the situation is required” in such a scenario because “such an evaluation involves a departure from the normal client-lawyer relationship.” For this reason, Virginia Rule 2.3 cmt. [3] essentially repeats the requirement found in black letter Virginia Rule 2.3(b)(1) that “making the evaluation [must be] compatible with other functions undertaken in behalf of the client.” Virginia Rule 2.3 cmt. [3] provides an example: “if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction.”

That seems obvious. Among other things, such incompatible steps might trigger what is frequently called a “material limitation” conflict under Virginia Rule 1.7(a)(2). That

is because “there is a significant risk that the representation of one or more clients [in this situation, representation of the client defending against fraud charges] will be materially limited by the lawyer’s responsibilities to . . . a third person” – when the “others” for whom the lawyer performs the evaluation of the client’s conduct “concerning the same or a related transaction.”

Virginia Rule 2.3 cmt. [3] concludes by noting that in other situations where a lawyer’s evaluation for the benefit of a third person would be compatible with the lawyer’s relationship with the client, lawyers nevertheless “should advise the client of the implications of evaluation, particularly the lawyer’s responsibilities to third persons and a duty to disseminate the findings.” Presumably, such a lawyer’s contractual arrangements with such a “third person” will define the lawyer’s responsibility to that person, as well as the duty to “disseminate the findings.”

The word “findings” adds yet another word to define what Virginia Rule 2.3 covers. Presumably “findings” are synonymous with an examination “report[ ]” (Virginia Rule 2.3(a)), an “evaluation”) (Virginia Rule 2.3(b)); a “report of an evaluation” (Virginia Rule 2.3(c)); an “investigation” (Virginia Rule 2.3 cmt. [4]); the “results” of an examination (Virginia Rule 2.3 cmt. [2]).

**ABA Model Rule 2.3 cmt. [3]** contains the identical language.

#### **Virginia Rule 2.3 Comment [4]**

Virginia Rule 2.3 cmt. [4] addresses lawyers’ process of undertaking a Virginia Rule 2.3 evaluation.

Virginia Rule 2.3 cmt. [4] begins by noting the obvious point that an evaluation’s “quality . . . depends on the freedom and extent of the investigation upon which it is

based.” Using the term “investigation” here might be confusing, because Virginia Rule 2.3 cmt. [2] warns that “[a] legal evaluation should be distinguished from an investigation” (although the investigation referenced in Virginia Rule 2.3 cmt. [2] presumably differs from the type of “investigation” referred to in Virginia Rule 2.3 cmt. [4]). Still, using the word “investigation” can mean two very different activities, and the nearly successive Virginia Rule Comments could confuse lawyers trying to comply with Virginia Rule 2.3.

Virginia Rule 2.3 cmt. [4] next understandably explains that “[o]rdinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment.”

But Virginia Rule 2.3 cmt. [4] then notes that in some situations “the terms of the evaluation may be limited.” Virginia Rule 2.3 cmt. [4] provides several examples: (1) “certain issues or sources may be categorically excluded”; (2) “the scope of search may be limited by time constraints”; (3) “the scope of search may be limited by . . . the noncooperation of persons having relevant information.” Virginia Rule 2.3 cmt. [4] warns that any “such limitations which are material to the evaluation” should be “described in the report.”

Virginia Rule 2.3 cmt. [4] concludes by describing a scenario in which the client “refuses to comply with the terms upon which it was understood the evaluation was to have been made” – “after a lawyer has commenced an evaluation.” In that circumstance, “the lawyer’s obligations are determined by law, having reference to the terms of the client’s agreement and the surrounding circumstances.” It is unclear why Virginia Rule 2.3 cmt. [4] mentions this possibility. Presumably the Virginia Rule Comment’s reference to “law” does not refer to some extrinsic legal obligations, but rather to the law of contract

– which requires contractual parties to comply with their contract. It is also unclear what “the terms of the client’s agreement” means. Presumably that refers to the “client’s agreement” with a person who will receive the evaluation, not with the client’s lawyer.

**ABA Model Rule 2.3 cmt. [4]** contains the identical language.

In contrast to Virginia Rule 2.3 cmt. [4], ABA Model Rule 2.3 cmt. [4] also contains a warning that “[i]n no circumstances is the lawyer permitted to knowingly make a false statement of material fact or law in providing an evaluation under this Rule,” referring to ABA Model Rule 4.1. ABA Model Rule 4.1(a) explains that “[i]n the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person.” Of course, that principle should go without saying. Interestingly, ABA Model Rule 2.3 cmt. [4] does not also mention a provision that might be more likely in play – ABA Model Rule 4.1(b). That ABA Model Rule explains that “[i]n the course of representing a client, a lawyer shall not knowingly . . . fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by [ABA Model] Rule 1.6.”

#### **ABA Model Rule 2.3 Comment [5]**

Virginia did not adopt ABA Model Rule 2.3 cmt. [5].

ABA Model Rule 2.3 cmt. [5] addresses lawyers’ disclosure of their evaluation to a third person.

ABA Model Rule 2.3 cmt. [5] begins by bluntly stating that “[i]nformation relating to an evaluation is protected by [ABA Model] Rule 1.6.” Black letter Virginia Rule 2.3(c) also contains that language.

ABA Model Rule 2.3 cmt. [5] then notes that “[i]n many situations, providing an evaluation to a third party poses no significant risk to the client.” In those circumstances, “the lawyer may be impliedly authorized to disclose information to carry out the representation.” ABA Model Rule 2.3 cmt. [5] refers to ABA Model Rule 1.6(a), which identifies an exception to lawyers’ confidentiality duty if disclosing protected client confidential information is “impliedly authorized in order to carry out the representation.”

ABA Model Rule 2.3 cmt. [5] then explains that if “it is reasonably likely that providing the evaluation will affect the client’s interests materially and adversely,” the lawyer may not “provide” (presumably meaning disclose) the evaluation to a third person without “first obtain[ing] the client’s consent after the client has been adequately informed concerning the important possible effects on the client’s interests” – referring to ABA Model Rules 1.6(a) and 1.0(e). The former reference is to the client consent exception to the general confidentiality rule, and the latter defines “informed consent.”

### **Virginia Rule 2.3 Comment [6]**

Virginia Rule 2.3 cmt. [6] addresses lawyers’ responses to clients’ financial auditors.

Virginia Rule 2.3 cmt. [6] addresses the scenario in which a client refers to its lawyer “a question concerning the legal situation of a client” that “arises at the instance of the client’s financial auditor.” Not surprisingly, Virginia Rule 2.3 cmt. [6] explains that the procedure governing such lawyers’ response to client’s auditor “is set forth in the American Bar Association’s Statement of Policy Regarding Lawyers’ Responses to Auditors’ Requests for Information, adopted in 1975.” The ABA seems to have updated that Statement of Policy since then, but presumably lawyers would know that.

**ABA Model Rule cmt. [6]** contains the identical language.

# ABA MODEL RULE 2.4

## Lawyer Serving As Third-Party Neutral

### Rule

#### Virginia Rule 2.4

The Virginia Rules do not contain a Rule 2.4. Virginia instead discusses third-party neutrals in Rule 2.10.

#### ABA Model Rule 2.4

Because ABA Model Rule 2.4 addresses the same issues as Virginia Rule 2.10, this document includes its summary, analysis, and comparison of ABA Model Rule 2.4 in its discussion of Virginia Rule 2.10.

# RULE 2.10

## Third Party Neutral

Virginia Rule 2.10 addresses third party neutrals. The ABA Model Rules deal with lawyers serving as third party neutrals in ABA Model Rule 2.4, which Virginia did not adopt. Because ABA Model Rule 2.4 clearly parallels Virginia Rule 2.10, this document will summarize, analyze and compare ABA Model Rule 2.4 in this analysis of Virginia Rule 2.10.

### Rule

#### Virginia Rule 2.10(a)

Virginia Rule 2.10(a) addresses lawyers acting as third-party neutrals.

Virginia Rule 2.10 inexplicably leaves out the hyphen between “third” and “party” in both the black letter Rule provisions and the Comments. ABA Model Rule 2.4 correctly includes the hyphen.

Virginia Rule 2.10(a) notes that such a third-party neutral “does not represent any party.” Instead, a third-party neutral “assists parties in reaching a voluntary settlement of a dispute through a structured process known as a dispute resolution proceeding.”

Virginia Rule 2.10(a) does not name the specific types of “dispute resolution proceeding[s]” in which lawyers act as third-party neutrals. But Virginia Rule 2.10 cmt. [1] (discussed below) provides examples of such proceedings: “mediation, conciliation, early

neutral evaluation, non-binding arbitration and non-judicial settlement conferences.”

Significantly, that list does not include binding arbitration.

**ABA Model Rule 2.4(a)** describes essentially the same role. “[a] lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer.” In that role, the third-party neutral “assists [them] to reach a resolution of a dispute or other matter that has arisen between them.”

ABA Model Rule 2.4(a) next identifies the type of dispute resolution proceedings in which lawyers act as third-party neutrals. In contrast to Virginia Rule 2.10 cmt. [1]’s list of proceedings in which lawyers can serve as third-party neutrals, ABA Model Rule 2.4(a) describes the role that such third-party neutrals play – thus implicitly defining those proceedings. “an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.”

This overlaps with Virginia Rule 2.4 cmt [1]’s list. That list includes mediation and non-binding arbitration. The ABA Model Rule 2.4(a) description uses the term “arbitrator” – without distinguishing between binding and non-binding arbitration. The generic term presumably includes both kinds of arbitrations. As explained elsewhere, the Virginia Rules contain dramatically different individual and imputed disqualification standards for lawyers who had earlier served in different kinds of arbitrations (binding, non-binding and partisan).

### **Virginia Rule 2.10(b)**

Virginia Rule 2.10(b) addresses various requirements and prohibitions governing lawyers who serve as third-party neutrals.

First, such lawyers “shall inform the parties of the difference between the lawyer’s role as a third-party neutral and the lawyer’s role as one who represents the client.” Obviously that latter role does not describe the lawyer herself – who will be acting as a third-party neutral in the alternative dispute resolution proceeding. It would have been better if Virginia Rule 2.10(b)(1) had used a more generic term for lawyers’ representational role such as “lawyers” or even “a lawyer’s.” But presumably lawyers understand the meaning, and will explain those different roles to the alternative resolution proceeding participants.

Second, lawyers serving as third-party neutrals “shall encourage unrepresented parties to seek legal counsel before an agreement is executed.”

Third, such lawyers serving as third-party neutrals “may encourage and assist the parties in reaching a resolution of their dispute.” That seems obvious – because that is their role.

Fourth, lawyers serving as third-party neutrals “may not compel or coerce the parties to make an agreement.” That should also be obvious.

**ABA Model Rule 2.4(b)** addresses the same concept of third-party neutrals’ disclosure duty.

ABA Model Rule 2.4(b) describes two disclosures that contrast with Virginia Rule 2.10(b)’s required disclosure.

First, such third-party neutrals “shall inform unrepresented parties that the lawyer is not representing them.” This ABA Model Rule 2.4(b) disclosure requirement is more direct than Virginia Rule 2.10(b)(1)’s more abstract disclosure requirement. Presumably

such lawyers acting as third-party neutrals do not need to inform represented parties that the lawyer is not representing them.

Second, such lawyers acting as third-party neutrals “shall explain the difference between the lawyer’s role as a third party neutral and a lawyer’s role as one who represents a client.” But in contrast to Virginia Rule 2.4(b), lawyers acting as third-party neutrals must explain that difference only “[w]hen the lawyer knows or reasonably should know that a party does not understand the lawyer’s role in the matter.” Thus, the mandatory universal disclosure of that explanation in Virginia Rule 2.10(b)(1) does not appear in the ABA Model Rule.

Third, ABA Model Rule 2.4(b) does not contain the two other mandatory actions described in Virginia Rule 2.10(b)(2) (encouraging unrepresented parties to hire a lawyer) and Virginia Rule 2.10(b)(3) (helping the parties resolve their dispute).

Fourth, ABA Model Rule 2.4(b) does not include the prohibited action described in Virginia Rule 2.10(b)(4) (which understandably prohibits lawyers acting as third-party neutrals from coercing the parties into resolving their dispute.)

### **Virginia Rule 2.10(c)**

Virginia Rule 2.10(c) addresses lawyers’ qualifications to serve as third-party neutrals.

Virginia Rule 2.10(c) explains that lawyers may serve in that capacity only if they have “not previously represented and [are] not currently representing one of the parties in connection with the subject matter of the dispute resolution proceeding.” That probably goes without saying, because Virginia Rule 2.10(a) bluntly indicates that third-party neutrals do not represent any party. The prohibition on lawyers serving as third-party

neutrals in a matter in which they had previously represented one of the parties is only slightly less obvious.

**ABA Model Rule 2.4** does not contain such a provision.

### **Virginia Rule 2.10(d)**

Virginia Rule 2.10(d) addresses lawyers serving as third-party neutrals if they currently are or have in the past represented any of the dispute resolution proceeding parties in unrelated matters, or third-party neutrals serving if they had or are representing one of the parties in a related representation.

Virginia Rule 2.10(d) does not contain a per se prohibition on lawyers playing such a third-party neutral role. This contrasts with Virginia Rule 2.10(c)'s per se prohibition. But Virginia Rule 2.10(d) contains a list of conditions under which lawyers can play such a role.

First, under Virginia Rule 2.10(d)(1), such lawyers must make a “full disclosure of the prior or present representation.” Virginia Rule 2.10(d)(1)'s use of the term “present representation” contrasts with Virginia Rule 2.10(c)'s use of the probably preferable term “currently representing.”

Second, Virginia Rule 2.10(d)(2) requires such lawyers to “obtain[ ] the parties’ informed consent.” Virginia Rule 2.10(d)(2) uses the awkward phrase “in light of the disclosure” (presumably meaning the “full disclosure of the prior or present representation” identified in Virginia Rule 2.10(d)(1) that must precede the third-party neutral’s obtaining the parties’ informed consent). And the phrase also seems unnecessary. Presumably the required “informed consent” would include such disclosure – especially because it is explicitly included in the previous Rule provision. The term

“informed consent” is the ABA Model Rules’ standard formulation for that process. The standard Virginia Rule formulation is “consent after consultation.” The terms are presumably synonymous, but it would have made sense for the Virginia Rules to use a consistent formulation.

Third, under Virginia Rule 2.10(d)(3), a lawyer may serve as a third-party neutral only if she “reasonably believes that a prior or present representation will not compromise or adversely affect the ability to act as a third party neutral.” The phrase “compromise or adversely affect” seems repetitive. There is no materiality requirement, which is somewhat surprising. Virginia Rule 1.7(a)(2)’s “material limitation” conflict provision includes a materiality element – which would seem appropriate here too.

Fourth, under Virginia Rule 2.10(d)(4), a lawyer may serve as a third-party neutral role if “there is no unauthorized disclosure of information in violation of [Virginia] Rule 1.6.” Virginia Rule 1.6 is the core Virginia Rules’ confidentiality rule. That confidentiality provision makes sense. The prohibition on an “unauthorized disclosure” presumably means that the current or former client’s consent to the disclosure of such information would render it “authorized” rather than “unauthorized.” And technically, lawyers’ confidentiality duty to former clients is imposed by Virginia Rule 1.9, not Virginia Rule 1.6. So one would have thought that Virginia Rule 2.10(d)(4) would have referred to both rules, because it refers to both current and past representations. There is a no harm-no foul aspect to the absence of a Virginia Rule 1.9 reference. Virginia Rule 1.9(c)(1) explicitly refers to Virginia Rule 1.6 in describing the prohibition on lawyers’ disclosure of former clients’ protected client confidential information.

**ABA Model Rule 2.4** does not contain such a provision.

## **Virginia Rule 2.10(e)**

Virginia Rule 2.10(e) addresses the prohibition on third-party neutrals representing any of the alternative dispute resolution parties during or after the dispute resolution proceeding.

Virginia Rule 2.10(e) first bluntly states that “[a] lawyer who serves . . . as a third party neutral may not serve as a lawyer on behalf of any party to the dispute . . . .” As a linguistic matter, the phrase “serve as a lawyer” seems unusual. The Virginia Rules normally use the word “represent,” and that very sentence uses the term “represent” later. Presumably the term “serve as a lawyer” is synonymous with “represent.”

Presumably Virginia Rule 2.10(e)’s prohibition on third-party neutrals serving as lawyers is the other side of the Virginia Rule 2.10(c) coin. Virginia Rule 2.10(c) prohibits lawyers from acting as third-party neutrals if they are “currently representing one of the parties in connection with the subject matter of the dispute resolution proceeding.” Virginia Rule 2.10(e) applies the other way – prohibiting third-party neutrals from simultaneously “serv[ing] as a lawyer on behalf of any party to the dispute” That should be obvious. Presumably the term “any party to the dispute” extends beyond just the parties that are participating in the ADR. Thus, presumably third-party neutrals could not simultaneously advise one of the parties in connection with the ADR or its subject matter.

Virginia Rule 2.10(e) next turns to post-proceeding representations.

Virginia Rule 2.10(e) explains that “[a] lawyer who . . . has served as a third party neutral may not . . . represent one such party [to the dispute] against the other in any legal proceeding related to the subject of the dispute resolution proceeding.”

Virginia Rule 2.10(e)'s prohibition seems far too narrow. On its face, it would not prohibit such a third-party neutral from advising one of the ADR parties about such a later proceeding, or otherwise directing some other lawyer to “represent” the party in such a later “legal proceeding relating to the subject of a dispute resolution proceeding.” If it meant to prohibit such behind-the-scenes post-ADR representations, Virginia Rule 2.10(e) could have used the type of broader language contained in Virginia Rule 2.10(c): “in connection with the subject matter of the dispute resolution proceeding.” Or if Virginia Rule 2.10(e) was meant to focus on post-ADR legal proceedings, it could have used the type of broader language contained in Virginia Rule 8.5(b)(1): “in connection with a proceeding.” That type of language presumably would have prohibited representation related to the legal proceeding, but not “in” the legal proceeding.

This per se prohibition does not contain any exception if the alternative dispute resolution proceeding parties consent. This contrasts with Virginia Rule 2.10(d)(2)'s consent exception – allowing lawyers to act as third-party neutrals in an alternative dispute resolution proceeding if the lawyer is simultaneously representing or had previously represented one of the parties in an unrelated matter (with disclosure and consent).

**ABA Model Rule 2.4** does not contain a provision addressing such third-party neutrals representing one of the alternative dispute resolution parties.

There may be little if any significance to the absence in ABA Model Rule 2.4 of the prohibition on a third-party neutral simultaneously representing one of the parties in the alternative dispute resolution. That seems like common sense.

But the ABA Model Rules differ dramatically from the Virginia Rules in addressing third-party neutrals' later representation of one of the alternative dispute resolution proceeding's parties in the same or a substantially related matter. Black letter ABA Model Rule 2.4 does not address that scenario. But ABA Model Rule 2.4 cmt. [4] acknowledges that lawyers "who serve [ ] as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter." The ABA Model Rule Comment refers to ABA Model Rule 1.12 for guidance on such conflicts of interest "that arise for both the individual lawyer and the lawyer's law firm." This is discussed below.

### **Virginia Rule 2.10(f)**

Virginia Rule 2.10(f) addresses lawyers' possible withdrawal from their third-party neutral role.

Virginia Rule 2.10(f) first explains that such lawyers "shall withdraw" as a third-party neutral if: (1) "any of the requirements stated in this Rule is no longer satisfied"; or (2) "if any of the parties in the dispute resolution proceeding so requests." In other words, any of the dispute resolution proceeding parties can demand such lawyers' withdrawal from their third-party neutral role.

Virginia Rule 2.10(f) concludes with the requirement that "the third party neutral shall report the withdrawal to the authority issuing the referral," – "[i]f the parties are participating [in the alternative dispute resolution proceeding] pursuant to a court referral."

**ABA Model Rule 2.4** does not contain a similar provision.

### **Virginia Rule 2.10(g)**

Virginia Rule 2.10(g) addresses lawyers' fees in connection with their third-party neutral role.

Virginia Rule 2.10(g) explains that such third-party neutrals “shall not charge a fee contingent on the outcomes of the dispute resolution proceeding.” Virginia Rule 1.5(c) allows fees to be “contingent on the outcome of the matter for which the service is rendered,” but that Rule presumably covers lawyers' representing their clients in such a matter. Virginia Rule 2.10(a) clearly states that a third-party neutral “does not represent any party.”

**ABA Model Rule 2.4** does not contain a similar provision.

### **Virginia Rule 2.10(h)**

Virginia Rule 2.10(h) addresses joint representations.

Virginia Rule 2.10(h) explains that Virginia Rule 2.10 “does not apply to joint representation, which is covered by [Virginia] Rule 1.7.”

This is an odd provision, because Virginia Rule 2.10(a) bluntly states that “[t]he third party neutral does not represent any party.” Perhaps Virginia Rule 2.10(h) focuses on the possibility that a lawyer serving as a third-party neutral in a dispute resolution proceeding may simultaneously represent one of the parties in unrelated matters (under Virginia Rule 2.10(d)).

**ABA Model Rule 2.4** does not contain such a provision.

## Comment

### Virginia Rule 2.10 Comment [1]

Virginia Rule 2.10 cmt. [1] addresses the type of alternative dispute resolution proceedings covered by Virginia Rule 2.10.

Virginia Rule 2.10 cmt. [1] first makes the obvious point that Virginia Rule 2.10 contains the “conflicts of interest and other ethical guidelines” for lawyers who serve as third-party neutrals.

As explained above, Virginia Rule 2.10 cmt. [1] then lists examples of dispute resolution proceedings “that are conducted by a third party neutral” (preceded by the word “include”): “mediation, conciliation, early neutral evaluation, non-binding arbitration and non-judicial settlement conferences.” Two types of proceedings in that list raise issues.

First, the term “early neutral evaluation” is mentioned in Virginia Rule 2.10 cmt. [3]. That type of proceeding presumably differs from the scenario in which a lawyer representing a client provides an evaluation for others. Virginia Rule 2.3 addresses that separate situation.

Second, Virginia Rule 2.10 cmt. [1]’s reference to “non-binding arbitration” seems simple enough, but implicates one of the Virginia Rules’ most confusing elements. It is clear that the Virginia Rules treat binding arbitration and non-binding arbitration very differently. This distinction is confirmed by Virginia Rule 2.10 cmt. [5], discussed below, which bluntly states that “[a] third party neutral as defined in these Rules does not include a lawyer providing binding arbitration services” (referring to Code of Virginia Section 8.01-577 et seq.).

Significantly, the Virginia Rules treat both the individual and the imputed disqualification of arbitrators very differently depending on whether the arbitrators serve: (1) as a partisan arbitrator selected by a party in a multi-party arbitration panel scenario; (2) as a binding arbitration arbitrator; or (3) as a non-binding arbitration arbitrator. In its summary and analysis of Virginia Rule 1.12(a), this document addresses the Virginia Rules' complicated and potentially confusing treatment of those various arbitrators' individual and imputed disqualification.

**ABA Model Rule 2.4 cmt. [1]** addresses lawyers serving as third-party neutrals, and also lists the many variations in the roles they may play.

ABA Model Rule 2.4 cmt. [1] first recognizes that “[a]lternative dispute resolution has become a substantial part of the civil justice system.” ABA Model Rule 2.4 cmt. [1] then explains that lawyers may “represent[ ] clients in dispute-resolution processes,” and also “often serve as third-party neutrals.”

ABA Model Rule 2.4 cmt. [1] next defines “[a] third-party neutral [as] a person . . . who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction.” That essentially matches the Virginia Rule 2.10(a) definition. But in contrast to Virginia Rule 2.10 cmt. [1]’s list of examples of alternative dispute resolution proceedings in which lawyers serve as third-party neutrals (which include “mediation, conciliation, early neutral evaluation, non-binding arbitration and non-judicial settlement conferences”), ABA Model Rule 2.4 cmt. [1] lists third-party neutrals’ roles: “such as a mediator, arbitrator, conciliator or evaluator.”

The mediation and conciliation descriptions match Virginia Rule 2.10 cmt. [1]. Unlike the ABA Model Rules, the Virginia Rules contain an entirely separate rule

addressing mediators: Virginia Rule 2.11. Virginia Rule 2.10 cmt. [1]’s “non-binding arbitration” role is a subset of ABA Model Rule 2.4(1)’s “arbitrator” reference. ABA Model Rule 2.4 cmt. [1] does not include “early neutral evaluation” and “non-judicial settlement conferences.” And in contrast to Virginia Rule 2.10 cmt. [1], ABA Model Rule 2.10 cmt. [1] does contain another example of lawyers’ service as a third-party neutral: “evaluator.” Interestingly, ABA Model Rule 2.3 addresses evaluators, and does not describe them as third-party neutrals. The same is true in Virginia Rule 2.3, which also addresses evaluators. Presumably there are two types of evaluators: (1) one who represents a client “evaluating that client and then reports to the client or a third party (as described in Virginia Rule 2.3(a)) or (2) a third-party neutral (as described in Virginia Rule 2.10 cmt. [1] and in ABA Model Rule 2.3(a)). One would think that both Virginia Rule 2.10 and ABA Model Rule 2.4 would explain that difference.

ABA Model Rule 2.4 cmt. [1] concludes with explanation that “[w]hether a third party neutral serves primarily as a facilitator, evaluator, or decisionmaker depends on the particular process that is either selected by the parties or mandated by a court.”

Interestingly, the “evaluator” role thus appears in ABA Model Rule 2.4 cmt. [1]’s final sentence, and in the Comment’s earlier list. But that final sentence includes two other roles that are not included in the Comment’s list: “facilitator” and “decisionmaker.” A lawyer serving as a “facilitator” would seem to be playing a traditional third-party neutral role. But “decisionmaker” seems to define a very different role. Lawyers serving as a “decisionmaker” could act either in binding arbitration or non-binding arbitration. ABA Model Rule 2.4 cmt. [1] does not shed any light on that issue.

## **Virginia Rule 2.10 Comment [2]**

Virginia Rule 2.10 cmt. [2] addresses the issue of whether third-party neutrals' role constitutes the practice of law.

Virginia Rule 2.10 cmt. [2] first reminds lawyers serving as third-party neutrals under Virginia Rule 2.10 or as mediators under Virginia Rule 2.11 (a separate Rule which describes a mediator as a "third party neutral") that they are "engaged in the provision of a law-related service that may involve the application of a lawyer's particular legal expertise and skills." Presumably Virginia Rule 2.10 cmt. [2] uses the term "law-related," because such lawyers are not representing clients when undertaking those roles. Interestingly, Virginia did not adopt ABA Model Rule 5.7, which extensively deals with "law-related services."

Virginia Rule 2.10 cmt. [2] next explains that "[t]he standards set forth in this Rule . . . do not amount to a determination" that lawyers serving as third-party neutrals or as mediators are "engaged in the practice of law."

Virginia Rule 2.10 cmt. [2] concludes by explaining that such a determination "of whether a particular activity constitutes the practice of law is beyond the scope and purpose of these Rules." Perhaps Virginia Rule 2.10 cmt. [2] disclaims any such determination because of its possible effect on multijurisdictional practice, malpractice, etc. Otherwise, there seems to be little reason why it would matter whether such third-party neutrals or mediators are engaged in the practice of law.

**ABA Model Rule 2.4** does not contain a similar comment.

### **ABA Model Rule 2.4 Comment [2]**

Virginia did not adopt (either in Virginia Rule 2.10 or anywhere else) a comment similar to ABA Model Rule 2.4 cmt. [2].

ABA Model Rule 2.4 cmt. [2] first acknowledges that “[t]he role of a third-party neutral is not unique to lawyers.” ABA Model Rule 2.4 cmt [2] then notes that “in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases.”

ABA Model Rule 2.4 cmt. [2] then lists several possible sources of rules or guidance that may govern such third-party neutrals’ actions: (1) “court rules;” (2) “other law that appl[ies] either to third-party neutrals generally or to lawyers serving as third-party neutrals;” (3) “various codes of ethics, such as the Code of Ethics for Arbitrators and Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association, or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.”

That list confirms that ABA Model Rule 2.4 covers lawyers acting as arbitrators. Virginia Rule 2.10 cmt. [1] defines “non-binding arbitration” arbitrators as Virginia third-party neutrals, thus presumably excluding binding arbitration arbitrators. That same distinction appears in the disqualification and imputation disqualification rules in Virginia Rule 1.12 and elsewhere.

### **Virginia Rule 2.10 cmt. [3]**

Virginia Rule 2.10 cmt. [3] addresses third party neutrals’ provision of legal advice or neutral evaluations.

Virginia Rule 2.10 cmt. [3] first warns that lawyers “serving as third party neutral[s] shall not offer any of the parties legal advice” – noting that providing legal advice “is a function of the lawyer who is representing a client,” referring to the Virginia Rules Preamble. Virginia Rule 2.10 cmt. [3] then acknowledges that third-party neutrals may “offer neutral evaluations, if requested by the parties.” Virginia Rule 2.3 addresses evaluations, but Virginia Rule 2.3 applies to lawyers undertaking such evaluations on behalf of clients – whom such lawyer/evaluators presumably represent. This contrasts with Virginia Rule 2.10, which addresses lawyers acting as third-party neutrals rather than in a representational role representing a client.

Virginia Rule 2.10 cmt. [3] concludes by pointing to Virginia Rule 2.11 for the “[s]pecial provisions under which a lawyer-mediator can offer certain neutral evaluations.”

**ABA Model Rule 2.4** does not contain a similar Comment.

#### **ABA Model Rule 2.4 Comment [3]**

Virginia did not adopt ABA Model Rule 2.4 cmt. [3].

ABA Model Rule 2.4 cmt. [3] addresses third-party neutral lawyers’ disclosure obligations.

ABA Model Rule 2.4 cmt. [3] first acknowledges that nonlawyers may serve as third-party neutrals, but that “lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer’s service as a client representative.” ABA Model Rule 2.4 cmt. [3] then makes the unsurprising warning that “[t]he potential for confusion is significant when the parties are unrepresented in the process.”

ABA Model Rule 2.4 cmt. [3] next points to ABA Model Rule 2.4(b) as requiring a third-party neutral lawyer “to inform unrepresented parties that the lawyer is not representing them.” This essentially matches Virginia Rule 2.10(b)(1)’s disclosure duty, although that is not as clear as ABA Model Rule 2.4 cmt. [3]’s disclosure obligation.

ABA Model Rule 2.4 cmt. [3] then notes that “this information [about the absence of a representational relationship] will be sufficient” for “parties who frequently use dispute-resolution processes.” But ABA Model Rule 2.4 cmt. [3] then warns that “[f]or others, particularly those who are using the process for the first time, more information will be required.” In that situation, lawyers acting as third-party neutrals “should inform unrepresented parties of the important differences between the lawyer’s role as third-party neutral and a lawyer’s role as a client representative, including the inapplicability of the attorney-client evidentiary privilege.” This disclosure obligation essentially matches Virginia Rule 2.10(b)(1)’s disclosure obligation. That Virginia Rule on its face requires such disclosure to all parties, in contrast to ABA Model Rule 2.4 cmt. [3]’s obligation to make such a disclosure only to “unrepresented parties.” And Virginia Rule 2.10(b)(1) does not include the attorney-client privilege aspect of ABA Model Rule 2.10 cmt. [3]’s warning requirement.

ABA Model Rule 2.4 cmt. [3] concludes with the obvious point that “the extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.”

### **Virginia Rule 2.10 Comment [4]**

Virginia Rule 2.10 cmt. [4] points to Virginia Code Section 8.01-576.9 and 8.01-576.10 as governing the “[c]onfidentiality of information revealed in a dispute resolution process.

**ABA Model Rule 2.4** does not contain a similar Comment.

### **Virginia Rule 2.10 Comment [5]**

Virginia Rule 2.10 cmt. [5] confirms that “[a] third party neutral as defined in these [Virginia] Rules does not include a lawyer providing binding arbitration services.” Virginia Rule 2.10 cmt. [5] refers to Virginia Code Section 8.01.577 et seq. As mentioned above and as discussed in this document’s extensive summary and analysis of Virginia Rule 1.12(a), the Virginia Rules treat different types of arbitrators in very different ways.

**ABA Model Rule 2.4** does not contain a similar Comment.

### **Virginia Rule 2.10 Comment [6]**

Virginia Rule 2.10 cmt. [6] addresses conflicts of interest.

Virginia Rule 2.10 cmt. [6] explains that “the imputation of conflicts arising under paragraph (e) is addressed in [Virginia] Rule 1.10.” As explained above, Virginia Rule 2.10(e) indicates that a lawyer “who serves or has served as a third party neutral” may “not serve as a lawyer on behalf of any party to the dispute, nor represent one party against the other in any legal proceeding related to the subject of the dispute resolution proceeding.”

**ABA Model Rule 2.4 cmt. [4]** addresses third-party neutral lawyers’ later representation of parties to an earlier alternative dispute resolution process.

ABA Model Rule 2.4 cmt. [4] first points to ABA Model Rule 1.12 as addressing “[t]he conflicts of interest that arise for both the individual [third-party neutral] lawyer and the lawyer’s law firm” when such a third-party neutral lawyer “subsequently may be asked to serve as a lawyer representing a client in the same matter.”

Virginia deals with third-party neutrals’ post-ADR representations in several places. Virginia Rule 2.10(e) flatly prohibits lawyers who are serving or who have served as third-party neutrals from “serv[ing] as a lawyer on behalf of any party to the dispute, nor represent one such party against the other in any legal proceeding related to the subject of the dispute resolution proceeding.”

As mentioned above, and extensively addressed in this document’s summary and analysis of Virginia Rule 1.12(a), Virginia’s imputation of conflicts rules applicable to third-party neutrals is disjointed and confusing.

The ABA Model Rule approach seems far better, because a lawyer can find all of the disqualification and imputed disqualification guidance in the same place.

### **ABA Model Rule 2.4 Comment [5]**

Virginia did not adopt ABA Model Rule 2.4 cmt. [5].

ABA Model Rule 2.4 cmt. [5] addresses the role of lawyers representing parties in alternative dispute resolution proceedings.

ABA Model Rule 2.4 cmt. [5] seems somewhat out of place in ABA Model Rule 2.4 – whose title is “Lawyer Serving as Third-Party Neutral,” and whose very first sentence in ABA Model Rule 2.4(a) makes it clear that the Rule addresses lawyers who are “serv[ing] as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer” (emphasis added). Similarly, ABA Model Rule 2.4 cmt. [1] clearly

distinguishes between lawyers “representing clients in dispute-resolution processes” and lawyers acting as third-party neutrals (and who are therefore governed by ABA Model Rule 2.4).

ABA Model Rule 2.4 cmt. [5] itself confirms that “[l]awyers who represent clients in alternative dispute resolution processes are governed by the [ABA Model] Rules of Professional Conduct.”

Of course, even lawyers who act as third-party neutrals (and thus who do not represent any parties) in such alternative dispute-resolution processes are governed by some of the ABA Model Rules, such as those governing lawyers’ non-representational conduct (such as ABA Model Rule 8.4). Those and other ABA Model Rules apply to lawyers acting in non-representational and even in non-professional roles.

ABA Model Rule 2.4 cmt. [5] points to other rules and sources of guidance for lawyers who represent clients in dispute-resolution proceedings. First, such lawyers’ “duty of candor is governed by [ABA Model] Rule 3.3 “[w]hen the dispute-resolution process takes place before a tribunal. ABA Model Rule 2.4 cmt. [5] provides an example: “as in binding arbitration” (referring to ABA Model Rule 1.0(m)). Second, in other settings, “the lawyer’s duty of candor toward both the third-party neutral and other parties is governed by [ABA Model] Rule 4.1.” That ABA Model Rule addresses lawyers’ duty of honesty in a representational role.

# RULE 2.11

## Mediator

The ABA Model Rules do not contain a rule similar to the mediator – specific Virginia Rule 2.11.

### Rule

#### Virginia Rule 2.11(a)

Virginia Rule 2.11(a) addresses a particular kind of third-party neutral – a “lawyer-mediator.”

Virginia Rule 2.11(a) refers to Virginia Rule 2.10, which addresses lawyers who act as third-party neutrals. Rule 2.10 cmt. [1] describes proceedings in which lawyer third-party neutrals act (introduced by the word “include,” which means that the list is non-exclusive): “mediation, conciliation, early neutral evaluation, non-binding arbitration and non-judicial settlement conferences.”

Virginia Rule 2.11(a) deals with a third-party neutral conducting a “mediation.” The reference to Virginia Rule 2.10 and the inclusion in that Rule’s list of third-party neutral settings presumably mean that lawyer-mediators are governed by all of the Virginia Rule 2.10 provisions and prohibitions, in addition the mediator-specific provisions of Virginia Rule 2.11.

Virginia Rule 2.11(a) describes a lawyer-mediator as a third-party neutral “who facilitates communications between the parties and, without deciding the issue or imposing a solution on the parties, enables them to understand and resolve their dispute.”

This essentially matches the definition of third-party neutrals in Virginia Rule 2.10(a) and (b).

### **Virginia Rule 2.11(b)**

Virginia Rule 2.11(b) addresses the prerequisites for mediators to undertake and continue their role.

Virginia Rule 2.11(b) explains that mediators “should reasonably determine” if three prerequisites are met – both “[p]rior to agreeing to mediate and throughout the mediation process.” The prerequisites are: (1) “mediation is an appropriate process for the parties;” (2) party can participate “effectively” in the mediation process; and (3) “each party is willing to enter and participate in the process in good faith.”

### **Virginia Rule 2.11(c)**

Virginia Rule 2.11(c) addresses mediators’ offering of “legal information.”

Virginia Rule 2.11(c) first explains that mediators “may” offer such “legal information” in one of two circumstances: (1) “if all parties are present; or (2) “separately to the parties if they consent.”

Presumably, “legal information” is distinct from legal advice.” The former presumably involves what might be called “seminar” information that party could have obtained by consulting a textbook or professor, etc. As explained below, Virginia Rule 2.11 cmt. [7] explains that “[o]ffering legal information is an educational function” – which is consistent with generic rather than fact-specific advice. The latter focuses on advancing a party’s position, and usually involves suggestions about how to do so going forward.

Virginia Rule 2.11(c) next requires mediators to inform “unrepresented parties or those parties who are not accompanied by legal counsel about the importance of reviewing the lawyer-mediator’s legal information with legal counsel.” In other words, mediators must emphasize the importance of the parties consulting with their own lawyers, who can provide legal advice about a mediator’s legal information and any other aspect.

### **Virginia Rule 2.11(d)**

Virginia Rule 2.11(d) addresses mediators’ evaluations.

Virginia Rule 2.11(d) does not refer to Virginia Rule 2.3 – which focuses on evaluations. So presumably the evaluations mentioned in Virginia Rule 2.11(d) are different from those described in in Virginia Rule 2.3. Virginia Rule 2.3 evaluations involve lawyers’ representational role in evaluating a legal matter for a client – and then providing that evaluation to the client or to a third person who can rely on it. Under Virginia Rule 2.3, lawyers can undertake such an evaluation in their representational role if they believe that the evaluation “is compatible with other aspects of the lawyer’s relationship with the client,” and “the client consents after consultation.”

Virginia Rule 2.11(d) explains that mediators may offer a different type of evaluation. Of course, such mediators do not represent any parties to the mediation. Virginia Rule 2.11(d) explains that mediators may offer evaluations only under two conditions: (1) “if such evaluation is incidental to the facilitative role;” and (2) the evaluation “does not interfere with the lawyer-mediator’s impartiality or the self-determination of the parties.” Virginia Rule 2.11(d) provides three examples of the type of evaluation that mediators may offer if those two conditions are met: Mediators (1) “may

offer evaluation of, for example, strengths and weaknesses of positions;” (2) “assess the value and cost of alternatives to settlement;” or (3) “assess the barriers to settlement.”

### **Virginia Rule 2.11(e)**

Virginia Rule 2.11(e) addresses mediators’ required steps “[p]rior to the mediation session.” The reference to “the mediation session” seems to cover the mediation process generally rather than a specific session out of several mediation sessions. To that extent, it seems odd that the pre-mediation steps would be listed in Rule 2.11 after the Virginia Rule provisions describing what mediators may do during the mediation sessions or otherwise during the mediation: (1) “offer legal information” under Virginia Rule 2.11(c); and (2) “offer evaluation” under Rule 2.11(d).

Before “the mediation session,” a mediator must first consult with prospective mediation parties about four issues: (1) “the nature of the mediation process;” (2) “the limitations on the use of evaluation” referred to in Virginia Rule 2.11(b); (3) “the lawyer-mediator’s approach, style and subject matter expertise;” (4) “the parties’ expectations regarding the mediation process.”

The second of those four required consultation seems like a mismatch with the referenced Virginia Rule 2.11(d). That other Virginia Rule’s limitations are designed to limit the situations in which mediators may offer such evaluations (when the evaluations are “incidental to the facilitative role” and do not “interfere with the lawyer-mediator’s impartiality or the self-determination of the parties”). Thus, those limitations focus on the mediator’s ability to offer the evaluation, not “on the use of evaluation.”

Virginia Rule 2.11(e)(2) then requires that mediators “shall. . . enter into a written agreement to mediate.” The written agreement must “references the choice and

expectations of the parties.” The written references must include: “whether the parties have chosen, permit or expect the use of neutral evaluation or evaluative techniques during the course of the mediation.” The word “including” probably means that the written agreement may include other references. Presumably the reference to “neutral evaluation” means the type of evaluation described in Virginia Rule 2.11(d). Throughout black letter Virginia Rule 2.11 and its Comments, sometimes the word “evaluation” is preceded by the adjective “neutral,” but sometimes it is not. Presumably every evaluation by a mediator would be “neutral.”

### **Virginia Rule 2.11(f)**

Virginia Rule 2.11(f) addresses lawyer-mediators’ conduct of the mediation.

Not surprisingly, Virginia Rule 2.11(f) requires mediators to “conduct the mediation in a manner that is consistent with the parties’ choice and expectations.”

## Comment

### Virginia Rule 2.11 Comment [1]

Virginia Rule 2.11 [1] addresses the differences between lawyers' representational role and lawyers' role as a third-party neutral mediator.

Virginia Rule 2.11 cmt. [1] first confirms that “[a] lawyer-mediator . . . does not represent any of the parties to the mediation.” The Virginia Rule Comment then warns that mediators “should not assume” that several listed “traditional lawyering functions” for lawyers who represent clients are appropriate in the mediation role: “[o]ffering assessments, evaluations, and advice.”

Virginia Rule 2.11 cmt. [1] concludes by noting that those functions “are not specifically prohibited” in the Virginia Rule 2.11(a) definition of mediation,” (described as the “statutory definition”). However, the Virginia Rule Comment explains that such “an evaluative approach which interferes with the parties’ self-determination and the mediator’s impartiality would be inconsistent with this definition of mediation.” In other words, the mediator’s evaluations and assessments should not be so heavy-handed as to render the mediator partial, or interfere with the parties’ ability to work out their dispute. But it does seem odd that Virginia Rule 2.11 cmt. [1] warns about the potential danger of evaluations – after explicitly approving them (under certain conditions) in Virginia Rule 2.11(d).

### **Virginia Rule 2.11 Comment [2]**

Virginia Rule 2.11 cmt. [2] addresses both the risks and possible rewards of evaluations.

Virginia Rule 2.11 cmt. [2] first acknowledges the difficulty of “[d]efining mediation to exclude an evaluative approach,” because “no consensus exists as to what constitutes an evaluation,” and because “practice varies widely.” This statement is not very encouraging or helpful, because Virginia Rule 2.11 repeatedly mentions evaluations. And an entire Virginia ethics rule (Virginia Rule 2.3) deals with evaluations (although admittedly those are for third persons’ use). In addition, the mediators’ “attitude and style” (as well as the evaluations’ “context”) can affect evaluations’ effect on the mediation process.

Virginia Rule 2.11 cmt. [2] provides two examples of possible evaluations. First, a mediator’s question to a party “might be considered by some as ‘reality testing’ and facilitative, might be viewed by others as evaluative.” In contrast, a “facilitative mediator’s” evaluation “could help free the parties from the narrowing effect of the law and help empower them to resolve their dispute.” Both of these examples seem so abstract and philosophical that they provide no real useful guidance lawyer-mediators seeking to comply with their ethical duties.

### **Virginia Rule 2.11 Comment [3]**

Virginia Rule 2.11 cmt. [3] addresses the mediation parties’ “informed consent” to “the particular approach, style and subject matter expertise of the lawyer-mediator.”

Virginia Rule 2.11 cmt. [3] refers to mediation parties as “mediator clients,” which seems inapt. Lawyer-mediators do not have “clients” in the mediation, so the term “mediation clients” presumably refers to clients represented by lawyers in the mediation.

Most of the third-party neutral Rules and Comments use the word “parties,” which is much more appropriate. Virginia Rule 2.10(a) confirm that a third-party neutral “does not represent any party.” Of course, that includes mediators, who do not represent any party. In addition, Virginia Rule 2.11(c) itself acknowledges that some of the mediation parties may be “unrepresented.”

Virginia Rule 2.11 cmt. [3] next lists the issues that should be the subject of the mediator’s “consultation” with the mediation parties (1) “the nature of the mediation process;” (2) “the limitations on evaluation;” (3) “the lawyer-mediator’s approach, style and subject matter expertise; and (4) “the parties’ expectations regarding the mediation process.” This list matches black letter Virginia Rule 2.11(e), essentially word for word.

Because the preceding Virginia Rule 2.11 cmt. [2] acknowledges that “no consensus exists as to what constitutes an evaluation,” consulting with the client about “the limitations on evaluation” presumably could not be very effective. But Virginia Rule 2.11 cmt. [3] continues to address evaluations, claiming that the mediator “shall explain the risk that evaluation might interfere with mediator impartiality and party self-determination” – “[i]f the parties request an evaluative approach.”

Virginia Rule 2.11 cmt. [3] then confirms that the mediator and the parties must sign “a written agreement to mediate which reflects the choice and expectation of the parties.” As with other portions of Virginia Rule 2.11 cmt. [3], this language essentially

mirrors black letter Virginia Rule 2.11(e)(2). Not surprisingly, the mediator “shall then conduct the mediation” as the parties agreed.

Virginia Rule 2.11 cmt. [3] concludes by analogizing this process “to the lawyer-client consultation about the means to be used in pursuing a client’s objectives in [Virginia] Rule 1.2.” That analogy seems inappropriate. Lawyers in a representational role who consult with their clients “about the means to be used in pursuing a client’s objectives” act in a fiduciary capacity, which involves higher duties than a mediator’s contractual agreement with the mediation parties. And in the former situation, the client possesses the sole power to select a representation’s objectives, subject of course to ethical and legal constraints. In contrast, mediation parties negotiate over the role that their mediator will play, with neither party possessing the unilateral power to define the mediator’s role.

#### **Virginia Rule 2.11 Comment [4]**

Virginia Rule 2.11 cmt. [4] addresses the situation in which the mediator is “willing and able to offer evaluation during the mediation process” while meeting Virginia Rule 2.11(e)’s requirements.

Under Virginia Rule 2.11 cmt. [4], mediators have “a continuing responsibility . . . to assess the situation and consult with the parties before offering or responding to a request for an evaluation (referring to Virginia Rule 2.11(b) and (d)). Virginia Rule 2.11 cmt. [4] then essentially paraphrases black letter Virginia Rule 2.11(d)’s duty to assess the risks and benefits of such evaluations.

Virginia Rule 2.11 cmt. [4] concludes with another risk of such mediator evaluations – “the parties may miss out on opportunities to maintain or improve relationships or to create a higher quality and more satisfying result.”

### **Virginia Rule 2.11 Comment [5]**

Virginia Rule 2.11 cmt. [5] addresses additional considerations mediators may consider about using evaluations in the mediation process.

Virginia Rule 2.11 cmt. [5] implicitly acknowledges the downside of evaluations identified in Virginia Rule 2.11 cmt. [4] but then explains that “[o]n the other hand,” such evaluations may “help[] the parties reach agreement, especially when the most important issues are the strengths or weaknesses of legal positions, or the significance of commercial or financial risks.”

Virginia Rule 2.11 cmt. [5] concludes with examples of situations where such mediator evaluations may be beneficial: (1) “after parties have worked at possible solutions and have built up confidence in the mediator’s impartiality;” or (2) “where widely divergent party evaluations are major barriers to settlement.”

### **Virginia Rule 2.11 Comment [6]**

Virginia Rule 2.11 cmt. [6] addresses the effect of mediation parties’ lawyers’ presence.

Virginia Rule 2.11 cmt. [6] begins by noting that such lawyers’ presence “offers additional protection in minimizing the risk of a poor quality evaluation and of too strong an influence on a parties’ self-determination.” In other words, mediation parties’ lawyers can help their clients avoid mediators’ “poor quality evaluation,” and ensure that the mediator does not interfere with the mediation parties’ “self-determination.” Black letter Virginia Rule 2.11(d) explicitly indicates that avoiding such interference is a prerequisite to mediators’ evaluations.

Virginia Rule 2.11 cmt. [6] concludes that “in certain cases . . . the most appropriate way to assure that the parties are making fully informed decision” is to couple any evaluations “with a reminder to the parties that the evaluation is but one of the factors to be considered as they deliberate on the outcome.” One would think that even fairly unsophisticated mediation parties would understand this.

### **Virginia Rule 2.11 Comment [7]**

Virginia Rule 2.11 cmt. [7] addresses the difference between legal advice and the sort of “legal information” that mediators may provide to the mediation parties under Virginia Rule 2.11(c), and then return to the topic of “evaluations.”

Virginia Rule 2.11 cmt. [7] first confirms “that mediators shall not offer any of the parties legal advice.” However, mediators “may offer legal information” – which “is an educational function which aids the parties in making informed decisions.”

Virginia Rule 2.11 cmt. [7] then subtly shifts to another topic – back to evaluations, which are addressed in the preceding Virginia Rule 2.11 cmt. [6]. Virginia Rule 2.11 cmt. [7] provides examples of what the Virginia Rule Comment calls “[n]eutral evaluations in the mediation process:” “opining as to the strengths and weaknesses of positions, assessing the value and costs of alternatives to settlement or assessing the barriers to settlement.” That precise language appears in Virginia Rule 2.11(d).

Virginia Rule 2.11 cmt. [7] is a confusing mixture of completely different topics. The first three sentences focus on “legal advice” (which mediators may not provide) and “legal information” (which mediators may provide under certain conditions). But for some reason the final sentence again addresses evaluations, which is repeatedly discussed in the preceding Comments.

### **Virginia Rule 2.11 Comment [8]**

Virginia Rule 2.11 cmt. [8] addresses the prohibition on mediators being too heavily handed a role in the mediation.

Virginia Rule 2.11 cmt. [8] first explains that mediators “shall not:” (1) “make decisions for any party to the mediation process;” or (2) “use a neutral evaluation to coerce or influence the parties to settle their dispute or to accept a particular solution to their dispute.” That seems obvious.

Virginia Rule 2.11 cmt. [8] concludes by pointing to Virginia Rule 2.11(d), (e) and (f) as “restrict[ing] the use of evaluative techniques” by the mediator to two permissible situations: (1) “where the parties have given their informed consent to the use of such techniques;” and (2) “where a neutral evaluation will assist, rather than interfere with the ability of the parties to reach a mutually agreeable solution to their dispute.” As with the many preceding Comments’ discussions of neutral evaluations, Virginia Rule 2.11 cmt. [8] essentially repeats the exact points made in black letter Virginia Rule 2.11 and its other Comments. In other words, there really is nothing new.

### **Virginia Rule 2.11 Comment [9]**

Virginia Rule 2.11 cmt. [9] addresses (again) the basic nature of mediation, and its possible benefits.

Virginia Rule 2.11 cmt. [9] begins with an odd reference to Virginia Rule 1.7 – acknowledging that “a lawyer is cautioned in [Virginia] Rule 1.7 regarding the special considerations in common representation.” Virginia Rule 2.11 cmt. [9] then explains that those “should not deter a lawyer-mediator from accepting clients for mediation.”

One might wonder where that concept came from. Virginia Rule 1.7 addresses conflicts facing lawyers who represent clients. Lawyer-mediators do not “accept[ ] clients for mediation.” In fact, the very next sentence in Virginia Rule 2.11 cmt. [9] itself confirms that “[i]n mediation, a lawyer-mediator represents none of the parties.” Virginia Rule 2.10(a) similarly emphasizes that a “third party neutral does not represent any party.”

Perhaps the reference to Virginia Rule 1.17 is an attempt to analogize the challenges facing lawyers representing multiple clients in a “common representation” to the challenges facing a mediator who does not represent any of the mediation parties but deals with multiple people. If that is the intent, the analogy is a horrible one. Lawyers representing multiple clients face a completely different set of ethical duties (involving loyalty, confidentiality, conflicts, etc.) from a lawyer-mediator assisting some other lawyer’s clients or an unrepresented person in trying to resolve a dispute.

Virginia Rule 2.11 cmt. [9] then shifts gears, and explains that mediators “should be trained to deal with strong emotions.”

Virginia Rule 2.10 cmt. [9] concludes by noting that mediation “can be especially useful in a case where communication and relational breakdown have made negotiation or litigation of legal issues more difficult.”

### **Virginia Rule 2.11 Comment [10]**

Virginia Rule cmt. [10] cites several Virginia Code sections as governing the “[c]onfidentiality of information revealed in the mediation process.” Virginia Code § 8.01-576.9, 8.01-576.10; 8.01-581.22.

# RULE 3.1

## Meritorious Claims And Contentions

### Rule

#### Virginia Rule 3.1

Virginia Rule 3.1 addresses the prohibition on lawyers' impermissibly frivolous litigation positions.

Virginia Rule 3.1 begins with a blunt prohibition – stating that lawyers “shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous.” Thus, Virginia Rule 3.1's prohibition applies to lawyers asserting or defending a claim. It seems odd to refer to a lawyer “bring[ing] . . . a proceeding.” Presumably, lawyers “initiate” a proceeding.

Virginia Rule 3.1 then turns to lawyers' conduct once the proceeding is started – explaining that lawyers in that setting “shall not . . . assert or controvert an issue therein.” As with the awkward formulation mentioned above, lawyers generally are not referred to as “assert[ing] or controvert[ing] an issue (emphasis added).” Lawyers “assert” or “controvert” a claim, a defense, etc. But the meaning seems clear.

Virginia Rule 3.1 next explains a condition under which lawyers may engage in the otherwise prohibited conduct: “unless there is a basis for doing so that is not frivolous.” Virginia Rule 3.1 provides an example of such a non-frivolous basis: “which includes a good faith argument for an extension, modification or reversal of existing law.” In other words, lawyers do not automatically violate Virginia Rule 3.1 by refusing to follow existing

law. Interestingly, the standard for such refusal is defined as “a good faith argument.” This is a different standard than the one identified in the earlier part of that sentence, which describes a different standard: “not frivolous.” Presumably this means that lawyer’s “argument for an extension, modification or reversal of existing law” does not violate Virginia Rule 3.1 even if it is “frivolous” – as long as the lawyer acts in “good faith.” This seems like a mismatch of standards. The word “frivolous” seems to focus on objective legal strength or weakness. The term “good faith” seems to focus on lawyers’ motivation. In other words, determining if some action is “frivolous” addresses an extrinsic standard based on law. The term “good faith” standard presumably addresses lawyers’ internal emotional impetus.

The phrase “extension, modification or reversal of existing law” covers the gamut of what such lawyers may freely argue if they act in “good faith.”

Virginia Rule 3.1 concludes by addressing the special circumstances involving lawyers in the criminal (or analogous) context. Virginia Rule 3.1 mentions “[a] lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration.” The former setting seems obvious. The latter proceeding presumably applies to analogous situations – perhaps civil proceedings in which the client faces incarceration. Lawyers in either setting “may nevertheless so defend the proceeding as to require that every element of the case be established.” That should be axiomatic. Of course lawyers can defend the proceeding (criminal or civil) so as to require” that the adversary satisfy “every element” of what the adversary must establish. Presumably that statement does not only allow such lawyers to stand by while the adversary meets its burden of proof, but instead presumably also allows such lawyers to take some affirmative

steps in defending their clients. Perhaps those affirmative steps involve denying the adversary's accusations that are factually accurate, etc. This Virginia Rule 3.1 concluding sentence does not seem to focus on law, but rather on facts.

**ABA Model Rule 3.1** is similar to Virginia Rule 3.1.

Among other things, ABA Model Rule 3.1 contains the same awkward wording referring to lawyers who “bring . . . a proceeding,” the axiomatic concluding sentence, etc.

But ABA Model Rule 3.1 differs from Virginia Rule 3.1 in one way. In contrast to Virginia Rule 3.1's mention of “a basis” that is not frivolous, ABA Model Rule 3.1 has a lengthier phrase: “a basis in law and fact.” Because Virginia Rule 3.1 does not contain either of those extra words, its more generic term “basis” presumably includes both law and fact.

## Comment

### Virginia Rule 3.1 Comment [1]

Virginia Rule 3.1 cmt. [1] addresses lawyers' duty not to abuse the legal system, while acknowledging the law's flexibility and evolution.

Virginia Rule 3.1 cmt. [1] begins by acknowledging that "[t]he advocate has a duty to use legal procedure for the fullest benefit of the client's cause." Presumably the term "advocate" is intended to be synonymous with the term "lawyer" contained in black letter Virginia Rule 3.1. The "advocate's" duty presumably includes Virginia Rule 1.1's "competence" duty and Virginia Rule 1.2's "diligence" duty.

Virginia Rule 3.1 cmt. [1] then articulates a condition: "but [the "advocate"] also has a duty not to abuse legal procedure."

Virginia Rule 3.1 cmt. [1] next turns to the law – describing both its importance and its changeability. Virginia Rule 3.1 cmt. [1] understandably states that "[t]he law, both procedural and substantive, establishes the limits within which an advocate may proceed." That should go without saying. The Virginia Rule Comment then acknowledges that "[h]owever, the law is not always clear and is never static." That should also go without saying.

Virginia Rule 3.1 cmt. [1] concludes by acknowledging that "in determining the proper scope of advocacy, account must be given of the law's ambiguities and potential for change." This concept presumably frees lawyers to enhance imaginative arguments based on such "ambiguities" and seek "change" in the law. The latter presumably matches black letter Virginia Rule 3.1's explanation that lawyers may freely advance "a good faith argument for an extension, modification or reversal of existing law."

Of course, courts have their own way of handling lawyers' attempts to exploit ambiguities or seek changes in the law. If such lawyers' freedom was complete, no lawyer would ever face sanctions for advancing frivolous legal argument, seeking to overturn established law, etc. To be sure, lawyers facing such sanctions usually have ignored inescapable facts rather than ignored existing law. But even on the law side, lawyers presumably would face court sanctions if they flatly argued for the interpretation of a law that differs dramatically from an interpretation recently articulated by a controlling court. Legal ethics opinions and commentators have explained that analyzing lawyers' freedom to seek changes in the law focus on the recency of courts' interpretation of that law, any changes in society or the legal environment that might justify such a new approach, and even the changing membership in a multi-member court. One needs look no further than United States Supreme Court decisions overturning crystal clear precedent to highlight lawyers' freedom to seek changes in the law.

Of course, Virginia Rule 3.1 addresses lawyers' possible exposure to professional discipline for such actions. Presumably those lawyers are more likely to face professional discipline for advancing frivolous factual rather than frivolous legal arguments – much as courts address this issue in the same way.

**ABA Model Rule 3.1 cmt. [1]** is essentially identical to Virginia Rule 3.1 cmt. [1]. In contrast to Virginia Rule 3.1 cmt. [1]'s phrase "is never static," ABA Model Rule 3.1 cmt. [1] uses the phrase "never is static."

## **Virginia Rule 3.1 Comment [2]**

Virginia Rule 3.1 cmt. [2] addresses lawyers' pursuit of or continuation of arguably frivolous or losing legal or factual arguments.

Virginia Rule 3.1 cmt. [2] begins by addressing the possible frivolous nature of “[t]he filing of an action for defense or similar action taken for a client.” This identification awkwardly uses the word “action” to mean two entirely separate things. Virginia Rule 3.1 cmt. [2]’s first use of the word “action” presumably refers to a cause of action that the lawyer files (in contrast to the lawyer’s “defense” of such a cause of action. Five words later, Virginia Rule 3.1 cmt. [2]’s second use of the phrase “similar action” presumably refers to a broader type of conduct – although Virginia Rule 3.1 cmt. [2] does not explain what “action” might be “similar” to the “filing of an action or defense.” This potentially confusing dual use of the word “action” continues in Virginia Rule 3.1 cmt. [2], as explained below.

Virginia Rule 3.1 cmt. [2] next explains that such a step “is not frivolous merely because the facts have not first been fully substantiated.” This makes sense. Lawyers frequently must file or defend lawsuits with portions of the assertions or defenses made “on information and belief.” Virginia Rule 3.1 cmt. [2] then provides an example of such lawyers’ conduct that is “not frivolous:” “because the lawyer expects to develop vital evidence only by discovery.” Of course “vital evidence” is a subset of “necessary” evidence. And normally, when lawyers use the phrase “through discovery” rather than “by discovery. But the meaning seems clear.

Virginia Rule 3.1 cmt. [2] then turns to another situation in which “[s]uch action is not frivolous.” The word “action” in this setting presumably refers either to “[t]he filing of

an action,” or the undefined “similar action” mentioned in the preceding sentence – probably the latter. Virginia Rule 3.1 cmt. [2] states that “[s]uch action is not frivolous even though the lawyer believes that the client’s position ultimately will not prevail.” This also makes sense. Lawyers may and frequently do assert affirmative claims or defend claims hoping to win, but not expecting to win.

Virginia Rule 3.1 cmt. [2] then changes direction – explaining when such “action is frivolous.” The word “action” used in this sentence presumably includes the same conduct mentioned earlier in the Virginia Rule Comment. Virginia Rule 3.1 cmt. [2] explains that “[t]he action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person.”

This seems like a mismatch with Virginia Rule 3.1’s principles.

First, it seems odd to determine whether a lawyer’s action is frivolous or not based on the client’s “desires.” In determining whether a legal or factual assertion or defense is “frivolous” presumably focuses on the law and the facts, not on the client’s “desires” to cause some collateral effect on “a person.”

Virginia Rule 4.4 focuses on lawyers’ “means.” Such “means” clearly differ from clients’ and lawyers’ objectives. Virginia Rule 1.2 clearly makes that distinction. So it might be despicable for clients to direct their lawyers to file an undeniably non-frivolous and completely legally supportable claim because “the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person.” But the lawyer complying with such client direction presumably does not violate the ethics rule. There might be some tortious remedy such as malicious prosecution, etc. – but those torts normally require more than just the client’s blameworthy “desire.”

Second, even if that was a factor, labeling some lawyer’s action “frivolous” because the client “desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person” establishes a different standard from pertinent Virginia Rule 4.4. Virginia Rule 4.4(a) prohibits lawyers from “us[ing] means that have no substantial purpose other than to embarrass, delay, or burden a third person.” The “no substantial purpose” standard differs at least linguistically (and presumably substantively) from the “primarily” standard.

Virginia Rule 3.1 cmt. [2] then provides another – more appropriate and logical – example of an “action” that is “frivolous:” “if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.” That example at least properly focuses on facts and the law, rather than on the client’s “desires.” But there seems to be another mismatch with black letter Virginia Rule 3.1. The black letter Virginia Rule applies what amounts to an objective standard for judging lawyers’ conduct under current law (and presumably under known facts), but in contrast applies a more subjective “good faith” standard to lawyers’ argument “for an extension, modification or reversal of existing law.” Virginia Rule 3.1 cmt. [2] applies the more subjective good faith standard for judging the lawyers’ “argument on the merits of the action taken.” Of course, black letter Virginia Rule 3.1’s objective standard trumps Virginia Rule 3.1 cmt. [2]’s more subjective standard for this part of the analysis.

Virginia Rule 3.1 cmt. [2]’s concludes with another example that matches black letter Virginia Rule 3.1 – considering “frivolous” the lawyer’s conduct if the lawyer “is

unable . . . to make a good faith argument to an extension, modification or reversal of existing law.”

**ABA Model Rule 3.1 cmt. [2]** contains some of the same language as Virginia Rule 3.1 cmt. [2].

For instance, ABA Model Rule 3.1 cmt. [2]’s first sentence uses the word “action” in the same potentially confusing way as the Virginia Rule Comment, uses the phrase “vital evidence” (which seems under-inclusive) and uses the phrase “by discovery” rather than the more ordinarily-used “through discovery.”

ABA Model Rule 3.1 cmt. [2] also contains the assurance that lawyers’ conduct is not frivolous “even though the lawyer believes that the client’s position ultimately will not prevail.” The ABA Model Rule Comment also contains the mismatch between black letter ABA Model Rule 3.1’s objective standard for determining if “there is a basis in law and fact for doing so that is not frivolous” and the ABA Model Rule Comment’s statement that lawyers’ conduct is “frivolous” “if the lawyer is unable . . . to make a good faith argument on the merits of the action taken.” As explained above, the “good faith” standard presumably is a more subjective standard.

ABA Model Rule 3.1 cmt. [2] differs from Virginia Rule 3.1 cmt. [2] in two significant ways.

First, in contrast to Virginia Rule 3.1 cmt. [2], ABA Model Rule 3.1 cmt. [2] contains an explanation of what lawyers must affirmatively do: “[w]hat is required of lawyers, however, is that they inform themselves about the facts of their clients’ cases and the applicable law and determine whether they can make good faith arguments in support of their client’s positions.” Interestingly, this ABA Model Rule 3.1 cmt. [2] sentence (which

Virginia Rule 3.1 cmt. [2] does not contain) seems to apply the subjective “good faith arguments” both to lawyers’ associations of existing law and the known facts – in contrast to black letter ABA Model Rule 3.1’s limitation of the subjective “good faith” standard to lawyers’ efforts to change the law. Presumably black letter ABA Model Rule 3.1’s more objective standard trumps the more subjective “good faith” standard articulated in ABA Model Rule 3.1 cmt. [2].

Second, in contrast to Virginia Rule 3.1 cmt. [2], ABA Model Rule 3.1 cmt. [2] does not contain the seemingly inappropriate explanation that lawyers’ conduct is frivolous “if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person.” As explained above, the client’s “desire” or motivation would seem to have no place in determining whether lawyers’ conduct is “frivolous.”

### **ABA Model Rule 3.1 cmt. [3]**

Virginia did not adopt ABA Model Rule 3.1 cmt. [3].

ABA Model Rule 3.1 cmt. [3] addresses constitutional law’s implications in judging lawyers’ actions.

ABA Model Rule 3.1 cmt. [2] notes that “[t]he lawyer’s obligations under [ABA Model Rule 3.1] are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or a contention that otherwise would be prohibited by [ABA Model Rule 3.1]. “This presumably gives criminal defense lawyers some leeway in asserting defenses that might come close to (or perhaps even cross) the line into frivolous territory. ABA Model Rule 3.3 (and Virginia Rule 3.3) primarily address those scenarios.

# ABA MODEL RULE 3.2

## Expediting Litigation

Virginia did not adopt ABA Model Rule 3.2.

### Rule

#### ABA Model Rule 3.2

ABA Model Rule 3.2 addresses lawyers' litigation tactics.

ABA Model Rule 3.2 bluntly states that lawyers “shall make reasonable efforts to expedite litigation consistent with the interests of the client.”

ABA Model Rule 3.2 thus recognizes that lawyers owe their primary duty to their clients. So the requirement to “expedite litigation” is conditional. ABA Model Rule 3.2 also only requires lawyers to “make reasonable efforts” to expedite the litigation – further weakening the mandate to “expedite litigation.”

## Comment

### ABA Model Rule Comment [1]

ABA Model Rule 3.2 addresses lawyers' obligation to "make reasonable efforts to expedite litigation consistent with the interests of the client."

ABA Model Rule 3.2 cmt. [1] begins with a statement that "[d]ilatory practices bring the administration of justice into disrepute."

ABA Model Rule 3.2 cmt. [1] then acknowledges that "there will be occasions when a lawyer may properly seek a postponement for personal reasons." Presumably, the term "postponement" refers to litigation, although the preceding sentence does not mention litigation – instead referring more broadly to "the administration of justice." There can be no "postponement" of "the administration of justice."

ABA Model Rule 3.2 cmt. [1] next explains that despite lawyers' occasional appropriate postponement requests "for personal reasons," "it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates." Inclusion of the word "routinely" presumably means that lawyers may occasionally fail to expedite litigation" for that purpose.

ABA Model Rule 3.2 cmt. [1]'s phrase "convenience of the advocates" seems odd. First, that sentence contains the commonly-used word "lawyer." Presumably the later-used word "advocates" is intended to be synonymous. But deliberately using two different words to mean the same thing in the same sentence might generate confusion. Second, ABA Model Rule 3.2 cmt. [1] contains the singular "a lawyer" in describing improper postponement conduct "for the convenience of the advocates" (using the plural). Presumably "a lawyer" would not "fail to expedite litigation" for the convenience of both

“advocates.” So perhaps the singular would have been more appropriate (and if the plural was more appropriate, using the plural word “lawyers” would have been more consistent linguistically).

ABA Model Rule 3.2 cmt. [1] next understandably explains that a failure to expedite” will not be “reasonable if done for the purpose of frustrating an opposing party’s attempt to obtain rightful redress or repose” (emphasis added). It seems clumsy to say that “a failure to expedite” can be “done” for a specified purpose. The phrase “motivated by” or some other similar phrase would seem more appropriate.

ABA Model Rule 3.2 cmt. [1] next warns that “[i]t is not a justification [for an improperly-motivated “failure to expedite”] that similar conduct is often tolerated by the bench and bar.” In other words, lawyers may not point to custom or normal course of conduct in failing to expedite litigation.

ABA Model Rule 3.2 cmt. [1] explains that “[t]he question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay.” It seems odd to pose the analysis as a “question.” And the delay issue does not seem to focus on lawyers’ “competence.” Competence focuses on lawyers’ skills – not the motivation for certain litigation strategies. The term “course of action” seems inappropriate at first blush, because delay normally involves a course of “inaction.” Presumably the phrase “course of action” is intended to be synonymous with lawyers’ tactics or strategy.

ABA Model Rule 3.2 cmt. [1] concludes with warning that “[r]ealizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.” Although it might be appropriate to make that statement about “otherwise

improper delay,” it would seem to be “a legitimate interest of the client” to seek a “benefit” (financial or otherwise) from litigation delay. A lawyer representing a tenant about to be evicted obviously benefits his client by delaying the eviction. It is unclear what the term “otherwise improper delay” means. Unfortunately, ABA Model Rule 3.2 cmt. [1] does not provide any guidance about that phrase.

# RULE 3.3

## Candor Toward The Tribunal

### Rule

#### Virginia Rule 3.3(a)(1)

Virginia Rule 3.3(a)(1) addresses lawyers' duty of candor toward tribunals – specifically focusing on lawyers' own statements to the tribunals.

Virginia Rule 3.3(a)(1) prohibits lawyers from “knowingly . . . mak[ing] a false statement of fact or law to a tribunal.”

The prohibition on lawyers making knowingly false statements of law to a tribunal makes sense. But arguably the flat prohibition on any knowingly false statements of fact to a tribunal might be considered overbroad. On its face, this prohibition even includes immaterial facts. For instance, a judge who has just redecorated her chambers might ask lawyers during an in-chambers conference whether they like the new decoration. A lawyer who thinks that the decoration is hideous presumably would feel socially obligated to say that he likes it – even though that is a knowingly false statement. The same dilemma presents itself if the judge asks lawyers whether her clerk was courteous to them. Responding lawyers might feel compelled to answer in the affirmative, even if the clerk was rude. As a practical matter, such “little white lie” social niceties never seem to cause any ethics crisis.

Significantly, as explained below, Virginia Rule 3.3(a)(1) does not contain ABA Model Rule 3.3(a)(1)'s requirement that lawyers correct material statements of law or fact they previously made to a tribunal thinking them to be true, but which they later find to have been false.

Virginia Rule 3.3(a)(1)'s flat prohibition on knowingly making “a false statement of fact or law to a tribunal” parallels Virginia Rule 4.1(a)'s prohibition on a lawyer “knowingly . . . mak[ing] a false statement of fact or law” “[i]n the course of representing a client.” Of course, that Virginia Rule 4.1(a) prohibition is far broader than the tribunal-related prohibition in Virginia Rule 3.3(a)(1).

Virginia Rule 8.4(c) similarly warns that “[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” That prohibition is broader even than Virginia Rule 4.1(a)'s prohibition on false statements of fact or law while representing a client, and thus far broader than Virginia Rule 3.3(a)(1)'s tribunal-related prohibition. Virginia wisely added a clause at the end of Virginia Rule 8.4(c) that is not found in the parallel ABA Model Rule 8.4(c): “which reflects adversely on the lawyer’s fitness to practice law.” That Virginia Rule clause prevents the ludicrous effect of the unconditional language in ABA Model Rule 8.4(c) – which, on its face would render it “professional misconduct” to lie to a spouse about whether you like his meatloaf, whether he looks a bit heavy in his new suit, etc.

It is remarkable that Virginia did not include in its Virginia Rule 3.3(a)(1) a requirement that lawyers correct any material statements of fact or law they made to a tribunal thinking them to be true, but which they later found to have been false. Absent some other ethics provisions requiring such disclosure, the absence of that correction

duty might allow lawyers to innocently channel a client’s knowingly false statement of fact to a tribunal, and then prohibit the lawyer from correcting that statement if the client confesses that it was false (or the lawyer otherwise learns that it was false when the lawyer made it).

There are some candidates for such a correction duty.

One candidate for a disclosure duty is Virginia Rule 3.3(a)(2) – which prohibits lawyers from “knowingly . . . fail[ing] to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client.” As also explained below, that presumably would require lawyers to correct any statements that they channeled from their client to the tribunal – if such statements constituted “a criminal or fraudulent act by the client.” That is a fairly high standard, but presumably might apply to require lawyers’ correction of egregious misstatement of fact that the lawyers passed along to a tribunal thinking it to be true, but which they later found to have been false.

Unfortunately, Virginia Rule 3.3(d) is not a candidate. Unlike ABA Model Rule 3.3(b) (which parallels Virginia Rule 3.3(d)), Virginia Rule 3.3(d) only requires lawyers to disclose to a tribunal fraud on that tribunal by “a person other than a client.” The parallel ABA Model Rule 3.3(b) includes clients’ fraud on a tribunal.

Perhaps a candidate for such a correction duty can be found in Virginia Rule 4.1(b). Virginia Rule 4.1(b) requires lawyers to “disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.” Lawyers might be able to point to that generic duty to speak up if they find themselves having been used by a client to convey false statements of fact to a tribunal that they thought were truthful when made to the tribunal.

Another candidate for a disclosure duty is Virginia Rule 8.4(c) (discussed above).

Any of these possible disclosure candidates still seem to leave a gap in Virginia Rule 3.3(a)(1) – because such a fact-based correction duty does not address a lawyer’s “statement of . . . law to a tribunal” that the lawyer made thinking it to be true, but which the lawyer later learns to have been false. Those are much less likely to come from the client than from the lawyer’s own oversight. Lawyers looking for a correction duty in that scenario might point to Virginia Rule 3.3(a)(3) – which is discussed below. But that duty only applies to “controlling legal authority in the subject jurisdiction.” In other words, it would not independently require a lawyer to correct some statement to the tribunal about law that is not “controlling legal authority in the subject jurisdiction” – but which the lawyer made to the tribunal thinking it to be true but which the lawyer later learns to have been false.

All in all, it is surprising that Virginia did not adopt the ABA Model Rule 3.3(a)(1) correction duty.

**ABA Model Rule 3.3(a)(1)** contains the identical prohibition as Virginia Rule 3.3(a)(1) – prohibiting a lawyer from “knowingly . . . mak[ing] a false statement of fact or law to a tribunal.”

As discussed above, ABA Model Rule also includes a prohibition not found in Virginia Rule 3.3(a)(1): “knowingly . . . fail[ing] to correct a false statement of material fact or law previously made to the tribunal by the lawyer.”

Thus, under ABA Model Rule 3.3(a)(1) lawyers may never make a knowingly false statement of fact or law to a tribunal – even if it is an immaterial false statement of fact or law. But lawyers who later find that their previous statement to the tribunal was false

when they made it need only correct their earlier statements of “material fact or law” (emphasis added). This distinction makes sense. If a judge asks a lawyer where she parked, the lawyer would be prohibited from knowingly lying to the judge about where she parked. But if the lawyer responds with what she thought at the time was a truthful answer, and later learns that she had parked in a different place, it does not make sense for the ethics rules to impose a duty that the lawyer correct such an immaterial statement of fact to the tribunal.

### **Virginia Rule 3.3(a)(2)**

Virginia Rule 3.3(a)(2) addresses lawyers’ silence if their silence would have ill effects.

As explained above, Virginia Rule 3.3(a)(2) prohibits lawyers from knowingly “fail[ing] to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent by the client” (emphasis added). Virginia Rule 3.3(a)(2) therefore may require lawyers’ correction of a previous factual statement the lawyer made to the court, and later learns to have been false. This possible duty to speak implicitly adopts the approach ABA Model Rule 3.3(a)(1) takes in imposing such a correction requirement (in ABA Model Rule 3.3(a)(1)). The disclosure requirement is also similar (but much more limited) to the non-tribunal correction requirement in Virginia Rule 4.1(b). Under Virginia Rule 4.1(b), in the course of representing clients lawyers shall not knowingly “fail to disclose a fact when a disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.” Unlike ABA Model Rule 4.1(b), Virginia Rule 4.1(b) does not contain an exception for disclosure prohibited by Virginia Rule 1.6’s confidentiality duty. Thus,

Virginia Rule 4.1(b)'s generic disclosure requirement is broader than generic ABA Model Rule 4.1(b)'s disclosure requirement, because there is no Virginia Rule 1.6 exception.

### **Virginia Rule 3.3(a)(3)**

Virginia Rule 3.3(a)(3) focuses on lawyers' silence in the face of their knowledge of certain adverse legal authority.

Virginia Rule 3.3(a)(3) indicates that “[a] lawyer shall not knowingly . . . fail to disclose to the tribunal controlling legal authority in the subject jurisdiction known to the lawyer to be adverse to the position of the client and not disclosed by opposing counsel” (emphasis added).

As explained above, Virginia Rule 3.3(a)(1) and parallel ABA Model Rule 3.3(a)(1) both prohibit lawyers' knowingly “false statement of . . . the law to a tribunal.” In contrast, Virginia Rule 3.3(a)(3) forces lawyers to speak up in those circumstances, in contrast to Virginia Rule 3.3(a)(1)'s prohibition on them knowingly making a false affirmative statement of law. As explained below, the Virginia Rule 3.3(a)(3) duty to speak differs significantly from the parallel ABA Model Rule's requirement, and the requirement found in most states.

Importantly, Virginia Rule 3.3(a)(3) requires that the lawyer “knows” of the adverse authority. In other words, Virginia Rule 3.3(a)(3) does not have a “know or should have known” negligence standard.

**ABA Model Rule 3.3(a)(2)** addresses the same basic concept as Virginia Rule 3.3(a)(3), but with a different description of the legal authority that lawyers must disclose if they know of it.

ABA Model Rule 3.3(a)(2) warns that “[a] lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel” (emphasis added).

ABA Model Rule 3.3(a)(2) thus contains the phrase “legal authority in the controlling jurisdiction,” rather than Virginia Rule 3.3(a)(3)’s phrase “controlling legal authority in the subject jurisdiction.”

It is unclear whether Virginia intended a different duty, but the language difference between Virginia Rule 3.3(a)(3) and ABA Model Rule 3.3(a)(2) might apply differently in a multi-judge tribunal. In such a setting, an opinion by a judge other than the judge handling the lawyer’s case presumably would be “legal authority in the controlling jurisdiction” – but would not be “controlling legal authority in the subject jurisdiction.” Thus, a lawyer complying with the ABA Model Rule 3.3(a)(2) would have such a disclosure duty, but a lawyer applying Virginia Rule 3.3(a)(3) apparently would not have an ethics duty to disclose that other judge’s opinion.

#### **Virginia Rule 3.3(a)(4)**

Virginia Rule 3.3(a)(4) addresses lawyers’ offering of “evidence” – rather than: (1) their own statements of fact or law to the tribunal; (2) their failure to disclose facts to the tribunal; or (3) their failure to disclose law to the tribunal.

Virginia Rule 3.3(a)(4) prohibits lawyers from “knowingly” “offer[ing] evidence that the lawyer knows to be false.” Not surprisingly, Virginia Rule 3.3(a)(4) thus prohibits lawyers from knowingly offering false evidence even if it is not material. This is similar to

Virginia Rule 3.3(a)(1)'s total prohibition on lawyers knowingly making even an immaterial "false statement of fact or law to a tribunal."

Virginia Rule 3.3(a)(4) next states that "[i]f a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures."

This basic concept implicates several subtle issues.

First, the word "knows" when used in advance of lawyers' offering of evidence or lawyers' later discovery of falsity after they have offered the evidence means actual knowledge. Under the Virginia Terminology, the word "knows" is defined as "denot[ing] actual knowledge of the fact in question" (although such "knowledge may be inferred from circumstances). Thus, the standard for lawyers' offering or correcting earlier evidence does not rest on a negligence "should have known" standard.

Second, Virginia Rule 3.3(a)(4) takes the opposite approach as Virginia Rule 3.3(a)(1) to lawyers' statements to a tribunal. As explained above, Virginia Rule 3.3(a)(1) prohibits lawyers' false statements of fact or law to a tribunal – even immaterial statements of fact or law. But that Virginia Rule does not require lawyers to correct even material statements of "fact or law to a tribunal" if the lawyers find out that the statements were false when the lawyer made them thinking them to be true. In contrast, Virginia Rule 3.3(a)(4) contains a remedial requirement. Virginia Rule 3.3(a)(4) thus takes the same approach as ABA Model Rule 3.3(a)(1) and ABA Model Rule 3.3(a)(3) – which prohibit lawyers from engaging in knowing misconduct in making statements of fact or law to a tribunal or offering evidence – but only requiring remedial action in those two scenarios if the statements of fact or law or the evidence were "material."

Virginia Rule 3.3(a)(4) applies the same standard as the rule governing lawyers' offering of evidence. In other words, lawyers may never offer evidence they know in advance is false, but they must only take remedial action if they offered "material" evidence that they later learn to have been false. Given the far more important role of evidence than lawyers' statements in the tribunal setting, one might have expected that Virginia would have applied a per se remedial approach in the evidence rule, although not in the earlier rule governing lawyers' statements to the tribunal. In other words, one might have expected that Virginia would have required lawyers to take some remedial steps to correct even false immaterial evidence – given the difficulty of determining what effect even such false immaterial evidence might have had on a jury or even a judge.

Third, the requirement that lawyers "take reasonable remedial measures" if they come to know that material evidence they have offered was false certainly does not give much guidance to those lawyers. What are "reasonable remedial measures"? Working through Virginia Rule 3.3's Comments, lawyers probably will come to the conclusion that if all else fails such "reasonable remedial measures" require disclosure to the tribunal of the false evidence. But it would have been far more useful for that "bottom line" conclusion to be in the black letter rule rather than hidden in complicated and lengthy Comments. Although ABA Model Rule 3.3(a)(3)'s addition of the phrase "if necessary, disclosure to the tribunal" is not extremely helpful, but at least it salutes that possibility – in contrast to Virginia Rule 3.3(a)(4)'s more succinct and less useful phrase "shall take reasonable remedial measures." That phrase does not even reference a possible duty of disclosure to the tribunal.

Fourth, Virginia Rule 3.3(a)(4) requires such “reasonable remedial measures” if a lawyer has “offered material evidence” that the lawyer later learns was false (emphasis added). It is unclear what the term “offered” means. For instance, has a lawyer cross-examining the adversary or hostile witness “offered” the responses as evidence? The same question might be asked if the lawyer moves for the admission of an adversary’s documents into evidence to use in such cross-examination. It would seem that those steps might constitute “offering” evidence. Thus, the Virginia Rule’s “remedial measures” duty could conceivably include evidence that the lawyer has offered through examination of a witness called by another party’s lawyer. Virginia Rule 3.3 cmt. [10] mentions testimony by “the lawyer’s client, or another witness.” Perhaps that limitation limits the lawyer’s disclosure duty to those scenarios.

As explained below, ABA Model Rule 3.3(a)(3) includes in the black letter rule that limitation on the remediation duty – if “the lawyer’s client, or a witness called by the lawyer” has offered material false testimony. So Virginia Rule 3.3(a)(4) may impose lawyers’ remediation duty to a broader range of evidence than ABA Model Rule 3.3(a)(3).

**ABA Model Rule 3.3(a)(3)** also addresses presentation of evidence.

Like Virginia Rule 3.3(a)(4), ABA Model Rule 3.3(a)(3) first prohibits lawyers from knowingly offering evidence that is false, even if that evidence is immaterial.

But ABA Model Rule 3.3(a)(3) differs in three ways from Virginia Rule 3.3(a)(4).

First, in contrast to Virginia Rule 3.3(a)(4), ABA Model Rule 3.3(a)(3) applies the “remedial measures” duty only if a lawyer or “the lawyer’s client, or a witness called by the lawyer” has offered material evidence the lawyer later learns to be false.

Second, in contrast to Virginia Rule 3.3(a)(4), ABA Model Rule 3.3(a) includes the following phrase after mentioning “reasonable remedial measures: “including, if necessary, disclosure to the tribunal.” The shorter Virginia Rule 3.3(a)(4) version represents the older ABA Model Rule formulation. As explained below, Virginia Rule 3.3 cmt. [10] explains that when all else fails the required “remedial measures” must include disclosure to the tribunal. So the “bottom line” seems to be the same under the Virginia Rules as under the ABA Model Rules. If there is no other way for the lawyer to correct the “taint” caused by their offering of material false evidence, the lawyer must correct the false evidence through disclosure to the tribunal. Black letter ABA Model Rule 3.3(a)(3) includes that “bottom line,” but Virginia Rule 3.3(a)(4) does not.

Third, ABA Model Rule 3.3(a)(3) explains that a lawyer “may refuse to offer evidence . . . that the lawyer reasonably believes is false – but with an exception: “other than the testimony of a defendant in a criminal matter.” Black letter Virginia Rule 3.3(a)(3) does not contain either the general approach or the exception. Instead, Virginia deals with the general approach in Virginia Rule 3.3(b) and the criminal context in Virginia Rule 3.3 cmt. [11] and elsewhere.

### **Virginia Rule 3.3(b)**

Virginia Rule 3.3(b) addresses lawyers’ refusal to present certain evidence.

Virginia Rule 3.3(b) assures that lawyers “may refuse to offer evidence that the lawyer reasonably believes is false.”

This is a permissive standard – allowing lawyers to refuse their clients’ direction to present evidence that the lawyer “reasonably believes is false.” Thus, the standard differs from that in Virginia Rule 3.3(a) – all the provisions of which deal with lawyers’ actual

knowledge. The obvious corollary of that approach is that a lawyer may present evidence that he “reasonably believe” is false. Virginia Rule 3.3 cmt. [8] states the principle explicitly: “[a] lawyer’s reasonable belief or suspicion that evidence is false does not preclude its presentation to the trier of fact.” Some lawyers may find that this ability somewhat surprising. But the adversarial system is presumed to “smoke out” such falsity through cross examination or other means. And of course many lawyers would not face such a dilemma, because they would worry (or know) that a clever adversary’s cross-examination will “smoke out” the falsity – damaging the lawyer’s client’s credibility. For instance, a lawyer whose client wants to present an entirely implausible scenario as an excuse in some civil case presumably will convince the client not to do so – because during cross-examination the client will be shown to be untrustworthy and thus unsympathetic. On its face, the discretion described in Virginia Rule 3.3(b) applies in both civil and criminal cases (in contrast to parallel ABA Model Rule 3.3(a)(3)).

**ABA Model Rule 3.3(a)(3)** contains the same basic principal: “[a] lawyer may refuse to offer evidence . . . that the lawyer reasonably believes is false.” In contrast to Virginia Rule 3.3(b), black letter ABA Model Rule 3.3(a)(3) contains an exception: “other than the testimony of a defendant in a criminal matter.”

### **Virginia Rule 3.3(c)**

Virginia Rule 3.3(c) addresses lawyers in ex parte proceedings.

Significantly, Virginia Rule 3.3 cmt. [14] explains that the term “ex parte proceedings do not include grand jury proceedings or proceedings which are non-adversarial, including various administrative proceedings in which a party chooses not to appear.” Presumably the term likewise excludes other proceedings in which the

adversary does not show up – either unintentionally or intentionally. New York City LEO 2019-1 (2/4/19) similarly stated that lawyers’ disclosure duty in ex parte proceedings “does not apply to proceedings in which an opposing party appears pro se or is absent by choice.” Instead, the duty “applies only to proceedings in which, for practical or legal reasons, only one side has an opportunity to present its case.”

Virginia Rule 3.3(c) requires lawyers in an ex parte proceeding to “inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.” Thus Virginia Rule 3.3(c) applies in a very different setting from a normal hearing or trial where there is an adversary. In an adversarial setting, lawyers have a duty to their clients not to disclose bad facts – although under Virginia Rule 3.3(a)(2) lawyers must disclose such facts to the tribunal if disclosure “is necessary to avoid assisting a criminal or fraudulent act by the client.” Under Virginia Rule 4.1(a), lawyers have a similar duty that applies in other contexts. That generic duty also appears in ABA Model Rule 4.1(a), although the ABA Model Rule contains an exception for disclosure prohibited by ABA Model Rule 1.6 (an exception not included in Virginia Rule 4.1(a)).

Virginia Rule 3.3(c)’s requirement that lawyers disclose even adverse facts to tribunals handling ex parte proceedings is limited to “all material facts known to the lawyer.” It makes sense to limit the duty to facts “known” to the lawyer. The Virginia Terminology section defines the word “know” as “denot[ing] actual knowledge of the fact in question” (although “[a] person’s knowledge may be inferred from circumstances”). Thus, lawyers’ obligation to speak up in an ex parte proceeding does not involve a negligence or “should have known” standard.

**ABA Model Rule 3.3(d)** contains the identical language as Virginia Rule 3.3(c).

### **Virginia Rule 3.3(d)**

Virginia Rule 3.3(d) addresses lawyers' duty when a non-client has perpetrated "a fraud upon the tribunal."

Virginia Rule 3.3(d) requires lawyers to "promptly reveal the fraud to the tribunal" if they "receive[ ] information clearly establishing that a person other than a client has perpetuated a fraud upon the tribunal in a proceeding in which the lawyer is representing a client."

The term "clearly establishing" is an archaic term previously used in several places in the Virginia Rules. It is not defined in the current Virginia Rules. The Virginia Rules formerly defined it as essentially requiring a client confession. But of course that standard would not make much sense when applied to non-clients' conduct. Presumably the "clearly established" standard means far less than actual knowledge, but would require more than mere suspicion.

Interestingly, and perhaps understandably, Virginia Rule 3.3(d) requires lawyers to "promptly reveal" such non-clients' fraud on the tribunal. This contrasts with the confidentiality-sensitive standard when lawyers come to know that they have presented false evidence – which only requires "reasonable remedial measures," rather than immediate disclosure under Virginia Rule 3.3(a)(4). And while Virginia Rule 3.3(a)(4) explicitly fails to include the ABA Model Rule language "including, if necessary, disclosure to the tribunal," Virginia Rule 3.3(d) goes beyond the "including, if necessary, disclosure to the tribunal" in the parallel ABA Model Rule 3.3(b) – by requiring prompt disclosure to the tribunal.

**ABA Model Rule 3.3(b)** contains the same basic duty as Virginia Rule 3.3(d), but has several provisions that differ from Virginia Rule 3.3(d).

First, under ABA Model Rule 3.3(b), lawyers have a disclosure duty only if the lawyer “knows” of the defined wrongdoing. ABA Model Rule 1.0(f) defines the knowledge standard as “denot[ing] actual knowledge of the fact in question” (although “[a] person’s knowledge may be inferred from circumstances”). Virginia Rule 3.3(d) uses a “clearly establishing” standard. That is not defined in the Virginia Rules or Virginia Rule Comments.

Second, ABA Model Rule 3.3(b) requires lawyers’ disclosure if “a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.” Virginia Rule 3.3(d) imposes a disclosure duty only when the lawyer has information “clearly establishing” that “a person other than a client” was engaged (or will engage) in the wrongdoing (emphasis added). In other words, ABA Model Rule 3.3(b) covers clients’ wrongdoing, but Virginia Rule 3.3(d) does not.

Third, ABA Model Rule 3.3(b) imposes the disclosure duty if a “person” (presumably including the lawyer’s client) “intends to engage, is engaging or has engaged” in the specified wrongdoing. Virginia Rule 3.3(d) requires disclosure if a non-client “has perpetuated a fraud upon the tribunal” (emphasis added). So ABA Model Rule 3.3(b) covers intended future and ongoing wrongdoing, while Virginia Rule 3.3(d) looks only at past wrongdoing.

Fourth, ABA Model Rule 3.3(b) defines the wrongdoing triggering lawyers’ disclosure duty as “criminal or fraudulent conduct related to the proceeding.” Virginia Rule 3.3(d) defines the wrongdoing triggering lawyers’ disclosure duty as “a fraud upon

the tribunal.” Thus, ABA Model Rule 3.3(b) covers a much broader range of misconduct than Virginia Rule 3.3(d).

Fifth, ABA Model Rule 3.3(b) requires lawyers in the specified scenario to “take reasonable remedial measures, including if necessary, disclosure to the tribunal.” Virginia Rule 3.3(d) does not use the generic phrase “reasonable remedial measures,” but instead requires that lawyers in that situation to “promptly reveal the fraud to the tribunal.” Thus, ABA Model Rule 3.3(b) does not contain the temporal requirement of prompt disclosure, and also presumably leaves open the possibility of “reasonable remedial measures” other than disclosure to the tribunal (although that seems to be required as the last resort under the ABA Model Rule 3.3(b)).

### **Virginia Rule 3.3(e)**

Virginia Rule 3.3(e) addresses the duration of Virginia Rule 3.3’s duties.

Virginia Rule 3.3(e) explains that the duties in some of Virginia Rule 3.3(a) and (d) “continue until the conclusion of the proceeding,” and apply even if compliance with the disclosure requirements would require “disclosure of information protected by [Virginia] Rule 1.6.” For example, the duty presumably ends upon a settlement with complete reciprocal releases, or when a deadline for a final appeal passes.

As explained elsewhere, Virginia Rule 1.6(a) protects only a subset of the information protected by ABA Model Rule 1.6(a). Virginia Rule 1.6(a) protects (1) “information protected by the attorney-client privilege under applicable law;” (2) “other information gained in the professional relationship that the client has requested be held inviolate;” and (3) “other information gained in the professional relationship . . . the

disclosure of which would be embarrassing or would be likely to be detrimental to the client.”

Significantly, Virginia Rule 3.3(e)’s disclosure duty covers client confidential information protected by Virginia Rule 1.6 – not just protected client confidential information whose disclosure would otherwise be prohibited by Virginia Rule 1.6.

Virginia Rule 3.3(e) limits the duration of lawyers’ disclosure duty to the situations described in Virginia Rule 3.3(a) and Virginia Rule 3.3(d) – thus conspicuously leaving out Virginia Rule 3.3(b) and Virginia Rule 3.3(c). These exclusions make sense. Virginia Rule 3.3(b) allows lawyers to refrain from presenting evidence, which is not really a “duty.” Virginia Rule 3.3(c) on its face applies “[i]n an ex parte proceeding” (thus implicitly applying “until the conclusion of the proceeding”).

Virginia Rule 3.3(e) (and the parallel ABA Model Rule 3.3(c) addressed below) make sense. They bring finality to such a disclosure duty. Although the Virginia Rules did not contain such a provision until 2016, selecting some date for the duty to end avoids a nightmarish dilemma for a lawyer who might learn decades after a trial or a deposition that her client committed perjury (for instance, a client professing to the misconduct on her deathbed in hopes of avoiding some potentially more important punishment in the afterlife).

But Virginia 3.3(e)’s and ABA Model Rule 3.3(c)’s attempt at picking a definite termination date for the disclosure duty ignores all of the many ways in which litigants can re-open litigation or otherwise renew a dispute in which false testimony might be critically important. Relying on court rules or their own inherent authority, courts can revisit final orders under certain circumstances. And there are several legal and (especially)

equitable theories under which clients can seek relief from unfair judgments long after they are considered “final.” For instance, the equitable doctrine of “constructive trust” can essentially at any time in the future force defendants to relinquish money or other property that equity does not think they deserve. So the Virginia Rules’ and the ABA Model Rules’ attempt to end lawyers’ duty in this circumstance is laudable – but perhaps not completely dispositive.

**ABA Model Rule 3.3(c)** contains essentially the same requirement.

As with Virginia Rule 3.3(e), ABA Model Rule 3.3(c) importantly requires disclosure of that confidential information protected by ABA Model Rule 1.6 – not just information whose disclosure is prohibited by ABA Model Rule 1.6.

## Comment

### Virginia Rule 3.3 Comment [1]

Virginia Rule 3.3 cmt. [1] addresses the tension between lawyers' duties to advocate for their clients and to avoid misleading tribunals.

Virginia Rule 3.3 cmt. [1] first notes that “[t]he advocate’s task is to present the client’s case with persuasive force. That description appears in ABA Model Rule 3.3 cmt. [2]. The phrase “persuasive force” is understandable, but seems misplaced here. That term would seem to focus on the lawyer’s competence and diligence – rather than its content. Virginia Rule 3.3 addresses lawyers’ content – not the forcefulness of the lawyers’ presentation.

Virginia Rule 3.3 cmt. [1] next notes that lawyers performing that duty “while maintaining confidences of the client” is “qualified by the advocate’s duty of candor to the tribunal.”

Virginia Rule 3.3 cmt. [1] concludes by noting that advocates do “not vouch for the evidence submitted in a cause,” and that “the tribunal is responsible for assessing the [evidence’s] probative value.” Those statements also appear in ABA Model Rule 3.3 cmt. [2].

### ABA Model Rule 3.3 Comment [1]

Virginia did not adopt ABA Model Rule 3.3 cmt. [1].

ABA Model Rule 3.3 cmt. [1] addresses ABA Model Rule 3.3’s reach.

ABA Model Rule 3.3 cmt. [1] first explains that ABA Model Rule 3.3 applies to lawyers representing clients in a tribunal setting (pointing to the ABA Model Rules’

definition of “tribunal” in ABA Rule 1.0(m)). ABA Model Rule 3.3 cmt. [1] then confirms that ABA Model Rule 3.3 applies in “an ancillary proceeding. . . such as a deposition.”

ABA Model Rule 3.3 cmt. [1] next provides an example – confirming that ABA Model Rule 3.3’s disclosure requirement applies “if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false” (emphasis added). This sentence has a surprising temporal concept. The use of the present tense “is testifying” seem to require that such lawyers must take immediate action in the deposition. Otherwise, ABA Model Rule 3.3 cmt. [1] presumably would have used the phrase “a client who has testified in a deposition offered evidence that is false.” Assuming that ABA Model Rule 3.3 cmt. [1] describes a scenario in which a client “is testifying in a deposition,” lawyers presumably must immediately “take reasonable remedial measures.”

ABA Model Rule 3.3 cmt. [10] describes a similar scenario: “if the lawyer knows of the falsity of testimony elicited from the client during a deposition.” That ABA Model Rule Comment explains that in such a scenario the lawyer’s “proper course is to remonstrate with the client confidentially.” Some court rules on their face prohibit such private conversations during a deposition break – unless they focus on possible privilege protection for some exhibit or testimony. Presumably even courts adopting such narrow rule would not punish lawyers for discussing with their clients the possibility of correcting testimony that the lawyers know to be false. But the privilege might not protect those conversations under such court’s rules or practices.

Under ABA Model Rule 3.3 cmt. [10] lawyers facing such a deposition scenario also might consider withdrawing from the representation (which would obviously

terminate the deposition) or reporting her client’s false testimony to the tribunal (which also seems logistically difficult if not impossible in the middle of a deposition).

All in all, lawyers probably would ignore ABA Model Rule 3.3 cmt. [1]’s phrase requiring them to take such immediate “reasonable remedial measures” if they “come[ ] to know that a client who is testifying in a deposition has offered evidence that is false” (emphasis added) – and instead deal with such false evidence after the deposition ends (as in an errata sheet). If that does not work, the lawyer might ultimately have to disclose the falsity to the tribunal under ABA Model Rule 3.3 cmt. [1].

### **ABA Model Rule 3.3 Comment [2]**

Virginia did not adopt ABA Model Rule 3.3 cmt. [2] (although Virginia Rule 3.3 cmt. [1] contains similar language.

ABA Model Rule 3.3 cmt. [2] addresses lawyers’ competing interests and duties in a tribunal setting. ABA Model Rule 3.3 cmt. [2] contains an expansive description of lawyers’ duties as “officers of the court.” That status requires lawyers “to avoid conduct that undermines the integrity of the adjudicative process.”

Like Virginia Rule 3.3 cmt. [1], ABA Model Rule 3.3 cmt. [2] explains that lawyers acting as advocates in “an adjudicative proceeding” have “an obligation to present the client’s case with persuasive force.” As explained above, the term “persuasive force” seems to involve lawyers’ competence and diligence in making a case, not the content of what they say or the content of the evidence they offer.

ABA Model Rule 3.3 cmt. [2] contains the same language as Virginia Rule 3.3 cmt. [1] – reminding lawyers that the “[p]erformance of that duty while maintaining confidences of the client . . . is qualified by the advocate’s duty of candor to the tribunal.” ABA Model

Rule 3.3 cmt. [2] then combines statements made in Virginia Rule 3.3 cmt. [1] (noting that lawyers are “not required to . . . vouch for the evidence submitted in a cause”) and in Virginia Rule 3.3 cmt. [4] (noting that lawyers are “not required to make a disinterested exposition of the law”).

ABA Model Rule 3.3 cmt. [2] concludes with a warning that “the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.”

### **Virginia Rule 3.3 Comment [3]**

Virginia Rule 3.3 cmt. [3] addresses lawyers’ own statements to tribunals.

Virginia Rule 3.3 cmt. [3] first notes that lawyers normally have no personal knowledge, and therefore present clients’ or others’ factual assertions. Virginia Rule 3.3 cmt. [3] then explains that “litigation documents ordinarily present assertions by the client, or by someone on the client’s behalf, and not assertions by the lawyer” (emphasis added). The term “litigation documents” is undefined, and seems odd. Presumably the term means pleadings, although perhaps it also includes documents not filed in the court.

It is unclear why Virginia Rule 3.3 cmt. [3] contains the phrase: “[c]ompare [Virginia] Rule 3.1.” Virginia Rule 3.1 generally prohibits lawyers from taking any frivolous actions in a tribunal setting.

Citing Virginia Code Section 8.01-271.1, Virginia Rule 3.3 cmt. [3] next explains that lawyers’ signatures on pleadings “constitutes a certification that the lawyer believes, after reasonable inquiry, that there is a factual and legal basis for the pleading.” Virginia Rule 3.3 cmt. [3] then explains that “an assertion purporting to be on the lawyer’s own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly

be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry.” This should be obvious.

Virginia Rule 3.3 cmt. [3] then turns to another issue – warning that in some circumstances “failure to make a disclosure is the equivalent of an affirmative misrepresentation.” This warning presumably refers to Virginia Rule 3.3(a)(2) and (3), as well as Virginia Rule 3.3(c).

Virginia Rule 3.3 cmt. [3] concludes with a reminder that lawyers representing clients in litigation are bound by Virginia Rule 1.2(c)’s duty “not to counsel a client to commit or assist the client in committing a fraud” – referring to “[t]he Comment to [Virginia] Rule [1.2(c)].” The unhelpful reference to “the Comment” to Virginia Rule 1.2(c) presumably refers to Virginia Rule 1.2 cmt. [9] or [10]. The former prohibits lawyers from “knowingly assist[ing] a client in criminal or fraudulent conduct.” The latter requires (among other things) lawyers to “avoid furthering” their clients’ wrongdoing.

Virginia Rule 3.3 cmt. [3] concludes with the following: “[s]ee also the Comment to [Virginia] Rule 8.4(b).” This unhelpful reference to an unidentified Comment matches the preceding reference to an unidentified Comment to Virginia Rule 1.2(c).

Black letter Virginia Rule 8.4(b) prohibits lawyers from “commit[ing] a criminal or deliberately wrongful act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness to practice law.” It is unclear what Virginia Rule 8.4 Comment this Virginia Rule 3.3 cmt. [3] refers to. Virginia Rule 3.3 cmt. [3]’s preceding sentence focuses on lawyers’ improper interaction with their clients and litigation-related fraud.

Virginia Rule 3.3 cmt. [3]’s reference to Virginia Rule 1.2(c) makes sense, because that also focuses on improper lawyer-client interaction. But the immediately following

reference to Virginia Rule 8.4(b) seems incorrect. Virginia Rule 8.4(b) focuses on a lawyer's own misconduct. Virginia Rule 8.4(a) prohibits lawyers "knowingly assist[ing] or induc[ing] another [to "violate or attempt to violate the Rules of Professional Conduct"], or do so through the acts of another." That would seem like a better match to Virginia Rule 3.3 cmt. [3]'s preceding sentence. Perhaps the reference to Virginia Rule 8.4(b) refers to an earlier portion of Virginia Rule 3.3 cmt. [3].

**ABA Model Rule 3.3 cmt. [3]** is essentially identical to Virginia Rule 3.3 cmt. [3].

ABA Model Rule 3.3 cmt. [3] contains the same odd reference to "litigation documents" without defining what those are. It also contains the strange reference to ABA Model Rule 3.1, the unhelpful reference to an unidentified ABA Model Rule 1.2 Comment, and the unhelpful reference to an unidentified Comment to ABA Model Rule 8.4(b).

### **Virginia Rule 3.3 Comment [4]**

Virginia Rule 3.3 cmt. [4] addresses lawyers' legal arguments.

Virginia Rule 3.3 cmt. [4] first understandably states that "[l]egal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal." Virginia Rule 3.3 cmt. [4] then adds the point that "the complexity of law often makes it difficult for a tribunal to be fully informed unless pertinent law is presented by the lawyers in the cause" (emphasis added). Virginia Rule 3.3 cmt. [4] next makes essentially the same point: "[a] tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it" (emphasis added).

Virginia Rule 3.3 cmt. [4] thus uses two terms to describe law that the tribunal should have before it: "pertinent law" and "the applicable law" (emphasis added).

Presumably those terms are intended to be synonymous with black letter Virginia Rule 3.3(a)(3)'s term "controlling legal authority in the subject jurisdiction." That is the only type of law Virginia Rule 3.3 requires lawyers to disclose to tribunals.

Virginia Rule 3.3 cmt. [4] next confirms that lawyers are "not required to make a disinterested exposition of the law." But Virginia Rule 3.3 cmt. [4] contains an odd turn of phrase – explaining that "[t]he underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case" (emphasis added). Describing a "legal argument" as "a discussion" is awkward at best. Presumably, the term includes both the lawyer's legal argument and either the court's questioning or the adversary's legal argument.

Virginia Rule 3.3 cmt. [4] then contends that lawyers "must recognize the existence of pertinent legal authorities" (emphasis added). That is a strange statement. The term obviously does not require lawyers to find all "pertinent legal authorities," because Virginia Rule 3.3(a)(3) requires lawyers to disclose adverse authority only if it is "known to the lawyer to be adverse." It also seems odd that an ethics rule would require lawyers to "recognize" legal authority. The real question is: what must the lawyer do with that legal authority, having recognized it? Virginia Rule 3.3 cmt. [4] answers that question by prohibiting lawyers from knowingly failing to disclose "controlling" adverse legal authority. One might have expected Virginia Rule 3.3 to short circuit the requirement – skipping the demand that the lawyer "recognize" the authority, and just requiring the lawyer to disclose it.

Virginia Rule 3.3 cmt. [4] concludes with an explanation that lawyers have "a duty to disclose controlling adverse authority in the subject jurisdiction which has not been

disclosed by the opposing party.” As explained below, this seems to describe a narrower disclosure requirement than ABA Model Rule 3.3(a)(2).

**ABA Model Rule 3.3 cmt. [4]** contains a similar explanation.

ABA Model Rule 3.3 cmt. [4] contains the same strange mandate that lawyers “must recognize the existence of pertinent legal authorities.”

In contrast to Virginia Rule 3.3 cmt. [4], ABA Model Rule 3.3 cmt. [4] does not contain the sentences explaining that tribunals should possess “pertinent law” and “the applicable law” so they can properly address the legal issues before it.

More significantly, in contrast to Virginia Rule 3.3(a)(3)’s requirement that lawyers “disclose controlling legal authority in the subject jurisdiction,” ABA Model Rule 3.3(a)(2) uses the phrase “directly adverse” authority “in the controlling jurisdiction.” As explained above, adverse authority “in the controlling jurisdiction” might not control the case being handled by the lawyer. That situation might arise in a multi-judge tribunal setting – in which one judge’s ruling would constitute “legal authority in the controlling jurisdiction” (ABA Model Rule 3.3(a)(2)’s standard) but not “controlling legal authority in the subject jurisdiction” (Virginia Rule 3.3(a)(2)’s standard).

### **Virginia Rule 3.3 Comment [5]**

Virginia Rule 3.3 cmt. [5] addresses lawyers’ obligation to refuse non-clients’ false evidence.”

Virginia Rule 3.3 cmt. [5] begins by stating that lawyers must refuse to “offer” evidence “provided by a person who is not the client” if the lawyer “knows” it to be false – “regardless of the client’s wishes.” Virginia Rule 3.3 cmt. [5] presumably describes a scenario in which a non-client “provide[s]” evidence to the lawyer that the lawyer knows

to be false. The lawyer in that situation must refuse to offer it, even if the lawyer's client wishes the lawyer to offer it.

Virginia Rule 3.3 cmt. [5]'s limitation of that prohibition to evidence "provided by a person who is not the client" might be confusing (emphasis added). One reading Virginia Rule 3.3 cmt. [5]'s phrase might logically conclude that lawyers who are "provided" evidence by a person who is a client would have a different duty or at least discretion to present that evidence that the lawyer knows to be false. But black letter Virginia Rule 3.3(a)(4) bluntly indicates such a lawyer shall not knowingly "offer evidence that the lawyer knows to be false." That prohibition on its face applies to clients and non-clients. So Virginia Rule 3.3 cmt. [5] would be more complete and less confusing if it included clients and non-clients in the prohibition, by deleting the phrase "who is not the client" – so the sentence would prohibit lawyers from offering evidence they know to be false if "provided by a person" (whether the client or not the client). Virginia Rule 3.3 cmt. [5] would be even more clear (and more complete) if it did not refer to evidence "provided" by anyone. The prohibition on lawyers offering knowingly false evidence applies to all evidence – whether some person (the client or otherwise) "provides" the false evidence to the lawyer or the lawyer finds it or develops it herself.

**ABA Model Rule 3.3 cmt. [5]** also addresses lawyers' presentation of evidence.

ABA Model Rule 3.3 cmt. [5] requires lawyers to refuse to offer knowingly false evidence, without Virginia Rule 3.3 cmt. [5]'s odd and confusing reference to evidence "provided" by someone. ABA Model Rule 3.3 cmt. [5] thus contains a more logical and broader prohibition on lawyers knowingly offering false evidence.

ABA Model Rule 3.3 cmt. [5] also contains two statements not found in Virginia Rule 3.3 cmt. [5].

First, ABA Model Rule 3.3 cmt. [5] explains that lawyers' duty to refuse to offer false evidence "is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence."

Second, and more importantly, ABA Model Rule 3.3 cmt. [5] assures that "[a] lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity."

Virginia Rule 3.3 cmt. [5] does not contain this provision, which presumably allows lawyers to draw out false testimony from a non-client for the purpose of later "establishing its falsity" – thus undermining the non-client's credibility. On its face, Virginia Rule 3.3(a)(4) would seem to prohibit even that trial tactic. Perhaps Virginia Rule 3.3(a)(4)'s term "offer" does not include lawyers' drawing out knowingly false evidence from an adverse witness. The lawyer is not "offer[ing]" that evidence in the sense of presenting it for the jury to believe it. And presumably the lawyer drawing out such false evidence must immediately show it to be false. Perhaps lawyers hoping to damage an adverse witness by offering such false evidence and then proving its falsity could point to the next sentence in black letter Virginia Rule 3.3(a)(4) – essentially arguing that their immediate examination proving the evidence's falsity is an appropriate "reasonable remedial measure." That would technically not avoid a violation, because such a lawyer did not "come[ ] to know of [the false evidence's] falsity" – because the lawyer already knew of its falsity before offering it. But there would be a "no harm no foul" aspect of such a scenario.

### **Virginia Rule 3.3 Comment [6]**

Virginia Rule 3.3 cmt. [6] addresses lawyers' ethics dilemma when clients have or intend to provide false evidence.

Virginia Rule 3.3 cmt. [6] first notes that lawyers face a conflict between their duty to protect their client's confidences and their duty of candor to the court "[w]hen false evidence is offered by the client."

Virginia Rule 3.3 cmt. [6]'s sentence might result in some confusion. That sentence first discusses a situation "[w]hen false evidence is offered by the client" (emphasis added), which would seem to describe some act that has already occurred (or is contemporaneously occurring). Lawyers facing that situation must ultimately disclose the falsity to the tribunal if all else fails.

Virginia Rule 3.3 cmt. [6] next explains "[i]f a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce evidence that is false, the lawyer should seek to persuade the client that the evidence should not be offered." This second sentence thus describes lawyers' dilemma before the client has offered false evidence. Presumably the words "offer" and "introduce" are intended to be synonymous. But it would have been more clear if Virginia Rule 3.3 cmt. [6] had used the same term to mean the same thing.

Virginia Rule 3.3 cmt. [6] then switches back to address clients' past false testimony – explaining that "if [false evidence] has been offered," lawyers "should seek to persuade the client that . . . its false character should immediately be disclosed."

Virginia Rule 3.3 cmt. [6] concludes by indicating that "[i]f the persuasion is ineffective, the lawyer must take reasonable remedial measures." In what undoubtedly

would trigger frustration by any Virginia lawyer seeking guidance in such a crisis-filled scenario, Virginia Rule 3.3 cmt. [6] does not explain what such “reasonable remedial measures” might or might constitute. The phrase “if [false testimony] has been offered, that its false character should immediately be disclosed” apparently does not describe what lawyers must do – but rather describes a step that the lawyer should “seek to persuade” the client to take. That meaning would explain the final sentence of Virginia Rule 3.3 cmt. [6] – requiring such lawyers to take “reasonable remedial measures” if such “persuasion is ineffective.”

Virginia Rule 3.3 cmt. [6] does not contain ABA Model Rule 3.3 cmt. [6]’s blunt statement that lawyers “must refuse to offer the false evidence.” Virginia Rule 3.3 cmt. [5] states that lawyers must refuse to offer false evidence only if “provided by a person who is not the client.” Thus, Virginia Rule 3.3 cmt. [6] indicates only that lawyers “must take reasonable remedial measures” if the lawyers are unsuccessful in persuading their clients to not testify falsely and/or unsuccessful in persuading the client not to direct the lawyer “to introduce evidence that is false.”

Thus, Virginia Rule 3.3 cmt. [6] seems to describe a scenario in which the lawyer allows the client to testify falsely, or presents knowingly false evidence. But such an interpretation would seem to conflict with black letter Virginia Rule 3.3(a)(4), which indicates that lawyers “shall not knowingly . . . offer evidence that the lawyer knows to be false.” Of course, the black letter Virginia Rule 3.3(a)(4) provision would take precedence over any Virginia Rule Comment, but one would expect that the Virginia Rule Comment would not introduce any ambiguity.

**ABA Model Rule 3.3 cmt. [6]** also addresses lawyers' dilemma when clients have provided, or intend to provide, false evidence.

ABA Model Rule 3.3 cmt. [6] is similar to Virginia Rule 3.3 cmt. [6]. But there are several differences.

ABA Model Rule 3.3 cmt. [6] does not contain Virginia Rule 3.3 cmt. [6]'s introductory description of a scenario in which the client has already offered false evidence. Instead, ABA Model Rule 3.3 cmt. [6] addresses lawyers' duty "[i]f a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence." ABA Model Rule 3.3 cmt. [6] explains that in such a circumstance, "the lawyer should seek to persuade the client that the evidence should not be offered." Thus, like Virginia Rule 3.3 cmt. [6], ABA Model Rule 3.3 cmt. [6] contains both the word "introduce" and the word "offer" in describing lawyers' use of false evidence in a tribunal. Although presumably those are synonymous terms, it would have been clearer to use the same term to mean the same thing.

ABA Model Rule 3.3 cmt. [6] then explains what the lawyer must do "[i]f the persuasion is ineffective and the lawyer continues to represent the client." Virginia Rule 3.3 cmt. [6] does not contain that phrase. The phrase implicitly acknowledges that the lawyer might withdraw.

ABA Model Rule 3.3 cmt. [6] does not include the additional persuasive efforts described in Virginia Rule 3.3 cmt. [6], which include attempting to persuade clients "that the [false] evidence should not be offered, or if [such false evidence] has been offered, that its false character should immediately be disclosed." Instead, ABA Model Rule 3.3 cmt. [6] bluntly states that if the lawyer's persuasion has been ineffective, "the lawyer

must refuse to offer the false evidence.” Virginia Rule 3.3 cmt. [6] does not contain that warning, but it appears in black letter Virginia Rule 3.3(a)(4).

ABA Model Rule 3.3 cmt. [6] next explains that such lawyers may call a witness (presumably either a client or a non-client) to provide other testimony “[i]f only a portion of a witness’s testimony will be false.”

It seems odd that ABA Model Rule 3.3 cmt. [6] addresses only a witnesses’ “testimony.” Testimony represents only a subset of possible evidence. So while the “testimony” scenario is helpful, it might have made more sense to explain that the same principle would apply to all evidence (including, for example, documentary evidence) – some of which is false and some of which is not false.

ABA Model Rule 3.3 cmt. [6] concludes with another blunt statement – plainly stating that lawyers “may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.” Virginia Rule 3.3 cmt. [6] does not contain that explicit prohibition.

### **ABA Model Rule 3.3 Comment [7]**

Virginia did not adopt ABA Model Rule 3.3 cmt. [7].

ABA Model Rule 3.3 cmt. [7] addresses states’ differing approach to lawyers’ ethics dilemma when their clients intend to testify falsely.

ABA Model Rule 3.3 cmt. [7] first explains that the forbearance and disclosure duties in ABA Model Rule 3.3(a) and ABA Model Rule 3.3(b) “apply to all lawyers, including defense counsel in criminal cases.” ABA Model Rule 3.3 cmt. [7] then notes that in “some jurisdictions” courts require lawyers who know that their clients’ “testimony

or statement will be false” to nevertheless “present the accused as a witness or to give a narrative statement if the accused so desires.”

The reference to “the testimony or statement” seems odd. Presumably, such a “statement” would constitute “testimony.”

Like many similar ABA Model Rule Comments, ABA Model Rule 3.3 cmt. [7] is not very useful. If a state has adopted the ABA Model Rule 3.3 cmt. [7] formulation, lawyers in that state presumably would want to know what to do in their state, not what other jurisdictions do.

ABA Model Rule 3.3 cmt. [7] concludes with an explanation that lawyers’ ethical obligations are “subordinate to such requirements” in such jurisdictions.

Virginia has rejected the so-called “narrative approach” as an ethically acceptable option in such a scenario.

### **Virginia Rule 3.3 Comment [8]**

Virginia Rule 3.3 cmt. [8] addresses lawyers’ ethical freedom to offer evidence – depending on whether the lawyer knows for sure whether or not the evidence is false.

Virginia Rule 3.3 cmt. [8] begins by stating that “[t]he prohibition against offering false evidence only applies if the lawyer knows the evidence is false.” This approach is consistent with Virginia Rule 3.3(a)(4), which flatly prohibits lawyers only from “knowingly . . . offer[ing] evidence that the lawyer knows to be false” (emphasis added).

Virginia Rule 3.3 cmt. [8] next explains that lawyers’ “reasonable belief or suspicion that evidence is false does not preclude its presentation to the trier of fact.” The reference to evidence’s “presentation to the trier of fact” is unusual. The other references to evidence contain words like “offer” or “introduce.” So the term “presentation” is accurate,

but could be confusing – because it uses a different word from similar references to the same scenario.

And the description of such evidence’s “presentation to the trier of fact” also is unusual. The other references to evidence’s being offered, or introduced, do not mention “the trier of fact.” Presumably that phrase could refer either to a jury or to a court sitting without a jury. And also presumably the phrase refers to courts making legal rather than purely factual findings as part of their judicial function, even if a jury will decide other factual issues. For instance, presumably Virginia Rule 3.3 cmt. [8]’s principle applies to lawyers presenting a client’s or other witness’ affidavit in support of some legal argument (pre-trial, during the trial, or post-trial). It might be technically accurate to describe the court in that purely legal setting as a “trier of fact,” but the phrase most commonly refers to a jury or a court sitting without a jury – deciding purely factual issues.

Virginia Rule 3.3 cmt. [18] articulates a significant principle. Under Virginia Rule 3.3(b), lawyers “may refuse to offer evidence that the lawyer reasonably believes is false.” But Virginia Rule 3.3 cmt. [8] explains that lawyers may (even if they do not have to) present evidence they reasonably believe is false.

Many lawyers do not believe that they can offer evidence that they “reasonably believe” is false. But their freedom to do so highlights the basic nature of the adversarial system. If the adversary does not demonstrate such evidence’s falsity, the lawyer presumably may proceed to argue such evidence during closing argument, and has no duty to correct it. Of course, if the lawyer later comes to know of the evidence’s falsity, the lawyer must take “reasonable remedial measures” under Virginia Rule 3.3(a)(4) – which ultimately includes disclosure of the falsity to the tribunal (under Virginia Rule 3.3

cmt. [10]). And Virginia Rule 3.3(e) explains that such a duty “continue[s] until the conclusion of the proceeding.”

Virginia Rule 3.3 cmt. [8] concludes with a warning that “the lawyer cannot ignore an obvious falsehood” – although the lawyer “should resolve doubts about the veracity of testimony or other evidence in favor of the client.”

Not surprisingly, it can be a fine line between lawyers’ “reasonable belief” that evidence is false and “knowing” that the evidence is false. Virginia Rule 3.3 cmt. [8] emphasizes that lawyers must essentially give their clients and favorable witnesses (as well as documentary evidence) the benefit of the doubt. On the other hand, Virginia Rule 3.3 cmt. [8] prohibits lawyers from “ignor[ing] an obvious falsehood.” It is unclear where in the spectrum between “reasonable belief” and “knowing” such a state of mind falls. The term “obvious” is ambiguous at best. For instance, a client’s alibi might seem to be completely implausible, but not obviously false. Lawyers presumably could thus take an outlandish but not completely impossible alibi story at face value.

In a somewhat analogous situation (involving lawyers’ suspicion that their clients are using the lawyers’ service to engage in wrongdoing), ABA LEO 491 (4/29/20) required lawyers “to inquire further to assisting” clients’ wrongful conduct if the lawyer “has knowledge of facts that create a high probability that a client is seeking the lawyer’s services in a transaction to further criminal or fraudulent activity.” The ABA LEO explained that “[f]ailure to make a reasonable inquiry is willful blindness punishable under the actual knowledge standard.” Furthermore, if a client “refuses to provide information or asks the lawyer not to evaluate the legality of a transaction the lawyer should explain to the client

that the lawyer cannot undertake the representation unless an appropriate inquiry is made.”

**ABA Model Rule 3.3 cmt. [8]** also addresses the “knowledge” standard in ABA Model Rule 3.3’s context.

ABA Model Rule 3.3 cmt. [8] begins with the same general statement as Virginia Rule 3.3 cmt. [8] – that “[t]he prohibition against offering false evidence only applies if a lawyer knows that the evidence is false.” ABA Model Rule 3.3 cmt. [8] then states that lawyers’ “reasonable belief” that evidence is false does not prevent the lawyer from presenting it.

Like Virginia Rule 3.3 cmt. [8], ABA Model Rule 3.3 cmt. [8] explains that “although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.”

But there are two differences between ABA Model Rule 3.3 cmt. [8] and Virginia Rule 3.3 cmt. [8].

First, in contrast to Virginia Rule 3.3 cmt. [8], ABA Model Rule 3.3 cmt. [8] does not also mention the lawyer’s “suspicion” as insufficient to prevent the lawyer from offering such evidence. That word presumably is unnecessary, because it involves less of a factual basis than “a reasonable belief.” So if lawyers’ “reasonable belief” that evidence is false does not preclude its presentation, then the lesser “suspicion” certainly would not.

Second, in contrast to Virginia Rule 3.3 cmt. [8], ABA Model Rule 3.3 cmt. [8] states that, “[a] lawyer’s knowledge that evidence is false . . . can be inferred from the circumstances,” referring to ABA Model Rule 1.0(f). It is unclear whether knowledge “inferred from the circumstances” is the same as knowledge of “an obvious falsehood”

(which both ABA Model Rule 3.3 cmt. [8] and Virginia Rule 3.3 cmt. [8] contain). On first blush, it would seem that “inferred from the circumstances” seems to be a lower knowledge standard than “ignor[ing] an obvious falsehood.”

### **Virginia Rule 3.3 Comment [9]**

Virginia Rule 3.3 cmt. [9] addresses lawyers’ ethical freedom under some circumstances to refuse to offer evidence they reasonably believe is false.

Virginia Rule 3.3 cmt. [9] begins by pointing to Virginia Rule 3.3(a)(4)’s prohibition on offering evidence “the lawyer knows to be false.” Virginia Rule 3.3 cmt. [9] contains the phrases “offering evidence” and “offer testimony or other proof” in its first sentence; contains the phrase “[o]ffering such proof” in its second sentence; and contains the phrase “offer the testimony” in its third sentence. It seems clear that “testimony” is a type of “evidence.” The ethics rules general do not use the word “proof.” Presumably that is either synonymous with “evidence” or is (like “testimony”) a subset of “evidence.” ABA Model Rule 3.3 cmt. [9] contains the same phrases.

Virginia Rule 3.3 cmt. [9] next states that lawyers may “refuse to offer testimony or other proof that the lawyer reasonably believes is false.” This ethical freedom also appears in black letter Virginia Rule 3.3(b): “[a] lawyer may refuse to offer evidence that the lawyer reasonably believes is false.” Black letter ABA Model Rule 3.3 does not contain that ethical freedom.

But Virginia Rule 3.3 cmt. [9] then contains a veiled criticism of lawyers offering “proof” if they “reasonably believe” it to be false – warning that doing so “may reflect adversely on the lawyer’s ability to discriminate in the quality of evidence.” That is a

criticism of the lawyer's judgment. But Virginia Rule 3.3 cmt. [9] then goes further – stating that such poor judgment might “impair the lawyer's effectiveness as an advocate.”

This presumably focuses on the tactical reasons why lawyers might (and probably should) decline to offer evidence that they reasonably believe is false. The adversary's demonstration that the evidence is false would undoubtedly reflect on the lawyer's entire case. So tactically-wise lawyers presumably would normally refuse to offer evidence they reasonably believe is false – to avoid the adversary's inevitable devastating cross-examination or other successful attack on the false evidence.

Virginia Rule 3.3 cmt. [9] next explains that “[b]ecause of the special protections historically provided criminal defendants,” Virginia Rule 3.3(a)(4) does not permit a lawyer to refuse to offer the testimony of such a client [presumably a criminal defendant client] where the lawyer reasonably believes but does not know that the testimony will be false.”

The word “when” might have been more appropriate than “where.” The term “where” has a geographic notation.

More significantly, Virginia Rule 3.3 cmt. [9]'s discussion focuses on “testimony,” which is only a subset of evidence that clients and their lawyers might offer. To be sure, testimony is most likely to involve falsity in the scenario addressed in Virginia Rule 3.3, but the issue of falsity might also arise in connection with other evidence (such as documentary evidence).

Virginia Rule 3.3 cmt. [9] concludes by reemphasizing that: “[u]nless the lawyer knows the [criminal defendant's] testimony will be false, the lawyer must honor the client's decision to testify.”

In fact, criminal defendants’ constitutional right to testify presumably prevents those client’s lawyers from refusing to “honor the client’s decision to testify.” That creates an almost insoluble dilemma for a lawyer who knows that her client intends to testify falsely.

Virginia Rule 3.3 cmt. [9] states an understandable approach, which is consistent with the U.S. Constitution, the ABA Model Rules and other states’ ethics rules. But given this explanation, it is odd that black letter Virginia’s Rule 3.3(b) states that “[a] lawyer may refuse to offer evidence that the lawyer reasonably believes is false” – without including the phrase found in the parallel ABA Model Rule 3.3(a)(3) sentence: “[o]ther than the testimony of a defendant in a criminal matter.” Given the historic importance of the concept articulated in Virginia Rule 3.3 cmt. [9], one would have thought that the black letter rule would have included the same exception.

**ABA Model Rule 3.3 cmt. [9]** is essentially the same as Virginia Rule 3.3 cmt. [9].

Like Virginia Rule 3.3 cmt. [9], ABA Model Rule 3.3 cmt. [9] uses the presumably synonymous but potentially confusing words “evidence,” “testimony” and “proof.” As explained above, “testimony” seems to be a subset of “evidence.” And perhaps “proof” is meant to be synonymous with “evidence.” It is therefore consistent with black letter ABA Model Rule 3.3(a)(3), which explicitly excludes criminal defense clients from lawyers’ discretion to offer evidence that the lawyer “reasonably believes is false.”

Like Virginia Rule 3.3 cmt. [9], ABA Model Rule 3.3 cmt. [9] contains the word “where” rather than the arguably more appropriate word “when.”

In contrast to Virginia Rule 3.3 cmt. [9], ABA Model Rule 3.3 cmt. [9] refers specifically to ABA Model Rule 3.3 cmt. [7].

### **Virginia Rule 3.3 Comment [10]**

Virginia Rule 3.3 cmt. [10] addresses lawyers' remedial duties if they later learn that "material evidence" they have offered is false, or when lawyers are "surprised when the lawyer's client, or another witness, offers testimony during a proceeding that the lawyer knows to be false."

Virginia Rule 3.3 cmt. [10] begins by describing two situations that raise ethical difficulties for a lawyer: (1) "[h]aving offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false;" (2) "[o]r, a lawyer may be surprised when the lawyer's client, or another witness, offers testimony during that proceeding that the lawyer knows to be false."

Like other nearby Virginia Rule 3.3 Comments, Virginia Rule 3.3 cmt. [10] thus uses the words "evidence" and "testimony" – the latter presumably is a subset of the former. Virginia Rule 3.3 cmt. [10] also contains the phrase "false statements or evidence." Presumably a "statement" is the same as "testimony."

Virginia Rule 3.3 cmt. [10] applies to all witnesses – not just witnesses called by the client's lawyer. This matches black letter Virginia Rule 3.3(a)(4)'s reach and differs from the parallel black letter ABA Model Rule 3.3(a)(3) and the accompanying ABA Model Rule Comments – which limit the remedial duties to "the lawyer's client, or a witness called by the lawyer" (emphasis added).

Virginia Rule 3.3 cmt. [10] then turn to lawyers who know that their clients have testified falsely "during a deposition." Virginia Rule 3.3 cmt. [10] explains that "[i]n such situation or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures" (emphasis added). The

singular word “situation” seems inapt, because the preceding two sentences describe two very different scenarios. Virginia Rule 3.3 cmt. [10] corrects this apparent mistake in the next sentence – which contains the plural “situations.” ABA Model Rule 3.3 cmt. [10] correctly uses the plural “situations” in both of its parallel sentences.

Although not inaccurate, the phrase “elicited from the client” oddly focuses on the lawyer taking the deposition rather than on the client providing the testimony. The preceding sentence uses the more straight-forward formulation about clients or witnesses who “offer[ ] testimony.” Of course, in all such situations, testimony is “elicited” from the witness. It seems odd that in one sentence the focus is on the witness offering the testimony, and in the next sentence the focus is on testimony that is “elicited” from the witness.

Virginia Rule 3.3 cmt. [10] also seems underinclusive. Non-clients (such as friends) can provide false testimony in depositions. And, of course, clients and any other witness can offer false “evidence” other than testimony (such as documentary evidence).

Virginia Rule 3.3 cmt. [10] next explains that “[i]n such situations, the advocate’s proper course is to remonstrate with the client confidentially, advise the client of the lawyer’s duty of candor to the tribunal and seek the client’s cooperation with respect to the withdrawal or correction of the false statements or evidence.”

The phrase “false statements or evidence” (emphasis added) is strange. “Statements” are a subset of “evidence,” although that phrase seems to distinguish between them. Using the phrase “the false statements or other evidence” (emphasis added) presumably would have been more accurate.

Virginia Rule 3.3 cmt. [10] explains that “[i]f that effort fails, the advocate must take further remedial action.” Using the term “advocate” seems inapt. Lawyers always act as their clients’ advocate – in a tribunal setting and elsewhere. The Virginia Rules generally use the term “lawyer,” although occasionally they also use the word “attorney” (which is more pretentious). A consistent use of the word “lawyer” would be preferable. And it is potentially confusing to use both the word “lawyer” and the word “advocate” in the same Comment – as in Virginia Rule 3.3 cmt. [10].

Virginia Rule 3.3 cmt. [10] next explains that “[i]f that fails, the advocate must take further remedial action.” If the lawyers’ “withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation.”

Unfortunately, Virginia Rule 3.3 cmt. [10] (and parallel ABA Model Rule 3.3 cmt. [10]) do not explain how such a lawyer’s “withdrawal” would ever “undo the effect of the false evidence.” Perhaps a jury (or the court) would intuitively know that the lawyer’s withdrawal meant that her client had testified falsely – thereby discounting or even ignoring the testimony. But that could not be certain. This lack of an explanation for how lawyers’ withdrawal would ever constitute an appropriate “remedial action” and “undo the effect of the false evidence” is one of the most obvious gaps in both Virginia Rules’ and the ABA Model Rules’ guidance for lawyers in this crisis scenario. And the failure to provide such guidance could have real consequences – because many lawyers’ first instinct would be to withdraw in an effort to disassociate from the false evidence. But how is such a lawyer to know whether withdrawing would “undo the effect of the false

evidence,” and save the lawyer from the more dramatic and client-damaging “remedial measure” possible duty to disclose the evidence’s falsity to the tribunal?

Virginia Rule 3.3 cmt. [10] next doubles down, by explaining that if withdrawal is not possible or “will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by [Virginia] Rule 1.6.” Significantly, Virginia Rule 3.3 cmt. [10]’s and black letter Virginia Rule 3.3(e)’s disclosure duty covers client confidential information protected by Virginia Rule 1.6 – not just protected client confidential information whose disclosure would otherwise be prohibited by Virginia Rule 1.6.

Virginia Rule 3.3 cmt. [10] concludes with the hopeful statement that “[i]t is for the tribunal then to determine what should be done.”

**ABA Model Rule 3.3 cmt. [10]** addresses the same seemingly insoluble dilemma addressed in Virginia Rule 3.3 cmt. [10], and is essentially the same as Virginia Rule 3.3 cmt. [10].

Like Virginia Rule 3.3 cmt. [10], ABA Model Rule 3.3 cmt. [10] uses several synonymous or overlapping terms: (1) “evidence,” “statement,” and “testimony;” (2) “lawyer” and “advocate.” Also like Virginia Rule 3.3 cmt. [10], ABA Model Rule 3.3 cmt. [10] does not address the potentially more likely use of false documentary evidence rather than false testimony.

Like Virginia Rule 3.3 cmt. [10], ABA Model Rule 3.3 cmt. [10] does not explain how the lawyer’s withdrawal could ever “undo the effect of the false evidence.”

Also like Virginia Rule 3.3 cmt. [10], ABA Model Rule 3.3 cmt. [10] mentions only the “falsity of testimony elicited from the client during a deposition.”

There are several differences between ABA Model Rule 3.3 cmt. [10] and Virginia Rule 3.3 cmt. [10].

First, in contrast to Virginia Rule 3.3 cmt. [10]’s imposition of a remedial duty in the event of false testimony by “the lawyer’s client, or another witness,” ABA Model Rule 3.3 cmt. [10] imposes a remedial duty to disclose false testimony by “the lawyer’s client, or another witness called by the lawyer” – “either during the lawyer’s direct examination or in response to cross-examination by the opposing lawyer” (emphasis added).

Second, in contrast to Virginia Rule 3.3 cmt. [10], ABA Model Rule 3.3 cmt. [10] concludes with several possible steps the tribunal might make: “making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.” It seems strange that ABA Model Rule 3.3 cmt. [10] would just include those three options, without the introductory phrase “such as” or words to that effect. Judges are imaginative enough that they might think of more than just those three possible options.

### **Virginia Rule 3.3 Comment [11]**

Virginia Rule 3.3 cmt. [11] addresses lawyers’ duty to correct clients’ deception in a tribunal setting.

Virginia Rule 3.3 cmt. [11] begins by explaining that “[e]xcept in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client’s deception to the court or to the other party.”

This sentence implicates several issues.

First, the introductory phrase “[e]xcept in the defense of a criminal accused” could give the erroneous impression that the “rule” requiring disclosure might not apply in that setting. As explained below, it clearly does.

Second, the sentence describes “the rule generally recognized.” That phrase does not explain who recognizes the rule. And fairly stated, the rule requiring disclosure is “not generally recognized” – it is universally recognized.

Third, the phrase “if necessary to rectify the situation” itself has several problems. Virginia Rule 3.3 cmt. [11] does not explain when it would not be necessary to disclose clients’ deception in the scenario described. And a disclosure would not technically “rectify the situation.” Situations are not “rectified.”

Fourth, Virginia Rule 3.3 cmt. [11] indicates that “an advocate must disclose the existence of the client’s deception” (emphasis added). A better way to put that would be that the lawyer must disclose the client’s deception – not “the existence” of the deception.

Fifth, the word “deception” is inapt. Virginia Rule cmt. [11] addresses false testimony or other evidence – not “deception.” Testimony might be accurate but deceptive.

Sixth, the sentence requires the lawyer to disclose the deception “to the court or to the other party” (emphasis added). But the lawyer must clearly disclose the client’s false testimony or other evidence to the court – there is no equally acceptable disclosure to “the other party” under black letter Virginia Rule.

Among other things, this apparent option to “disclose the existence of the client’s deception . . . to the other party” seems inconsistent with Virginia Rule 3.3 cmt. [10]’s explanation that unless the lawyer’s withdrawal “undo[es] the effect of the false evidence,

the advocate must make such disclosure to the tribunal” (emphasis added). Moreover, presumably Virginia Rule 3.3 (and ABA Model Rule 3.3) focuses on the systemic concern about tainting the tribunal – so disclosure to the tribunal would seem to be the only appropriate option in the specified situation. Virginia Rule 3.3 cmt. [10] requires that lawyers “must make such disclosure to the tribunal as is reasonably necessary to remedy” clients’ false testimony.

Virginia Rule 3.3 cmt. [10] next explains the countervailing cost of this possible disclosure: “[s]uch a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury.” Virginia Rule 3.3 cmt. [10] refers to Virginia Rule 1.2(c), apparently as shedding some light on what Virginia Rule 3.3 cmt. [10] describes as “the truth-finding process which the adversary system is designed to implement.” But Virginia Rule 1.2(c) does not really deal with that issue. Instead, Virginia Rule 1.2(c) warns that “[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.” Virginia Rule 1.2(c) then assures that “a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.” Although that principle obviously applies in “the adversary system” as everywhere else, the reference to Virginia Rule 1.2(c) seems inappropriate (although ABA Model Rule 3.3 cmt. [11] refers to the parallel ABA Model Rule 1.2(d)).

Virginia Rule 3.3 cmt. [11] concludes with another justification for its disclosure obligation: “unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer’s advice to reveal

the false evidence and insist that the lawyer keep silent” – “[t]hus the client could in effect coerce the lawyer into being a party to fraud on the court.”

**ABA Model Rule 3.3 cmt. [11]** addresses the same dilemma lawyers face when determining what remedial measures they must undertake when their clients testify falsely.

ABA Model Rule 3.3 cmt. [11] does not include Virginia Rule 3.3 cmt. [11]’s introductory phrase: “[e]xcept in the defense of a criminal accused.” As explained above, that inapt introduction could cause damaging misunderstanding – which seems to create an exception for lawyers representing criminal defendants relieving such lawyers from the duty to disclose their client’s “deception” if necessary to “rectify the situation.” As explained above, Virginia Rule 3.3 cmt. [11]’s introductory phrase is confusing at best, and could lead Virginia lawyers to make the wrong decision about their duties in one of the most critical scenarios that any lawyer can face – knowing that their criminal defendant client has testified falsely. So the absence of that introductory phrase in the ABA Model Rules seems wise.

ABA Model Rule 3.3 cmt. [11] likewise does not contain Virginia Rule 3.3 cmt. [11]’s apparently acceptable “remedial measures” option of disclosing “the client’s deception to . . . the other party.” As explained above, that Virginia Rule 3.3 cmt. [11] explanation may not mean what it seems to say.

Apart from that, ABA Model Rule 3.3 cmt. [11] contains the identical language as Virginia Rule cmt. [11] – other than a reference to ABA Model Rule 1.2(d) rather than the essentially identical Virginia Rule 1.2(c). That ABA Model Rule prohibits lawyers from counseling or assisting clients in criminal or fraudulent conduct. As explained above in

the context of parallel Virginia Rule 1.2(c), the reference to ABA Model Rule 1.2(d) seems a bit off the mark.

### **Virginia Rule 3.3 Comment [12]**

Virginia Rule 3.3 cmt. [12], [13], [13a] and [13b] address criminal defendants' perjury.

These provisions came from an earlier version of the ABA Model Rules, and provide an interesting but essentially useless discussion of the legal profession's historical debate about lawyers dealing with their client's intent to present false testimony in the future.

Virginia Rule 3.3 cmt. [12] explains that lawyers "should seek to persuade the client to refrain from perjurious testimony." Virginia Rule 3.3 cmt. [12] then notes that if the lawyer fails in that persuasive effort "before trial, the lawyer ordinarily can withdraw."

But Virginia Rule 3.3 cmt. [12] then ominously warns that it may not be possible to withdraw "either because trial it imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available."

ABA Model Rule 3.3 does not contain a similar provision.

### **Virginia Rule 3.3 cmt. [13]**

Virginia Rule 3.3 cmt. [13] also addresses lawyers' dilemma when criminal defense clients intend to or do testify falsely.

Virginia Rule 3.3 cmt. [13] begins by making the obvious point that criminal defense clients' intention to testify falsely presents "[t]he most difficult situation."

Virginia Rule 3.3 cmt. [13] notes that lawyers' steps to "rectify the situation" might increase the odds of the clients' criminal conviction and possible additional perjury charge. As explained above, the term "rectify the situation" seems improper. "Situations" are not "rectified."

Virginia Rule 3.3 cmt. [13] next explains that "if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court." The term "exercise control over the proof" seems oddly obtuse. Presumably that term denotes a lawyer's ability to offer or refuse to offer the evidence. But of course criminal defendants have the constitutional right to testify on their own behalf, which means that the lawyer in that situation does not have "control of the proof." That constitutional right to testify is the "irresistible force" that sometimes conflicts with the "immovable object" of the prohibition on lawyers knowingly presenting false evidence (including their own client's false testimony). And of course lawyers questioning their criminal defendant clients in a way that will offer false testimony is participating in more than "a merely passive way."

Virginia Rule 3.3 cmt. [13]'s concluding points essentially repeats Virginia Rule 3.3 cmt. [11]'s concluding analysis.

ABA Model Rule 3.3 does not contain a similar Comment.

### **Virginia Rule 3.3 cmt. [13a]**

Virginia Rule 3.3 cmt. [13a] also addresses lawyers' dilemma when criminal defense clients intend to or do testify falsely.

Virginia Rule 3.3 cmt. [13a] begins with perhaps the most useless of this Virginia Rule Comment series.

Virginia Rule 3.3 cmt. [13a] notes that “[t]hree resolutions of this dilemma” that “have been proposed.” Presumably a Virginia lawyer would not care about that in such a crisis situation – but would instead want to know what he or she must or may do. Virginia Rule 3.3 cmt. [13a] then describes one resolution as allowing lawyers to use the so-called “narrative” approach, under which clients testify “without guidance through the lawyer’s questioning.” Although Virginia Rule 3.3 cmt. [13a] unhelpfully neglects to say it, Virginia has rejected the ethical propriety of the so-called “narrative approach.”

The second “suggested resolution, of relatively recent origin, is that the advocate be entirely excused from a duty to reveal perjury if the perjury is that of the client.”

Virginia Rule 3.3 cmt. [13a] criticizes both of these two possible resolutions.

ABA Model Rule 3.3 does not contain a similar Comment.

### **Virginia Rule 3.3 cmt. [13b]**

Virginia Rule 3.3 cmt. [13b] also addresses lawyers’ dilemma when criminal defense clients intend to or do testify falsely.

Virginia Rule 3.3 cmt. [13b] begins by describing the third “resolution” as being the proper one – explaining that “[t]he ultimate resolution of the dilemma . . . is that the lawyer must reveal the client’s perjury if necessary to rectify the situation.” That approach is inconsistent with the exception described in the first sentence of Virginia Rule 3.3 cmt. [11] – which introduces the requirement that lawyers “must disclose the existence of the client’s deception to the court or to the other party,” prefaced with the confusing phrase: “[e]xcept in the defense of a criminal accused.”

Virginia Rule 3.3 cmt. [13b]’s third “resolution” is of course a correct statement of the current ethics rules approach in Virginia (but not all states), and is consistent with

Virginia Rule 3.3 cmt. [10]. As mentioned above, presumably it is always necessary for lawyers to disclose their client’s perjury – if the lawyers “know” that the client has testified falsely. But significantly, lawyers infrequently “know” that their clients have testified falsely, because lawyers must always give their clients the benefit of the doubt – even if the client’s “story” is incredibly implausible, but not impossible.

As explained above, Virginia Rule 3.3 cmt. [13b]’s historically correct conclusion about the ultimate resolution of lawyers’ dilemma highlights the possibly confusing effect of Virginia Rule 3.3 cmt. [11]’s opening phrase: “[e]xcept in the defense of a criminal accused . . . .”

ABA Model Rule 3.3 does not contain a similar Comment. But ABA Model Rule 3.3 cmt. [10] contains essentially the same “bottom line” guidance for lawyers facing the repeatedly described scenario in which a criminal defendant client insists on testifying falsely or does testify falsely.

### **ABA Model Rule 3.3 Comment [12]**

Virginia did not adopt ABA Model Rule 3.3 cmt. [12] or a similar Comment. There is no Virginia Rule 3.3 Comment providing guidance to lawyers interpreting black letter Virginia Rule 3.3(d).

ABA Model Rule 3.3 cmt. [12] addresses lawyers’ responsibility when “a person, including the lawyer’s client” intends to, does, or has engaged in specified wrongdoing.

ABA Model Rule 3.3 cmt. [12] begins by describing lawyers’ “special obligation” to protect tribunals against “criminal or fraudulent conduct” of any sort.

ABA Model Rule 3.3 cmt. [12] next mentions: (1) “bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the

proceeding”; (2) “unlawfully destroying or concealing documents or other evidence”; and (3) “failing to disclose information to the tribunal when required by law to do so.”

ABA Model Rule 3.3 cmt. [12] then turns to what lawyers must do in those circumstances: “[t]hus, [ABA Model Rule 3.3(b)] requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer’s client, intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding” (emphasis added).

ABA Model Rule 3.3 cmt. [12] thus requires such lawyers to take “reasonable remedial measures, including, disclosure if necessary.” Presumably, the lawyer would make such a “disclosure” to the tribunal.

As with similar provisions that require disclosure “if necessary,” ABA Model Rule 3.3 cmt. [12] does not describe when such disclosure is “necessary.” Presumably such disclosure would always be “necessary.”

Interestingly, the closest Virginia provision to ABA Model Rule 3.3(b) is Virginia Rule 3.3(d). But Virginia Rule 3.3(d) is limited to “a person other than a client” who has in the past engaged in a more limited type of wrongdoing – “fraud upon the tribunal in a proceeding.” Virginia Rule 3.3(d) requires such lawyers to “promptly reveal the fraud to the tribunal” – but only if they “receive[] information clearly establishing” such non-clients’ specified past misconduct. As explained above, Virginia Rule 3.3(d) is confusing for many reasons. And there is no Virginia Rule Comment providing any guidance on any of the confusing terms.

### **Virginia Rule 3.3 Comment [14]**

Virginia Rule 3.3 cmt. [14] addresses lawyers’ duties in ex parte proceedings.

Virginia Rule 3.3 cmt. [14] begins by noting that in ordinary adversarial proceedings, “an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision” – because “the conflicting position is expected to be presented by the opposing party” (emphasis added).

The phrase “presenting one side of the matters” seems strange (although the same phrase appears in ABA Model Rule 3.3 cmt. [14]). The plural “matters” is odd enough, but it seems wrong to consider a “matter” as having two “sides” – one of which a lawyer presents on behalf of her client. It might be better to use a phrase such as the following: “. . . presenting her client’s position on matters . . .”

Virginia Rule 3.3 cmt. [14] next contrasts this normal scenario with ex parte proceedings. Virginia Rule 3.3 cmt. [14] notes that in ex parte proceedings, there is “no balance of presentation by opposing advocates,” although like all proceedings, ex parte proceedings’ “object . . . is nevertheless to yield a substantially just result.” Virginia Rule 3.3 cmt. [14] also notes that in such ex parte proceedings, “[t]he judge has an affirmative responsibility to accord the absent party just consideration.”

Virginia Rule 3.3 cmt. [14] explains that in such ex parte settings, lawyers must disclose adverse “material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.”

Interestingly, Virginia Rule 3.3 cmt. [14]’s “reasonably believes” standard does not point to a “reasonable lawyer” – but rather focuses on the lawyer involved in the ex parte proceeding. Presumably the “reasonably believes” standard still represents an objective standard, but perhaps less objective than a pure “reasonable lawyer” standard.

Virginia Rule 3.3 cmt. [14] contains the example of “an application for a temporary restraining order,” and specifically excludes from its application “grand jury proceedings or proceedings which are non-adversarial, including various administrative proceedings in which a party chooses not to appear.”

Virginia Rule 3.3 cmt. [14] then warns that “a particular tribunal (including an administrative tribunal) may have an explicit rule or other controlling precedent which requires disclosure even in a non-adversarial proceeding.” In that situation, lawyers must comply with a disclosure demand by the tribunal or “challenge the action by available legal means.” Reference to “the action” seems inapt. It seems far more likely that the lawyer would challenge the rule or the controlling precedent. The tribunal presumably is not aware of the adverse facts, and therefore might not be in a position to make “a disclosure demand.” Even if it did, the lawyer would challenge the “disclosure demand.” So using the phrase “challenge the action” seems inappropriate in any setting.

Virginia Rule 3.3 cmt. [14] concludes by noting that “[t]he failure to disclose information as part of a legal challenge to a demand for disclosure will not constitute a violation of this Rule.” In other words, a lawyer challenging a tribunal’s “rule or other controlling precedent” requiring disclosure “even in a non-adversarial proceeding” presumably does not have to disclose the withheld information in a challenge to that tribunal’s rule or precedent.

Significantly, Virginia did not adopt ABA Model Rule 3.9, which addresses lawyers’ responsibilities when “representing a client before a legislative body or administrative agency in a nonadjudicative proceeding.” That ABA Model Rule requires such lawyers

to “conform to the provisions of [ABA Model] Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.”

**ABA Model Rule 3.3 cmt. [14]** also addresses lawyers’ duties in the context of ex parte proceedings.

ABA Model Rule 3.3 cmt. [14] begins with the same general explanation as Virginia Rule 3.3 cmt. [14] of why ex parte proceedings are different from adversarial proceedings.

ABA Model Rule 3.3 cmt. [14] contains the same odd phrase found in the Virginia Rule – describing lawyers’ “limited responsibility of presenting one side of the matters that a tribunal should consider” (emphasis added). ABA Model Rule 3.3 cmt. [14] also mentions temporary restraining proceedings as falling within the Rule’s obligation.

But there are several differences between ABA Model Rule 3.3 cmt. [14] and Virginia Rule 3.3 cmt. [14].

First, in contrast to Virginia Rule 3.3 cmt. [14]’s explanation that such a disclosure duty does not apply to grand jury proceedings or non-adversarial proceedings, ABA Model Rule 3.3 cmt. [14] does not contain those examples that fall outside its guidance.

Second, ABA Model Rule 3.3 cmt. [14] does not contain an explanation of tribunals’ explicit disclosure rules or precedent that lawyers must either comply with or challenge.

Third, ABA Model Rule 3.3 cmt. [14] does not include the assurance found at the end of Virginia Rule 3.3 cmt. [14] that lawyers do not violate the ethics rules if they fail “to disclose information as part of a legal challenge to a demand for disclosure.”

As explained above, Virginia did not adopt ABA Model Rule 3.9 – which applies certain disclosure obligations to nonadjudicative proceedings.

### **Virginia Rule 3.3 Comment [15]**

Virginia Rule 3.3 cmt. [15] addresses Virginia Rule 3.3's disclosure duty's duration.

Virginia Rule 3.3 cmt. [15] begins by noting that lawyers' "obligation to rectify false evidence or false statements of law and fact should have a practical time limit." Virginia Rule 3.3 cmt. [15] explains that "[t]he conclusion of the proceedings is a reasonably definite point for the termination of the obligation." Virginia Rule 3.3 cmt. [15] then defines that point: "[a] proceeding has concluded within the meaning of this [Virginia Rule 3.3(b)] when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed."

As explained above, this definition makes sense from a policy standpoint – to avoid lawyers' possible lifelong duty to disclose their clients' tribunal-related misconduct that might have occurred many decades earlier. But the definition is artificial in some ways, because there are numerous situations in which tribunals can reopen, reconsider or revisit their earlier actions. And there are numerous legal theories both in law and equity (such as the equitable "constructive trust" remedy) that allows litigants to revisit long-settled, tribunal-related results.

**ABA Model Rule 3.3 [13]** contains essentially the identical language.

### **ABA Model Rule 3.3 Comment [15]**

Virginia did not adopt ABA Model Rule 3.3 cmt. [15].

ABA Model Rule 3.3 cmt. [15] addresses lawyers' withdrawal after the lawyer has complied "with the duty of candor imposed by this [ABA Model] Rule."

ABA Model Rule 3.3 cmt. [15] begins by explaining that normally such a lawyer's compliance with her duty of candor "does not require that the lawyer withdraw from the

representation of a client whose interests will or have been adversely affected by the lawyer's disclosure.”

As explained below, this may be an accurate prediction based on the tribunal's refusal to allow such withdrawal, but otherwise makes little sense.

ABA Model Rule 3.3 cmt. [15] next reminds lawyers that they “may, however, be required by [ABA Model] Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this [ABA Model Rule 3.3's] duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client.”

ABA Model Rule 1.16(a) explains that lawyers “shall not represent a client, or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation would 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.” Presumably ABA Model Rule 3.3 cmt. [15]'s reference to a possible requirement “to seek permission of the tribunal to withdraw” focuses on either ABA Model Rule 1.16(a)(1) or (3). But even ABA Model Rule 1.16(a)(1) seems like an unlikely candidate for imposing such a requirement that the lawyer seek permission to withdraw. Ironically, such “an extreme deterioration of the client-lawyer relationship” in that scenario that resulted from the lawyer's compliance with her ethical responsibility, not her “violation of the rules of professional conduct or other law.”

ABA Model Rule 3.3 cmt. [15] refers to such a lawyer's inability to “competently represent the client.” That reference presumably refers to ABA Model Rule 1.1. ABA

Model Rule 1.1 requires that “[a] lawyer shall provide competent representation to a client” – which “requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” A lawyer who has complied with her disclosure obligation under ABA Model Rule 3.3 would presumably still meet ABA Model Rule 1.1’s competence requirement. An “extreme deterioration of the client-lawyer relationship” presumably would have little if any effect on the lawyer’s competence. Instead, it would adversely affect (probably fatally) the lawyer’s ability to deal with the client on a day-to-day basis.

Among other things, such a scenario might (and probably would) trigger a conflict under ABA Model Rule 1.7(a)(2) – creating “a significant risk” that the lawyer’s representation of the client “will be materially limited by . . . a personal interest of the lawyer” (such as the personal interest in avoiding the taint that might otherwise diminish the lawyer’s standing in the tribunal or her reputation).

And there might be other reasons why the lawyer normally would withdraw if such “an extreme deterioration of the client-lawyer relationship” occurred. But presumably it would not involve the lawyer’s competence.

ABA Model Rule 3.3 cmt. [15] then points to ABA Model Rule 1.16(b) for further guidance on “the circumstances in which a lawyer will be permitted to seek a tribunal’s permission to withdraw.” ABA Model Rule 1.16(b) describes seven situations in which lawyers “may withdraw from representing a client” – several of which might apply in an ABA Model Rule 3.3-triggered scenario. For instance, under ABA Model Rule 1.16(b)(2) “a lawyer may withdraw from representing a client if . . . the client persists in a course of action involving a lawyer’s services that the lawyer reasonably believes is criminal or

fraudulent.” ABA Model Rule 1.16(b)(3) describes a similar withdrawal option “if . . . the client has used the lawyer’s services to perpetuate a crime or fraud.” ABA Model Rule 1.16(b)(4) describes a similar scenario “if . . . the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.” ABA Model Rule 1.16(b)(7) contains essentially a catch-all option: “[a] lawyer may withdraw from representing a client if . . . other good cause for withdrawal exists.”

Several of these ABA Model Rule 1.16(b) provisions might justify lawyers’ efforts to withdraw from a representation after the lawyer has complied with her disclosure obligations.

As a practical matter, one would think that a lawyer’s compliance with her disclosure obligations (such as her disclosure of a client’s false testimony or presentation of other evidence) would inevitably “result[ ] in such an extreme deterioration of the client-lawyer relationship” that continuing the representation would be essentially impossible.

After all, ABA Model Rule 3.3 cmt. [11] itself understandably warns that “[t]he disclosure of a client’s false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury.”

Perhaps ABA Model Rule 3.3 cmt. [15]’s unrealistic statement that “[n]ormally, a lawyer’s compliance with the duty of candor imposed by [ABA Model Rule 3.3] does not require that the lawyer withdraw from the representation of the client” is somewhat disingenuously intended to give lawyers an ethical thread to hang onto if the tribunal denies the lawyer’s motion to withdraw and instead orders the lawyer to keep representing the client. Judges understandably worry that granting a withdrawal motion

might require them to declare a mistrial – costing judicial resources, and possibly supplying a road map to a criminal defendant (and others with whom he is imprisoned or with whom he might otherwise communicate) about how to trigger such a mistrial. It is difficult to think of any other reason why ABA Model Rule 3.3 cmt. [15] would explain that “normally a lawyer can continue to represent a criminal defendant after disclosing the criminal defendant’s perjurious misconduct.

ABA Model Rule 3.3 cmt. [15] concludes by warning that “[i]n connection with a request for permission to withdraw that is premised on a client’s misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by [ABA Model] Rule 1.6.” This warning seems to be unintentionally somewhat ironic, because a lawyer seeking such a withdrawal after complying with her ABA Model Rule 3.3 disclosure duties has already disclosed evidence of her client’s perjurious testimony or presentation of false evidence.

# RULE 3.4

## Fairness To Opposing Party And Counsel

### Rule

#### Virginia Rule 3.4(a)

Virginia Rule 3.4(a) addresses lawyers' participation in various tribunal-related misconduct, including obstructing justice.

Virginia Rule 3.4 contains listed misconduct focusing on the misconduct's purpose (Virginia Rule 3.4(a), (b), (i)) and the misconduct's effect (Virginia Rule 3.4(g), (j)).

Interestingly, Virginia did not adopt ABA Model Rule 8.4(d)'s more generic prohibition: "[i]t is professional misconduct for a lawyer . . . engage in conduct that is prejudicial to the administration of justice." Of course, other Virginia Rule 8.4 provisions presumably would prohibit the actions that would necessarily involve such generic misconduct.

Virginia Rule 3.4(a) prohibits two different types of misconduct.

First, "[a] lawyer shall not . . . [o]bstruct another party's access to evidence." The word "party" might denote a litigation party, or it might refer more generically to some third party (in other words, another person). The word "evidence" presumably denotes documentary evidence, intangible evidence such as witnesses' testimony, etc. This prohibition casts a wide net, and presumably includes the more specific misconduct

mentioned later in that sentence, as well as other misconduct prohibited elsewhere in Virginia Rule 3.4 (discussed below).

Second, “[a] lawyer shall not . . . alter, destroy or conceal a document or other material having potential evidentiary value for the purpose of obstructing a party’s access to evidence.” The three-part phrase “alter, destroy or conceal” seems logically inapt. A series like that normally moves from the lesser to the greater. One would think that the following order would make more sense: “alter, conceal or destroy” – representing increasingly egregious behavior. As explained below, Virginia Rule 3.4 cmt. [2] lists the same misconduct, but in the more logical order.

The term “other material” presumably means tangible items other than documents, such as fruits of a crime, weapons, etc.

Virginia Rule 3.4(a)’s first prohibition applies to “a document or other material having potential evidentiary value.” This term expands the prohibition beyond just evidence. And, the prohibition covers lawyers’ actions that have a specified motivation “for the purpose of obstructing a party’s access to evidence.”

Virginia Rule 3.4(a) then expands the prohibition, indicating that “[a] lawyer shall not counsel or assist another person to do any such act.” The word “counsel” presumably denotes advice or encouragement. The phrase “any such act” creates some uncertainty, because presumably it expands the prohibition to similar misconduct.

**ABA Model Rule 3.4(a)** contains similar language, but differs from Virginia Rule 3.4(a) in several ways.

First, ABA Model Rule 3.4(a)’s first generic prohibition states that “[a] lawyer shall not . . . unlawfully obstruct another party’s access to evidence” (emphasis added). Thus,

ABA Model Rule 3.4(a) imports extrinsic law into the prohibition. The same term “unlawfully” introduces the same list of prohibited actions in the same order described above as inapt: “alter, destroy or conceal.” ABA Model Rule 3.4 cmt. [2] contains the same list of misconduct, as in Virginia Rule 3.4(a), but in the more logical order – representing increasingly egregious behavior: “entered, concealed, or destroyed.”

Second, in contrast to Virginia Rule 3.4(a), ABA Model Rule 3.4(a) does not repeat the improper purpose after its temporally-awkward list of misconduct.

### **Virginia Rule 3.4(b)**

Virginia Rule 3.4(b) addresses forms of witness tampering.

Under Virginia Rule 3.4(a), “[a] lawyer shall not . . . [a]dvice or cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein.” The word “[a]dvice” presumably means encouraging the person to engage in that action. The word “cause” seems to involve that misconduct, as well as some assistance in the action. The phrase “secrete himself or herself” presumably refers to the witness making himself or herself difficult if not impossible to serve or otherwise locate. The separate phrase “leave the jurisdiction of a tribunal” may mean action that does not make the witness impossible or even difficult to find, but places the witness outside the reach of process requiring the witness to testify.

As with Virginia Rule 3.4(a), Virginia Rule 3.4(b) concludes with a description of the motive rendering the misconduct unethical: “for the purpose of making that person unavailable as a witness therein.”

**ABA Model Rule 3.4** does not contain a similar provision.

### **Virginia Rule 3.4(c)**

Virginia Rule 3.4(c) addresses different forms of witness tampering.

Virginia Rule 3.4(c) indicates that “[a] lawyer shall not”: (1) “[f]alsify evidence”; (2) “counsel . . . a witness to testify falsely”; (3) “assist a witness to testify falsely”; (4) “offer an inducement to a witness that is prohibited by law.”

The first prohibited conduct presumably includes falsifying documents or other evidence, as well as falsifying testimony.

The phrase “counsel or assist” presumably has the same meaning as that in Virginia Rule 3.4(a), discussed above. Lawyers “assist” witnesses in testifying falsely by suggesting false statements, etc.

The final listed misconduct involves lawyers’ “offer” of an illegal “inducement to a witness.” So presumably the lawyer’s ethics violation does not depend on the witness accepting the illegal inducement.

The phrase “prohibited by law” obviously imports extrinsic law into the ethics rules.

Virginia Rule 3.4(c) then lists nine permissible payments lawyers may make to a witness. Lawyers “may advance, guarantee, or pay” three types of payments. The word “advance” presumably refers to a lawyer making the payment with expectation that someone else will reimburse the lawyer (probably the client, although third parties may in certain circumstances make such payments). The word “guarantee” presumably refers to the reverse situation – a lawyer promising to reimburse someone else for a payment that he or she makes. And the word “pay” is the simplest description of lawyers’ permissible action.

The first type of Virginia Rule 3.4(a) permissible payment that lawyers may “advance, guarantee, or pay” is for “reasonable expenses incurred by a witness in attending or testifying.” Those obviously include travel expenses such as mileage, hotel bills, parking, food, etc. Such expenses must be “reasonable.” This limitation makes sense, because it presumably precludes the lawyer from extravagant spending such as putting a witness up at a city’s most expensive hotel – with the hopes of inducing more favorable testimony. Of course, the word “attending” is broader than “testifying.” Witnesses can attend a proceeding without testifying, but they cannot testify without attending. So the word “testifying” would seem to be superfluous. Perhaps it includes witnesses testifying in some remote location or in a deposition, thus not actually “attending” a proceeding. And perhaps Virginia Rule 3.4(c)(1) includes the word “testifying” to make it clear that the testimony-related expenses are fair game for the lawyer to “advance, guarantee, or pay.” There is something vaguely uneasy about paying for a witness’s testimony, so this assurance that lawyers may pay expenses associated with testifying is reassuring.

The second type of Virginia Rule 3.4(c) permissible payment lawyers may “advance, guarantee, or pay” is: “reasonable compensation to a witness for lost earnings as a result of attending or testifying.” This is a dramatically different type of payment, because it does not just cover expenses. And the compensation can cover the same type of witness action: “attending or testifying.” But there are also two limitations. The “compensation” must be “reasonable.” That word seems superfluous in this provision, because of the second limitation. On its face, Virginia Rule 3.4(c)(2) allows lawyers to “advance, guarantee, or pay . . . reasonable compensation to a witness for lost earnings”

(emphasis added). Presumably compensating a witness for “lost earnings” would by definition be “reasonable” – at least if they match the lost earnings.

This limitation to “compensation . . . for lost earnings” on its face does not allow a lawyer to pay a witness for her time spent traveling if that is required, preparing to testify, waiting to testify, testifying, etc. There has been a general movement nationally in favor of allowing such reasonable payments. Traditionally, most states prohibited lawyers from paying witnesses anything other than some minimal witness fee, along with reasonable expenses. But many if not most states now permit lawyers to pay reasonable compensation for fact witnesses. The courts and bars allowing such compensation understandably require disclosure of the compensation. And those courts and bars reason that jurors or the other finder of fact can take such compensation into account when judging the witness’s bias or credibility.

Limiting lawyers’ payment to witnesses of their “lost earnings” flies in the face of this understandable trend. It certainly allows a lawyer to pay a factory worker or other hourly-paid witness – it is easy to calculate such witness’s “lost earnings.” But many professionals would not suffer any measurable “lost earnings” if they spend time preparing to testify and testifying. Presumably lawyers could still pay “reasonable compensation” if there was some way to reliably calculate such “lost earnings.” For instance, perhaps a realtor spending a day preparing to testify, waiting to testify and then testifying could reasonably calculate that she earns \$750 on average each weekday during the year. That might satisfy the “lost earnings” “standard.”

Also, limiting witness compensation to “lost earnings” presumably does not cover retired witnesses. The courts and bars permitting reasonable and transparent

compensation to retired fact witnesses for the time they spend preparing to testify, waiting to testify and then testifying understandably (but often impliedly) reason that the witnesses worked hard all their life so they could play golf, spend time with grandchildren, relax, etc. So it would not seem inappropriate for them to expect some reasonable compensation for being taken away from such activities. And because the justice system works better when witnesses testify, these courts and bars presumably reason that such witnesses should also be entitled to reasonable compensation – as long as it is transparent and can be put before the jury or other finder of fact.

The bottom line question in Virginia is whether the list of permissible amounts lawyers “may advance, guarantee, or pay” is exclusive, or instead provides examples of permissible action. In other words, if such reasonable compensation beyond that “for lost earnings” is not “prohibited by law” (which presumably it would not be), may a lawyer make such payments? Prohibiting such payments might inhibit some fact witnesses to testify, which would seem contrary to the public interest. And as long as the compensation is “reasonable” and is transparent to the juror or other finder of fact, payment other than just for “lost earnings” would not seem to result in any prejudice to the administration of justice. In fact, such payments arguably assist in the administration of justice.

The third type of Virginia Rule 3.4(c) permissible payments that lawyers “may advance, guarantee, or pay” is “a reasonable fee for the professional services of an expert witness.” This type of payment represents the traditional expert witness fee, which by court rule must be transparent. Most jurisdictions prohibit expert witnesses’ fees being contingent on the outcome of the case. However, at least one jurisdiction (Washington,

D.C.) permits such contingent fees for expert witnesses, although the fees cannot be a percentage of the recovery.

**ABA Model Rule 3.4(b)** contains language identical to Virginia Rule 3.4(c).

But in contrast to Virginia Rule 3.4(c), ABA Model Rule 3.4(b) does not contain the nine types of permissible payments. ABA Model Rule 3.4 cmt. [3] (discussed below) addresses payments to fact and expert witnesses.

### **Virginia Rule 3.4(d)**

Virginia Rule 3.4(d) addresses lawyers' and their clients' compliance with or challenge to a tribunal's rule or ruling.

Under Virginia Rule 3.4(d), “[a] lawyer shall not . . . [k]nowingly disobey or advise a client to disregard” two types of tribunal actions: (1) “a standing rule”; or (2) “a ruling of a tribunal made in the course of a proceeding.” Thus, Virginia Rule 3.4(d) focuses both on a lawyer's knowing disobedience, and the lawyer's advice that a client disregard one of those two types of tribunal actions.

The term “standing rule” presumably refers to a tribunal's local rule. And a “ruling . . . made in the course of proceeding” could be a substantive or a procedural “ruling.”

Virginia Rule 3.4(d) contains an exception: “but the lawyer may take steps, in good faith, to test the validity of such rule or ruling.” This understandable provision permits lawyers to ask the tribunal for reconsideration, or seek some judicial review through interlocutory appeal, mandamus, etc.

It is unclear whether the term “good faith” focuses on lawyers' motives, or on the challenge's merits. Under Virginia Rule 3.1, lawyers may not take tribunal-related action “unless there is a basis for doing so that is not frivolous.” But the “not frivolous” standard

“includes a good faith argument for an extension, modification or reversal of existing law.”

As this document explains in its summary and analysis of Virginia Rule 3.1, there is a spectrum of lawyer conduct. Lawyers might be disciplined if they challenge a rule or ruling that was recently upheld by a higher court and easy to understand. But they might avoid ethics sanctions if they challenge a rule or ruling that is old, has received criticism, or has been questioned by other tribunals, etc. Presumably the same standard applies to lawyers’ conduct under Virginia Rule 3.4(d).

**ABA Model Rule 3.4(c)** is similar to Virginia Rule 3.4(d). But there are several differences.

First, in contrast to Virginia Rule 3.4(d)’s focus on both lawyers’ and their clients’ action, ABA Model Rule 3.4(c) only explains what a lawyer may not do: “knowingly disobey an obligation under the rules of a tribunal.”

Second, in contrast to Virginia Rule 3.4(d)’s reference to “a standing rule or a ruling of a tribunal made in the course of a proceeding,” ABA Model Rule 3.4(c) refers to “an obligation under the rules of a tribunal.” That seems to match Virginia Rule 3.4(d)’s term “standing rule,” but excludes the proceeding-specific tribunal “ruling” reference contained in Virginia Rule 3.4(d).

Third, in contrast to Virginia Rule 3.4(d)’s exception allowing lawyers to “take steps, in good faith, to test the validity of such rule or ruling,” ABA Model Rule 3.4(c) contains a differently worded exception: “except for an open refusal based on an assertion that no valid obligation exists.” The term “open refusal” seems odd. It is difficult to imagine a lawyer secretly disobeying a tribunal’s rule. And ABA Model Rule 3.4(c) does not explicitly require that the lawyer’s challenge be asserted in good faith. The ABA Model Rule 3.4(c)

exception does not imply some appellate step either, although under that ABA Model Rule a lawyer may end up in an appellate court. Of course, ABA Model Rule 3.1 would apply to such a lawyer's actions.

### **Virginia Rule 3.4(e)**

Virginia Rule 3.4(e) addresses lawyers' discovery requests and responses.

Virginia Rule 3.4(e) first indicates that “[a] lawyer shall not . . . [m]ake a frivolous discovery request.” Presumably the court ultimately decides whether the discovery request is frivolous or not, although a disciplinary authority might conduct its own analysis. Virginia Rule 3.4(e) then addresses the reverse scenario – explaining that “[a] lawyer shall not . . . fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.” This conduct presumably would also play out most frequently in the judicial process, with court sanctions rather than bar sanctions punishing lawyers who engage in such misconduct.

The term “legally proper” seems inapt. If the term includes the Virginia ethics Rules as “law,” the term is appropriate. But importing other extrinsic law seems odd.

And the term “opposing party” seems too narrow. Lawyers represent third parties who receive discovery requests the party seeking such discovery obviously is an “opposing party” in that discovery context, but not in the way that term traditionally is used. And of course lawyers' clients do not receive discovery requests from themselves. So the phrase “by an opposing party” is unnecessary, and appears to describe only a subset of the context in which Virginia Rule 3.4(e) might apply.

**ABA Model Rule 3.4(d)** contains language identical to Virginia Rule 3.4(e).

Among other things, ABA Model Rule 3.4(a) raises the same issues implicated by the terms “legally proper” and “by an opposing party.”

In contrast to Virginia Rule 3.4(e), ABA Model Rule 3.4(d) begins with the phrase “in pretrial procedure.” That phrase also seems too limiting. A discovery request might come after a trial, in connection with a fee dispute, etc. As with the phrase “by an opposing party” (contained in ABA Model Rule 3.4(d) and in Virginia Rule 3.4(e), the phrase “in pretrial procedure” also seems unnecessary. Presumably the ABA Model Rule applies whenever and however a lawyer’s client seeks discovery or responds to discovery.

### **Virginia Rule 3.4(f)**

Virginia Rule 3.4(f) addresses lawyers’ impermissible trial statements.

Virginia Rule 3.4(f) first prohibits certain statements by lawyers “[i]n trial.” This limitation presumably excludes from those prohibitions lawyer statements in other settings, such as pre-trial or post-trial hearings, depositions, etc. Of course, similar statements in those other settings might violate other Virginia Rules. For instance, Virginia Rule 3.6 addresses lawyers’ extrajudicial statements, and Virginia Rule 3.8 addresses prosecutors’ statements.

Virginia Rule 3.4(f) states that “[i]n trial,” a lawyer “shall not:” (1) “allude to any matter that the lawyer does not reasonably believe is relevant”; (2) “allude to any matter . . . that will not be supported by admissible evidence”; (3) “assert personal knowledge of facts in issue except when testifying as a witness”; (4) “state a personal opinion as to the justness of a cause”; (5) “state a personal opinion . . . as to . . . the credibility of a witness”; (6) “state a personal opinion . . . as to the culpability of a civil litigant”; (7) “state a personal

opinion as to . . . the guilt . . . of an accused”; (8) “state a personal opinion as to . . . the innocence of an accused.” All of those make sense, although lawyers might not always strictly comply with the prohibitions. The phrase “justness of a cause” seems too limited – one would think that the prohibition would also prohibit lawyers from stating their “personal opinion as to the “justness” of a defense.

**ABA Model Rule 3.4(e)** contains language identical to Virginia Rule 3.4(f).

### **Virginia Rule 3.4(g)**

Virginia Rule 3.4(g) addresses lawyers’ procedural or evidentiary violations.

Under Virginia Rule 3.4(g), “[a] lawyer shall not . . . [i]ntentionally or habitually violate any established rule of procedure or of evidence, where such conduct is disruptive of the proceedings.”

Virginia Rule 3.4(g) is odd, for several reasons.

First, the alternatives of “[i]ntentionally or habitually” seems inappropriate (emphasis added). The word “intentionally” focuses on the actor’s mental state, and the word “habitually” focuses on the action’s repetition. Something can be done “intentionally” but only once, and unintentional conduct can occur “habitually.”

Second, the phrase “established rule of procedure or of evidence” seems inapt (emphasis added). All rules of procedure and evidence are “established.” Perhaps the term is intended to distinguish a rule from a ruling, but even that seems inappropriate – for the third reason discussed below.

Third, Virginia Rule 3.4(g)’s prohibition only applies “where such conduct is disruptive of the proceedings.” One would think that Virginia Rule 3.4(g) would prohibit frivolous or bad faith rule violations even if they did not disrupt the proceedings. And it

would also make sense for the ethics rules to prohibit “conduct . . . disruptive of the proceedings” regardless of its basis (whether it violates a rule or for some other reason, or perhaps no reason at all).

As mentioned above, Virginia Rule 3.4 contains listed misconduct focusing on the misconduct’s purpose (Virginia Rule 3.4(a), (b), (i)) and the misconduct’s effect (Virginia Rule 3.4(g), (j)).

**ABA Model Rule 3.4** does not contain a similar provision.

### **Virginia Rule 3.4(h)**

Virginia Rule 3.4(h) addresses lawyers’ attempts to stymie another party’s informal discovery.

As explained above, Virginia Rule 3.4(b) prohibits lawyers from “[a]dvis[ing] or caus[ing] a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein.”

Virginia Rule 3.4(h) addresses a lesser form of similar conduct. Under Virginia Rule 3.4(h), “[a] lawyer shall not . . . [r]equest a person other than a client to refrain from voluntarily giving relevant information to another party” (with certain exceptions). The word “[r]equest” presumably involves less than a demand or even advice not to voluntarily give relevant information. The word “relevant” limits the type of information covered by the prohibition – understandably allowing lawyers to request non-clients to refrain from voluntarily giving irrelevant information to another party. The term “another party” presumably means “another person” rather than a formal litigation party. Otherwise, the prohibition would not apply to anticipated litigation, before there are “parties.”

Virginia Rule 3.4(h) allows such a “[r]equest” under three conditions.

First, under Virginia Rule 3.4(h)(1), lawyers may make such a request if “the information is relevant in a pending civil matter.” Thus, lawyers have more freedom to make such a request in a “pending civil matter.” Perhaps the higher stakes involved in a criminal matter make such a request unlikely to inhibit justice.

Second, under Virginia Rule 3.4(h)(2), lawyers may make such a request only “in a civil matter” and only if the lawyer requests such forbearance from certain specified persons: “a relative”; “a current . . . employee . . . of a client”; “a current . . . other agent of a client”; a “former employee . . . of a client”; a “former . . . other agent of a client.” Thus, Virginia Rule 3.4(h)’s prohibition covers anyone other than the client’s relatives or a corporate client’s current or former employees or other agents. It is unclear what the term “other agent of a client” means.

Third, under Virginia Rule 3.4(h)(3), a lawyer may make such a request if “the lawyer reasonably believes that the person’s interests will not be adversely affected by refraining from giving such information.” It is unclear how such persons’ “interests” would be “adversely impacted by refraining from giving such information.” If they refrained from “giving” the information, the party seeking the information might (and presumably would) initiate formal discovery processes if that person’s information was important enough to justify that. Perhaps Virginia Rule 3.4(h)(3) rests on the notion that voluntarily refraining from giving information shows favoritism. It is unclear whether that is the sort of “adverse” effect that eliminates this condition and thus imposes the prohibition on lawyers’ request for such a person to voluntarily refrain from giving information.

**ABA Model Rule 3.4(f)** is similar to Virginia Rule 3.4. Thus, ABA Model Rule 3.4(f) applies to persons “other than a client,” addresses only requesting those persons to

refrain from giving “relevant” information, and uses the phrase “another party,” (which presumably means “another person”).

But ABA Model Rule 3.4(f) differs from Virginia Rule 3.4(h) in several ways.

First, in contrast to Virginia Rule 3.4(h)(1)’s permission for lawyers to make such a request if “the information is relevant in a pending civil matter,” ABA Model Rule 3.4(f) presumably applies in all settings – criminal as well as civil, and whether or not litigation is pending.

Second, in contrast to Virginia Rule 3.4(h)(2)’s list of persons to whom the lawyer may ethically make such a request, ABA Model Rule 3.4(f)(1) only allows lawyers to make such a request to clients’ “relative or an employee or other agent of a client.” This presumably limits the exception to current client employees or agents – a much narrower range than Virginia Rule 3.4(h)(2)’s inclusion of “former” client employees or agents within the group to which lawyers may make such a request.

### **Virginia Rule 3.4(i)**

Virginia Rule 3.4(i) addresses lawyers’ threat to present criminal or disciplinary charges.

Under Virginia Rule 3.4(i), “[a] lawyer shall not . . . [p]resent or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter. Thus, Virginia Rule 3.4(i) lists four types of actions: (1) threatening to present criminal charges with the specified improper motive; (2) presenting criminal charges with the specified improper motive; (3) threatening to present disciplinary charges with the specified improper motive; and (4) presenting disciplinary charges with the specified improper motive.

The prohibition on lawyers “present[ing]” a criminal or disciplinary charge with an improper motive obviously focuses on the lawyer “just doing it” rather than threatening to do it. In those situations, it obviously can be difficult to determine if the lawyer had an improper motive. The lawyer could always point to the motive of helping society by catching criminals, assisting the profession by seeking discipline of unethical lawyers, etc. This is why Virginia Rule 3.4(i)’s “threaten” prong more frequently triggers lawyer discipline. If the threat is coupled with a *quid pro quo*, the Bar can more easily establish the lawyer’s “sole” motive. For instance, a threat such as “if you don’t settle this case by paying my client \$10,000, we will report your tax delinquency to the IRS” clearly establishes the lawyer’s sole motive.

These four prohibitions apply under Virginia Rule 3.4(i) and if the lawyer acts “solely to obtain an advantage in a civil matter” (emphasis added). If lawyers have any motive other than that, Virginia Rule 3.4(i) does not apply. The word “solely” presumably means that even a miniscule of a different motivation renders the ethics prohibition inapplicable. Virginia Rule 3.4(i) could have used several other standards found elsewhere in the Virginia Rules. For instance, under Virginia Rule 3.1 cmt. [2], an action is frivolous “if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person” (emphasis added). Virginia Rule 3.4(a) prohibits certain conduct taken “for the purpose of obstructing a party’s access to evidence” (emphasis added). Virginia Rule 3.4(b) prohibits other action taken “for the purpose of making that person unavailable as a witness therein” (emphasis added). Virginia Rule 4.4(a) prohibits a lawyer from using means “that have no substantial purpose other than to embarrass, delay, or burden a third person” (emphasis added). So

presumably Virginia Rule 3.4(i) deliberately contains the prohibition on the specified conduct only if the lawyer is “solely” motivated by “obtain[ing] an advantage in a civil matter.”

Virginia Rule 3.4(i) notably limits the prohibition to “a civil matter.” This excludes from the prohibition such presenting or threatening to gain some advantage in a criminal matter. Of course, that might violate other Virginia Rules.

The term “matter” is not defined, but presumably includes some civil action, dispute, etc. In a different government conflicts-related context, Virginia Rule 1.11(f)(1) defines the term “matter” as including (and thus not limited to): “any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties.” That expansive definition highlights Virginia Rule 3.4(i)’s breadth.

The history of this prohibition provides a fascinating insight into the ABA’s and states’ ethics rule developments and ethics rules organization.

The pre-1983 ABA Model Code of Professional Responsibility DR 7-105(A) stated, “[a] lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.” When the ABA adopted the ABA Model Rules of Professional Conduct in 1983, it deliberately dropped that provision. ABA LEO 363 (7/6/92) explained that the ABA considered such misconduct covered by other ABA Model Rule.

But most states have kept variations of the old ABA Model Code prohibition. In the absence of an ABA Model Rule provision covering that topic, states had to find a place

to put any similar continuing prohibition. States have placed their continuing prohibitions in their Rule 1.2, 3.4, 4.4, 8.4, (and in unique rules for states that have a different numbering format). This can make it very difficult for lawyer's researching such prohibitions (especially outside their home state) to know whether they can present or threaten to present criminal or disciplinary charges. To make matters more confusing, states use differing formulations (discussed below) – which makes a word search unreliable. Some states have continued a similar prohibition, but articulated in legal ethics opinions rather than in a rule – also making it difficult to find.

States also take differing positions on the substance of the basic prohibition. Some states follow the old ABA Model Code trifecta prohibition: “[a] lawyer shall not present, participate in presenting or threaten to present criminal charges solely to obtain an advantage in a civil matter.”

Virginia Rule 3.4(i) does not include the “participating in presenting” prohibition. This presumably allows Virginia lawyers to discuss with their clients those clients’ ability to file criminal or disciplinary charges.

Some states only prohibit the threatening, and not the presenting or the participation in presenting. Most states follow the old ABA Model Code limitation to “criminal” charges. Virginia Rule 3.4(i) includes “disciplinary” charges in its prohibition. Not all states limit their prohibitions to circumstances when the lawyer is “solely” motivated by the impure motive.

All of these variations are more worrisome because bars takes these prohibitions very seriously. Several Virginia legal ethics opinions have explained the breadth of Virginia Rule 3.4(i)’s prohibition.

**ABA Model Rule 3.4** does not contain a similar prohibition.

ABA LEO 363 (7/6/92) explained which threats or similar actions might violate other ethics rules.

### **Virginia Rule 3.4(j)**

Virginia Rule 3.4(j) addresses lawyers' actions that harass or injure others.

Under Virginia Rule 3.4(j), “[a] lawyer shall not” engage in six specified actions if the lawyer has the specified knowledge (discussed below) that the actions would have the specified ill effect on “another,” (also discussed below). The six actions are: (1) “[f]ile a suit”; (2) “initiate criminal charges”; (3) “assert a position”; (4) “conduct a defense”; (5) “delay a trial”; or (6) “take other action.”

The term “initiate criminal charges” presumably is intended to be synonymous with Virginia Rule 3.4(i)'s term “present criminal . . . charges.” It is strange that two consecutive rules would use different terms to mean the same thing.

The term “assert a position” seems to signify one event. In contrast, the term “conduct a defense” seems to describe a pattern of conduct, rather than a single event. And of course the phrase “take other action” is a catch-all that could include any action or pattern of actions.

Virginia Rule 3.4(j)'s prohibition applies if the lawyer takes one of the specified actions “on behalf of the client.” This phrase presumably is intended to be synonymous with other phrases such as: “[i]n the course of representing a client” (Virginia Rule 4.1), “[i]n representing a client” (Virginia Rules 4.2 and 4.4), “[i]n dealing on behalf of a client” (Virginia Rule 4.3).

Virginia Rule 3.4 contains listed misconduct focusing on the misconduct's purpose (Virginia Rule 3.4(a), (b), (i)) and the misconduct's effect (Virginia Rule 3.4(g), (j)).

Virginia Rule 3.4(j)'s prohibition only applies “when the lawyer knows or when it is obvious that such an action” would have the specified ill effects. The Virginia Terminology defines “knows” as “denot[ing] actual knowledge of the fact in question, although “[a] person’s knowledge may be inferred from circumstances.” The term “obvious” presumably falls somewhere between knowledge and “reasonable should know” – which appears elsewhere in the Virginia Rules. Perhaps it is close to Virginia Rule 1.6(b)(3) “clearly establishes” standard.

Virginia Rule 3.4(j) describes the specified ill effects that trigger the prohibition as follows: “actions [that] would serve merely to harass or maliciously injure another.” The word “serve” seems inapt. Normally, the word “serve” has a favorable meaning, describing the conferral of a benefit: “such action would merely harass or maliciously injure another” might make more sense. And like Virginia Rule 3.4(i)'s word “solely,” Virginia Rule 3.4(j)'s word “merely” presumably limits the prohibition to actions that serve any other purpose other than “to harass or maliciously injure another.” This further narrows Rule 3.4(j)'s reach.

**ABA Model Rule 3.4** does not contain a similar provision. ABA Model Rule 3.1 prohibits frivolous litigation-related actions.

## Comment

### Virginia Rule 3.4 Comment [1]

Virginia Rule 3.4 cmt. [1] addresses the adversary system's basic nature.

Virginia Rule 3.4 cmt. [1] begins by explaining that the adversary system's procedure "contemplates that the evidence in a case is to be marshaled competitively by the contending parties."

Virginia Rule 3.4 cmt. [1] concludes by understandably stating that "[f]air competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like."

**ABA Model Rule 3.4 cmt. [1]** contains identical language.

### Virginia Rule 3.4 Comment [2]

Virginia Rule 3.4 cmt. [2] addresses improper document-related discovery tactics.

Virginia Rule 3.4 cmt. [2] begins by making the obvious point that "[d]ocuments and other items of evidence are often essential to establish a claim or defense." The Virginia Rule Comment then explains that "the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right" – although "[s]ubject to evidentiary privileges."

Virginia Rule 3.4 cmt. [2] next explains that such right's exercise "can be frustrated if relevant material is altered, concealed or destroyed." Interestingly, this misconduct trifecta is more appropriate than the order of the same words in black letter Virginia Rule 3.4(a): "alter, destroy or conceal."

Virginia Rule 3.4 cmt. [2] then warns that “[a]pplicable law makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding for one whose commencement can be foreseen.”

Virginia Rule 3.4 cmt. [2] concludes by explaining that Virginia Rule 3.4(a) “applies to evidentiary material generally, including computerized information.” The term “computerized information” seems archaic.

**ABA Model Rule 3.4 cmt. [2]** contains the identical first three sentences. The third sentence thus contains the more logical trifecta “altered, concealed or destroyed” – in contrast to black letter ABA Model Rule 3.4(a)’s order: “alter, destroy or conceal.”

ABA Model Rule 3.4 cmt. [2] also uses the same archaic reference to “computerized information” as Virginia Rule 3.4 cmt. [2].

In contrast to Virginia Rule 3.4 cmt. [2], ABA Model Rule 3.4 cmt. [2] explains that “[a]pplicable law in many jurisdiction” defines offenses involving document destruction.

There are several other differences between ABA Model Rule 3.4 cmt. [2] and Virginia Rule 3.4 cmt. [2].

First, ABA Model Rule 3.4 cmt. [2] notes that “[f]alsifying evidence is also generally a criminal offense.”

Second, ABA Model Rule 3.4 cmt. [2] concludes with a topic Virginia Rule 3.4 and its Comments do not address – lawyers’ treatment of fruits and instrumentalities of a crime. ABA Model Rule 3.4 cmt. [2] explains that “[a]pplicable law may permit a lawyer to take temporary possession of physical evidence of client crimes.” ABA Model Rule 3.4 cmt. [2] then explains that lawyers may do so “for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence.” The

ABA Model Rule Comment finally notes that “[i]n such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.”

Virginia Rule 3.4’s failure to address this fascinating issue is ironic, because a seminal case involving that issue came from a Richmond, Virginia lawyer’s possession of his criminal client’s fruits and instrumentalities of a crime. In re Ryder, 263 F.Supp. 360 (E.D. Va. 1967).

### **Virginia Rule 3.4 Comment [3]**

Virginia Rule 3.4 cmt. [3] addresses lawyers’ payments to fact witnesses.

Virginia Rule 3.4 cmt. [3] begins by acknowledging that “it is not improper to pay a witness’s reasonable expenses or to pay a reasonable fee for the services of an expert witness.”

But Virginia Rule 3.4 cmt. [3] concludes with a warning that “[t]he common law rule as that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.” The term “occurrence witness” presumably is intended to refer to fact witnesses (in contrast to expert witnesses).

The phrase “for testifying” is not defined. If that phrase is intended to reference payments related to the substance of a fact witness’s testimony, both the “common law” and the criminal law presumably condemn that practice. Notably, Virginia Rule 3.4 cmt. [3]’s reference to “[t]he common law rule” does not state the applicable rule in Virginia. As explained above, black letter Virginia Rule 3.4(c)(2) itself allows what the provision calls “reasonable compensation” (but what could also be called a “fee”) in certain circumstances. And those might not be the only circumstances in which lawyers may pay

a fact witness. But as explained above, bars have been moving in the direction of allowing lawyers to pay for the time fact witnesses spend traveling, preparing for and even testifying – as long as the jury or other fact finder knows of the payments and therefore can assess their impact on the witnesses' credibility.

Virginia Rule 3.4 cmt. [3]'s statement that "it is improper to pay an expert witness a contingent fee" under the common law "rule" is correct – although as explained above, at least one jurisdiction (Washington, D.C.) allows that.

**ABA Model Rule 3.4 cmt. [3]** contains essentially the same language as Virginia Rule 3.4 cmt. [3].

In contrast to Virginia Rule cmt. [3]'s language approving "a witness's reasonable expenses," ABA Model Rule 3.4 cmt. [3] does not contain the word "reasonable" (although presumably that is implicit).

In contrast to Virginia Rule 3.4 cmt. [3]'s approval of lawyers paying "a reasonable fee for the services of an expert witness," ABA Model Rule 3.4 cmt. [3] uses a more generic phrase: "to compensate an expert witness on terms permitted by law."

### **Virginia Rule 3.4 Comment [3a]**

Virginia Rule 3.4 cmt. [3a] addresses lawyers' compliance with or disregard of tribunals' rules and rulings.

Virginia Rule 3.4 cmt. [3a] begins by understandably noting that "[t]he legal system depends upon voluntary compliance with court rules and rulings in order to function effectively." The Virginia Rule Comment then explains that "[t]hus, a lawyer generally is not justified in consciously violating such rules or rulings." This essentially matches black letter Virginia Rule 3.4(d), although it uses the odd word "consciously" rather than the

black letter Virginia Rule 3.4(d)'s word "[k]nowingly." The term "knowingly" is a defined Virginia Rules term and is more commonly used throughout the Virginia Rules than the scientific-sounding word "consciously."

Virginia Rule 3.4 cmt. [3a] then changes direction, explaining that "[h]owever, [Virginia Rule 3.4(d)] allows a lawyer to take measures necessary to test the validity of a rule or ruling, including open disobedience." Virginia Rule 3.4 cmt. [3a] does not include black letter Virginia Rule 3.4(d)'s "good faith" condition for such "measures."

Virginia Rule 3.4 cmt. [3a] refers to Virginia Rule 1.2(c). Under Virginia Rule 1.2(c), a lawyer "may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law." This general description of permissible action presumably recognizes "a rule or ruling" as a subset of "the law."

**ABA Model Rule 3.4** does not contain a similar provision.

#### **Virginia Rule 3.4 Comment [4]**

Virginia Rule 3.4 cmt. [4] addresses lawyers' request that non-clients refrain from voluntarily giving information to third parties.

Virginia Rule 3.4 cmt. [4] begins by parroting black letter Virginia Rule 3.4(h). The Virginia Rule Comment then describes the exception as follows: "permitting lawyers to advise current or former employees or other agents of a client to refrain from giving information to another party."

Virginia Rule 3.4 cmt. [4]'s word "advise" seems quite different from black letter Virginia Rule 3.4(h)'s word "[r]equest." A "request" asks for something. The word "advise" denotes a suggestion (presumably based on superior knowledge).

It is unclear what the term “other agents of client” refers to. That undefined category of persons could be large.

Virginia Rule 3.4 cmt. [4] explains the basis for the exception: “Because such persons [“current or former employees or other agents of a client”] may identify their interests with those of the client.” The word “may” weakens that rationale. One would have expected the justification to use stronger language, such as “probably” or “presumably.”

Virginia Rule 3.4 cmt. [4] concludes with an explanation of why Virginia Rule 3.4(h) “is limited to civil matters” – “because of concerns with allegations of obstruction of justice (including perceived intimidation of witnesses) that could be made in a criminal investigation and prosecution.” It is unclear why “intimidation of witness” might not occur in the civil context, although perhaps the criminal context’s higher stakes make it more likely that a criminal defendant’s lawyer might try to silence a witness whose testimony could harm the lawyer’s client.

Virginia Rule 3.4 cmt. [4] refers to Virginia Rule 4.2. That is a strange reference, because Virginia Rule 4.2 addresses lawyers’ communication with persons who are represented by a lawyer in the matter about which the lawyer wishes to communicate with the person. If that reference was intended to alert criminal defense lawyers, it seems unnecessary – they presumably know the rule. And it also seems unlikely that witnesses with whom such lawyers might wish to communicate (and wish to request their silence) would be represented by a lawyer. And if it was meant to alert government lawyers, the law generally allows them to communicate *ex parte* even with a represented person, as long as it is not in a custodial setting.

**ABA Model Rule 3.4 cmt. [4]** is similar to Virginia Rule 3.4 cmt. [4].

Like Virginia Rule 3.4 cmt. [4], ABA Model Rule 3.4 cmt. [4] first explains that ABA Model Rule 3.4(f) “permits a lawyer to advise” specified persons “to refrain from giving information to another party,” (emphasis added). Thus, the ABA Model Rule cmt. [4] also contains the word “advise” – which seems very different from black letter ABA Model Rule 3.4(f)’s word “request.”

In contrast to Virginia Rule 3.4(h)(2)’s list of those whom a lawyer may “request” silence as “a relative or a current or former employee or other agent of a client,” ABA Model Rule 3.4 cmt. [4] mentions only “employees of a client.” ABA Model Rule 3.4 cmt. [4] provides the same rationale for that more limited exception: “for the employees may identify their interests with those of the client.” This rationale makes more sense than Virginia Rule 3.4 cmt. [4]’s same explanation for an exception that covers many more persons – both former employees and both current and former client agents. They are far less likely to “identify their interests with those of the client.”

Like Virginia Rule 3.4 cmt. [4], ABA Model Rule 3.4 cmt. [4] concludes with a reference to the ABA Model Rule ex parte communication prohibition (ABA Model Rule 4.2). That more general reference is helpful, and does not implicate the same issues as Virginia Rule 3.4 cmt. [4]’s reference to the Virginia Rule 4.2 immediately following a discussion of such advice in the “criminal investigation and prosecution” context.

### **Virginia Rule 3.4 Comment [5]**

Virginia Rule 3.4 cmt. [5] addresses Virginia Rule 3.4(i)’s prohibition on lawyers presenting or threatening criminal or disciplinary charges in certain circumstances.

Virginia Rule 3.4 cmt. [5] begins by parroting the black letter prohibition. But Virginia Rule 3.4 cmt. [5] then assures that “a lawyer may offer advice about the possibility of criminal prosecution and the client’s rights and responsibilities in connection with such prosecution.” This presumably underlies Virginia’s deliberate deletion of the old ABA Model Code’s prohibition on lawyers’ “participating in” criminal charges-related actions.

Interestingly, Virginia Rule 3.4 cmt. [5]’s assurance does not address lawyers’ advice about their clients’ possible presenting of disciplinary charges against another lawyer. And notably, Virginia Rule 3.4 cmt. [5] does not reference Virginia Rule 8.4(a)’s warning that “[i]t is professional misconduct for a lawyer to . . . violate or attempt to violate the [Virginia] Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.” That prohibition presumably would prohibit a lawyer from assisting or inducing her client to take action that the lawyer would be prohibited by Virginia Rule 3.4(i) from taking herself.

**ABA Model Rule 3.4** does not have a similar Comment because ABA Model Rule 3.4 does not contain a prohibition on threatening criminal or disciplinary charges.

### **Virginia Rule 3.4 Comment [6]**

Virginia Rule 3.4 cmt. [6] addresses Virginia Rule 3.4(j)’s prohibition on certain litigation-related misconduct.

Virginia Rule 3.4 cmt. [6] begins by noting that Virginia Rule 3.4(j) “deals with conduct that could harass or maliciously injure another.”

But the Virginia Rule cmt. [6] then focuses on delay. As mentioned above, Virginia Rule 3.4(j) only explicitly mentions “delay” in reference to delaying a trial. And even that one explicit reference (and the other possibly implicit references to delay contained in

black letter Virginia Rule 3.4(j) seems a bit inapt). Delay can certainly injure an adversary, but it seems to be a stretch to say that delay could “harass or maliciously injure another.” That adverse impact would seem to come from more affirmative action rather than lack of action. Even Virginia Rule 3.4 cmt. [6] itself describes delay as “frustrating an opposing party’s attempt to obtain rightful redress or repose.” That would seem to fall short of harassment or malicious injury.

The Virginia Rule 3.4 cmt. [6] next states that “[d]ilatory practices bring the administration of justice into disrepute,” and “should not be indulged merely for the convenience of the advocates, or solely for the purpose of frustrating an opposing party’s attempt to obtain rightful redress or repose.” Virginia Rule 3.4 cmt. [6] then continues condemning “[d]ilatory practices” and “[d]elay” – explaining that “it is not a justification that similar conduct is tolerated by the bench and the bar.” Virginia Rule 3.4 cmt. [6] concludes with an odd sentence: “[t]he question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay,” (emphases added). This concluding sentence confirms that Virginia Rule 3.4 cmt. [6] focuses exclusively on “delay.”

Virginia Rule 3.4 cmt. [6]’s concluding sentence seems inappropriate and incorrect.

First, a lawyer’s “competence” would seem irrelevant to this issue. Competence goes to lawyers’ skills, not motives. Virginia Rule 1.1 explains that “[c]ompetent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Those characteristics seem irrelevant to determining whether a lawyer “knows or . . . it is obvious” that the lawyer’s “action would serve merely to harass or maliciously injure another.”

Secondly, it is not necessary that a lawyer's action has "some substantial purpose other than delay." Black letter Virginia Rule 3.4(j) prohibits lawyers' actions (and presumably in some situations delay) if "such action would serve merely to harass or maliciously injure another" (emphasis added). So Virginia Rule 3.4(j) would not apply if the lawyers' "action" has any "purpose other than delay" – not just a "substantial purpose other than delay." In other words, Virginia Rule 3.4 cmt. [6]'s concluding sentence uses the incorrect standard.

**ABA Model Rule 3.4** does not contain a similar comment.

### **Virginia Rule 3.4 Comment [7]**

Virginia Rule 3.4 cmt. [7] addresses lawyers' civility.

Virginia Rule 3.4 cmt. [7] begins by acknowledging that "a lawyer should always act in a manner consistent with the best interests of a client" "[i]n the exercise of professional judgment on those decisions which are for the lawyer's determination into handling of a legal matter." Virginia Rule 1.2 addresses the allocation of responsibility and the requirement of consultation between clients and lawyers about both the objectives of the representation and the means by which the lawyers will seek those objectives.

Virginia Rule 3.4 cmt. [7] then changes direction, noting that "[h]owever, when an action in the best interest of a client seems to the lawyer to be unjust, the lawyer may ask the client for permission to forego such action." That should seem obvious. Virginia Rule 1.16 goes even further, and explains that lawyers may withdraw from a representation even if the withdrawal would have a "material adverse effect on the interests of the client" under certain circumstances. Under Virginia Rule 1.16(b)(1), lawyers may withdraw if

“the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is illegal or unjust.” Under Virginia Rule 1.16(b)(3), lawyers may withdraw if “a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent.” And of course lawyers may always withdraw if the withdrawal will not have a “material adverse effect on the interests of the client.” So not only may a lawyer request that the client forego “unjust” actions, the lawyer may withdraw if the client does so, or insists on her lawyer doing so.

Virginia Rule 3.4 cmt. [7] then turns to civility, noting that “[t]he duty of lawyer to represent a client with zeal does not militate against his concurrent obligation to treat, with consideration, all persons involved in the legal process and to avoid the infliction of needless harm.” The term “a lawyer” would seem preferable to the simple word “lawyer.” And the phrase “does not militate against” seems unnecessarily pretentious. Finally, the term “needless harm” seems inapt. The simple word “harm” might have been better, or a phrase such as “avoidable harm.”

Virginia Rule 3.4 cmt. [7] concludes with a very specific example of uncivil conduct: “it would be improper to ask any question that the lawyer has no reasonable basis to believe is relevant to the case and that is intended to degrade any witness or other person.” It certainly makes sense, but also seems so targeted as to be a wasted opportunity to speak more generally about civility.

### **Virginia Rule 3.4 Comment [8]**

Virginia Rule 3.4 cmt. [8] also deals with civility.

Virginia Rule 3.4 cmt. [8] begins by noting that “[i]n adversary proceedings, clients are litigants and though ill feeling may exist between the clients, such ill feeling should

not influence a lawyer’s conduct, attitude or demeanor towards opposing counsel.” That emphasis on civility makes sense, but presumably is not limited just to “adversary proceedings.” Ill feelings between clients may also arise in many other settings, including transactional settings.

Virginia Rule 3.4 cmt. [8] then turns to actions that lawyers should not undertake. The Virginia Rule Comment explains that “[a] lawyer should not make unfair or derogatory personal reference to opposing counsel.” Virginia Rule 3.4 cmt. [8] then adds that “[h]arassing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.”

Virginia Rule 3.4 cmt. [8] next describes conduct lawyers should engage in. The Virginia Rule Comment notes that “[a] lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of the client.” Although the phrase “rights of the client” probably would be better phrased as “interests of the client,” the suggestion makes great sense.

Virginia Rule 3.4 cmt. [8] concludes with two other useful suggestions: (1) “[a] lawyer should follow the local customs of courtesy or practice, unless the lawyer gives timely notice to opposing counsel of the intention not to do so”; and (2) “[a] lawyer should be punctual in fulfilling all professional commitments.”

**ABA Model Rule 3.4** does not have a similar Comment because ABA Model Rule 3.4 does not contain a prohibition on threatening criminal (or disciplinary) charges.

# RULE 3.5

## Impartiality And Decorum Of The Tribunal

### Rule

#### Virginia Rule 3.5(a)

Virginia Rule 3.5(a) addresses lawyers' direct or indirect communications with jurors or venire members, before or after their service.

Notably, Virginia Rule 3.5(b) (discussed below) imposes the same restrictions on such persons' immediate family or household members.

**ABA Model Rule 3.5(a), (b) and (c)** also applies to several types of communications with jurors or prospective jurors, before or after their service.

ABA Model Rule 3.5 does not apply those restrictions to jurors' or prospective jurors' family or household members.

#### Virginia Rule 3.5(a)(1)

Virginia Rule 3.5(a)(1) addresses lawyers' direct or indirect communications with jurors or prospective jurors.

Virginia Rule 3.5(a)(1) prohibits lawyers from certain specified communications "before or during a trial of a case." Virginia Rule 3.5(a)(2) (discussed below), prohibits different conduct after a trial. Virginia Rule 3.5(a)(1) prohibits specified communications "directly or indirectly."

The explicit reference to lawyers “indirectly” doing what they cannot do directly is a helpful reminder, but generally applicable to all Virginia Rules. Virginia Rule 8.4(a) explains that “[i]t is professional misconduct for a lawyer to...violate or attempt to violate the [Virginia] Rules of Professional Conduct knowingly, assist or induce another to do so, or do so through the act of another” (emphasis added). So every Virginia Rule prohibition implicitly includes the prohibition on lawyers engaging in the specified ethics violations “indirectly.”

Lawyers complying with their Virginia Rule 3.5 duties should also keep in mind their Virginia Rule 5.3(a) and (b) impose a duty to “make reasonable efforts” to ensure that “a nonlawyer employee retained by... a lawyer” acts in a way that is “compatible with the professional obligations of the lawyer.” They should likewise remember that they “shall be responsible for conduct of such a person” under the circumstances described in Virginia Rule 5.3(c). Although Virginia Rule 5.3 is not as clear as ABA Model Rule 5.3, Virginia Rule 5.3 on its face applies to a non-lawyer retained by the lawyer to investigate a juror or venire member.

Virginia Rule 3.5(a)(1) prohibits lawyers during those specified times from either directly or indirectly “communicating” with a juror or “anyone the lawyer knows to be a member of the venire from which the jury will be selected for the trial of the case.” The knowledge requirement thus on its face applies only to venire members, not to jurors.

The Virginia Rules Terminology section defines “knows” as “denoting actual knowledge of the fact in question,” although “[a] person’s knowledge may be inferred from circumstances.”

Presumably, lawyers will know who has been selected as a juror. But at least theoretically, a lawyer on a trial team might unknowingly communicate with a juror – and thus violate the strict liability prohibition on such communications – even if that trial team member did not “know” that the person was a juror.

Virginia Rule 3.5(a)(1) contains an exception: “except as permitted by law.” It is unclear what law might allow such communications, but it makes sense to have such a general exception.

**ABA Model Rule 3.5(a)** addresses a certain type of communication with jurors and prospective jurors – based on content rather than on the means of communication (and not applying a per se prohibition, such as ABA Model Rule 3.5(b), discussed below).

Under ABA Model Rule 3.5(a), “[a] lawyer shall not... seek to influence a... juror, prospective juror... by means prohibited by law.” ABA Model Rule 3.5(a) applies the same prohibition to other tribunal-related persons, as discussed below.

Thus, in contrast to Virginia Rule 3.5(a)(1)’s per se prohibition on communications (“excepted as permitted by law”), ABA Model Rule 3.5(a) prohibits only communications “that seek to influence” a juror or prospective juror. And in contrast to Virginia Rule 3.5(a)(1)’s assurance that lawyers may engage in such communications if they are “permitted by law” (presumably focusing on content as well as means), ABA Model Rule 3.5(a) prohibits communications “by means prohibited by law” – thus focusing on means rather than content, and importing extrinsic law into the prohibition.

**ABA Model Rule 3.5(b)** also addresses communications with jurors and prospective jurors, as well as other tribunal and prospective tribunal-related persons.

ABA Model Rule 3.5(b) explains that “[a] lawyer shall not ... communicate ex parte with such person [including “a ... juror, prospective juror”] during the proceeding unless authorized to do so by law or court order.”

ABA Model Rule 3.5(b) thus contains an additional prohibition focusing on timing. ABA Model Rule 3.5(b) states that, “[a] lawyer shall not... communicate ex parte with [a juror or prospective juror, among others] during the proceeding [emphasis added]. It is unclear whether the word “proceeding” is intended to be synonymous with the word “trial.” Presumably the word “proceeding” includes the entire case, not just the trial of the case.

ABA Model Rule 3.5(b) contains an exception “unless authorized to do so by law or court order.” Thus, ABA Model Rule 3.5(b) takes the approach of Virginia Rule 3.5(a)(1) in recognizing an exception based on extrinsic law, instead of importing extrinsic law into the prohibition, as in ABA Model Rule 3.5(a).

ABA Model Rule 3.5(b) recognizes that the exception could come either from “law or court order.” This contrasts with ABA Model Rule 3.5(a)’s prohibition on seeking to influence a juror or prospective juror (among others) “by mean prohibited by law” – without referencing a possible “court order.”

### **Virginia Rule 3.5(a)(2)**

Virginia Rule 3.5(a)(2) addresses communications with jurors after their service.

Virginia Rule 3.5(a)(2) prohibits specified communications “after discharge of the jury from further consideration of a case.”

Virginia Rule 3.5(a)(2)(i) states that “[a] lawyer shall not... ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the

juror or to influence the juror's actions in future jury service.” Thus Virginia Rule 3.5(a)(2)(i) focuses on the lawyer's motive in the communication, not the content of that communication.

The word “harass” means to intimidate, pressure, badger, etc. The word appears throughout statutory and common law.

The word “embarrass” seems like a lesser form of abuse than the word “harass.” Presumably a negative form of embarrassment would amount to harassment if it is sufficiently hostile. But presumably Virginia Rule 3.5(a)(2)(i) also prohibits communications that embarrass through flattery – such as “you were by far the best juror.”

The prohibition of communications “calculated merely to ... influence the juror's actions in future jury service” (which ABA Model Rule 3.5(c)(3) does not contain) is more difficult to assess. It would seem that any communication meeting that standard would also fall within one of the other two prohibited types – such as “if you serve on a jury again, you should pay more careful attention,” or “you did such a good job serving on this jury that you should try to be the foreperson if you ever serve again.”

Under Virginia Rule 3.5(a)(2)(ii), “[a] lawyer shall not... “communicate with a member of that jury if the communication is prohibited by law or court order.” That seems clear enough.

Under Virginia Rule 3.5(a)(2)(iii), “[a] lawyer shall not... communicate with a member of that jury if the juror has made known to the lawyer a desire not to communicate.” That also seems clear, as well as obvious.

**ABA Model Rule 3.5(c)** also addresses communications with jurors after their service (among other things).

ABA Model Rule 3.5(c) prohibits lawyers from “communicat[ing] with a juror or prospective juror after discharge of the jury if: (1) the communication is prohibited by law or court order; (2) the juror has made known to the lawyer a desire not to communicate; or (2) the communication involves misrepresentation, coercion, duress or harassment.” Thus, like Virginia Rule 3.5(a)(2)(ii), ABA Model Rule 3.5(c)(1) prohibits such communications if they are “prohibited by law or court order.” And like Virginia Rule 3.5(a)(2)(iii), ABA Model Rule 3.5(c)(2) prohibits such communications if “the juror has made known to the lawyer a desire not to communicate.”

But ABA Model Rule 3.5(c) differs from Virginia Rule 3.5(a)(2) in several ways.

First, in contrast to Virginia Rule 3.5(a)(2)’s application to post-service communications with “a member of that jury,” ABA Model Rule 3.5(c) prohibits specified post-service communications “with a juror or prospective juror” (emphasis added). In other words, ABA Model Rule 3.5(c) covers communications with members of the venire who did not serve as jurors.

Second, ABA Model Rule 3.5(c) does not contain a provision similar to Virginia Rule 3.5(a)(2)(i)’s motive-based prohibition on a lawyer “ask[ing] questions of or mak[ing] comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence the juror’s actions in future jury service.” However, ABA Model Rule 3.5(c)(3) contains a similar content-based prohibition not found in Virginia Rule 3.5 – prohibiting communications “with a juror or prospective juror” if “the communication involves misrepresentation, coercion, duress or harassment.” Thus ABA Model Rule 3.5(c)(3) focuses on the communications’ content, not on the lawyer’s motive (the Virginia

Rule 3.5(2)(1)'s more expansive reference to communications “calculated merely to harass” or have some other ill effect).

### **Virginia Rule 3.5(a)(3)**

Virginia Rule 3.5(a)(3) addresses lawyers' investigation of jurors or venire members.

Under Virginia Rule 3.5(a)(3), “[a] lawyer shall not... conduct or cause, by financial support or otherwise, another to conduct a vexatious or harassing investigation of either a juror or a member of a venire.”

As above, Virginia Rule 3.5(a)(3)'s reference to lawyers acting through another or assisting another in behavior that the lawyer could not engage in seems unnecessary – given Virginia Rule 8.4(a)'s common sense generally applicable prohibition on indirect such conduct. But Virginia Rule 3.5(a)(3)'s reminder is useful. The very specific reference to “financial support” also serves as a helpful warning that lawyers may not assist such investigations in that way.

Notably, Virginia Rule 3.5(a)(3) does not prohibit all investigations. Instead, it only prohibits investigations of “either a juror or a member of a venire” if the investigation is “vexatious or harassing.” Thus, lawyers presumably can conduct the typical internet-based “investigation” of jurors or venire members, drive-throughs of their neighborhood, etc.

**ABA Model Rule 3.5** does not contain a similar provision.

But like Virginia Rule 8.4(a), ABA Model Rule 8.4(a) warns that “[i]t is professional misconduct for a lawyer to... violate or attempt to violate the [ABA Model] Rules of

Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.”

And similar to Virginia Rule 5.3’s requirement that lawyers make “reasonable efforts” to assure that nonlawyers they retain act in a way that is “compatible” with the Virginia Rules (and rendering the lawyers derivatively liable for such retained nonlawyers’ misdeeds under specified circumstances), ABA Model Rule 5.3 imposes the same requirement and warns of the same derivative liability.

ABA Model Rule 5.3 cmt. [3] also makes it clear that ABA Model Rule 5.3’s duties and derivative liability risks apply to nonlawyers retained by the lawyer but not employed by the lawyer or her firm.

### **Virginia Rule 3.5(b)**

Virginia Rule 3.5(b) addresses lawyers’ communications with, or investigation of, jurors’ or venire members’ families.

Virginia Rule 3.5(b) explains that “[a]ll restrictions imposed by [Virginia Rule 3.5(a)] upon a lawyer also apply to communications with or investigation of members of the immediate family or household of a juror or a member of a venire.” The terms “immediate family” and “household” are not defined. In a different context, Virginia Rule 1.8(c) explains that “a person related to a lawyer includes a spouse, child, grandchild, parent, or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.” Also in a different context, Virginia Rule 1.8(i) applies specified restrictions on “[a] lawyer related to another lawyer as a parent, child, sibling or spouse, or who is intimately involved with another lawyer.”

Those definitions are more expansive than Virginia Rule 3.5(b)'s terms "immediately family" and "household." But they may provide some guidance about Virginia Rule 3.5(b)'s prohibition.

Virginia Rule 3.5(b) does not contain its own knowledge standard. Instead, Virginia Rule 3.5(b) incorporates "[a]ll restrictions imposed by" Virginia Rule 3.5(a). Virginia Rule 3.5(a)(1) does not on its face apply a knowledge standard to lawyers' communication with jurors – presumably because lawyers will know who is serving on a jury. But Virginia Rule 3.5(a)(1) applies the same communication prohibitions only on a person "the lawyer knows to be a member of the venire." It is unclear whether Virginia Rule 3.5(b) applies the same per se standard to jurors' family and household members, and the same knowledge standard to venire members' immediate family and household members. The latter standard would seem appropriate, but the former would not. One would expect the prohibition on lawyers' communications with immediate family and household members of a juror to apply only if the lawyer knows of that relationship.

**ABA Model Rule 3.5** does not contain a provision similar to Virginia Rule 3.5(b).

Presumably other ABA Model Rules might prohibit such communications. For instance, ABA Model Rule 4.3 limits certain communications with unrepresented persons. ABA Model Rule 4.4(a) prohibits lawyers from "us[ing] methods of obtaining evidence that violate the legal rights" of third persons.

### **Virginia Rule 3.5(c)**

Virginia Rule 3.5(c) addresses lawyers' duty to report "improper conduct" by or directed to a juror or venire member.

Under Virginia Rule 3.5(c), “[a] lawyer shall reveal promptly to the court” two types of “improper conduct:” (1) “improper conduct by a member of a venire or a juror;” (2) “improper conduct . . . by another toward a venireman or a juror or a member of the juror’s family” (emphasis added).

Virginia Rule 3.5(c) ends with a condition: “of which the lawyer has knowledge.” Presumably that knowledge requirement applies to either type of improper conduct, and in any event should go without saying – lawyers can only “reveal promptly to the court” something “of which the lawyer has knowledge.”

Virginia Rule 3.5(c)’s first specified type of “improper conduct” presumably includes improper communications by a juror or venire member, solicitation of a bribe, improper statements that exhibit bias or prejudice, etc. In the internet age, such “improper conduct” might also include jurors’ or venire members’ impermissible research or electronic communications about their service or possible service, etc. Such improper juror research or investigation has resulted in courts overturning death penalty cases, among other examples.

Virginia Rule 3.5(c)’s second type of “improper conduct” presumably includes another party’s communications or investigations prohibited by other Virginia Rule 3.5 provisions.

Virginia Rule 3.3(d) contains a disclosure obligation that might also apply in this setting. Under Virginia Rule 3.3(d), “[a] lawyer who receives information clearly establishing that a person other than a client has perpetrated a fraud upon the tribunal in a proceeding in which the lawyer is representing a client shall promptly reveal the fraud to the tribunal.”

**ABA Model Rule 3.5** does not contain a similar provision.

But similar to Virginia Rule 3.3(d), ABA Model Rule 3.3(b) indicates that “[a] lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.”

### **Virginia Rule 3.5(d)**

Virginia Rule 3.5(d) addresses gifts or loans to tribunal-related persons.

Under Virginia Rule 3.5(d), “[a] lawyer shall not give or lend anything of value to a judge, official, or employee of a tribunal under circumstances which might give the appearance that the gift or loan is made to influence official action.” Notably, Virginia Rule 3.5(d) does not flatly prohibit such gifts or loans. The “appearance” standard has generally been rejected as appropriate in applying ethics rules in Virginia and elsewhere. Some courts continue to use the “appearance of impropriety” standard in their disqualification analyses.

In a very different context, Virginia Rule 7.3(d)(4)’s general prohibition on lawyers paying or giving anything of value in return for a referral explicitly permits lawyers to “give nominal gifts of gratitude that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer’s services.” Virginia Rule 7.3(d)(4) might provide some guidance, but lawyers would be wise to avoid even a hint of improper conduct by “giv[ing] or lend[ing] anything of value to a judge, official, or employee of a tribunal.”

**ABA Model Rule 3.5(a)** generally indicates that “[a] lawyer shall not . . . seek to influence a judge . . . or other official by means prohibited by law.”

Unlike Virginia Rule 3.5(d)’s looser and undefined “appearance” standard, ABA Model Rule 3.5(a) thus imports extrinsic law into its prohibition on lawyers’ “seek[ing] to influence a judge . . . or other official.”

### **Virginia Rule 3.5(e)**

Virginia Rule 3.5(e) addresses lawyers’ communications with judges and other tribunal-related persons. Ironically, Virginia Rule 3.5(e) nowhere uses the term “ex parte,” even though this Virginia Rule is commonly considered to be a prohibition on “ex parte” communications with a judge, etc.

Lawyers should also familiarize themselves with the applicable restrictions imposed on judges by Virginia’s Canons of Judicial Conduct for the Commonwealth of Virginia and the Code of Conduct for United States Judges.

Virginia Rule 3.5(e) applies to communications “[i]n an adversary proceeding.” That term contrasts with Virginia Rule 3.7(a)’s description of lawyers acting as both a witness and an advocate “in an adversarial proceeding” (emphasis added). Presumably the two terms are intended to be synonymous.

The term “adversary proceeding” is not defined. But it seems underinclusive. If there are non-“adversary” proceedings, one would expect Virginia Rule 3.5(e)’s prohibitions and requirements to apply to them as well. And if there are no non-“adversary” proceedings, then the word “adversary” is superfluous.

Virginia Rule 3.5(e) prohibits lawyers from specified communications (discussed below), and understandably also prohibits a lawyer from “caus[ing] another to communicate” in a way prohibited by Virginia Rule 3.5(e). As explained above, Virginia Rule 8.5(a) generally prohibits lawyers from causing another to engage in conduct that the lawyer herself cannot engage in.

Virginia Rule 3.5(e) limits its prohibition to certain content: “as to the merits of the cause.” Notably, Virginia Rule 3.5(e)’s prohibition on its face does not prohibit communication about logistics, procedure, scheduling, etc. This contrasts with ABA Model Rule 3.5(b)’s per se prohibition (discussed below). Of course, such communications must not violate other Virginia Rules prohibitions on knowingly false statements (under Virginia Rule 4.1), etc.

Virginia Rule 3.5(e) lists the tribunal-related persons with whom lawyers may not communicate “as to the merits of the cause:” “judge or an official before whom the proceeding is pending.” It is unclear whether such an “official before whom the proceeding is pending” is someone serving in that role when there is no judge, or instead refers to some other tribunal employee assisting or working with a judge (bailiffs, law clerks, etc.).

Virginia Rule 3.5(e) contains four exceptions to its prohibition on such communications.

First, under Virginia Rule 3.5(e)(1), lawyers may engage in otherwise prohibited communications if made “in the course of official proceedings in the cause.” The phrase “in the cause” sounds somewhat archaic, but presumably refers to the case. Perhaps

this exception allows such communications in the presence of the adversary’s lawyer, but presumably the exception also applies in ex parte proceedings.

Second, under Virginia Rule 3.5(e)(2), lawyers may engage in otherwise prohibited communications “in writing if the lawyer promptly delivers a copy of the writing to opposing counsel or to the adverse party who is not represented by a lawyer.” Of course, this includes letters to the judge or the judge’s clerk, etc. If the lawyer serves such a letter in the normal course to those other people, the lawyer has not violated Virginia Rule 3.5(e). The list of those to whom lawyers must provide “adequate notice” seems underinclusive: “opposing counsel or to the adverse party who is not represented by a lawyer.” Friendly parties might not be represented by a lawyer, and presumably lawyers would have to provide adequate notice to them as well.

Third, under Virginia Rule 3.5(e)(3), a lawyer may engage in otherwise prohibited communications “orally upon adequate notice to opposing counsel or to the adverse party who is not represented by a lawyer.” Presumably, this does not require that “opposing counsel” or an unrepresented adversary participate in such oral communications. Presumably this approach prevents the opposing counsel or unrepresented adversary from blocking a lawyer’s otherwise permissible oral communications with a judge. In other words, as long as the lawyer provides “adequate notice” that she intends to engage in such oral communications, she may safely do so even if opposing counsel or unrepresented adversary does not show up. As with Virginia Rule 3.5(e)(2), the list of “adequate notice” recipients presumably also includes friendly third parties who are not represented by a lawyer.

Fourth, under Virginia Rule 3.5(e)(4), lawyers may engage in otherwise prohibited communications “as otherwise authorized by law.”

**ABA Model Rule 3.5(b)** also addresses communications with judges or other tribunal-related persons.

Under ABA Model Rule 3.5(b), “[a] lawyer shall not ... communicate ex parte with [“a judge . . . or other official”] during the proceeding unless authorized to do so by law or court order.”

ABA Model Rule 3.5(b) differs dramatically from Virginia Rule 3.5(d), in several ways.

First, in contrast to Virginia Rule 3.5(e)’s application to “an adversary proceeding,” ABA Model Rule 3.5(b) applies “during the proceeding” (presumably thus applying to non-adversarial proceedings).

Second, in contrast to Virginia Rule 3.5(e)’s prohibition on a lawyer “caus[ing] another to communicate,” ABA Model Rule 3.5(b) applies only to lawyers. But as explained above, other ABA Model Rules prohibit lawyers from causing another to engage in conduct that the lawyer herself could not engage in.

Third, in contrast to Virginia Rule 3.5(e)’s prohibition that applies only to communications “as to the merits of the cause,” ABA Model Rule 3.5(b) contains a per se prohibition on ex parte communications – regardless of content.

Fourth, in contrast to Virginia Rule 3.5(e)(1), (2) and (3)’s specific exceptions, ABA Model Rule 3.5(b) contains a single exception: “unless authorized to do so by law or court order.” ABA Model Rule 3.5(b) thus imports extrinsic law into its prohibition.

Fifth, in contrast to Virginia Rule 3.5(e)(4)'s exception "as authorized by law," ABA Model Rule 3.5(b) contains a broader exception: "unless authorized to do so by law or court order."

### **Virginia Rule 3.5(f)**

Virginia Rule 3.5(f) addresses lawyers' disruptive tribunal-related conduct.

Under Virginia Rule 3.5(f), "[a] lawyer shall not engage in conduct intended to disrupt a tribunal." Thus, Virginia Rule 3.5(f)'s prohibition focuses on the lawyer's intent, not the results of his conduct.

**ABA Model Rule 3.5(d)** contains the identical language.

## Comment

### ABA Model Rule 3.5 Comment [1]

Virginia did not adopt ABA Model Rule 3.5 cmt. [1].

ABA Model Rule 3.5 cmt. [1] begins by noting that “[m]any forms of improper influence upon a tribunal are proscribed by criminal law.” ABA Model Rule 3.5 cmt. [1] then notes that the ABA Model Code of Judicial Conduct specifies other improper conduct – “with which an advocate should be familiar.”

ABA Model Rule 3.5 cmt. [1] concludes by understandably noting that “[a] lawyer is required to avoid contributing to a violation of such provisions.” The phrase “contributing to a violation” is odd. Lawyers obviously must themselves avoid violating any of those provisions and must avoid doing so indirectly (as explained above). It is unclear what “contributing to a violation of such provisions” would entail.

### Virginia Rule 3.5 Comment [2]

Virginia Rule 3.5 cmt. [2] addresses lawyers’ communications with jurors and venire members.

Virginia Rule 3.5 cmt. [2] begins by noting that “veniremen and jurors should be protected against extraneous influences” – “[t]o safeguard the impartiality that is essential to the judicial process. Virginia Rule 3.5 cmt. [2] then continues with that theme, noting that “[w]hen impartiality is present, public confidence in the judicial system is enhanced.”

Virginia Rule 3.5 cmt. [2] next flatly prohibits “extra-judicial communication with veniremen prior to trial.” This contrasts with Virginia Rule 3.5 cmt. [2]’s prohibition on specified communications “with jurors during trial” and “[a]fter the trial” (mentioned several

sentences later). So it is unclear whether lawyers may freely communicate with venire members after the trial. As explained below, ABA Model Rule 3.5 cmt. [3] applies the same post-trial standards to lawyers' communications with jurors and venire members.

Virginia Rule 3.5 cmt. [2] next explains that [t]here “should be no extra-judicial communication with veniremen prior to trial or with jurors during a trial by or on behalf of the lawyer connected with the case” (emphasis added). The word “must” would have been more appropriate.

Virginia Rule 3.5 cmt. [2] then states that “a lawyer who is not connected with the case should not communicate with or cause another to communicate with a venireman or juror about the case.” It is unclear what the phrase “connected with the case” means. Presumably the phrase denotes lawyers who are representing a client in the case, or assisting lawyers who are representing the client. It seems like a strange requirement. It is difficult to imagine why a “lawyer who is not connected to the case” would be interested in such communications. Of course, lawyers who are “connected with the case” are prohibited from acting through other lawyers in such improper communications.

Virginia Rule 3.5 cmt. [2] then turns to post-trial communications – explaining that lawyers may engage in such communications “so long as the lawyer refrains from asking questions or making comments that tend to harass or embarrass the juror or to influence actions of the juror in future cases.” Virginia Rule 3.5 cmt. [2] then provides a rationale for this more permissible standard: “[w]ere a lawyer to be prohibited from communicating after trial with a juror, the lawyer could not ascertain if the verdict might be subject to legal challenge, in which event the invalidity of a verdict might go undetected.”

Virginia Rule 3.5 cmt. [2] concludes by requiring that any legally permissible “extra-judicial communication by a lawyer with a juror” “should be made considerately and with deference to the personal feelings of the juror.”

**ABA Model Rule 3.5 cmt. [2]** addresses lawyers’ communication with jurors and prospective jurors (as well as with others – discussed below).

Under ABA Model Rule 3.5 cmt [2], “[d]uring a proceeding a lawyer may not communicate ex parte with . . . jurors, unless authorized to do so by law or court order.” As explained above, black letter ABA Model Rule 3.5(a) and (b) limit such communications with a “juror” and “prospective juror.” Oddly, ABA Model Rule 3.5 cmt. [2] does not mention the prohibition on the communications with prospective jurors “[d]uring a proceeding.” But ABA Model Rule 3.5 cmt. [3] mentions post-discharge communications with a “prospective juror.”

**ABA Model Rule 3.5 cmt [3]** also addresses lawyers’ post-trial communications.

ABA Model Rule 3.5 cmt. [3] begins by noting that “[a] lawyer may on occasion want to communicate with a juror or a prospective juror after the jury has been discharged.” As explained above, Virginia Rule 3.5 cmt. [2] does not address lawyers’ post-trial communications with venire members (and theoretically therefore does not prohibit those).

ABA Model Rule 3.5 cmt. [3] explains that lawyers “may do so unless the communication is prohibited by law or a court order but must respect the desire of the juror not to talk with the lawyer.” Presumably the same warning applies to lawyers’ post-trial communications with venire members.

ABA Model Rule 3.5 cmt. [3] concludes by understandably warning that lawyers “may not engage in improper conduct during the communication.” Although such “improper conduct” is not defined, presumably it includes conduct prohibited in any ABA Model Rule 3.5 provision.

### **Virginia Rule 3.5 Comment [3]**

Virginia Rule 3.5 cmt. [3] addresses lawyers’ communications with judges.

Virginia Rule 3.5 cmt. [3] begins by noting that “[a]ll litigants and lawyers should have access to tribunals on an equal basis.”

After this understandable general statement, Virginia Rule 3.5 cmt. [3] states that “[g]enerally, in adversary proceedings a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which the judge resides . . .” – “in circumstance which might have the effect or give the appearance of granting undue advantage to one party” (emphasis added).

This sentence implicates several issues. First, black letter Virginia Rule 3.5(e) prohibits specified communications, so the word “should” seems inappropriately non-mandatory. The word “must” would have been preferable (if not required). Second, the term “a judge” seems underinclusive. Two sentences later, Virginia Rule 3.5 cmt. [3] refers to communications “with a judge or hearing officer” (emphasis added). Third, the prohibition on communications “relative to a matter” does not match black letter Virginia Rule 3.5(e)’s definition of the prohibited types of communications: “as to the merits of the cause.” Presumably even harmless logistical communications (such as what courtroom will be used) are “relative to a matter” – but are not “as to the merits of the cause.”

Virginia Rule 3.5 cmt. [3] then provides an example that also seems inapt: “[f]or example, a lawyer should not communicate with a tribunal by a writing unless a copy thereof is promptly delivered to opposing counsel or to an adverse party proceeding pro se” (emphasis added). Black letter Virginia Rule 3.5(e)(2) flatly prohibits such ex parte communications “as to the merits of the cause” without such a later copying of the opposing counsel or adverse pro se party. So the word “must” would have been preferable (it not required). As explained above, the list of suggested copy recipients seems underinclusive – a friendly party can proceed pro se, and presumably deserves to also receive a copy.

Virginia Rule 3.5 cmt. [3] then continues this mismatch – explaining that “[o]rdinarily an oral communication by a lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel, or, if there is none, to the opposing party” (emphases added). Black letter Virginia Rule 3.5(e) requires (rather than just encouraging) those steps – at least as to communications “as to the merits of the cause.”

Virginia Rule 3.5 cmt. [3] concludes with a warning that “[a] lawyer should not condone or lend himself or herself to private importunities by another with a judge or hearing officer on behalf of the lawyer or the client.” That archaic formulation matches black letter Virginia Rule 3.5(e)’s succinct and modern phrase “or cause another.”

**ABA Model Rule 3.5 cmt. [2]** addresses the same ex parte prohibition, but more precisely and accurately.

ABA Model Rule 3.5 cmt. [2] explains that “[d]uring a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding such as judges, masters . . . unless authorized to do so by law or court order.”

Notably, ABA Model Rule 3.5 cmt. [2] contains a flat prohibitions on such communications, regardless of their content. This contrasts with Virginia Rule 3.5(e)'s prohibition on specified communications “as to the merits of the cause.” As explained above, Virginia Rule 3.5 cmt. [3] uses a different phrase to describe the prohibited content: “relative to a matter.”

### **Virginia Rule 3.5 Comment [4]**

Virginia Rule 3.5 cmt. [4] addresses both lawyers' improper conduct and judges' improper conduct.

Virginia Rule 3.5 cmt. [4] begins by understandably noting that “[t]he advocate's function is to present evidence and arguments so that the cause may be decided according to law.” The word “function” seems somewhat impersonal and inappropriate. The word “role” would probably have been preferable.

Virginia Rule 3.5 cmt. [4] next changes directions – explain that “[r]efraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants.” This probably makes sense, although labeling the prohibition on lawyers' improper litigation-related conduct a “corollary” of the lawyer's right to speak on behalf of a client seems a stretch.

Virginia Rule 3.5 cmt. [4] then completely changes the topic – focusing on lawyers' response to judges' inappropriate conduct. Virginia Rule 3.5 cmt. [4] explains that “[a] lawyer must stand firm against abuse by a judge but should avoid reciprocation” (emphasis added). As explained below, ABA Model Rule 3.5 cmt. [4] uses the more appropriate word “may” rather than “must.” The latter encourages lawyers to be

champions for their clients, but might be too strong if the lawyers' "stand[ing] firm" would harm her client. Virginia Rule 3.5 cmt. [4] then provides a rationale for discouraging "reciprocation": "the judge's default is no justification for similar dereliction by an advocate." These words might be a bit too colorful, but the point is well taken.

Virginia Rule 3.5 cmt. [4] then assures that "[a]n advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics." This continuing string of colorful language also makes sense.

Virginia Rule 3.5 cmt. [4] concludes by reminding lawyers that Virginia "Rule 8.3(b) also requires a lawyer to report such conduct by a judge to the appropriate authority and with this duty and recourse there is no reason for a lawyer to reciprocate."

Virginia Rule 8.3(b) requires that "[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." It is unclear whether Virginia Rule 3.5 cmt. [4]'s phrase "abuse by a judge" automatically equates to such conduct requiring lawyers' reporting of the judge under Virginia Rule 8.3(b). Certainly some "abuse by a judge" would meet that standard, but presumably lawyers would have to analyze the "applicable rules of judicial conduct" to determine if "abuse by a judge" meets the standard, and also satisfies the additional Virginia Rule 8.3(b) condition that the judge's violation also "raises a substantial question as to the judge's fitness for office." That is a very high standard, which Virginia Rule 3.5 cmt. [4] surprisingly does not acknowledge or warn the lawyer to consider.

**ABA Model Rule 3.5 cmt. [4]** is similar to Virginia Rule 3.4 cmt. [4].

The first two sentences are the same, including the odd “corollary” sentence discussed above, and the equally colorful “belligerence or theatrics” sentence discussed above.

But there are several differences between ABA Model Rule 3.5 cmt. [4] and Virginia Rule 3.5 cmt. [4].

First, as mentioned above, in contrast to Virginia Rule 3.5 cmt. [4]’s statement that “[a] lawyer must stand firm against abuse by a judge” (emphasis added), ABA Model Rule 3.5 cmt. [4] more understandably uses the word “may” rather than “must.”

Second, in contrast to Virginia Rule 3.5 cmt. [4]’s concluding sentence noting lawyers’ requirement to report “such [specified] conduct by a judge to the appropriate authority,” ABA Model Rule 3.5 cmt. [4] does not contain that arguably overbroad statement.

### **ABA Model Rule 3.5 Comment [5]**

Virginia did not adopt ABA Model Rule 3.5 cmt. [5].

ABA Model Rule 3.5 cmt. [5] addresses lawyers’ disruptive tribunal-related conduct.

ABA Model Rule 3.5 cmt. [5] states that “[t]he duty to refrain from disruptive conduct applies to the proceeding of a tribunal, including a deposition.” This certainly makes sense. But ABA Model Rule 3.5 cmt. [5] concludes with a reference to ABA Model Rule 1.0(m). ABA Model Rule 1.0(m)’s definition of “tribunal” does not on its face include depositions – although it includes “a court . . . acting in an adjudicative capacity.” That process would not seem to include depositions.

# RULE 3.6

## Trial Publicity

### Rule

#### Virginia Rule 3.6(a)

Virginia Rule 3.6(a) addresses lawyers' extrajudicial statements about their clients' matters.

Virginia Rule 3.6(a) applies to "a lawyer participating in or associated with" specified matters (emphasis added).

The word "participating" is not defined. Presumably that word covers lawyers who are representing clients in the specified matters. But the word might include others, who are not actually representing clients in the specified matters, but are otherwise involved in some way.

The word "participating" is one of several words the Virginia Bar uses to describe a lawyer's relationship with a matter. For instance, Virginia Rule 1.12(b) (which addresses lawyers' negotiations for jobs, refers to "any person who is involved . . . as attorney for a party in a matter" (emphasis added). Perhaps the word "participating" is intended to be synonymous with the word "involved." The unfortunate lack of definition or consistency might create confusion.

Significantly, Virginia Rule 3.6(a) uses the word "participating" – which certainly denotes a current involvement of some sort. In contrast, ABA Model Rule 3.6(a) (as

discussed below) contains the phrase “is participating or has participated” (thus covering both the present tense and the past tense).

As discussed elsewhere in this document, the Virginia Rules (and the ABA Model Rules) unfortunately do not define the key word “associated.” That definition plays a central role in Virginia Rule 1.10’s imputation analysis, among other things.

Although the word “associated” is not on its face limited to the present tense, the overall phrase “participating in or associated with” would seem to have that meaning.

Virginia Rule 3.6(a) next defines the matters in which lawyers governed by Virginia Rule 3.6(a) are “participating” or are “associated”: (1) the investigation . . . of a criminal matter that may be tried by a jury;” (2) “the prosecution . . . of a criminal matter that may be tried by a jury;” and (3) “the defense of a criminal matter that may be tried by a jury.” The “investigation” presumably includes an investigation by the prosecution or by the defense.

Notably, Virginia Rule 3.6(a) is limited to criminal matters, thus excluding civil matters. And Virginia Rule 3.6(a) takes even a narrower approach than that – covering only a criminal matter “that may be tried by a jury.” The word “may” presumably means criminal matters that are capable of being tried to a jury. Presumably that excludes criminal matters that are not susceptible to a jury trial (whatever those may be). Virginia Rule 3.6(a) does not limit its reach to criminal matters that “will” be tried by a jury. It is unclear whether Virginia Rule 3.6(a) applies to criminal matters once the defendant has agreed to a non-jury trial. To the extent that a criminal defendant could later change his mind, presumably Virginia Rule 3.6(a) applies.

Virginia Rule 3.6(a) then defines the prohibited actions – explaining that the specified lawyers “shall not make or participate in making” certain types of statements (discussed below). The phrase “participate in” (ironically, also used in an undefined way earlier in the same sentence) presumably covers lawyers having some role in the statements – although that role is not defined. To the extent a lawyer himself could not make one of the specified statements, Virginia Rule 8.4(a) would also prohibit the lawyer from “knowingly assist[ing] or induc[ing] another to do so, or do so through the acts of another.” In other words, the prohibition on lawyers’ acting through another presumably would extend the prohibition on lawyers statements to lawyers’ participation to the extent defined in Virginia Rule 8.4(a).

Virginia Rule 3.6(a) then turns to the prohibition on certain statements by those specified lawyers in those specified circumstances. The prohibition includes several conditions.

First, it must be “an extrajudicial statement.” Thus, Virginia Rule 3.6(a) does not cover statements made in a judicial setting. Other Virginia Rules might prohibit certain judicial-setting statements, such as: Virginia Rule 4.1(a)’s general prohibition on knowingly false statements of fact or law; of Virginia Rule 3.3(a)’s more specific prohibition on knowingly false statements to a tribunal; Virginia Rule 3.4(f)’s limitations on what lawyers may say in court; Virginia Rule 8.4(c)’s general prohibition on deceptive conduct; etc.

Second, the communication be one “that a reasonable person would expect to be disseminated by means of public communication.” The “reasonable person” reference presumably involves an objective standard, rather than requiring the communicating

lawyer's subjective expectation. The phrase "by means of public communication" presumably involves widespread dissemination. In other words, a lawyer's private family-setting or a cocktail party communication would not meet this standard.

Third, the lawyer must either "know[], or should know" that her communication will have a specified effect. The Virginia Terminology section defines "knows" as denoting "actual knowledge of the fact in question," although "[a] person's knowledge may be inferred from circumstances." The term "should know" presumably implies some sort of negligence standard. But Virginia Rule 3.6(a) does not use the more standard phrase "reasonably should know" – the term contained in Virginia Rule 4.4(a) (for example). So it is unclear whether the phrase "should know" is more subjective than the more common phrase "reasonably should know."

Fourth, the communicating lawyer must "know[], or should know" that the communication "will have a substantial likelihood of interfering with the fairness of the trial by a jury." The Virginia Terminology section defines "substantial" as follows: "when used in reference to a degree or extent denotes a material matter of clear and weighty importance." That seems somewhat inapt in this setting. But the term "substantial likelihood" clearly requires more certainty than the word "likelihood" used by itself.

The reference to "the trial by a jury" reflects Virginia Rule 3.6(a)'s limitation to that context. As discussed above, it is unclear whether Virginia Rule 3.6(a) covers communications that would have interfered to the specified degree with the trial by a jury if the criminal defendant had opted for a jury trial instead of a non-jury trial. Virginia Rule 3.6(a)'s phrase "will have a substantial likelihood" of that effect implies that Virginia Rule 3.6(a) only applies if there will in fact be a jury trial" (emphasis added).

Interestingly, Virginia Rule 3.6(a) applies two different standards to two different calculations: (1) whether a lawyer’s statement will “be disseminated by means of public communications; and (2) whether the statement “will have a substantial likelihood of interfering with the fairness of the trial by a jury.” The dissemination possibility is judged by whether “a reasonable person would expect” the statement to be disseminated. That obviously applies a “reasonable person” standard, not focusing on the lawyer himself. The “interfering with the fairness” possibility looks at whether “the lawyer knows, or should know” that the statement will have that effect. Although the phrase “or should know” presumably imposes a sort of “reasonable lawyer” standard, that second standard certainly focuses on “the lawyer” rather than “a reasonable person.” This contrasts with ABA Model Rule 3.6(a) (discussed below), which uses the same “the lawyer knows or reasonably should know” when analyzing both the dissemination issue and the impact issue.

The legal profession’s focus on pre-trial publicity started in earnest after the Warren Commission’s report on the Kennedy assassination – which included a recommendation that the ABA address that issue. Virginia Rule 3.6(a) was further affected by the Fourth Circuit decision finding constitutional limitations on what the ethics rules could prohibit. *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir 1979). Most states have a much more expansive rule prohibiting lawyers’ public pretrial communications.

**ABA Model Rule 3.6(a)** also addresses lawyers’ extrajudicial statements about their clients’ matters.

ABA Model Rule 3.6(a) differs dramatically in several ways from Virginia Rule 3.6(a).

First, in contrast to Virginia Rule 3.6(a)'s application to "[a] lawyer participating in or associated with" the specified actions, ABA Model Rule 3.6(a) applies to "[a] lawyer who is participating or has participated in" (emphasis added) the specified actions. ABA Model Rule 3.6(a) thus clearly covers lawyer whose participation has ended: "has participated in." But it does not include the defined word "associated with" – which may define a different sort of relationship with the specified actions.

Second, in contrast to Virginia Rule 3.6(a)'s application to lawyers in a defined relationship with "the investigation or the prosecution or the defense of a criminal matter that may be tried by a jury," ABA Model Rule 3.6(a) applies to lawyers who have or had the defined relationship to "the investigation or litigation of a matter." Thus, ABA Model Rule 3.6(a) includes Virginia Rule 3.6(a)'s "investigation" element, but then includes a broader scope of activity: "litigation of a matter." This obviously includes civil litigation, and litigation that may not be tried to a jury – in contrast to Virginia Rule 3.6(a)'s much narrower reach.

Third, in contrast to Virginia Rule 3.6(a)'s knowledge standard ("the lawyer knows, or should know" of the specified ill effects), ABA Model Rule 3.6(a) uses the more traditional formulation: "the lawyer knows or reasonably should know."

Fourth, in contrast to Virginia Rule 3.6(a)'s standard about the lawyer's extrajudicial statement ("that a reasonable person would expect to be disseminated by means of public communication"), the ABA Model Rule 3.6(a) focuses on extrajudicial statements that the lawyer herself "knows or reasonably should know will be disseminated by means of public communication" (emphasis added). In other words, public dissemination [and the] instead of Virginia Rule 3.6(a)'s totally objective "reasonable

person would expect” standard, ABA Model Rule 3.6(a) focuses on whether the lawyer who makes the statement “knows or reasonably should know [that the statement] will be disseminated by means of public communication.”

Fifth, in contrast to Virginia Rule 3.6(a)’s description of the impermissible impact on a jury trial (“interfering with the fairness of the trial by a jury” (emphasis added), ABA Model Rule 3.6(a) seems to require more than “interfer[ence]”: “materially prejudicing an adjudicative proceeding in the matter,” (emphasis added). Although Virginia Rule 3.6 does not define the word “interfering” and ABA Model Rule 3.6 does not define the term “materially prejudicing,” the latter would seem more severe than the former. In that case, ABA Model Rule 3.6 would allow a broader range of lawyers’ statements than Virginia Rule 3.6 before they would violate ABA Model Rule 3.6.

Sixth, in contrast to Virginia Rule 3.6(a)’s knowledge standard governing the effect on a jury trial (“that the lawyer knows, or should know, will have a substantial likelihood of interfering with the fairness of the trial by a jury”), ABA Model Rule 3.6(a) applies the “lawyer knows or reasonably should know” both (1) to the “dissemination by means of public communication;” and (2) to the effect of the communication: “and will have a substantial likelihood of materially prejudicing and adjudicative proceeding in the matter”).

Thus, ABA Model Rule 3.6(a) differs from Virginia Rule 3.6(a) both in the lawyer’s knowledge of the possible impact, and in the definition of the impact itself. ABA Model Rule 3.6(a)’s formulation (“will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter”) may essentially be synonymous with the Virginia formulation: “of the substantial likelihood of interfering with the fairness of a trial by a jury.” And ABA Model Rule 3.6(a) covers a broader range of what might be affected (“an

adjudicative proceeding in the matter,” rather than Virginia Rule 3.6(a)’s “the trial by a jury”).

### **Virginia Rule 3.6(b)**

Virginia Rule 3.6(b) addresses lawyers’ duty to prevent colleagues from making statements that the lawyer could not make.

Under Virginia Rule 3.6(b), “[a] lawyer shall exercise reasonable care to prevent employees and associates from making an extrajudicial statement that the lawyer would be prohibited from making under this [Virginia Rule 3.6(b)].”

The word “employees” seems clear. The word “associates” is also used in the ordinary sense – law firm lawyers who are not owners of the law firm. Ironically, that frequently-used term is a mismatch with the word “associated” used in Virginia Rule 3.6(a) – discussed above – which presumably denotes some relationship rather than a job description. As mentioned above, the Virginia Rules’ (and the ABA Model Rules’) failure to define “associated” could generate confusion.

Virginia Rule 3.6(b) essentially parallels the more generic Virginia Rule 5.1 requirement that law firm management make “reasonable efforts” to ensure that the law firm has in place measures reasonably ensuring that lawyers in the firm “conform to” the Virginia Rules, and the requirement that lawyers with “direct supervisory authority” over other lawyers make the same reasonable efforts. Virginia Rule 5.2 imposes essentially the same duty on lawyers with institutional supervision over, and direct supervision of, non-lawyers in the firm – although Virginia Rule 5.3 uses the word “compatible with” rather

than “conform to” the Virginia Rules. That is because the Virginia Rules do not govern non-lawyers – but the effect is the same as if they were lawyers.

**ABA Model Rule 3.6(d)** also addresses associated lawyers’ statements.

Under ABA Model Rule 3.6(d), “[n]o lawyer associated in a firm or government agency with a lawyer subject to [ABA Model Rule 3.6(a)] shall make a statement prohibited by [ABA Model Rule 3.6(a)].”

Thus, ABA Model Rule 3.6(d) presumably has the same effect as Virginia Rule 3.6(a)’s use of the phrase “associated with.”

ABA Model Rule 3.6 does not have a similar provision requiring lawyers to make reasonable efforts to assure that their colleagues do not make statements that the lawyer themselves could not make. Presumably the ABA Model Rules rely on those more generic duties described in ABA Model Rule 5.1 and ABA Model Rule 5.2.

### **ABA Model Rule 3.6(b)**

Virginia did not adopt ABA Model Rule 3.6(b).

ABA Model Rule 3.6(b) addresses statements that lawyers may make – either as an exception to ABA Model Rule 3.6(a)’s prohibition, or because they presumably pass muster under ABA Model Rule 3.6(a). In essence, these are “safe harbor” statements lawyers may safely make.

ABA Model Rule 3.6(b)’s list includes the following: “(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved; (2) information contained in a public record; (3) that an investigation of a matter is in progress; (4) the scheduling or result of any step in litigation; (5) a request for assistance

in obtaining evidence and information necessary thereto; (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and (7) in a criminal case . . . (i) the identity, residence, occupation and family status of the accused; (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person; (iii) the fact, time and place of arrest; and (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.”

Most of the “safe harbor” list focuses on criminal matters, despite ABA Model Rule 3.6(a)’s application to “investigation or litigation of a matter” – not just a criminal matter.

### **ABA Model Rule 3.6(c)**

Virginia did not adopt ABA Model Rule 3.6(c).

ABA Model Rule 3.6(c) addresses what could be called self-defense statements.

ABA Model Rule 3.6(c) explains that “[n]otwithstanding” ABA Model Rule 3.6(a)’s prohibition, “a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer’s client.” In other words, a lawyer may make positive statements about her client to protect her client from the “substantial undue prejudicial effect” of statements made by someone else. But ABA Model Rule 3.6(c) also contains a “reasonable lawyer” standard – so it applies an objective rather than subjective standard to the lawyer’s defensive statements.

ABA Model Rule 3.6(c) concludes with another limitation – explaining that “[a] statement made pursuant to [ABA Model Rule 3.6(c)] shall be limited to such information

as is necessary to mitigate the recent adverse publicity.” Thus, ABA Model Rule 3.6(c)’s concluding sentence implies a temporal condition to the defensive statements – by referring to “recent adverse publicity.” That temporal element may be part of the “reasonable lawyer” standard for determining whether a lawyer’s defensive statements fall within the ABA Model Rule 3.6(c) exception.

## Comment

### Virginia Rule 3.6 Comment [1]

Virginia Rule 3.6 cmt. [1] addresses the rationale for Virginia Rule 3.6's standard for assessing lawyers' extrajudicial statements.

Virginia Rule 3.6 cmt. [1] begins by acknowledging that “[i]t is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression.” That introductory sentence identifies the competing public interests – avoiding tainting the jury on the one hand, and allowing “free expression” on the other hand (focusing on transparency of the justice system, which is also in the public interest).

Virginia Rule 3.6 cmt. [1] next mentions the specific context in which unique Virginia Rule 3.6(a) applies: “[a] criminal matter which may be tried by a jury.” Of course, that matches black letter Virginia Rule 3.6(a)'s limited reach. Virginia Rule 3.6 cmt. [1] explains that “preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a defendant or witnesses prior to trial.” Notably, that Virginia Rule 3.6 cmt. [1] sentence does not mention information “that may be disseminated” about the prosecution, the prosecutor, the government, etc.

Virginia Rule 3.6 cmt. [1] then warns that “[i]f there were no such limits, the result would be the practical nullification of the protective effects of the rules of forensic decorum and the exclusionary rules of evidence.” The term “forensic decorum” seems inapt. “Decorum” focuses on good taste and etiquette. In a tribunal setting, the word might involve lawyers' courtesy to court staff, remembering to stand when addressing the judge, etc. Virginia Rule 3.6 in general, and Virginia 3.6 cmt. [1] in particular, addresses hard rules that govern non-judicial communications and tribunal-related conduct (such as the

mandatory “exclusionary rules of evidence”). This presumably means that potential jurors would hear in the public press or otherwise publically available information that would be excluded from admission in a courtroom.

Virginia Rule 3.6 cmt. [1] then turns to the competing public interest – in transparency: “[o]n the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves.”

Virginia Rule 3.6 cmt. [1] concludes by describing another interest in favor of disclosure: “[i]n addition to its legitimate interest in the conduct of judicial proceedings, the public has a right to know about threats to its safety and measures aimed at assuring its security.”

**ABA Model Rule 3.6 cmt. [1]** contains essentially the same language as Virginia Rule 3.6 cmt. [1]. But there are several differences.

First, in contrast to Virginia Rule 3.6 cmt. [1]’s limitation to “a criminal matter which may be tried by a jury” (which matches black letter Virginia Rule 3.6(a)), ABA Model Rule 3.6 cmt. [1] does not contain that limiting language.

Second, in contrast to Virginia Rule 3.6 cmt. [1]’s description of “information that may be disseminated about a defendant or witness to trial,” ABA Model Rule 3.6 cmt. [1] contains a generic reference to “information that may be disseminated about a party prior to trial.” This broader reference presumably reflects ABA Model Rule 3.6(a)’s broader reach.

Third, ABA Model Rule 3.6 cmt. [1] contains additional discussion not found in Virginia Rule 3.6 cmt. [1] about the public interest in favor of transparency. ABA Model

Rule 3.6 cmt. [1] explains that the public “also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern.” ABA Model Rule 3.6 cmt. [1] similarly concludes by noting that “[f]urthermore, the subject matter of legal proceedings is often a direct significance in debate and deliberation over questions of public policy.”

### **ABA Model Rule 3.6 Comment [2]**

Virginia did not adopt ABA Model Rule 3.6 cmt. [2].

ABA Model Rule 3.6 cmt. [2] addresses special types of litigation.

ABA Model Rule 3.6 cmt. [2] understandably warns that “[s]pecial rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation.” The phrase “may validly govern” seems obvious. Judges and other officials supervising those proceedings decide what special rules govern public statements about such proceedings. It is up to them and not the ABA Model Rules to decide what is “valid.”

ABA Model Rule 3.6 cmt. [2] concludes by emphasizing the obvious impact of such “[s]pecial rules of confidentiality:” “[ABA Model] Rule 3.4(c) requires compliance with such rules.” ABA Model Rule 3.4(c) indicates that “[a] lawyer shall not . . . knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists. As this document discusses in its summary, analysis and comparison of ABA Model Rule 3.4(c), the term “open refusal” seems odd – it would seem that lawyers’ disobeying of a tribunal’s rule would always be “open.” It is difficult to image a lawyer secretly refusing to disobey “an obligation under the rules of a tribunal.”

### **ABA Model Rule 3.6 Comment [3]**

Virginia did not adopt ABA Model Rule 3.6 cmt. [3].

ABA Model Rule 3.6 cmt. [3] addresses ABA Model Rule 3.6's rationale's effect on the prohibition's reach.

ABA Model Rule 3.6 cmt. [3] begins by restating the basic prohibition articulated in ABA Model Rule 3.6(a). ABA Model Rule 3.6 cmt. [3] then contends that “the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small.” That explanation supports ABA Model Rule 3.6 cmt. [3]'s approach in which “the rule applies only to lawyers who are, or who had been involved in investigation or litigation of a case, and their associates.” Presumably, any other prohibition might run afoul of constitutional rights. It is difficult to imagine prohibiting lawyers in other firms from commenting on a litigation matter.

ABA Model Rule 3.6 cmt. [3]'s use of the word “associates” follows the customary meaning of that word – lawyers who are not owners of a law firm. But the use highlights the unfortunate implications of the ABA Model Rules' failure to define the word “associated.”

### **ABA Model Rule 3.6 Comment [4]**

Virginia did not adopt ABA Model Rule 3.6 cmt. [4]

ABA Model Rule 3.6 cmt. [4] addresses acceptable statements under ABA Model Rule 3.6(b).

ABA Model Rule 3.6 cmt. [4] begins by explaining that ABA Model Rule 3.6(b) “identifies specific matters about which a lawyer’s statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition” in ABA Model Rule 3.6(a). Thus, ABA Model Rule 3.6 cmt. [4] essentially provides a blanket exception to ABA Model Rule 3.6(a)’s prohibition.

ABA Model Rule 3.6 cmt. [4] concludes with the assurance that ABA Model Rule 3.6(b) “is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement but statements on other matters may be subject to [ABA Model Rule 3.6(a)]”.

### **ABA Model Rule 3.6 Comment [5]**

Virginia did not adopt ABA Model Rule 3.6 cmt. [5].

ABA Model Rule 3.6 cmt. [5] addresses statements that are likely to violate ABA Model Rule 3.6(a).

ABA Model Rule 3.6 cmt. [5] begins by noting that “certain subjects are more likely than not to have a material prejudicial effect on a proceeding.” ABA Model Rule 3.6 cmt. [5] notes that this “material prejudicial effect” is “particularly [likely] when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration.”

ABA Model Rule 3.6 cmt. [5] then lists six subjects that fall within that standard: “(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party

or witness; (2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement; (3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented; (4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or a proceeding that could result in incarceration; (5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or (6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.”

Although ABA Model Rule 3.6 cmt. [5]'s introductory sentence mentions both “a criminal matter” and “a civil matter triable to a jury,” nearly all of the numbered paragraphs explicitly refer to criminal matters or are far more likely to involve a criminal matter, rather than a civil matter. This is not surprising, because criminal matters implicate heightened constitutional considerations and public policy issues.

### **ABA Model Rule 3.6 Comment [6]**

Virginia did not adopt ABA Model Rule 3.6 cmt. [6].

ABA Model Rule 3.6 cmt. [6] addresses the type of proceeding's effect on ABA Model Rule 3.6's application.

ABA Model Rule 3.6 cmt. [6] begins by acknowledging that “[a]nother relevant factor in determining prejudice is the nature of the proceeding involved.” ABA Model Rule 3.6 cmt. [6] then understandably states that “[c]riminal jury trials will be the most sensitive to extrajudicial speech,” and that “[c]ivil trials may be less sensitive.” ABA Model Rule 3.6 cmt. [6] continues this analysis by stating that “[n]on-jury hearings and arbitration proceedings may be even less affected.”

ABA Model Rule 3.6 cmt. [6] concludes by noting that ABA Model Rule 3.6 “will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.”

### **ABA Model Rule 3.6 Comment [7]**

Virginia did not adopt ABA Model Rule 3.6 cmt. [7].

ABA Model Rule 3.6 cmt. [7] addresses ABA Model Rule 3.6(c)’s exception for defensive statements.

ABA Model Rule 3.6 cmt. [7] begins by stating that “extrajudicial statements that might otherwise raise a question under this [ABA Model] Rule may be permissible when they are made in response to statements made publicly by another party, another party’s lawyer, or third persons.”

It is unclear how far this self-defense exception extends. ABA Model Rule 3.6 cmt. [7]’s first sentence refers to self-defense statements “that might otherwise raise a question” – which would seem to cover borderline cases rather than statements that would clearly otherwise violate ABA Model Rule 3.6. That does not go as far as ABA Model Rule 3.6(c), which on its face allows self-defense statements that would otherwise

violate ABA Model Rule 3.6(a). ABA Model Rule 3.6 cmt. [7] explains that such a justification might apply “where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer’s client.”

ABA Model Rule 3.6 cmt. [7] next states that “[w]hen prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding,” (emphasis added).

ABA Model Rule 3.6 ct. [7] concludes with an understandable warning that “[s]uch responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others” (emphasis added).

As in several other ABA Model Rule contexts, ABA Model Rule 3.6 cmt. [7] contains a mismatch with black letter ABA Model Rule 3.6(c). The former indicates that self-defense statements “should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others” (emphasis added). This is more permissive than black letter ABA Model Rule 3.6(c), which requires that such self-defense statements “shall be limited to such information as is necessary to mitigate the recent adverse publicity” (emphasis added). The more restrictive black letter provision presumably trumps ABA Model Rule 3.6 cmt. [7].

### **ABA Model Rule 3.6 Comment [8]**

Virginia did not adopt ABA Model Rule 3.6 cmt. [8].

ABA Model Rule 3.6 cmt. [8] addresses prosecutors’ additional duties.

ABA Model Rule 3.6 cmt. [8] refers to ABA Model Rule 3.8(f) “for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.” ABA Model Rule 3.8(f) prohibits prosecutors “from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused” – “except for statements that are necessary to inform the public of the nature and extent of the persecutor’s action and that serve a legitimate law enforcement purpose.” ABA Model Rule 3.8(f) also requires prosecutors to “exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under [ABA Model] Rule 3.6 or this [ABA Model Rule 3.8].”

# RULE 3.7

## Lawyer As Witness

### Rule

#### Virginia Rule 3.7(a)

Virginia Rule 3.7(a) contains Virginia’s version of what is commonly called the “witness-advocate rule.”

Under Virginia Rule 3.7(a), “[a] lawyer shall not act as an advocate in an adversarial proceeding in which the lawyer is likely to be a necessary witness” – with several exceptions discussed below.

The word “advocate” presumably denotes the role of a lawyer arguing for a client, rather than serving as a fact witness for the client.

Notably, Virginia Rule 3.7(a) prohibits lawyers from playing that role “in an adversarial proceeding.” That term is not defined, and differs from ABA Model Rule 3.7(a)’s word “trial” (discussed below). Thus, it is unclear whether a pre-trial hearing would be considered “an adversarial proceeding.” It is unlikely that a lawyer would both argue at a hearing and testify as a fact witness at the hearing. If the term “adversarial proceeding” refers generally to all the entire tribunal-related events that commonly take place in litigation, perhaps Virginia Rule 3.7(a) would prohibit a lawyer from arguing at a hearing if that lawyer was a necessary witness at the later trial.

Virginia Rule 3.7(a)’s use of the singular “an adversarial proceeding” (emphasis added) presumably indicates that each proceeding will be treated separately – meaning

that a lawyer who is a “necessary witness” at the trial nevertheless could act as “an advocate” in a hearing.

Virginia Rule 3.7(a) applies if the lawyer “is likely to be a necessary witness” in “an adversarial proceeding” (emphasis added).” The phrase “is likely to” involves a prediction about what will happen. In other words, Virginia Rule 3.7(a) would apply even if it is not certain that the lawyer “will” be a necessary witness. However, Virginia Rule 3.7(a) presumably would not apply merely because there is “some possibility” that the lawyer is “a necessary witness.” The word “likely” presumably falls somewhere between those two ends of a spectrum.

Virginia Rule 3.7(a) applies only if the lawyer “is likely to be a necessary witness” (emphasis added). The word “necessary” implicates several issues – most of which play out in disqualification motions rather than in legal ethics opinions. For instance, some courts find that a lawyer who could testify about some pertinent meeting is not “a necessary witness” about what happened in the meeting if others could testify about what happened at the meeting. In contrast, some courts say that every witness who attended such a meeting is a “necessary witness” about what happened.

Another key issue focuses on who determines if the lawyer “is likely to be a necessary witness.” This question raises the possibility that the client can decide whether her lawyer “is likely to be a necessary witness” by agreeing not to call her lawyer as a witness. That certainly would remove the lawyer as “a necessary witness.” Interestingly, most courts take a surprisingly paternalistic approach that the court decides whether a lawyer “is likely to be a necessary witness.” This does not make much sense. If a sophisticated client (especially one with independent counsel) decides that she would

rather have her lawyer act as an advocate at a trial even if it meant giving up that lawyer's testimony at the trial, one would think that the client has the right to do that. Clients make decisions like that all the time. But most courts do not allow clients to forgo their lawyer's testimony in order to allow the lawyer to advocate for the client – even if the client wants that outcome.

**ABA Model Rule 3.7(a)** contains the identical language as Virginia Rule 3.7(a), with one exception.

As mentioned above, in contrast to Virginia Rule 3.7(a)'s term “in an adversarial proceeding,” ABA Model Rule 3.7(a) uses the more easily defined term “at a trial.”

ABA Model Rule 3.7(a)'s exclusive focus on “the trial” reflects a dramatic change to the ABA's approach to the witness-advocate rule. At high-water mark, the pre-1983 ABA Model Code of Professional Responsibility indicated that a lawyer could not even accept a representation if one of the lawyer's colleagues was likely to be a necessary witness at any stage of the litigation (even at a hearing) – and also indicated that an individual lawyer/witness's disqualification from playing both roles was imputed to every other lawyer in the firm. At that time, the witness-advocate rule was in the conflicts section of the old ABA Model Code of Professional Responsibility.

But the witness-advocate rule's rationale was never clear. The old ABA Model Code suggested that perhaps a jury would give more weight to a lawyer's factual testimony if the jury saw the same lawyer arguing on behalf of her client. But the old ABA Model Code also recognized that perhaps the jury would have exactly the opposite reaction – discounting the lawyer's factual testimony because she was probably trying to favor her client on whose behalf she was also arguing.

The 1983 ABA Model Rules moved in the direction of narrowing both the individual and the imputation consequences of a lawyer acting in both roles. The ABA Model Rules even moved the witness-advocate rule from the conflicts section to the trial section.

But some questions linger, which courts still consider, and on which they frequently disagree. As explained above, it is unclear whether a lawyer who knows that she will testify at a trial (either because the client wants her to or because it is undeniably clear that she is a “necessary witness”) may argue at a pre-trial hearing, take a deposition, etc. To show how complicated this can be, some courts or bars have held that such a lawyer can take a deposition – but might be prevented from doing that if the deposition will be videotaped, and the jury might therefore see the lawyer at the deposition. The same questions arise post-trial. If a lawyer testified at the trial, can the same lawyer then argue at an appeal of the trial outcome? Bars disagree about that, and other similar issues.

It now seems universally accepted that a lawyer whose client wants the lawyer to testify or understands that her lawyer is a “necessary witness” may nevertheless play potentially any “behind the scenes” role in representing the client – absent an actual conflict, triggered by some adversity or by a “material limitation” under ABA Model Rule 1.7(a)(2). In other words, even if such a lawyer cannot be the in-trial “advocate,” the lawyer can be a “puppet master” for the litigation team, can write every brief and every deposition outline, can direct the litigation and trial strategy, etc. This demonstrates that the witness-advocate rule has always been a jury appearance issue, rather than an actual conflict issue.

But there are lingering effects of the old and seemingly illogical worry about lawyers playing dual roles. For instance, most courts apply the witness-advocate rule

even if there is no jury – as in a judge trial. One might think the judges are sophisticated enough to avoid either giving the lawyer/witness's testimony too much weight, or not enough weight.

### **Virginia Rule 3.7(a)(1) – (3)**

Virginia Rule 3.7(a)(1) – (3) address exceptions under which a lawyer may act as an “advocate” in an adversarial proceeding in which the lawyer is “likely to be a necessary witness.”

Two of the three exceptions focus on the lawyer/witness's testimony's content, and the third focuses on the impact of his disqualification.

Virginia Rule 3.7(a)(1) allows a lawyer to act both as an advocate and as a witness “in an adversarial proceeding” if “the testimony relates to an uncontested issue.” This exception presumably includes factual issues on which the parties agree – although an adversary might decline to agree that an issue is “uncontested” in an effort to trigger the witness-advocate rule. Presumably the court can decide if an issue is “uncontested,” in which case the lawyer may play both roles.

Virginia Rule 3.7(a)(2) allows a lawyer to play both roles if “the testimony relates to the nature and value of legal services rendered in the case.” That presumably refers to a lawyer's testimony (usually by way of affidavit) to support a petition for attorney's fees. That issue might come up during the pre-trial phase of litigation, or (more frequently) after the trial. This exception allows the client to avoid having to retain another lawyer to argue an attorney's fee petition.

Virginia Rule 3.7(a)(3) focuses on the impact of disqualifying a lawyer under the witness-advocate rule. Virginia Rule 3.7(a)(3) allows lawyers to play both rules if “disqualification of the lawyer would work a substantial hardship on the client.”

The word “work” seems inapt in this context. “Work” normally is a good thing. The word “cause” might be more appropriate in Virginia Rule 3.7(a)(3).

The Virginia Terminology section defines “substantial” as follows: “when used in reference to degree or extent denotes a material matter of clear and weighty importance.” All or most courts apply this exception very sparingly. Among other things, imposing a heavy burden on a lawyer attempting to rely on this exception deters the lawyer from putting off any witness-advocate issue until late in the case, at which time the lawyer could point to Virginia Rule 3.7(a)(3) in an effort to stay in the case despite being a “necessary witness.”

Among the issues on which courts continue to disagree, some courts seem to insist that any witness-advocate issue be resolved early in the life of a case. But that is not always possible, because issues arise as litigation proceeds, and it may not be possible early in the case to predict whether a lawyer is a “necessary witness.” Other courts take the opposite position – putting off any witness-advocate issue until later in the case once the factual context begins to solidify and it is possible to predict whether it is “likely” that one of the lawyers will be a “necessary witness.” And such courts presumably have in the back of their minds the great likelihood that the case will settle – as most cases do. But putting off that issue until late in the litigation sometimes tempts lawyers to rely on Virginia Rule 3.7(a)(3) or its ABA Model Rule counterpart – triggering the court’s hostility to their reliance on that exception.

**ABA Model Rule 3.7(a)(1) – (3)** contains language identical to Virginia Rule 3.7(a)(1) – (3).

As in Virginia Rule 3.7(a)(3), ABA Model Rule 3.7(a)(3)'s word “work” seems inapt.

### **Virginia Rule 3.7(b)**

Virginia Rule 3.7(b) addresses the impact of the adversary calling a lawyer as a witness to testify in “an adversarial proceeding” in which the lawyer intends to be an advocate.

Unique Virginia Rule 3.7(b) describes a scenario in which that occurs “after [a lawyer has] undertak[en] employment in contemplated or pending litigation. The word “contemplated. . . litigation” presumably means litigation that the lawyer’s client is considering. On its face, it would seem to be synonymous with the word “anticipated,” used in the standard work product doctrine analysis. But it would seem more appropriate to focus solely on the lawyer’s client’s intent, rather than predict some adversary’s action.

Virginia Rule 3.7(b) describes a scenario in which “a lawyer learns or it is obvious” that an event might occur. The word “learns” presumably refers to the lawyer’s actual knowledge. The word “obvious” seems to denote an objective analysis, focusing on what a “reasonable lawyer” would expect. In other words, it does not look only at what the lawyer “should” realize. Presumably the court would decide what is “obvious.”

Virginia Rule 3.7(b) then defines what “a lawyer learns [or what] is obvious: “that the lawyer may be called as a witness other than on behalf of the client.” The word “may” clearly refers to the possibility of that event, not its certainty.

Interestingly, Virginia Rule 3.7(b) does not use the same phrase as Virginia Rule 3.7(a) contains: “is likely to.” The word “may” seems to involve more uncertainty than

the phrase “is likely to.” This obviously refers to an adversary or another non-client party calling the lawyer as a witness. As explained above, if the client plans to call his lawyer as a witness, that presumably would demonstrate that the lawyer is “a necessary witness.” Perhaps the phrase “may be called as a witness other than on behalf of the client” also includes the court calling the lawyer as a witness under some inherent power. If so, it would seem preferable for that phrase to have instead been: “that the lawyer may be called by a party other than a client.” That would have avoided any inference that the phrase focuses on the content of the lawyer’s testimony rather than on who “may” call the lawyer as a witness.

Virginia Rule 3.7(b) concludes with the effect of that possibility (that some non-client “may” call the lawyer as a witness): “the lawyer may continue the representation until it is apparent that the testimony is or may be prejudicial to the client.” In short, this provision prevents an adversary from triggering the witness-advocate rule’s impact by adding the adversary’s lawyer to the witness list. If it was that easy to cause the other lawyer’s disqualification, it is easy to envision the mischief that might occur. This is because the adversary can call a witness even if that witness is not “a necessary witness.” Presumably a lawyer appearing on the adversary’s trial witness list could seek to be removed as a witness. But in the example discussed above (when the lawyer was one of many people attending a pertinent meeting), the witness may not be a “necessary witness” about what happened in the meeting – but certainly would be a witness. So Virginia Rule 3.7(b) recognizes that a lawyer called by the adversary as a witness in “an adversarial proceeding” will not be disqualified from also acting as an advocate, unless and until it is apparent that the testimony “is or may be prejudicial to the client.”

Virginia Rule 3.7(b) contains the phrase “may continue the representation,” rather than what at first blush might seem like a more suitable phrase – such as “may continue to act as an advocate.” Perhaps this is because if it becomes “apparent that [the lawyer’s] testimony is or may be prejudicial to the client,” the lawyer must withdraw from the representation, not just from the advocate role. Virginia Rule 1.7(a)(1) would not cover that situation, because “the representation of one client” would not be “directly adverse to another client.” The lawyer would not be representing any client in testifying as a fact witness. Instead, Virginia Rule 1.7(a)(2) presumably would apply the conflict analysis. A lawyer whose testimony is or may be prejudicial to the client” presumably faces a “significant risk that the representation [of the client in the ‘adversarial proceeding’] will be materially limited by a personal interest of the lawyer” – presumably the lawyer’s desire not to be charged with perjury if the lawyer does not tell the truth about some factual matter. And there may be other Virginia Rules that would apply when a lawyer providing factual testimony would harm her client with that testimony.

The phrase “is or may be prejudicial to the client” implicates some uncertainty. Prejudice comes in degrees. Virginia Rule 3.7(b) does not contain a materiality element for such prejudice, which is somewhat surprising. Perhaps any type of variance between the client’s testimony and the lawyer’s testimony might be automatically prejudicial because it casts doubt on the client’s credibility. For instance, if the client remembers a meeting occurring several years ago on a Tuesday afternoon, while the lawyer remembers it occurring on a Tuesday morning, perhaps the adversary could argue that the client is lying about that event (and therefore must be lying about other facts). Still, Virginia Rule 3.7(b)’s “may be prejudicial” might be appropriate. Presumably the court

would decide whether a lawyer’s testimony “may be prejudicial” to his client. The court would have to decide that issue in some sidebar hearing, because Virginia Rule 3.7(b) requires the lawyer’s withdrawal from the representation (not just the advocate role) in the event that the lawyer’s testimony “may be prejudicial to the client.” In other words, a court presumably would not wait until the lawyer has testified to make that judgment.

**ABA Model Rule 3.7** does not contain a similar provision.

### **Virginia Rule 3.7(c)**

Virginia Rule 3.7(c) addresses the imputation issue.

Under Virginia Rule 3.7(c), “[a] lawyer may act as advocate in an adversarial proceeding in which another lawyer is in the lawyer’s firm is likely to be called as a witness unless precluded from doing so by [Virginia] Rule 1.7 or 1.9.” Virginia Rule 3.7(c) represents a retreat from the witness-advocate rule’s high-water mark (discussed above) – when a lawyer’s disqualification was automatically imputed to the lawyer’s colleagues. Virginia Rule 1.7 is the core current-client conflict Rule. Virginia Rule 1.9 is the core former-client conflict Rule.

Interestingly, Virginia Rule 3.7(c) does not focus on the lawyer/witness’s conflict under Virginia Rule 1.7 or Virginia Rule 1.9. Instead, Virginia Rule 3.7(c) focuses on that lawyer’s colleague – who would like to act as an advocate in “an adversarial proceeding.” Perhaps the testifying lawyer might have her own Virginia Rule 1.7 or Virginia Rule 1.9 conflict, although in all or nearly all situations, such a conflict would already have been imputed to all of her associated colleagues in the firm. Of course, a lawyer/witness whose testimony “is or may be prejudicial to the client” cannot avoid a conflict by refusing to testify (if she can be subpoenaed) or by changing her testimony to avoid the prejudice.

So Virginia Rule 3.7(c)'s likeliest scenario involves the lawyer/witness having a Virginia Rule 1.7 or Virginia Rule 1.9 conflict – which is then imputed to colleagues under Virginia Rule 1.10 or perhaps some other imputation rule.

Virginia Rule 3.7(c)'s description of a disqualified lawyer's colleagues' ability to “act as advocate” does not contain the “associated” status that vexes so many Virginia Rules' and ABA Model Rules' analyses. Instead, Virginia Rule 3.7(c) presumably covers all lawyers employed in the same law firm: “another lawyer in the lawyer's firm.” That broad reach certainly simplifies the analysis.

Significantly, Virginia Rule 3.7(c) applies if one of the law firm's lawyers “is likely to be called as a witness” – not if that lawyer has been called as a witness. And Virginia Rule 3.7(c) does not contain the “necessary witness” standard contained in Virginia Rule 3.7(a). And Virginia Rule 3.7(c)'s application does not depend on who is “likely” to call the lawyer as a witness.

**ABA Model Rule 3.7(b)** contains essentially the same language as Virginia Rule 3.7(c).

ABA Model Rule 3.7(b) raises the same issues discussed above in connection with Virginia Rule 3.7(c). But there is one difference between ABA Model Rule 3.7(b) and Virginia Rule 3.7(c).

In contrast to Virginia Rule 3.7(c)'s application to “an adversarial proceeding,” ABA Model Rule 3.7(b) contains the phrase “in a trial.” This parallels the mismatch between Virginia Rule 3.7(a) and ABA Model Rule 3.7(a) (discussed above).

## Comment

### Virginia Rule 3.7 Comment (1)

Virginia Rule 3.7 cmt. [1] addresses the underlying problem caused by lawyers acting both as witnesses and advocates, which provides the rationale for the witness-advocate rule.

Virginia Rule 3.7 cmt. [1] first contends that “[c]ombining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between a lawyer and client.” Virginia Rule 3.7 cmt. [1] does not take the position that combining those roles does prejudice the opposing party and does involve a conflict of interest. Instead, Virginia Rule 3.7 cmt. [1] explains that those are possible effects.

Under the old ABA Model Code’s confusing and arguably illogical position that jurors might give more weight to the testimony of a lawyer who is also an advocate (but also might give less weight), presumably combining the roles of advocate and witness would “prejudice the opposing party” only if the jury gave the lawyer/witness’s testimony more weight. The jury’s impulse in the opposite direction (giving the lawyer/witness’s testimony less weight because the jury thinks that the lawyer is simply serving her client by giving false testimony) would prejudice the client, not the opposing party. And there is also uncertainty about whether the lawyer’s playing both roles involves a “conflict of interest between the lawyer and client.” If the lawyer’s testimony would help the client, the only “conflict” presumably would come from the adverse effect on the jury mentioned above. Of course, there might be other conflicts not based on the testimony’s content. For instance, a lawyer desperate to earn fees for acting as an advocate might be tempted to play dual roles rather than just helping the client by serving as a favorable witness.

**ABA Model Rule 3.7 cmt. [1]** contains the same “conflict of interest” language as Virginia Rule 3.7 cmt. [1].

In contrast to Virginia Rule 3.7 cmt. [1]’s contention that lawyers’ playing both roles “can prejudice the opposing party,” ABA Model Rule 3.7 cmt. [1] instead states that lawyers’ playing both roles “can prejudice the tribunal and the opposing party” (emphasis added). It is easy to imagine prejudice to the opposing party, as explained above. But ABA Model Rule 3.7 cmt. [1] on its face does not explain the possible “prejudice” to the “tribunal.” ABA Model Rule 3.7 cmt. [2] (discussed below) explains that possible prejudice.

### **Virginia Rule 3.7 Comment [2]**

Virginia Rule 3.7 cmt. [2] addresses the rationale for Virginia Rule 3.7’s general prohibition on lawyers playing combined roles as advocate and witness.

Virginia Rule 3.7 cmt. [2] begins by noting that “[t]he opposing party has proper objection where the combination of roles may prejudice that party’s rights in the litigation.” Virginia Rule 3.7 cmt. [2] then explains the basis for that possibility of prejudice (describing the two roles in the opposite order contained in Virginia Rule 3.7(a): “[a] witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others.”

Virginia Rule 3.7 cmt. [2] concludes with the possible consequence of that difference – correctly pointing to the jury’s or other fact-finder’s possible confusion: “[i]t may not be clear whether a statement by an advocate witness should be taken as proof or as an analysis of the proof.”

Virginia Rule 3.7 cmt. [2] may be trying to skirt the real worry – that jurors will discount a lawyer/witness’s factual testimony because the jurors will think that the lawyer/witness is shading the truth to assist the client that he represents as advocate. It would not seem too difficult for a juror to distinguish between a witness’s testimony “on the basis of personal knowledge” and “analysis” of those facts.

Perhaps Virginia Rule 3.7 cmt. [2] worries about lawyers/witnesses using adjectives that seem to be argumentative rather than simply stating facts. As explained above, the old ABA Model Code worried as much that the jury would lend more credence to the factual testimony of a lawyer who is also advocating for the client in the same setting.

In any event, Virginia Rule 3.7 cmt. [2] reflects the judicial system’s difficulty handling lawyers acting in the tribunal setting playing more than one role.

**ABA Model Rule 3.7 cmt. [2]** contains essentially the identical language as Virginia Rule 3.7 cmt. [2].

In contrast to Virginia Rule 3.7 cmt. [2]’s sole focus on prejudice to the opposing party, ABA Model Rule 3.7 cmt. [2] also focuses on possible prejudice to the tribunal – paralleling the same dichotomy between Virginia Rule 3.7 cmt. [1] (which only mentions “prejudice” to the “opposing party”) and ABA Model Rule 3.7 cmt. [1] (which focuses on “prejudice” to “the tribunal and the opposing party”).

ABA Model Rule 3.7 cmt. [2] begins by stating that “[t]he tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness” (emphasis added).

ABA Model Rule 3.7 cmt. [2]'s statement that “[t]he tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness” makes sense if the jury is the trier of fact. Although even then, it would seem that a jury might be “confused” by a lawyer playing two roles – but is unlikely to be “misled” by a lawyer playing two roles. And if the tribunal is the “trier of fact,” it would seem that the court would not be “confused or misled” by a lawyer playing both roles.

This focus on the trier of fact’s “confusion” or worse seems more to the point than Virginia Rule 3.7 cmt. [1]’s concern. But as explained above, it would seem that judges serving as the triers of fact would be able to sort out the implications of a lawyer playing both roles. But most courts nevertheless apply the witness-advocate rule even in judge trials.

### **Virginia Rule 3.7 Comment [3]**

Virginia Rule 3.7 cmt. [3] addresses the first Virginia Rule 3.7(a)(1) exception (allowing a lawyer to act both as an advocate and as a witness if “the testimony relates to an uncontested issue”) and the second exception (“the testimony relates to the nature and value of legal services rendered in the case”).

Virginia Rule 3.7 cmt. [1] begins by pointing to Virginia Rule 3.7(a)(1)’s recognition “that if the testimony will be uncontested, the ambiguities in a dual role are purely theoretical.”

Virginia Rule 3.7 cmt. [3] then turns to the second exception, which “recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue.” That justification highlights the

essentially logistical nature of that exception – based on the testimony’s content, but recognizing that the client’s cost savings outweighs any possible prejudice. And of course the fee question is normally not the central part of the case and is usually addressed by the court rather than the jury.

Virginia Rule 3.7 cmt. [3] concludes by pointing to the judge – explaining that “[m]oreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony” (emphasis added).

It is unclear whether Virginia Rule 3.7 cmt. [3]’s phrase “in such a situation” includes both the Virginia Rule 3.7(a)(1) “uncontested issue” scenario and Virginia Rule 3.7(a)(2)’s “value of legal services” scenario. Presumably it means the latter, but it is unclear why the judge’s “firsthand knowledge” is significant. Presumably Virginia Rule 3.7 cmt. [3] recognizes that judges normally award fees, and that their award focuses on whether work was necessary and appropriate, not on whether the lawyer/witness is credible when testifying about the time that she spent.

**ABA Model Rule 3.7 cmt. [3]** contains language identical to Virginia Rule 3.7 cmt. [3].

But in contrast to Virginia Rule 3.7 cmt. [3], and much like the difference between Virginia Rule 3.7 cmt. [2] and ABA Model Rule 3.7 cmt. [2], ABA Model Rule 3.7 cmt. [3] contains an introductory sentence not found in Virginia Rule 3.7 cmt. [3]. ABA Model Rule 3.7 cmt. [3] thus begins by describing the general rule before turning to the exceptions: “[t]o protect the tribunal, [ABA Model Rule 3.7(a)] prohibits a lawyer from simultaneously

serving as advocate and necessary witness except in those circumstances specified in [ABA Model Rule 3.7(a)(1) – (a(3)).”

It seems odd to say that ABA Model Rule 3.7(a) “protect[s] the tribunal.” Perhaps a tribunal’s jury would be “protected” by ABA Model Rule 3.7(a). But the tribunal itself presumably would not be “confused” by a lawyer playing two roles – judges should be able to distinguish between a lawyer’s testimony as a witness and conduct as an advocate. The judge is not likely to give more or less weight to the lawyer’s testimony based on the lawyer’s advocacy role.

This emphasis on protecting the tribunal is consistent with ABA Model Rule 3.7 cmt. [1]’s and ABA Model Rule 3.7 cmt. [2]’s references to “the tribunal.” As explained above, those Virginia Rule Comments do not mention possible prejudice to the tribunal.

#### **Virginia Rule 3.7 Comment [4]**

Virginia Rule 3.7 cmt. [4] addresses Virginia Rule 3.7(a)(3)’s exception – allowing a lawyer to act as both an advocate and a witness if “disqualification of the lawyer would work substantial hardship on the client.”

Virginia Rule 3.7 cmt. [4] begins by acknowledging that Virginia Rule 3.7(a)(3) “recognizes that a balancing is required between the interests of the client and those of the opposing party.” Virginia Rule 3.7 cmt. [4] then describes the opposing party’s interests: “[w]hether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer’s testimony, and the probability that the lawyer’s testimony will conflict with that of other witnesses.” This exclusive focus on an opposing party’s possible prejudice is consistent with Virginia Rule 3.7 cmt. [1] and [2]. The phrase “probable tenor of the lawyer’s testimony” seems odd.

The testimony’s “tenor” usually focuses on the testimony’s emotional component, not its content.

Virginia Rule 3.7 cmt. [4] then turns to the client’s interests, against which the opposing party’s interests must be balanced. The Virginia Rule Comment explains that “[e]ven if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer’s client.” Of course, this is the “substantial hardship” standard.

Virginia Rule 3.7 cmt. [4] notes that “[i]t is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness.” The reference to “one or both parties” is intriguing. As explained above, courts are understandably reluctant to allow lawyers to play both advocate and witness roles under the “substantial hardship” exception if it appears that the lawyer has intentionally created the “hardship” by convincing the court to put off the witness-advocate decision until a time when disqualification would have that ill effect on the lawyer’s client. That in essence would reward the client and the lawyer for the procrastination.

But the reference to “both parties” presumably focuses on other parties’ procrastination. Perhaps courts would be more likely to allow a lawyer to continue in both roles if the adversary “could reasonably foresee that the lawyer would probably be a witness” – but did not make any move to seek that lawyer’s earlier disqualification as advocate. Such delay presumably could come from either the adversary’s negligence or deliberate delay in an effort to seek the other lawyer’s disqualification when it would more clearly harm her client. Interestingly, Virginia Rule 3.7 cmt. [4]’s description of those factors’ relevance contains the phrase “would probably be a witness.” This presumably

is intended to be synonymous with black letter Virginia Rule 3.7(a)'s phrase "is likely to be a necessary witness."

Virginia Rule 3.7 cmt. [4] concludes by explaining that "[t]he principle of imputed disqualification stated in [Virginia] Rule 1.10 has no application to this aspect of the problem." It is unclear what this means. If a lawyer continues to act as both an advocate and a witness because Virginia Rule 3.7(a)(3) applies, the proceedings continue without any Virginia Rule 1.10 implication. If the lawyer is disqualified despite arguing that Virginia Rule 3.7(a)(3) should apply, presumably Virginia Rule 3.7(c) would allow a colleague to act as the advocate ("unless precluded from doing so by [Virginia] Rule 1.7 or 1.9" – as Virginia Rule 3.7(c) explains).

**ABA Model Rule 3.7 cmt. [4]** contains language similar to that in Virginia Rule 3.7 cmt. [4].

Thus, ABA Model Rule 3.7 cmt. [4] has the same odd phrase "probable tenor of the lawyer's testimony" contained in Virginia Rule 3.7 cmt. [4] – also without explaining what that means. ABA Model Rule 3.7 cmt. [4] also contains a similar reference to whether "one or both parties could reasonably foresee that the lawyer would probably be a witness." But there are several differences between ABA Model Rule 3.7 cmt. [4] and Virginia Rule 3.7 cmt. [4].

First, ABA Model Rule 3.7 cmt. [4] refers both to the opposing party's prejudice and "[w]hether the tribunal is likely to be misled" when listing the various factors. ABA Model Rule 3.7 cmt. [4]'s reference to the witness-advocate rule's impact on the tribunal parallels that general theme in several ABA Model Rule 3.7 Comments (which mention the tribunal, in contrast to those parallel Virginia Rule 3.7 Comments).

It is hard to imagine that “the tribunal is likely to be misled” by a lawyer playing two roles. Judges presumably are capable of understanding the differing roles, and will be smart enough to avoid giving too much or too little weight to a lawyer’s testimony just because the lawyer also acts as an advocate. Perhaps the tribunal might be “confused” – but even that seems like a stretch.

Second, in contrast to Virginia Rule 3.7 cmt. [4]’s concluding sentence’s references to “[t]he principle of imputed disqualification” and reference to Virginia Rule 1.10, ABA Model Rule 3.7 cmt. [4]’s concluding sentence starts with the phrase “[t]he conflict of interest principle” and refers to ABA Model Rule 1.7 and 1.9, in addition to ABA Model Rule 1.10. But like Virginia Rule 3.7 cmt. [4]’s more limited reference to just Virginia Rule 1.10, it is unclear how the more extensive ABA Model Rule 3.7 cmt. [4]’s references are intended to guide the analysis.

### **ABA Model Rule 3.7 Comment [5]**

Virginia did not adopt ABA Model Rule 3.7 cmt. [5].

ABA Model Rule 3.7 cmt. [5] addresses ABA Model Rule 3.7(b)’s provision allowing a disqualified lawyer-witness’s colleague to act as an advocate, under certain conditions.

ABA Model Rule 3.7 cmt. [5] explains that ABA Model Rule 3.7(b) permits a colleague to act as an advocate, “[b]ecause the tribunal is not likely to be misled when a lawyer acts as an advocate in a trial in which another lawyer in the lawyer’s firm will testify as a necessary witness” – “except in situations involving a conflict of interest.”

It seems inappropriate to consider the possibility that a tribunal would be “misled” “when a lawyer acts as advocate in a trial in which another lawyer in the lawyer’s firm will

testify as a necessary witness.” A jury might be confused by a lawyer playing both roles – although presumably the court could clear up any confusion with an explanation or instructions. But neither the jury or (especially) the tribunal would ever seem in danger of being “misled” by a lawyer playing two roles.

As noted above, under the old ABA Model Code an individual lawyer’s disqualification from acting as both an advocate and as a witness in the same proceeding was imputed to all of that lawyer’s colleagues. ABA Model Rule 3.7(b) takes the opposite approach – unless there is a real conflict of interest. In that situation, the individual lawyer could not represent the client, and that individual lawyer’s disqualification is imputed to all of her colleagues. As explained above, ABA Model Rule 3.7(b) (and the similar Virginia Rule 3.7(c)) focuses on the colleague acting as an advocate, not on the lawyer who is also acting as a witness. But presumably the former’s disqualification is imputed from the latter’s conflict.

### **Virginia Rule 3.7 Comment [6]**

Virginia Rule 3.7 cmt. [6] addresses various conflicts scenarios.

Virginia Rule 3.7 cmt. [6] begins by pointing to Virginia Rule 1.7 and Virginia Rule 1.9 for determining “[w]hether the combination of roles involves an improper conflict of interest with respect to the client.”

That does not seem accurate. Virginia Rule 1.7 or Virginia Rule 1.9 conflict does not come from the “combination of roles” – it comes from the lawyer’s interests or conflicting loyalties. In other words, a lawyer either faces a Virginia Rule 1.7 or Virginia Rule 1.9 conflict, or does not – whether or not the lawyer will act as an advocate or as a witness. Of course, the lawyer’s testimony as a witness might manifest such a conflict,

depending on its content. So the lawyer's testimony might trigger the conflict which had existed, but had not yet had a public ill effect. For instance, a lawyer who knows that her client's testimony about a meeting is incorrect faces a conflict in advancing certain arguments, etc. (probably a Virginia Rule 1.7(a)(2) "material limitation" conflict). The conflict becomes public if the lawyer testifies to his differing recollection, but the conflict existed before that.

Virginia Rule 3.7 cmt. [6] provides an example: "if there is likely to be substantial conflict between the testimony of the client and that of the lawyer or a member of the lawyer's firm, the representation is improper." As explained above, even before the lawyer's testimony, the lawyer may well have a conflict.

Virginia Rule 3.7 cmt. [6] then correctly notes that "[t]he problem [in other words, the conflict] can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party." That of course is true, because (as explained above) the lawyer presumably would already have a conflict by reason of her knowledge that the client's recollection is wrong.

Virginia Rule 3.7 cmt. [6] then explains that unique Virginia Rule 3.7(b) provides that "[w]here a lawyer may be called as a witness other than on behalf of a client, [Virginia Rule 3.7(b)] allows the lawyer to continue representation until it becomes apparent that the testimony may be prejudicial to the client." The phrase "to continue representation" seems awkward. Black letter Virginia Rule 3.7(b) uses the more linguistically correct phrase "continue the representation" (emphasis added).

Virginia Rule 3.7 cmt. [6]'s substantive position makes sense. A lawyer who "may be called as a witness" by the adversary may not only continue the representation, but

may also continue to act as an advocate. But if that lawyer’s testimony would “be prejudicial to the client,” the lawyer clearly may not continue to act as an advocate, and presumably would not be able to continue with the representation. That is because such a real conflict requires the lawyer’s disqualification from representing the client, not from the lawyer’s dual role as advocate and witness.

Virginia Rule 3.7 cmt. [6] notes that “[d]etermining whether or not such a conflict exists is primarily the responsibility of the lawyer involved.” Virginia Rule 3.7 cmt. [6] refers to “Comment to [Virginia] Rule 1.7” – without identifying which Comment. Virginia Rule 3.7 cmt. [6]’s explanation seems inapt. To be sure, lawyers must assess whether they have a conflict, but they do not “determine” if they have a conflict – the Virginia Rules “determine” whether they have a conflict. Virginia Rule 3.7 cmt. [6] would lead a lawyer in the wrong direction if that lawyer believed that he could decide whether he had a conflict.

Virginia Rule 3.7 cmt. [6] concludes by noting that “[i]f a lawyer who is a member of a firm may not act as both advocate and witness by reason of conflict of interest, [Virginia] Rule 1.10 disqualifies the firm also.” That is an awkward way of describing Virginia Rule 1.10’s imputation provision. On its face, Virginia Rule 1.10(a) indicates that “[w]hile 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 [Virginia] Rules 1.6, 1.7, 1.9, or 2.10(e).” Thus, Virginia Rule 1.10(a) only applies to lawyers “associated” with the individually disqualified lawyer. As explained elsewhere in this document, under the Virginia Rules some lawyers in a firm are “associated” with other lawyers in the firm, and some are not. Virginia Rule 3.7 cmt.

[6]’s concluding sentence does not acknowledge this “associated” condition. Instead, Virginia Rule 3.7 cmt. [6] focuses on the lawyer “who is a member of a firm” (an undefined term that may or may not signify that the lawyer is “associated” with her law firm colleagues). Virginia Rule 3.7 cmt. [6]’s reference to that lawyer’s individual conflict resulting in an imputation described as “[Virginia] Rule 1.10 disqualifies the firm also” seems inapt – although the meaning is clear. Under the Virginia Rules, firms are not disqualified – lawyers within those firms are disqualified.

Virginia Rule 3.7 cmt. [6]’s concluding sentence seems to incorrectly describe Virginia Rule 1.10’s application. Virginia Rule 3.7 cmt. [6]’s concluding sentence states that the disqualification of “a member of a firm” is imputed to the entire firm under Virginia Rule 1.10. But Virginia Rule 1.10(a) only applies to lawyers who “are associated in a firm.” In other words, only a lawyer who is “associated in a firm” can be the source of an imputed disqualification. And such an individual lawyer’s disqualification is only imputed to other lawyers who “are associated in a firm.” Although the word “associated” is not defined or fully explained in the Virginia Rules, it seems clear that some lawyers are “associated” with a law firm and some are not.

**ABA Model Rule 3.7 cmt. [6]** is similar to Virginia Rule 3.7 cmt. [6], but there are several differences.

First, in contrast to Virginia Rule 3.7 cmt. [6]’s example of the likelihood of “substantial conflict between the testimony of the client and that of the lawyer or a member of the lawyer’s firm” rendering the representation “improper,” ABA Model Rule 3.7 cmt. [6] only mentions a conflict between “the testimony of the client and that of the lawyer” (not her colleagues).

Second, in contrast to Virginia Rule 3.7 cmt. [6]'s conclusion that in such a situation “the representation is improper,” ABA Model Rule 3.7 cmt. [6] instead concludes that they “substantial conflict” “involves a conflict of interest that requires compliance with [ABA Model] Rule 1.7.” Presumably this might allow the lawyer to continue the representation with consent (although as explained above, some courts take the paternalistic approach that does not allow clients to consent to their lawyers serving as both an advocate and a witness).

Third, in contrast to Virginia Rule 3.7 cmt. [6], ABA Model Rule 3.7 cmt. [6] follows that example and reference to ABA Model Rule 1.7 by noting that “[t]his [“requir[ing] compliance with Rule 1.7”] would be true even though the lawyer might not be prohibited by [ABA Model Rule 3.7(a)] from simultaneously serving as advocate and witness because the lawyer’s disqualification would work a substantial hardship on the client.” The phrase “serving as advocate and witness” seems inapt – lawyers “serve” as advocates, but do not “serve” as witnesses. But the substantive point makes sense – a lawyer’s ABA Model Rule 1.7 conflict might require the lawyer’s withdrawal or disqualification from representing a client, even if that would trigger the lawyer’s disqualification as advocate which would cause “substantial hardship on the client.”

Fourth, in contrast to Virginia Rule 3.7 cmt. [6], ABA Model Rule 3.7 cmt. [6] continues its discussion of possible conflicts by noting that “[s]imilarly a lawyer who might be permitted to simultaneously serve as an advocate and a witness by [ABA Model Rule 3.7(a)(3) – the “substantial hardship” exception] might be precluded from doing so by [ABA Model] Rule 1.9.” ABA Model Rule 1.9 is the core former-client conflict rule. As

explained above, conflicts can require lawyers' withdrawal (and certainly require lawyers' attention) regardless of a "substantial hardship" that it causes the lawyer or the client.

Fifth, in contrast to Virginia Rule 3.7 cmt. [6], ABA Model Rule 3.7 cmt. [6] recognizes the possibility of client consent – explaining that "[i]f there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing." Virginia Rule 3.7 does not address client consent. ABA Model Rule 3.7 cmt. [6] acknowledges that "[i]n some cases, the lawyer will be precluded from seeking the client's consent" – pointing to ABA Model Rule 1.7.

Sixth, in contrast to Virginia Rule 3.7 cmt. [6], ABA Model Rule 3.7 cmt. [6] concludes with a reference to ABA Model "Rule 1.0(b) for the definition of 'confirmed in writing' and [ABA Model] Rule 1.0(e) for the definition of 'informed consent.'"

### **ABA Model Rule 3.7 Comment [7]**

Virginia did not adopt ABA Model Rule 3.7 cmt. [7].

ABA Model Rule 3.7 cmt. [7] addresses ABA Model Rule 3.7(b)'s imputation provision.

ABA Model Rule 3.7 cmt. [7] first explains that ABA Model Rule 3.7(b) "provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by [ABA Model Rule 3.7(a)] (emphasis added). There is a mismatch between this guidance and black letter ABA Model Rule 3.7(b). Black letter ABA Model Rule 3.7(b) allows a lawyer to "act as advocate in a trial in which "another lawyer" in the lawyer's firm is likely to be called as a witness," under certain conditions (emphasis added). The term "another lawyer" presumably means a lawyer who is or is not "associated" with the lawyer who wishes to act as an

advocate. In other words, the “associated” status plays no role in black letter ABA Model Rule 3.7(b). This contrasts with ABA Model Rule 3.7 cmt. [7]’s presumably deliberate reference to the disqualified witness-advocate lawyer who “is associated in a firm” with the lawyer wishing to act as an advocate.

As explained in the ABA Model Rule General Notes, ABA Model Rules’ failure to define the word “associated” could generate substantial confusion and uncertainty. ABA Model Rule 3.7 cmt. [7]’s focus on lawyers “associated” in a law firm understandably looks at lawyers who are most likely to be disqualified, because of their more intimate relationship with other lawyers in the firm (based on the sharing of protected client confidential information about law firm clients, etc.).

ABA Model Rule 3.7 cmt. [7] concludes by properly noting that “[i]f, however, the testifying lawyer would also be disqualified by [ABA Model] Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by [ABA Model] Rule 1.10 unless the client gives informed consent under the conditions stated in [ABA Model] Rule 1.7.” Thus, ABA Model Rule 3.7 cmt. [7]’s first sentence’s analysis depends on an “associated” status, while its second sentence does not. To be sure, ABA Model Rule 1.10(a) itself depends on the “associated” status, which presumably would be imported into the ABA Model Rule 3.7 cmt. [7] analysis.

# RULE 3.8

## Additional Responsibilities Of A Prosecutor

Virginia Rule 3.8 was largely shaped by thoughtful input by the late Judge Denny Dohnal.

ABA Model Rule 3.8 has a different title: “Special Responsibilities of a Prosecutor.”

### Rule

#### Virginia Rule 3.8

Virginia Rule 3.8 introduces its provisions with the following phrase: “[a] lawyer engaged in a prosecutorial function.” The term “prosecutorial function” presumably includes lawyers other than acting as a full-time “prosecutor.”

**ABA Model Rule 3.8** contains a different introductory phrase: “[t]he prosecutor in a criminal case.”

ABA Model Rule 3.8’s introductory phrase differs from Virginia Rule 3.8’s introductory phrase in two ways.

First, in contrast to Virginia Rule 3.8’s term “[a] engaged in a prosecutorial function,” ABA Model Rule 3.8 uses the word “prosecutor.” The word “prosecutor” presumably refers to a narrower range of persons than the broader Virginia description.

Second, in contrast to Virginia Rule 3.8, ABA Model Rule 3.8 applies to prosecutors “in a criminal case.” Virginia Rule 3.8’s introductory phrase does not include that limitation. It is unclear to what extent Virginia Rule 3.8 applies in contexts other than

criminal cases, but Virginia deliberately chose different wording for its Virginia Rule 3.8's introductory phrase.

### **Virginia Rule 3.8(a)**

Virginia Rule 3.8(a) addresses charges that are not supported by probable cause.

Under Virginia Rule 3.8(a), “[a] lawyer engaged in a prosecutorial function shall . . . not file or maintain a charge that the prosecutor knows is not supported by probable cause” (emphasis added). The Virginia Rules Terminology section defines “knows” as “denoting actual knowledge of the fact in question,” although “[a] person’s knowledge may be inferred from circumstances.” Virginia Rule 3.8(a) thus prohibits prosecutors from initially filing such a charge, and presumably requires a prosecutor to drop a charge upon acquiring actual knowledge that the charge “is not supported by probable cause.”

**ABA Model Rule 3.8(a)** also addresses charges lacking probable cause.

Under ABA Model Rule 3.8(a), “[t]he prosecutor in a criminal case shall . . . refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause” (emphasis added).

ABA Model Rule 1.0(f) contains the same definition of “knows” as the Virginia Rules Terminology section.

Like Virginia Rule 3.8(a), ABA Model Rule 3.8(a) prohibits prosecutors from filing a charge that is not supported by probable cause – although using different language: “shall . . . refrain from prosecuting a charge . . . .”

In contrast to Virginia Rule 3.8(a)'s implicit requirement that prosecutors refrain from “maintain[ing] a charge” (presumably dropping it) if the prosecutor knows that the charge lacks probable cause, ABA Model Rule 3.8(a) does not explicitly address that

scenario using a separate phrase. But presumably ABA Model Rule 3.8(a)'s phrase "refrain from prosecuting a charge" would require prosecutors to end such a prosecution.

### **Virginia Rule 3.8(b)**

Virginia Rule 3.8(b) addresses prosecutors' dealings with unrepresented defendants.

Under Virginia Rule 3.8(b), "[a] lawyer engaged in a prosecutorial function shall . . . not knowingly take advantage of an unrepresented defendant." Virginia Rule 3.8(b) has the same knowledge requirement as Virginia Rule 3.8(a).

Virginia Rule 3.8(b)'s phrase "take advantage of" is colloquial but presumably is intended to be broad. Virginia Rule 3.8 cmt. [1b] and [2] (discussed below) provide some guidance.

Virginia Rule 3.8(b) uses the word "defendant." It is unclear whether this deliberate word choice limits persons to whom Virginia Rule 3.8(b) applies (as addressed below, ABA Model Rule 3.8(b) uses the word "accused").

**ABA Model Rule 3.8(b)** also addresses prosecutors' dealings with unrepresented accused persons.

Under ABA Model Rule 3.8(b), "[t]he prosecutor in a criminal case shall . . . make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel."

ABA Model Rule 3.8(b) thus includes specific requirements, rather than a prohibition. ABA Model Rule 3.8(b) requires only that prosecutors "make reasonable efforts," and therefore contains essentially a negligence standard.

In contrast to Virginia Rule 3.8(b)'s use of the word "defendant," ABA Model Rule 3.8(b) uses the word "accused." Presumably this covers persons who have been accused of criminal conduct, but who are not yet "defendants."

Presumably ABA Model Rule 3.8(b)'s first two requirements require prosecutors' affirmative action – advising accused "of the right to" counsel and also informing the accused of "the procedure for obtaining counsel." ABA Model Rule 3.8(b)'s third requirement requires only forbearance – giving the accused a "reasonable opportunity to obtain counsel."

**ABA Model Rule 3.8(c)** also addresses prosecutors' dealings with unrepresented accused persons.

Under ABA Model Rule 3.8(c), "[t]he prosecutor in a criminal case shall . . . not seek to obtain from an unrepresented accused a waiver of important pretrial rights." ABA Model Rule 3.8(c) provides an example: "such as the right to a preliminary hearing." Thus, ABA Model Rule 3.8(c) contains a prohibition, in contrast to ABA Model Rule 3.8(b)'s requirement of prosecutors' affirmative action and forbearance.

### **Virginia Rule 3.8(c)**

Virginia Rule 3.8(c) addresses prosecutors' dealings with witnesses.

Under Virginia Rule 3.8(c), "[a] lawyer engaged in a prosecutorial function shall . . . not instruct or encourage a person to withhold information from the defense after a party has been charged with an offense."

In essence, this is the criminal-context parallel to Virginia Rule 3.4(h). Virginia Rule 3.4(h) indicates that "[a] lawyer shall not . . . [r]equest a person other than a client to refrain from voluntarily giving relevant information to another party" – except under three

conditions (all of which must be present). The first two of the three conditions explicitly mention a “civil matter.” In other words, the general prohibition applies to anything but a civil matter – thus presumably rendering the general prohibition applicable in a criminal matter.

Virginia Rule 3.4 cmt. [4] makes this explicitly clear. Virginia Rule Comment 3.4 cmt. [4] explains that “[t]he [Virginia Rule 3.4(h)] exception is limited to civil matters because of concerns with allegations of obstruction of justice (including perceived intimidation of witnesses) that could be made in a criminal investigation and prosecution.” Virginia Rule 3.4 cmt. [4] then refers to Virginia Rule 4.2 (the ex parte communication rule), but inexplicably does not also refer to the directly applicable Virginia Rule 3.8(c).

Virginia Rule 3.8(c) describes the prohibited conduct as follows: “not instruct or encourage.” Those presumably describe different levels of action. The word “instruct” presumably denotes a command or insistence. The word “encourage” presumably denotes a less insistent or mandatory content.

Interestingly, Virginia Rule 3.4(h)’s prohibition (which, as discussed above, also applies in the criminal context) contains the much more mild word in describing the prohibition: “[r]equest.” A “request” differs dramatically from an instruction or an encouragement. Virginia Model Rule 3.4 cmt. [4]’s first sentence also uses the word “request[]” (matching Virginia Model Rule 3.4(b)) but its second sentence inexplicably describes the black letter rule as containing an exception “permitting a lawyer to advise” [certain persons] to refrain from giving information to another party” (emphasis added). “Advise” presumably involves more persuasive content than the word “request.”

Virginia Rule 3.8(c) applies only as of a certain time: “after a party has been charged with an offense.” The word “party” presumably is intended to be synonymous with Virginia Rule 3.8(b)’s word “defendant.” The next Virginia Rule (Virginia Rule 3.8(d), discussed below) uses yet another word that presumably is intended to be synonymous: “accused.” ABA Model Rule 3.8(b) and (c) use the word “accused,” which seems preferable to Virginia Rule 3.8(b)’s word “defendant” or Virginia Rule 3.8(c)’s word “party.” And it might have avoided confusion for Virginia Rule 3.8 to use the same term throughout the black letter rule and the Comments if the words were intended to be synonymous.

On its face, Virginia Rule 3.8(c) thus implicitly allows prosecutors to “instruct or encourage a person to withhold information from the defense” before “a party has been charged with an offense.” But if so, Virginia Rule 3.8(c) seems inconsistent with Virginia Rule 3.4(h) – discussed above. Absent Virginia Rule 3.4(h)’s exceptions (which black letter Virginia Rule 3.4(h) and Virginia Rule 3.4 cmt. [4] indicate do not apply in the criminal context), Virginia Rule 3.4(h) seems clear: “[a] lawyer shall not . . . [r]equest a person other than a client to refrain from giving relevant information to another party.” The only apparent way to reconcile Virginia Rule 3.4(h) and Virginia Rule 3.8(c) would be to exclude an accused before charges have been filed as outside Virginia Rule 3.4(h)’s term “another party.” In other words, Virginia Rule 3.4(h) prohibits lawyers from “[r]equest[ing]” a non-client from refraining from giving information to “another party.” If an accused is only considered “another party” after he “has been charged with an offense,” then Virginia Rule 3.4(h) would not apply to prosecutors before that event (and would be consistent with Virginia Rule 3.8(c)).

But elsewhere, the Virginia Rules use the word “party” fairly generically – to mention another person (a “third party,” as that term is commonly used). For instance, the following Virginia Rules and Comments clearly use the word “party” (without preceding it with the word “third”) to mean persons other than parties to litigation: Virginia Rule 1.2 cmt. [9] and [12]; Virginia Rule 1.11(f)(1); Virginia Rule 3.3 cmt. [11] (in its final sentence).

So if Virginia Rule 3.8(c) was intended to allow prosecutors to “instruct or encourage” a person to refrain from giving information to an accused (thus (and in that way either Virginia Rule 3.4(h) inapplicable, one would have thought that both rules would have made that clear. This is especially true because of the important “obstruction of justice” references contained in Virginia Rule 3.4 cmt. [4]. As mentioned above, Virginia Rule 3.4 cmt. [4] explicitly describes the difference between the civil and the criminal context, and refers to the latter as including “a criminal investigation and prosecution.” Because a “criminal investigation” can occur (and presumably always occurs) before a party has been charged with an offense, Virginia Rule 3.4 cmt. [4]’s language would seem to undercut if not eliminate the argument that Virginia Rule 3.4(h) does not apply in the criminal context before an accused “has been charged with an offense.”

### **Virginia Rule 3.8(d)**

Virginia Rule 3.8(d) addresses prosecutors’ required disclosures to criminal defendants.

Under Virginia Rule 3.8(d), “[a] lawyer engaged in a prosecutorial function shall . . . make timely disclosure (of specified information) to counsel for the defendant, or to the

defendant if he has no counsel.” Thus, Virginia Rule 3.8(d) explicitly applies to both represented and unrepresented criminal defendants

Virginia Rule 3.8(d) requires prosecutors to disclose the following information: (1) “the existence of evidence which the prosecutor knows tends to negate the guilt of the accused”; (2) “the existence of evidence which the prosecutor knows tends to . . . mitigate the degree of the offense”; (3) “the existence of evidence which the prosecutor knows tends to . . . reduce the punishment.”

Virginia Rule 3.8(d) presumably requires disclosure of the evidence itself, not just “the existence of evidence.” In other words, a prosecutor could not comply with Virginia Rule 3.8(d) by advising the criminal defendant’s counsel that the prosecutor knows “of the existence of evidence” – but does not disclose what it is.

As explained above, under the Virginia Rules Terminology section, the word “knows” denotes “actual knowledge of the fact in question,” although “[a] person’s knowledge may be inferred from circumstances.”

Virginia Rule 3.8(d) contains the word “accused.” Presumably that word is intended to be synonymous with the word “defendant” contained earlier in Virginia Rule 3.8(a), Virginia Rule 3.8(b) and perhaps the word “party” contained in Virginia Rule 3.8(c).

Virginia Rule 3.8(d) contains an exception: “except when disclosure is precluded or modified by order of a court.” That certainly makes sense.

**ABA Model Rule 3.8(d)** also addresses prosecutors’ disclosure duty.

ABA Model Rule 3.8(d) is similar to Virginia Rule 3.8(d), but there are several differences.

First, in contrast to Virginia Rule 3.8(d)'s disclosure obligation "to counsel for the defendant, or to the defendant if he has no counsel," ABA Model Rule 3.8(d) simply uses the word "defense."

Second, in contrast to Virginia Rule 3.8(d)'s disclosure obligation covering "the existence of evidence," ABA Model Rule 3.8(d) requires disclosure "of all evidence or information."

Third, in contrast to Virginia Rule 3.8(d)'s requirement that prosecutors disclose evidence that tends to "mitigate the degree of the offense," ABA Model Rule 3.8(d) contains the phrase "mitigates the offense." Presumably those phrases are intended to be synonymous.

Fourth, in contrast to Virginia Rule 3.8(d)'s requirement that prosecutors disclose evidence which tends to "reduce the punishment," ABA Model Rule 3.8(d) does not contain a similar requirement.

Fifth, in contrast to Virginia Rule 3.8(d), ABA Model Rule 3.8(d) requires additional disclosure: "in connection with sentencing, [prosecutors must] disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor." This ABA Model Rule 3.8(d) disclosure requirement appears to be a sentencing-related generic catch-all disclosure obligation.

Sixth, in contrast to Virginia Rule 3.8(d)'s exception "when disclosure is precluded or modified by order of a court," ABA Model Rule 3.8(d) contains a differently worded exception: "except when the prosecutor is relieved of this responsibility by a protective order of a tribunal." Presumably those two phrases are intended to be essentially synonymous.

### **Virginia Rule 3.8(e)**

Virginia Rule 3.8(e) addresses extrajudicial statements.

Under Virginia Rule 3.8(e), “[a] lawyer engaged in a prosecutorial function shall . . . not direct or encourage specified persons to make specified extrajudicial statements.

Virginia Rule 3.8(a) contains the following list of persons whom prosecutors may not “direct or encourage” to make the specified extrajudicial statements: (1) “investigators”; (2) “law enforcement personnel”; (3) “employees . . . assisting or associated with the prosecutor in a criminal case”; (4) “other persons assisting or associated with the prosecutor in a criminal case.”

Virginia Rule 3.8(e) prohibits prosecutors from “direct[ing] or encourag[ing]” those specified persons “to make an extrajudicial statement that the prosecutor would be prohibited from making under [Virginia] Rule 3.6.”

Virginia Rule 3.6(a) indicates that “[a] lawyer participating in or associated with the investigation or the prosecution or the defense of a criminal matter that may be tried by a jury shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication that the lawyer knows, or should know, would have a substantial likelihood of interfering with the fairness of the trial by a jury.” Virginia Rule 3.6(b) addresses lawyers’ colleagues’ statements – requiring “[a] lawyer shall exercise reasonable care to prevent employees and associates from making an extrajudicial statement that the lawyer would be prohibited from making under this [Virginia] Rule 3.6(a).”

Virginia Rule 3.8(e) thus provides a more specific list of the persons than Virginia Rule 3.6 whom prosecutors may not “direct or encourage” to make extrajudicial

statements that the prosecutor herself could not make under Virginia Rule 3.6. This differs at least conceptually from Virginia Rule 3.6(b)'s requirement that lawyers exercise "reasonable care" to prevent those persons from making such statements. Theoretically, a lawyer might violate Virginia Rule 3.6(b) by failing to take such "reasonable" measures, even if no one makes a prohibited extrajudicial statement. But a prosecutor who has exercised such "reasonable care" presumably would not violate Virginia Rule 3.8(e) if a colleague makes such an improper extrajudicial statement without the prosecutor's direction or encouragement.

Virginia Rule 5.1 and Virginia Rule 5.3 might also affect this dynamic. Virginia Rule 5.1 describes supervising lawyers' duties to "make reasonable efforts" to ensure that subordinate lawyers comply with the Virginia Rules, and describes the circumstances in which such supervising lawyers will be derivatively liable for such subordinates' ethics violations. Virginia Rule 5.3 takes essentially the same approach to lawyers' non-lawyer subordinates, although that Virginia Rule uses the word "compatible" rather than "compliance" in describing the Virginia Rules' application to such non-lawyer subordinates.

**ABA Model Rule 3.8(f)** also addresses prosecutors' and their colleagues' extrajudicial statements.

Under ABA Model Rule 3.8(f), prosecutors must "refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused." But there is an exception: "except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose."

ABA Model Rule 3.8(f) also requires prosecutors to “exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under [ABA Model] Rule 3.6 or [ABA Model Rule 3.8].”

ABA Model Rule 3.6 addresses permissible and impermissible extrajudicial statements, but differs dramatically from Virginia Rule 3.6. This document addresses both of those Rules and their significant differences in its summary, analysis and comparison of Virginia Rule 3.6.

Thus, in contrast to Virginia Rule 3.8(e)’s prohibition on prosecutors “direct[ing] or encourag[ing]” specified colleagues to make the specified extrajudicial statements, ABA Model Rule 3.8(f) only requires prosecutors to “exercise reasonable care to prevent” their colleagues from making those specified extrajudicial statements.

### **ABA Model Rule 3.8(e)**

Virginia Rule did not adopt ABA Model Rule 3.8(e).

ABA Model Rule 3.8(e) addresses prosecutors’ subpoenas to defense lawyers.

Under ABA Model Rule 3.8(e), prosecutors shall “not subpoena a lawyer in a grand jury or other criminal proceeding.” The subpoenas are improper if they would require such lawyers “to present evidence about a past or present client.”

But ABA Model Rule 3.8(e) allows such subpoenas if “the prosecutor reasonably believes” that three conditions exist: (1) “the information sought is not protected from disclosure by any applicable privilege; (2) the evidence sought is essential to the

successful completion of an ongoing investigation or prosecution; and (3) there is no other feasible alternative to obtain the information.”

### **ABA Model Rule 3.8(g)**

Virginia did not adopt ABA Model Rule 3.8(g).

ABA Model Rule 3.8(g) addresses prosecutors’ post-conviction disclosure duty.

ABA Model Rule 3.8(g)’s and ABA Model Rule 3.8(h)’s use of the word “prosecutor” presumably only applies to lawyers still serving in that function. In other words, the word presumably does not cover retired prosecutors or prosecutors who no longer are prosecuting (but instead practicing as defense lawyers or some other type of lawyer, or engaged in some other profession).

ABA Model Rule 3.8(g) applies “[w]hen a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted.” The word “knows” is discussed above and denotes “actual knowledge of the fact in question,” although it can be inferred from circumstances (as defined in ABA Model Rule 1.0(f)).

Under ABA Model Rule 3.8(g), the evidence of which a prosecutor “knows” must be: (1) “new”; (2) “credible”; and (3) “material.” The term “reasonable likelihood” presumably requires more than a “reasonable possibility” or a “possibility.”

ABA Model Rule 3.8(g)(1) requires a prosecutor in that circumstance to “promptly disclose that evidence to an appropriate court or authority.” It is unclear what the word “authority” means.

ABA Model Rule 3.8(g)(2) requires additional steps “if the conviction was obtained in the prosecutor’s jurisdiction.” Presumably this contrasts with ABA Model Rule

3.8(g)(1)'s duty – which applies to prosecutors' knowledge relating to a conviction that was obtained in some other jurisdiction (not the prosecutor's jurisdiction).

Under ABA Model Rule 3.8(g)(2), prosecutors in the specified circumstance must “(i) promptly disclose that evidence to the defendant unless a court authorizes delay; and (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.”

Thus, ABA Model Rule 3.8(g)(2) places additional requirements on prosecutors in whose jurisdiction the conviction was obtained.

### **ABA Model Rule 3.8(h)**

Virginia did not adopt ABA Model Rule 3.8(h).

ABA Model Rule 3.8(h) addresses prosecutors' duties when they have a specified level of knowledge that it was “reasonably likely” that a criminal defendant was wrongfully convicted.

ABA Model Rule 3.8(h) applies “[w]hen a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit.” The word “knows” is addressed above. Prosecutors having such knowledge “shall seek to remedy the conviction.”

Thus, like ABA Model Rule 3.8(g)(2), ABA Model Rule 3.8(h) applies to convictions “in the prosecutor's jurisdiction.” It understandably imposes a higher duty on such prosecutors than ABA Model Rule 3.8(g)(2) – which applies to prosecutors having specified information “creating a reasonable likelihood” that a criminal defendant was wrongfully convicted.

But interestingly, ABA Model Rule 3.8(h) only applies to criminal convictions “in the prosecutor’s jurisdiction.” Presumably convictions occurring in other jurisdictions would at least trigger ABA Model Rule 3.8(g)(1)’s duty – requiring prosecutors to “promptly disclose that evidence to an appropriate court or authority.”

## Comment

### Virginia Rule 3.8 Comment [1]

Virginia Rule 3.8 cmt. [1] addresses the general nature of prosecutors' role.

Virginia Rule 3.8 cmt. [1] begins with a frequently-quoted reminder that “[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”

Virginia Rule 3.8 cmt. [1] concludes by noting that [t]his responsibility [as a “minister of justice”] carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.”

Virginia Rule 3.8 cmt. [1] thus contains the word “defendant.” Virginia Rule 3.8(b) contains that word, but Virginia Rule 3.8(c) contains the presumably synonymous word “party,” and Virginia Rule 3.8(d) contains both the word “defendant” and the presumably synonymous word “accused.”

**ABA Model Rule 3.8 cmt. [1]** also addresses prosecutors' role.

ABA Model Rule 3.8 cmt. [1]'s first two sentences contain language identical to Virginia Rule 3.8 cmt. [1].

ABA Model Rule 3.8 cmt. [1] then includes language not found in Virginia Rule 3.8 cmt. [1].

First, ABA Model Rule 3.8 cmt. [1] describes as an additional prosecutor's responsibility the requirement “that special precautions are taken to prevent and to rectify the conviction of innocent persons.” The word “rectify” presumably refers to ABA Model

Rule 3.8(g) and (h) – which require prosecutors’ post-conviction disclosures in specified circumstances.

ABA Model Rule 3.8 cmt. [1] then notes that “[t]he extent of mandated remedial action is a matter of debate and varies in different jurisdictions.” ABA Model Rule 3.8 cmt. [1] also refers to the ABA Standards of Criminal Justice Relating to the Prosecution Function – praising the Standards as “the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense.”

ABA Model Rule 3.8 cmt. [1] then notes that “[co]mpetent representation of the sovereignty may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation.” That statement seems inapt. ABA Model Rule 1.1 addresses lawyers’ “competence” requirement – explaining that “[c]ompetent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” That definition relies on the word’s general usage, focusing on legal skill. It seems inappropriate to describe competence as “a matter of obligation” “requir[ing]” lawyers to take certain steps. To be sure, competent lawyers will be aware of those requirements. But normally the ABA Model Rules do not describe its many requirements as compliance with the “competence” standard.

ABA Model Rule 3.8 cmt. [1] concludes by noting that prosecutors’ “knowing disregard of those [other] obligations [imposed by ‘[a]pplicable law’] or a systematic abuse of prosecutorial discretion could constitute a violation of [ABA Model] Rule 8.4.” The ABA Model Rule Comment does not point to a specific ABA Model Rule 8.4 provision, but there are several in that general Rule listing various kinds of misconduct that might apply.

### **Virginia Rule 3.8 Comment [1a]**

Virginia Rule 3.8 cmt. [1a] addresses prosecutors' filing and maintaining of improper criminal prosecutions.

Virginia Rule 3.8 cmt. [1a] first confirms that Virginia Rule 3.8(a) "prohibits a prosecutor from initiating or maintaining a charge once he knows that the charge is not supported by even probable cause." This essentially parrots black letter Virginia Rule 3.8(a).

Virginia Rule 3.8 cmt. [1a] concludes by noting that "[t]he prohibition recognizes that charges are often filed before a criminal investigation is complete." This statement presumably refers to a scenario in which the prosecutor comes to know that the charge lacks probable cause after charges have been brought – when the investigation has been completed. In that situation, presumably the prosecutor can no longer "maintain[]" such a charge – meaning that she must drop it.

**ABA Model Rule 3.8** does not have a similar Comment.

### **Virginia Rule 3.8 Comment [1b]**

Virginia Rule 3.8 cmt. [1b] addresses black letter Virginia Rule 3.8(b)'s prohibition on prosecutors' "knowingly tak[ing] advantage of an unrepresented defendant."

Virginia Rule 3.8 cmt. [1b] first explains that Virginia Rule 3.8(b) "is intended to protect the unrepresented defendant from the overzealous prosecutor who uses tactics that are intended to coerce or induce the defendant into taking action that is against the defendant's best interests." Virginia Rule 3.8 cmt. [1b] then notes that judging such prosecutorial action is "based on an objective analysis." That is an interesting concept,

because black letter Virginia Rule 3.8(b) contains a “knowingly” standard – not a “reasonable prosecutor” standard or words to that effect.

Virginia Rule 3.8 cmt. [1b] provides an example: “it would constitute a violation of the provision if a prosecutor, in order to obtain a plea of guilty to a charge or charges, falsely represented to an unrepresented defendant that the court’s usual disposition of such charges is less harsh than is actually the case, e.g., that the court usually sentences a first-time offender for the simple possession of marijuana under the deferred prosecution provisions of Code of Virginia Section 18.2-251 when, in fact, the court has a standard policy of not utilizing such an option.”

That is quite a specific example. Although the prosecutor’s action presumably would violate Virginia Rule 3.8(b) because it would “knowingly take advantage of an unrepresented defendant,” it would also violate other Virginia ethics rules. For instance, under Virginia Rule 4.1(a), “[i]n the course of representing a client a lawyer shall not knowingly . . . make a false statement of fact or law.” Under Virginia Rule 8.4(c), “[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer’s fitness to practice law.” Such affirmative deception presumably would violate other Virginia Rules.

A more interesting example would involve a prosecutor’s silence rather than knowing false affirmative statements. For instance, prosecutors generally must disclose the immigration consequences of a defendant’s plea bargain – even if the prosecutors do not affirmatively mislead an illegal immigrant into underestimating a plea deal’s immigration-related impact.

**ABA Model Rule 3.8** does not contain a similar provision.

As mentioned above, ABA Model Rule 3.8 does not have a black letter provision similar to Virginia Rule 3.8(b). ABA Model Rule 3.8(b) and (c) address some examples of prosecutorial overreach, but those examples do not match Virginia Rule 3.8 cmt. [1b]'s example.

### **Virginia Rule 3.8 Comment [2]**

Virginia Rule 3.8 cmt. [2] addresses permissible prosecutorial conduct.

Virginia Rule 3.8 cmt. [2] begins by essentially distinguishing permissible prosecutorial conduct from impermissible prosecutorial conduct described in the preceding Virginia Rule 3.8 cmt. [1b]. Thus, Virginia Rule 3.8 cmt. [2] explains that “[a]t the same time, the prohibition [presumably on “tak[ing] advantage of an unrepresented defendant”] does not apply to the knowing and voluntary waiver by an accused of constitutional rights such as the right to counsel and silence which are governed by controlling case law.”

Virginia Rule 3.8 cmt. [2] next describes additional permissive conduct: when “an accused [is] appearing *pro se* before a tribunal, [Virginia Rule 3.8(b)] does not prohibit discussions between the prosecutor and the defendant regarding the nature of the charges and the prosecutor’s intended actions with regard to those charges.” Virginia Rule 3.8 cmt. [2] provides an example: “[i]t is permissible, therefore, for a prosecutor to state that he intends to reduce a charge in exchange for a guilty plea from a defendant if nothing in the manner of the offer suggests coercion and a tribunal ultimately finds that the defendant’s waiver of his right to counsel and his guilty plea are knowingly made and voluntary.”

As with Virginia Rule 3.8 cmt. [1b]'s very specific and therefore somewhat unhelpful example of prosecutorial misconduct, Virginia Rule 3.8 cmt. [2]'s equally narrow example of permissible prosecutorial conduct is not very helpful.

As in other Virginia Rule 3.8 black letter provisions and Comments, Virginia Rule 3.8 cmt. [2] contains both the words “defendant” and “accused.” Virginia Rule 3.8 cmt. [2] even uses both words in the same sentence (the Comment’s third sentence). As explained above, presumably those are intended to be synonymous (along with the word “party”).

**ABA Model Rule 3.8 cmt. [2]** also addresses prosecutors’ permissible and impermissible prosecutorial conduct.

ABA Model Rule 3.8 cmt. [2] first notes that “[i]n some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause.” ABA Model Rule 3.8 cmt. [2] then explains that “[a]ccordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons.” As explained above, this matches black letter ABA Model Rule 3.8(c) – which indicates that “[t]he prosecutor in a criminal case shall . . . not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing.”

ABA Model Rule 3.8 cmt. [2] then changes direction, and assures that black letter ABA Model Rule 3.8(c) “does not apply, however, to an accused appearing *pro se* with an approval of a tribunal.”

ABA Model Rule 3.8 cmt. [2] concludes by providing another example of permissible prosecutorial conduct: “[n]or does [ABA Model Rule 3.8(c)] forbid the lawful

questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.”

Although ABA Model Rule 3.8 cmt. [2] does not cite it, black letter ABA Model Rule 3.8(b) requires prosecutors to “make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel.”

### **Virginia Rule 3.8 Comment [3]**

Virginia Rule 3.8 cmt. [3] addresses black letter Virginia Rule 3.8(c)’s prohibition on prosecutors “instruct[ing] or encourag[ing] a person to withhold information from the defense after a party has been charged with an offense.”

Virginia Rule 3.8 cmt. [3] first explains that black letter Virginia Rule 3.8(c)’s “qualifying language” [“after a party has been charged with an offense] is intended to exempt the [ABA Model Rule 3.8(c)] application during the investigative phase (including grand jury). Virginia Rule 3.8 cmt. [3] then explains that during that investigative phase, “a witness may be requested to maintain secrecy in order to protect the integrity of the investigation and support concerns for safety.”

This might make sense, but seems to be a mismatch with Virginia Rule 3.4(h), which indicates that “[a] lawyer shall not . . . [r]equest a person other than a client to refrain from voluntarily giving relevant information to another party.” As explained above, there are exceptions in which lawyers may make such requests, but they are limited to civil matters – thus explicitly excluding criminal matters. In fact, Virginia Rule 3.4 cmt. [4] explicitly notes that “[t]he exception is limited to civil matters because of concerns with allegations of obstruction of justice (including perceived intimidation of witnesses) that

could be made in a criminal investigation and prosecution” – although inexplicably failing to reference Virginia Rule 3.8(c). It is unclear why Virginia Rule 3.4(h) would not apply in the scenario described in Virginia Rule 3.8 cmt. [3].

Virginia Rule 3.8 cmt. [3] next addresses black letter Virginia Rule 3.8(c)’s term “encourage.” Black letter Virginia Rule 3.8(c) prohibits prosecutors from “instruct[ing] or encourag[ing] a person to withhold information from the defense after a party has been charged with an offense (emphasis added).” Virginia Rule 3.8 cmt. [3] explains that Virginia Rule 3.8(c)’s use of the term “encourage” to describe impermissible prosecutorial conduct “is intended to prevent a prosecutor from doing indirectly what cannot be done directly.”

That seems like an odd phrase. The prohibition on lawyers doing something “indirectly that cannot be done directly” normally refers to a lawyer acting through another person. For instance, Virginia Rule 8.4(a) explains that “[i]t is professional misconduct for a lawyer to violate the [Virginia] Rules of Professional Conduct . . . through the acts of another.” Presumably Virginia Rule 3.8 cmt. [3]’s use of the phrase means that a prosecutor cannot “indirectly” “encourage” someone from doing something that cannot be “done directly” pursuant to the prosecutor’s “instruction.”

Moreover, if a prosecutor cannot “instruct or encourage a person to withhold information from the defense,” it would seem equally unethical for a prosecutor to “[r]equest a person other than a client to refrain from voluntarily giving relevant information to another party” under Virginia Rule 3.4(h).

Virginia Rule 3.8 cmt. [3] concludes by addressing black letter Virginia Rule 3.8(d)’s exception to prosecutors’ normal disclosure obligation – “when disclosure is

precluded or modified by order of a court.” Virginia Rule 3.8 cmt. [3] thus recognizes that “a prosecutor may seek a protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.”

**ABA Model Rule 3.8 cmt. [3]** contains language identical to Virginia Rule 3.8 cmt. [3]’s concluding sentence – addressing black letter ABA Model Rule 3.8(d)’s similar exception to prosecutors’ normal disclosure duty “when the prosecutor is relieved of this [disclosure] responsibility by a protective order of the tribunal.”

#### **Virginia Rule 3.8 Comment [4]**

Virginia Rule 3.8 cmt. [4] addresses black letter Virginia Rule 3.8(d) and (e)’s provisions.

Virginia Rule 3.8 cmt. [4] begins with a confusing statement that both of those black letter Virginia Rule 3.8 provisions “address knowing violations of the respective provisions so as to allow for better understanding and easier enforcement by excluding situations.” Neither of those black letter Virginia Rule 3.8 provisions allow for better understanding and easier enforcement by “excluding situations.” Neither of those black letter Virginia provisions seem to “exclude[e] any situations.”

Virginia Rule 3.8 cmt. [4] continues as follows after the words “by excluding situations”: (1) “(paragraph (d)) for example, where the lawyer/prosecutor does not know the theory of the defense so as to be able to assess the exculpatory nature of evidence or situations;” and (2) “(paragraph (e)) where the lawyer/prosecutor does not have knowledge or control over the *ultra vires* actions of law enforcement personnel who may be only minimally involved in a case.” The term “lawyer/prosecutor” seems odd. That

dual status is implicit in all of Virginia Rule 3.8's provisions – but Virginia Rule 3.8 cmt. [4] is the only provision that contains it.

Virginia Rule 3.8 cmt. [4] apparently intends to explain why black letter Virginia Rule 3.8(d) and (e) contain knowledge standards. To be sure, Virginia Rule 3.8(d) has a knowledge requirement – requiring prosecutors to make certain disclosures if the prosecutor “knows” that the information has a specified beneficial effect for the accused.

But Virginia Rule 3.8(e) does not have contain a knowledge requirement. Virginia Rule 3.8 cmt. [4] incorporates Virginia Rule 3.6(a)'s prohibition. But Virginia Rule 3.6(a)'s prohibition applies to statements “that the lawyer knows, or should know, will have a substantial likelihood of interfering with the fairness of the trial by a jury” (emphasis added). Thus, Virginia Rule 3.6(a) contains both a subjective (“knows”) standard and an objective (“or should know”) standard. The latter obviously does not require the lawyer's actual knowledge.

Perhaps Virginia Rule 3.8 cmt. [4]'s reference to Virginia Rule 3.8(e) intends to emphasize that black letter Virginia Rule 3.8(e)'s prohibition only on a prosecutor “direct[ing] or encourag[ing]” colleagues from making improper extrajudicial statements. That does not involve a knowledge requirement, but it does to a certain extent immunize prosecutors – thus at least somewhat matching up with Virginia Rule 3.8 cmt. [4]'s description of “situations . . . where the lawyer/prosecutor does not have knowledge or control over the *ultra vires* actions of law enforcement personnel who may be only minimally involved in a case.”

**ABA Model Rule 3.8 cmt. [5]** addresses prosecutors' extrajudicial statements – which Virginia Rule 3.8 cmt. [4] confusingly addresses.

ABA Model Rule 3.8 cmt. [5] first notes that black letter ABA Model Rule 3.8(f) “supplements [ABA Model] Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding.” As explained in this document’s summary, analysis and comparison of Rule 3.6, ABA Model Rule 3.6 contains extensive lists of public communications that prosecutors may ethically make (ABA Model Rule 3.6(b)) and not make (ABA Model Rule 3.6 cmt. [5]).

ABA Model Rule 3.8 cmt. [5] next explains that “[i]n the context of a criminal prosecution, a prosecutor’s extrajudicial statement can create the additional problem of increasing public condemnation of the accused.” ABA Model Rule 3.8 cmt. [5] acknowledges that “[a]lthough the announcement of an indictment, for example, will necessarily have severe consequences for the accused.” But ABA Model Rule 3.8 cmt. [5] also warns that “a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused.”

ABA Model Rule 3.8 cmt. [5] concludes by explaining that “[n]othing in this [ABA Model Rule 3.8 cmt. [5]] is intended to restrict the statements which a prosecutor may make which comply with [ABA Model] Rule 3.6(b) or 3.6(c).” As explained above, ABA Model Rule 3.6(b) and ABA Model Rule 3.6 cmt. [5] contain very extensive and detailed lists of the type of information lawyers may and may not publicly disseminate “by means of public communication.”

**ABA Model Rule 3.8 cmt. [6]** also addresses prosecutors’ and their colleagues’ extrajudicial statements.

ABA Model Rule 3.8 cmt. [6] begins by confirming that “[l]ike other lawyers, prosecutors are subject to [ABA Model] Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and non-lawyers who work for or are associated with the lawyer’s office.”

ABA Model Rule 5.1 addresses lawyers’ responsibility to make “reasonable efforts” assuring that their subordinates comply with the ABA Model Rules. And ABA Model Rule 5.3 contains essentially the same duties for lawyers who supervise non-lawyer subordinates (although those supervising lawyers must make “reasonable efforts” to ensure that the non-lawyers act in a way that is “compatible with the professional obligations of the lawyer” (rather than in compliance with them – because nonlawyers are not bound by lawyers’ ethics rules).

ABA Model Rule 3.8 cmt. [6] then notes that ABA Model Rule 3.8(f) “reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case.” ABA Model Rule 3.8 cmt. [6] explains that ABA Model Rule 3.8(f) “requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor.” Presumably that explanation relies on black letter ABA Model Rule 3.8(f)’s description of prosecutors’ duty to “exercise reasonable care” to prevent those “assisting or associated with the prosecutor” from making improper extrajudicial statements.” The phrase “assisting or associated with” does not necessarily describe only persons under “the direct supervision of the prosecutor.”

ABA Model Rule 3.8 cmt. [6] concludes with an assurance that “[o]rdinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.”

#### **ABA Model Rule 3.8 Comment [4]**

Virginia Rule did not adopt ABA Model Rule 3.8 cmt. [4] – because Virginia did not adopt black letter ABA Model Rule 3.8(e). As explained above, ABA Model Rule 3.8(e) prohibits prosecutors from subpoenaing lawyers except under certain situations.

ABA Model Rule 3.8 cmt. [4] explains that black letter ABA Model Rule 3.8(e) “is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.” That seems evident from black letter ABA Model Rule 3.8(e) itself, and therefore does not provide any useful guidance.

#### **ABA Model Rule 3.8 Comment [7]**

Virginia Rule did not adopt ABA Model Rule 3.8 cmt. [7], because Virginia Rule 3.8 does not require such post-conviction disclosure of information possibly exonerating a convicted criminal.

ABA Model Rule 3.8 cmt. [7] addresses prosecutors’ post-conviction disclosure obligation under black letter ABA Model Rule 3.8(g).

ABA Model Rule 3.8 cmt. [7] first addresses prosecutors’ post-conviction disclosure involving a criminal defendant convicted “outside the prosecutor’s jurisdiction.” ABA Model Rule 3.8 cmt. [7] then essentially repeats ABA Model Rule 3.8(g) requirements. Helpfully, ABA Model Rule 3.8 cmt. [7] also provides an example of the

“appropriate . . . authority” to whom a prosecutor in that situation would disclose the specified information under ABA Model Rule 3.8(g)(1): “such as the chief prosecutor of the jurisdiction where the conviction occurred.”

ABA Model Rule 3.8 cmt. [7] next turns to ABA Model Rule 3.8(g)(2)’s disclosure requirements if “the conviction was obtained in the prosecutor’s jurisdiction.” ABA Model Rule 3.8(g)(2) “requires the prosecutor to [as ABA Model Rule 3.8 cmt. [7] puts it] examine the evidence and “undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation” – and then “to promptly disclose the evidence to the court and, absent court-authorized delay, to the defendant.”

ABA Model Rule 3.8 cmt. [7] concludes with a helpful reminder that “[c]onsistent with the objectives of [ABA Model] Rules 4.2 and 4.3,” (1) “disclosure to a represented defendant must be made through the defendant’s counsel”; and (2) “in the case of an unrepresented defendant, [such disclosure] would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.”

ABA Model Rule 3.8 cmt. [7]’s description of a prosecutor’s ABA Model Rule 4.2 duty (communicating with the defendant’s lawyer instead of directly with the defendant) is not only “[c]onsistent with the obligations of [ABA Model Rule] 4.2, it is required by ABA Model Rule 4.2.

It makes more sense to address the appropriate “ordinary” process in the context of an unrepresented defendant. ABA Model Rule 3.8 cmt. [7]’s suggested steps could fairly be described as “[c]onsistent with the objectives” of ABA Model Rule 4.3.

### **ABA Model Rule 3.8 Comment [8]**

Virginia Rule did not adopt ABA Model Rule 3.8 cmt. [8], because Virginia Rule 3.8 does not require such post-conviction disclosure of information possibly exonerating a convicted criminal.

ABA Model Rule 3.8 cmt. [8] addresses prosecutors' ABA Model Rule 3.8(h) disclosure obligation if they come to know of specified evidence of a criminal defendant's innocence.

ABA Model Rule 3.8 cmt. [8] first explains that "once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction." This parallels black letter ABA Model Rule 3.8(h)'s obligation.

ABA Model Rule 3.8 cmt. [8] concludes with examples of "[n]ecessarily steps": which "may include" (1) "disclosure of the evidence to the defendant"; (2) "requesting that the court appoint counsel for an unrepresented indigent defendant"; and (3) "where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted."

### **ABA Model Rule 3.8 Comment [9]**

Virginia Rule did not adopt ABA Model Rule 3.8 cmt. [9], because Virginia Rule 3.8 does not require such post-conviction disclosure of information possibly exonerating a convicted criminal.

ABA Model Rule 3.8 cmt. [9] assures prosecutors that they do not violate ABA Model Rule 3.8(g) or (h) if their "independent judgement, made in good faith, [is] that the new evidence is not of such nature as to trigger the [ABA Model Rule 3.8(g) and (h)

disclosure obligations] though [the prosecutor’s “independent judgment . . . is] subsequently determined to have been erroneous.” In essence, ABA Model Rule 3.8 cmt. [9] gives prosecutors the benefit of the doubt in that context.

# ABA MODEL RULE 3.9

## Advocate In Nonadjudicative Proceedings

Virginia did not adopt ABA Model Rule 3.9.

### Rule

#### ABA Model Rule 3.9

ABA Model Rule 3.9 addresses the ABA Model Rules' applicability to lawyers representing clients in “a nonadjudicative proceeding.”

ABA Model Rule 3.9 begins with the phrase “[a] lawyer representing a client.” That phrase appears in several other ABA Model Rules (such as ABA Model Rule 4.2, which begins with “[i]n representing a client”). It is not clear if the phrase “in representing a client” is intended to be synonymous with other similar phrases that appear in other ABA Model Rules. For instance, the next ABA Model Rule (ABA Model Rule 4.1) begins with the explicitly different phrase “[i]n the course of representing a client.” And nearby ABA Model Rule 4.3 begins with the explicitly different phrase “[i]n dealing on behalf of a client.”

ABA Model Rule 3.9 next describes a setting in which a lawyer “representing a client” will be governed by ABA Model Rule 3.9: “before a legislative body or administrative agency in a nonadjudicative proceeding.” ABA Model Rule 3.9 cmt. [1] (discussed below) sheds light on the meaning of that description.

In addition, it is worth considering ABA Model Rule 1.0(m), which defines “tribunal.” That word “denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity.” ABA Model Rule 1.0(m) then explains that such an entity “acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party’s interests in a particular matter.”

ABA Model Rule 3.9 then addresses lawyers’ duties when “representing a client before a legislative body or administrative agency in a nonadjudicative proceeding.”

Such lawyers must comply with two duties: (1) they “shall disclose that the appearance is in a representative capacity;” and (2) they “shall conform to the provisions of [ABA Model] Rules 3.3(a) through (c), [ABA Model Rule] 3.4(a) through (c), and [ABA Model Rule] 3.5.”

The first duty thus requires lawyers to explain that they are representing a client when doing so in “a nonadjudicative proceeding.”

This document summarizes, analyzes and compares all the ABA Model Rules referenced in ABA Model Rule 3.9.

ABA Model Rule 3.3(a) prohibits lawyers from: making false statements of fact or law to a tribunal; failing to correct their earlier “material” statements of fact or law that they later find to have been false; failing to disclose “legal authority in the controlling jurisdiction” directly adverse to the client’s position; offering evidence the lawyer knows to be false; failing to take “reasonable remedial measures, including, if necessary,

disclosure to the tribunal” if lawyers learn that their clients, or witnesses they have called, have offered “material” false evidence.

ABA Model Rule 3.3(b) requires lawyers to “take reasonable remedial measures, including, if necessary, disclosure to the tribunal” if any person (not just their client) “intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.”

ABA Model Rule 3.3(c) explains that ABA Model Rule 3.3(a)’s and (b)’s duties “continue to the conclusion of the proceeding” and require disclosure “even if compliance requires disclosure of information otherwise protected by [ABA Model] Rule 1.6.” In other words, ABA Model Rule 3.3(c) trumps ABA Model Rule 1.6’s confidentiality duty.

ABA Model Rule 3.9 thus deliberately excludes from its duties lawyers’ obligation under ABA Model Rule 3.3(d) to “inform the tribunal” in “an ex parte proceeding” of “all material facts known to the lawyer that will enable a tribunal to make an informed decision, whether or not the facts adverse.” This is a strange exclusion. It would seem that a lawyer would have the same duty in an ex parte nonadjudicatory proceeding as in an ex parte adjudicatory proceeding. Perhaps the nonadjudicatory proceeding’s lack of a true adversary in the normal course of its actions renders ABA Model Rule 3.3(d) logically inapplicable. But if a body or agency acting in a nonadjudicatory proceeding would be implicitly misled by ignorance about material facts known to the lawyer, one might expect ABA Model Rule 3.9 to require disclosure so that the body or agency can “make an informed decision” – even a nonadjudicatory decision.

ABA Model Rule 3.4(a) prohibits lawyers from evidence tampering: “[a] lawyer shall not . . . unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy

or conceal a document or other material having potential evidentiary value [and] . . . shall not counsel or assist another person to do any such act.”

ABA Model Rule 3.4(b) similarly explains that “[a] lawyer shall not . . . falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.” As explained in this document’s summary, analysis and comparison of ABA Model Rule 3.4(b), that ABA Model Rule (and ABA Model Rule 3.4 cmt. [3]) takes a narrower view than bars in most states in explaining what payments lawyers may make to fact witnesses in traveling to, preparing for, and presenting testimony. Presumably that same issue would arise in nonadjudicative proceedings, thus implicating the same considerations.

ABA Model Rule 3.4 (c) explains that “[a] lawyer shall not . . . knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.” That essentially requires lawyers to comply with tribunals’ rules unless they make a non-frivolous challenge to those rules.

ABA Model Rule 3.5 prohibits lawyers from: seeking to influence tribunal-related persons “by means prohibited by law;” communicating ex parte with such persons “unless authorized to do so by law or court order;” communicating in certain situations with jurors or prospective jurors (which would seem irrelevant in nonadjudicative proceedings, which presumably have no jurors); “engag[ing] in conduct intended to disrupt a tribunal.”

## Comment

### ABA Model Rule 3.9 Comment [1]

ABA Model Rule 3.9 cmt. [1] addresses ABA Model Rule 3.9's context and rationale.

ABA Model Rule 3.9 cmt. [1] first explains the context of its applicability: “lawyers present facts, formulate issues and advance argument in the matters under consideration” – “[i]n representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in rule-making or policy-making capacity.”

Thus, ABA Model Rule 3.9 cmt. [1] oddly includes two governmental entities (“municipal councils” and “executive . . . agencies”) not explicitly mentioned in black letter ABA Model Rule 3.9 (which refers to “a legislative body or administrative agency”).

Presumably the phrase “in a rule-making or policy-making capacity” is intended to be synonymous with a “nonadjudicative” capacity.

It seems linguistically odd that ABA Model Rule 3.9 cmt. [1]'s sentence refers to “facts” and “issues” in the plural, but “argument” in the singular. To be sure, the word “argument” can refer to either the singular or the plural, but the inconsistency is noticeable.

ABA Model Rule 3.9 cmt. [1] next includes two understandable statements. First, ABA Model Rule 3.9 cmt. [1] explain that “[t]he decision-making body, like a court, should be able to rely on the integrity of the submissions made to it.” Second, and presumably as a result of that obvious principle, “[a] lawyer appearing before such a body must deal

with it honestly and in conformity with applicable rules of procedure.” Presumably the phrase “rules of procedure” refer to those bodies’ rules of procedure.

ABA Model Rule 3.9 cmt. [1] then repeats the references to those ABA Model Rules mentioned in black letter ABA Model Rule 3.9.

### **ABA Model Rule 3.9 Comment [2]**

ABA Model Rule 3.9 cmt. [2] addresses lawyers’ duties that may exceed those of non-lawyers essentially playing the same role.

ABA Model Rule 3.9 cmt. [2] begins by noting that “[l]awyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court.” This statement is generally true, but most states recognize special circumstances (usually involving small claims courts) in which non-lawyers may appear in courts. And of course litigants may appear before courts pro se.

ABA Model Rule 3.9 cmt. [2] then explains that “[t]he requirements of this [ABA Model Rule 3.9] therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers.”

ABA Model Rule 3.9 cmt. [2] concludes with the rationale for this distinction: “[h]owever, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.” This list of entities matches black letter ABA Model Rule 3.9, but is a subset of the entities mentioned in the preceding ABA Model Rule 3.9 cmt. [1].

### **ABA Model Rule 3.9 Comment [3]**

ABA Model Rule 3.9 cmt. [3] addresses situations in which ABA Model Rule 3.9 applies and in which it does not apply.

ABA Model Rule 3.9 cmt. [3] begins by explaining that ABA Model Rule 3.9 “only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer’s client is presenting evidence or argument.”

The reference to the ABA Model Rule 3.9 to “the lawyer’s client” implicates ABA Model Rule 8.4(a)’s explanation that “[i]t is professional misconduct for a lawyer to . . . violate or attempt to violate the [ABA Model] Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.” In other words, lawyers may not violate ABA Model Rule 3.9 through their clients.

ABA Model Rule 3.9 cmt. [3] then lists situations in which ABA Model Rule 3.9 does not apply: (1) “representation of a client in a negotiation or other bilateral transaction with a governmental agency;” (2) “representation of a client . . . in connection with an application for a license or other privilege;” (3) “representation of a client . . . in connection with . . . the client’s compliance with generally applicable reporting obligations, such as the filing of income-tax returns;” (4) “representation of a client in connection with an investigation or examination of the client’s affairs conducted by government investigators or examiners.” Those seems to be client-specific scenarios, rather than the presumably more generally applicable scenarios involving (as ABA Model Rule 3.9 cmt. [1] describes it) “a rule-making or policy-making” nonadjudicatory setting.

ABA Model Rule 3.9 cmt. [3] concludes with a reminder that “[r]epresentation in such matters is governed by [ABA Model] Rules 4.1 through 4.4.” Those ABA Model Rules apply when lawyers act in a representational role (although, as explained above, that representational role is described differently in several of those ABA Model Rules –

without any explanation of whether the deliberately different terms are intended to have a different meaning). It is strange that ABA Model Rule 3.9 cmt. [3] would single out these ABA Model Rules, without also reminding lawyers that they are always governed by ABA Model Rule 8.4 – whether acting in a representational or nonrepresentational role, or even in a non-professional personal role.

# RULE 4.1

## Truthfulness In Statements To Others

### Rule

#### Virginia Rule 4.1

Virginia Rule 4.1 addresses lawyers' "truthfulness" in statements to others.

Virginia Rule 4.1's introductory sentence begins with the phrase: "[i]n the course of representing a client."

The Virginia Rules and the ABA Model Rules use odd but obviously deliberately chosen alternating phrases that presumably are intended to be synonymous. Virginia Rule 4.1(a) and ABA Model Rule 4.1(a) begin with the phrase "[i]n the course of representing a client." Virginia Rule 4.1 cmt. [1] and ABA Model Rule 4.1 cmt. [1] begin with the phrase "when dealing with others on a client's behalf." Virginia Rule 4.2 and ABA Model Rule 4.2 begin with the phrase: "[i]n representing a client." Virginia Rule 4.3(a) and ABA Model Rule 4.3 begin with the phrase: "[i]n dealing on behalf of a client." Virginia Rule 4.4(a) and ABA Model Rule 4.4(a) begin with the phrase: "[i]n representing a client." It is unclear why the Virginia Rules and the ABA Model Rules use different phrases to describe what presumably is intended to involve the same scenario.

Virginia Rule 4.1 thus applies only when lawyers act in their representational role. Some Virginia Rules apply when lawyers act in their professional role, but not in their

representational role. For example, Virginia Rule 1.8(a) applies to lawyers' business transactions with their clients.

Other Virginia Rules apply to lawyers' conduct in their representational role, their non-representational role and even in their non-professional (personal) role. For instance, Virginia Rule 8.4 begins with the phrase "[i]t is professional misconduct for a lawyer to" – and then lists several types of misconduct. Virginia Rule 8.4 therefore applies to lawyers' conduct in their representational role, non-representational professional role, and even in their non-professional role. In other words, Virginia Rule 8.4's provisions apply to lawyers' conduct even in their purely private lives.

Virginia Rule 4.1's word "knowingly" implicates the Virginia Rule's Terminology section, which defines "knowingly" as "denot[ing] actual knowledge of the fact in question," although "[a] person's knowledge may be inferred from circumstances." This knowledge requirement contrasts with other Virginia Rules' strict liability provisions that do not require the lawyers' knowledge (such as Virginia Rule 1.7(a)).

**ABA Model Rule 4.1** contains the identical language and therefore implicates the identical definitional issues.

### **Virginia Rule 4.1(a)**

Virginia Rule 4.1(a) addresses lawyers' falsehoods when acting in their representational role.

Virginia Rule 4.1(a) bluntly states that "[i]n the course of representing a client a lawyer shall not knowingly ... make a false statement of fact or law."

This 20-word provision implicates numerous issues.

First, as discussed above, Virginia Rule 4.1(a)'s provision only applies to lawyers acting in their representational role. This prohibition on representational-related falsehoods contrasts with Virginia Rule 8.4(c), which (as discussed above) prohibits lawyers' falsehoods even when they communicate in their non-professional role. Virginia Rule 8.4(c) states that "[i]t is professional misconduct for a lawyer to ... engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law." Virginia Rule 8.4(c) thus does not just prohibit misleading communications. It prohibits "conduct involving" the listed types of misconduct. That presumably covers more than just a communication itself. The list of misconduct presumably includes elements of those terms. For instance, the Virginia Terminology section describes "fraud" as "denot[ing] conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information." The words "dishonesty" and "deceit" may not have legal definitions, but the word "misrepresentation" presumably has been given some additional clarity by courts or bars.

Second, Virginia Rule 4.1(a)'s blunt prohibition on "a lawyer knowingly ... mak[ing] a false statement of fact or law" is on its face limited to a lawyer's own statements. But, lawyers might directly encourage or assist others in doing so. Lawyers acting through another in violation of a Virginia Rule face discipline under Virginia Rule 8.4(a) – which indicates that "[i]t is professional misconduct for a lawyer to ... violate or attempt to violate the [Virginia] Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another."

But it is common knowledge (and accepted) that government lawyers advise police in conducting sting operations or spy operations – which necessarily involve deceptive

conduct. Lawyers also assist others in the laudable deception that necessarily underlies housing discrimination tests. Although perhaps less socially worthwhile, undercover investigations looking for trademark infringement or “palming off” misconduct also often involves deception. The Virginia Rules Scope’s first paragraph explains that “[t]he [Virginia] Rules of Professional Conduct are rules of reason.” All of this socially beneficial and commercially worthwhile deception ordinarily does not trigger disciplinary processes.

Interestingly, Virginia Rule 5.3 cmt. [1] contains a unique sentence not found in the ABA Model Rules – allowing lawyers to assist their nonlawyer subordinates in clearly deceptive conduct: “[Virginia Rule 5.3] is not intended to preclude traditionally permissible activities such as misrepresentation by a nonlawyer of one’s role in a law enforcement investigation or a housing discrimination ‘test.’” Allowing lawyers to assist in such deception certainly distances lawyers a bit from the otherwise unethical conduct, but if lawyers can direct their nonlawyer assistants to engage in such deceptive conduct, it would seem that should be able to do so themselves.

Third, Virginia Rule 4.1(a) prohibits lawyers’ false statements both of “fact” and “law.” Thus, it prohibits lawyers’ false statements about case law or statutory law. The prohibition would seem most commonly applied to lawyers’ statements of “law” to courts or adversaries. In the tribunal setting, Virginia Rule 4.1(a) parallels Virginia Rule 3.3(a) – which states that “[a] lawyer shall not knowingly ... make a false statement of fact or law to a tribunal.” That prohibition clearly applies when lawyers act in a representational role, but on its face the prohibition is not limited to that context.

Lawyers considering their Virginia Rule 4.1(a) obligations frequently have in mind their negotiation positions. Can lawyers exaggerate the strength of their case, tell “a little

white lie” about their “bottom line” settlement figure, etc.? Virginia Rule 4.1 cmt. [2] (discussed below) addresses that key issue.

Fourth, Virginia Rule 4.1(a) applies to lawyers’ specified false statements to anyone – presumably even their clients. ABA Model Rule 4.1(a) limits its specified lawyer’s false statements to “a third person” (thus presumably excluding the lawyer’s clients). Virginia Rule 4.1(a)’s deliberate decision not to include that limitation apparently extends the prohibition to lawyers’ statements to their own clients. This may not be a material issue, because lawyers’ false statements to their own client presumably would violate other Virginia rules, including Virginia Rule 8.4(c).

Fifth, Virginia Rule 4.1(a) does not contain a materiality element (unlike ABA Model Rule 4.1(a) – discussed below). Thus, lawyers theoretically violate Virginia Rule 4.1(a) if they knowingly make an immaterial false statement of fact or law. Other Virginia Rules clearly distinguish between material and immaterial statements. For instance, under Virginia Rule 3.3(a)(4), lawyers may not “offer any evidence [material or immaterial] that the lawyer knows to be false.” But lawyers “shall take reasonable remedial measure” if they have “offered material evidence and come[] to know of its falsity” (emphasis added). In other words, lawyers may not offer even immaterial false evidence, but must only correct evidence that they later learn to have been false if that evidence is material.

**ABA Model Rule 4.1(a)** also addresses lawyers’ misstatements to others.

Under ABA Model Rule 4.1(a), “[i]n the course of representing a client a lawyer shall not knowingly ... make a false statement of material fact or law to a third person” (emphasis added).

ABA Model Rule 4.1(a) involves several of the issues discussed above in connection with Virginia Rule 4.1(a). Some of those issues implicate ABA Model Rules that themselves differ from the parallel Virginia Rules.

For instance, in contrast to Virginia Rule 8.4(c), ABA Model Rule 8.4(c) does not contain Virginia Rule 8.4(c)'s limiting provision: "that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law." Theoretically all of those socially-acceptable statements mentioned above violate ABA Model Rule 8.4(c) as it is written. In contrast to Virginia Rule 3.3(a)(3) prohibition on lawyers' failure "to disclose to the tribunal controlling legal authority in the subject jurisdiction," ABA Model Rule 3.3(a)(2) uses a different phrase: "legal authority in the controlling jurisdiction." This document addresses those and other differences in the pertinent Virginia and ABA Model Rules in its summaries, analyses and comparisons of those Rules.

ABA Model Rule 4.1(a) itself differs from Virginia Rule 4.1(a) in several significant ways.

First, contrast to Virginia Rule 4.1(a)'s flat prohibition on lawyers knowingly making any "false statement of fact or law," ABA Model Rule 4.1(a) only prohibits lawyers from "knowingly mak[ing] a false statement of material fact or law to a third person" (emphasis added). Thus, ABA Model Rule 4.1(a) only prohibits a subset of the false statements of fact or law that Virginia Rule 4.1(a) on its face prohibits.

Second, in contrast to Virginia Rule 4.1(a)'s prohibition on lawyers knowingly making "a false statement of fact or law" to anyone, ABA Model Rule 4.1(a) prohibits such material false statements made "to a third person." If the term "third person" included someone other than the lawyer, ABA Model Rule 4.1(a) would essentially be nonsensical

– although presumably it would limit lawyers lying to themselves. That undoubtedly happens, but it is difficult to imagine the ethics rules prying into such self-deception. So presumably the word “third person” denotes someone other than the lawyer’s client. Thus, on its face and as reasonably interpreted, ABA Model Rule 4.1(a) does not prevent lawyers from knowingly “mak[ing] a false statement of material fact or law” to their client. That might seem surprising, but ABA Model Rule 8.4(c) and other ABA Model Rules presumably cover that subset of false statements.

### **Virginia Rule 4.1(b)**

Virginia Rule 4.1(b) addresses lawyers’ deceptive silence rather than affirmative misstatements.

Under Virginia Rule 4.1(b), “[i]n the course of representing a client a lawyer shall not knowingly ... fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.”

Thus, Virginia Rule 4.1(b) prohibits lawyers’ failure to communicate in certain specified circumstances. Virginia Rule 4.1(b)’s word choices implicate several issues.

First, Virginia Rule 4.1(b) contains the word “disclose.” As explained throughout this document, the word “disclose” presumably is intended to be synonymous with the word “reveal” – which Virginia Rule 1.6(a)’s core confidentiality rule contains.

Second, Virginia Rule 4.1(b) only requires “disclosure of a fact,” but presumably in some circumstances would require disclosure of more than one fact.

Third, Virginia Rule on its face only covers “a fact” – not the “law.”

Fourth, Virginia Rule 4.1(b) prohibits silence if disclosing “a fact . . . is necessary to avoid assisting a criminal or fraudulent act by a client.” (emphasis added) The word

“necessary” is not defined, and could create some confusion or difficult decisions. For instance, disclosure may not be necessary if a lawyer’s false statement of fact was an obvious joke or an exaggeration. In other words, the “necessary to avoid assisting a criminal or fraudulent act by client” focuses on the third party’s reliance on the lawyer’s silence.

Fifth, the word “assisting” parallels Virginia Rule 8.4(a)’s prohibition on lawyers’ “knowingly assist[ing] or induc[ing] another” to “violate or attempt to violate the [Virginia] Rules of Professional Conduct.”

Sixth, the word “criminal” presumably incorporates extrinsic law into Virginia Rule 4.1(b). The word “fraudulent” is defined in the Virginia Rules Terminology section.

Seventh, Virginia Rule 4.1(b) requires lawyers’ affirmative disclosure in circumstances involving “a criminal or fraudulent act by a client” (emphasis added). Lawyers’ silence in the face of a “non-client’s” “criminal or fraudulent act” implicates other ethics issues, including Virginia Rule 8.4(c)’s prohibition on deceptive conduct (discussed above).

Eighth, perhaps most notably, Virginia Rule 4.1(b) does not contain an exception for Virginia Rule 1.6(a) – protected client confidential information – which ABA Model Rule 4.1(b) contains (discussed below). On its face, Virginia Rule 4.1(b) thus requires lawyers’ disclosure even if that would otherwise violate their Virginia Rule 1.6(a) confidentiality duty to their client.

**ABA Model Rule 4.1(b)** also addresses lawyers’ silence that assists their clients’ crime or fraud.

ABA Model Rule 4.1(b)'s core language is identical to Virginia Rule 4.1(b) – thus implicating the word choices discussed above. But there are several significant differences between ABA Model Rule 4.1(b) and Virginia Rule 4.1(b) – which reflect differences in ABA Model Rule 4.1(a) and Virginia Rule 4.1(a).

First, in contrast to Virginia Rule 4.1(b)'s application to even immaterial facts, ABA Model Rule 4.1(b) applies only to lawyers' failure to disclose “a material fact” (emphasis added).

Second, in contrast to Virginia Rule 4.1(b)'s duty to disclose a fact to anyone in the specified situation, ABA Model Rule 4.1(b) requires lawyers to disclose “a material fact” in the specified circumstances “to a third person.”

Third, and most notably, in contrast to Virginia Rule 4.1(b)'s unconditional duty to disclose facts in the specified circumstances, ABA Model Rule 4.1(b) contains an exception that dramatically affects the analysis and its application: “unless disclosure is prohibited by [ABA Model] Rule 1.6.” Thus, ABA Model Rule 4.1(b) allows lawyers to avoid its disclosure requirement by pointing to their ABA Model Rule 1.6 confidentiality duty.

Significantly, ABA Model Rule 4.1(b)'s exception does not apply to information ABA Model Rule 1.6 protects. ABA Model Rule 1.6(a) prohibits lawyers from disclosing “information relating to the representation of a client” unless the client consents, the disclosure is impliedly authorized, or ABA Model Rule 1.6(b) permits such disclosure. As this document discusses in its summary, analysis and comparison of ABA Model Rule 1.6, that ABA Model Rule is very expansive. Instead, ABA Model Rule 4.1(b)'s exception applies only to information whose disclosure ABA Model Rule 1.6 “prohibits[.]” That

excludes from ABA Model Rule 4.1(b)'s exception any information ABA Model Rule 1.6(a) protects – but which ABA Model Rule 1.6 allows lawyers to disclose under ABA Model Rule 1.6(b).

In other words, because lawyers' disclosure of ABA Model Rule 1.6(a) - protected client confidential information under ABA Model Rule 1.6(b) is not "prohibited," lawyers' disclosure is required by ABA Model Rule 4.1(b).

And equally significantly from a temporal standpoint, as the ABA Model Rules have expanded the ABA Model Rule 1.6(b) discretionary disclosure of ABA Model Rule 1.6(a) protected client confidential information, the ABA Model Rules correspondingly have expanded lawyers' ABA Model Rule 4.1(b) disclosure duty. Once certain information moved from the prohibited ABA Model Rule 1.6 categorization to ABA Model Rule 1.6(b)'s occasionally permissible disclosure categorization, that information moved into ABA Model Rule 4.1(b)'s mandatory disclosure categorization. Perhaps most notably, in 2003 the ABA added two ABA Model Rule 1.6 provisions that had been repeatedly rejected since 1983 by the ABA House of Delegates. The ABA finally relented after the Enron scandal and Sarbanes-Oxley. Because the provisions only allow (but do not require) lawyers to disclose certain ABA Model Rule 1.6(a) protected client confidential information, it would be easy for lawyers to overlook the significance of their adoption. But because these ABA Model Rule amendments moved the specified protected client confidential information from the list that lawyers could not disclose to the list that lawyers could in certain circumstances disclose, their adoption dramatically affected the ABA Model Rule 4.1(b) analysis – because disclosure of the information was no longer "prohibited by [ABA Model] Rule 1.6."

Under ABA Model Rule 1.6(b)(2), “[a] lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services.”

Under ABA Model Rule 1.6(b)(3), “[a] lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services.”

Those ABA Model Rule amendments moved that information from the prohibited disclosure categorization to the discretionary disclosure categorization – which caused a ripple effect in ABA Model Rule 4.1(b). Fortunately, the two pertinent ABA Model Rule 1.6 Comments (ABA Model Rule 1.6 cmt. [7] and [8]) refer to this dramatic effect under ABA Model Rule 4.1(b). So lawyers unfamiliar with the ABA Model Rules or their state parallels might not have otherwise appreciated (or even be aware of) ABA Model Rule 4.1(b)’s transformation of what on their face are discretionary disclosures to mandatory disclosures.

Lawyers must also remember that ABA Model Rule 1.6(a)’s broad confidentiality duty may be trumped by other ABA Model Rules (which supplement the discretionary ABA Model Rule 1.6(b)’s disclosure opportunities). For instance, ABA Model Rule 3.3(a) requires lawyers to “correct a false statement of a material fact or law made to the tribunal by the lawyer – presumably whether the lawyer’s knowledge of the falsity of such previous

statements to a tribunal came from an otherwise ABA Model Rule 1.6(a)–protected communication with her client. Similarly, ABA Model Rule 3.3(a)(3) requires lawyers to “take reasonable remedial measures” if they come to know that they have offered false evidence – presumably even if that knowledge comes from otherwise ABA Model Rule 1.6’s protected communications with a client.

It is easy to envision that those tribunal-related scenarios could trigger ABA Model Rule 4.1(b)’s disclosure duty. ABA Model Rule 4.1(b)’s term “a third person” presumably includes tribunals. So ABA Model Rule 4.1(b)’s exception to the disclosure duty (excluding from that disclosure duty facts whose “disclosure is prohibited by [ABA Model] Rule 1.6”) may have little or no bearing on an analysis – because ABA Model Rule 3.3(a)(1) or ABA Model Rule 3.3(a)(3) might independently require disclosure regardless of ABA Model Rule 1.6’s otherwise general applicability.

## Comment

### Virginia Rule 4.1 Comment [1]

Virginia Rule 4.1 cmt. [1] addresses Virginia Rule 4.1's basic principle.

Virginia Rule 4.1 cmt. [1] begins by recognizing the compatibility of a prohibition on affirmative misstatements and the absence of any duty to disclose unfavorable facts: “[a] lawyer is required to be truthful when dealing with others on a client’s behalf, but generally has no affirmative duty to inform an opposing party of relative facts.”

As explained in connection with black letter Virginia Rule 4.1 (above), presumably Virginia Rule 4.1 cmt. [1]’s phrase “when dealing with others on a client’s behalf” is intended to be synonymous with similar but deliberately different formulations in Virginia Rule 4.1, Virginia Rule 4.2, Virginia Rule 4.3 and Virginia Rule 4.4 – all describing lawyers’ conduct while representing their clients.

Virginia Rule 4.1 cmt. [1] explicitly refers to lawyers who are “dealing with others on a client’s behalf.” This creates a possible mismatch with black letter Virginia Rule 4.1(a), which deliberately does not include ABA Model Rule 4.1(a)’s reference to lawyers’ false statements “to a third person.” As explained above, on its face black letter Virginia Rule 4.1(a) also covers lawyers’ false statements to their own clients.

Virginia Rule 4.1 cmt. [1]’s statement that “generally” lawyers have “no affirmative duty to inform an opposing party of relevant facts” is of course limited by the explicit exception contained in Virginia Rule 4.1(b) (discussed below).

Virginia Rule 4.1 cmt. [1] next explains that “[a] misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false.” Of course, a misrepresentation can occur if a lawyer does so even if the lawyer

does not know that it is false – but it would not then be a “knowing” misrepresentation (and presumably therefore not prohibited by Virginia Rule 4.1(a)). A lawyer presumably “incorporates” another person’s statement by explicitly including it in the lawyer’s communication. A lawyer presumably “affirms” such a statement by explicitly agreeing with it.

Virginia Rule 4.1 cmt. [1] then addresses a more difficult question – when lawyers’ silence amounts to such an affirmation. Virginia Rule 4.1 cmt. [1] explains that “[m]isrepresentations can also occur in one of two circumstances.” First, “[m]isrepresentations can also occur by failure to act.” Second, “[m]isrepresentations can also occur...by knowingly failing to correct false statements made by the lawyer’s client or someone acting on behalf of the client.”

The first example – “failure to act” – is nebulous. The word “act” seems somewhat inapt, although not inaccurate. Such lawyer’s “act” would not be a physical “act,” but rather would be a corrective communication.

The second example makes great sense. A lawyer representing a client in negotiations would have to correct the counterparty’s misunderstanding if that counterparty tells the lawyer “your client told me this morning that he was earning \$75,000 a year before my client laid him off” – if the lawyer knew that her client was only earning \$70,000 a year. A lawyer would have the same duty if the client’s employee, family member, etc., had provided such false facts to a counterparty.

Presumably both examples focus on lawyers’ Virginia Rule 4.1(b) duty to speak up if their silence would assist a client’s criminal or fraudulent act.

**ABA Model Rule 4.1 cmt. [1]** contains the identical first two sentences as Virginia Rule 4.1 cmt. [1], and this implicates the same issues (discussed above).

But there are two differences between ABA Model Rule 4.1 [1] and Virginia Rule 4.1 cmt. [1].

First, in contrast to Virginia Rule 4.1 cmt. [1]'s concluding sentence with the two examples of misrepresentation (including the oddly phrased “failure to act” example), ABA Model Rule 4.1 cmt. [1] focuses on communication’s content: “[m]isrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.” This represents standard misrepresentation law. A common example of such a truthful but misleading communication includes a marketing statement this document mentions in its summary, analysis and comparison of Virginia Rule 7.1 (which prohibits lawyers from “mak[ing] a false or misleading communication about the lawyer or the lawyer’s services”) – a lawyer accurately advertising that she won a \$1 million verdict, but failing to add that an appellate court reversed her victory, so her client lost the case and recovered nothing.

Second, in contrast to Virginia Rule 4.1 cmt. [1], ABA Model Rule 4.1 cmt. [1] contains a concluding sentence not found in Virginia Rule 4.3 cmt. [1]: “[f]or dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see [ABA Model] Rule 8.4.” Presumably that reference is more precisely to ABA Model Rule 8.4(c). Under ABA Model Rule 8.4(c), “[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation” (emphasis added). Presumably ABA Model Rule 4.1 cmt. [1] points to ABA Model Rule 8.4(c)'s word “conduct” – which refers to conduct other

than statements. For instance, a lawyer passing money to or receiving money from a client is engaging in “conduct,” but not making “a false statement.”

As explained above, ABA Model Rule 8.4 (like Virginia Rule 8.4) is not limited to lawyers’ conduct “[i]n the course of representing a client.” Instead, ABA Model Rule 8.4 (and Virginia Rule 8.4) begin with the much broader phrase: “[i]t is professional misconduct for a lawyer to . . . .”

### **Virginia Rule 4.1 Comment [2]**

Virginia Rule 4.1 cmt. [2] addresses lawyers’ ability to engage in negotiation “puffery.”

Virginia Rule 4.1 cmt. [2] begins by noting that “[t]his [Virginia Rule 4.1] refers to statements of fact.” Presumably Virginia Rule 4.1 cmt. [2] focuses on black letter Virginia Rule 4.1(a)’s reference to statements of “fact”: “[i]n the course of representing a client, a lawyer shall not knowingly . . . make a false statement of fact” (emphasis added).

Virginia Rule 4.1 cmt. [2] next turns to a contention that might cause non-lawyers to raise their eyebrows: “[w]hether a particular statement should be regarded as one of fact can depend on the circumstances.” This statement is certainly true in the extreme. For instance, a lawyer’s description of another lawyer as a “snake” is not meant as a statement of literal fact. But Virginia Rule 4.1 cmt. [2] seems to focus on statements that involve a much closer question.

Virginia Rule 4.1 cmt. [2] thus specifically acknowledges that certain principles apply “in negotiation”: “[u]nder generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact” (emphasis added). The plural word “conventions” seems odd, and is not further explained.

Virginia Rule 4.1 cmt. [2]'s word "material" in describing the facts covers only a subset of statements black letter Virginia Rule 4.1(a) prohibits. As explained above, Virginia Rule 4.1(a) deliberately left out the word "material" that is contained in ABA Model Rule 4.1(a).

Virginia Rule 4.1 cmt. [2] then provides three examples of statements that "are in this category" (presumably the category of "statements ordinarily . . . not taken as statements of material fact"): (1) "[e]stimates of price or value placed on the subject of a transaction"; (2) "a party's intentions as to an acceptable settlement of a claim"; (3) "the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud."

Virginia Rule 4.1 cmt. [2]'s sentence structure is odd. Instead of explaining at the beginning or the end of its list of examples that presumably pass muster under Virginia Rule 4.1(a), Virginia Rule 4.1 cmt. [2]'s concluding sentence contains two examples, then explains their significance, then adds another example.

Perhaps more significantly, the fact that those three examples are "ordinarily . . . not taken as statements of material fact" (emphasis added) may be dispositive under ABA Model Rule 4.1(a) (which contains the "material standard") – but is only marginally relevant under Virginia Rule 4.1(a) – which prohibits all "knowingly . . . false statement[s] of fact or law" – not just "material" statements that meet that standard. This is a strange mismatch.

In essence, Virginia Rule 4.1 cmt. [2] allows lawyers to engage in conduct that at least the legal profession labels with the soft and comforting word "puffery." To be sure, the ethics rules' approach to that sort of negotiation tactic parallels case law that

essentially warns negotiating parties that the other side will “puff” (a much gentler word than “lie”) about the value of a used car, “bottom line” price the other side is willing to pay for a house, etc. As a practical matter, all human beings do so. But the Virginia Rules and the ABA Model Rules undoubtedly struggled to articulate such a timeless, universal and everyday exception.

**ABA Model Rule 4.1 cmt. [2]** contains language identical to Virginia Rule 4.1 cmt. [2].

Thus, ABA Model Rule 4.1 cmt. [2] also uses that odd and undefined plural word “conventions” in describing generally accepted negotiation tactics.

As explained above, ABA Model Rule 4.1 cmt. [2]’s word “material” understandably matches that word’s inclusion in black letter ABA Model Rule 4.1(a).

In contrast to Virginia Rule 4.1 cmt. [2], ABA Model Rule 4.1 cmt. [2] also includes a concluding sentence reminding lawyers of other law: “[l]awyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.”

### **Virginia Rule 4.1 Comment [3]**

Virginia Rule 4.1 cmt. [3] addresses Virginia Rule 4.1(b)’s provision requiring disclosure in certain circumstances.

Virginia Rule 4.1 cmt. [3] begins by “recogniz[ing] that substantive law may require a lawyer to disclose certain information to avoid being deemed to have assisted the client’s crime or fraud.” Virginia Rule 4.1 cmt. [3] thus imports extrinsic law into Virginia Rule 4.1(b)’s analysis.

Virginia Rule 4.1 cmt. [3] concludes by pointing to Virginia Rule 1.6 for “[t]he requirement of disclosure.” That seems to contradict Virginia Rule 4.1 cmt. [3]’s previous

sentence – which instead “recognizes that substantive law” governs such disclosure. If Virginia Rule 1.6 was considered “substantive law” as referenced in Virginia Rule 4.1 cmt. [3]’s first sentence, that first sentence would have been unnecessary.

Virginia Rule 1.6(c) describes two circumstances under which lawyers must (rather than just may) disclose Virginia Rule 1.6(a) protected client confidential information.

Virginia Rule 1.6(c)(2) addresses lawyers’ duty to report other lawyers’ ethics violations in certain situations. So presumably Virginia Rule 4.1 cmt. [3]’s concluding sentence refers to Virginia Rule 1.6(c)(1).

Virginia Rule 1.6(c)(1) requires lawyers to disclose Virginia Rule 1.6(a) protected client confidential information – if the client states an intention “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.” So to that extent, extrinsic law defines what is a “crime.” But that analysis only involves the characterization of the client’s intended conduct – the underlying crime itself such as bank robbery, mail fraud, etc.

Virginia Rule 1.6(c)(1) thus does not on its face clearly refer to “substantive law” that “may require a lawyer to disclose certain information.” That duty seems to come from Virginia Rule 1.6(c)(1) itself – not from “substantive law.”

**ABA Model Rule 4.1 cmt. [3]** also addresses the occasional requirement for lawyers to disclose protected client confidential information, along with several other issues.

ABA Model Rule 4.1 cmt. [3] begins by accurately pointing to ABA Model Rule 1.2(d) as prohibiting a lawyer “from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent.”

ABA Model Rule 4.1 cmt. [3] next explains that ABA Model Rule 4.1(b) “states a specific application of the principle set forth in [ABA Model] Rule 1.2(d) and addresses the situation where a client’s crime or fraud takes the form of a lie or misrepresentation.” That may be implicit in ABA Model Rule 4.1(b), but certainly is not obvious. For instance, an overseas client might ask her visiting U.S. lawyer to take a package back to the client’s friend in the U.S. If the lawyer discovers that the package contains drugs, the client’s crime (arranging for the drugs’ transmission) has not “taken the form of a lie or misrepresentation.”

ABA Model Rule 4.1 cmt. [3] contends that “[o]rdinarily, a lawyer can avoid assisting a client’s crime or fraud by withdrawing from the representation.” Of course, the key question is whether the lawyer must make some disclosure before withdrawing. A lawyer savvy enough to foresee the possibility of her client or some third party putting her in an awkward situation implicating a disclosure duty can withdraw before that duty arises. But many if not most lawyers would not see such situations coming, and confront the possibility of withdrawing only after the disclosure duty has arisen.

ABA Model Rule 4.1 cmt. [3] then turns to a different scenario: “[s]ometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like.” This is an articulation of what commonly is called a “noisy withdrawal.” Such “noisy withdrawals” played a key role in ethics analyses before the ABA added ABA Model Rule 1.6(d)(2) and (3) in 2003. Those black letter

Rules sometimes allow (but do not require) lawyers' disclosure in certain circumstances that formerly did not exist – leaving such a “noisy withdrawal” as a sneaky way for lawyers to essentially warn third parties that something was amiss. ABA Model Rule 1.2 cmt. [10] contains essentially the identical language: “[i]t may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like” (referring to ABA Model Rule 4.1) (emphasis added).

One odd but presumably immaterial difference is ABA Model Rule 1.2 cmt. [10]’s word “any,” in contrast to ABA Model Rule 4.1 cmt. [3]’s word “an.”

Virginia Rule 1.6 cmt. [9a] contains essentially the same language, but as a discretionary disclosure rather than as a mandatory disclosure: “[n]either this [Virginia Rule 1.6] nor [Virginia] Rule 1.8(b) nor [Virginia] Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like” (emphasis added).

Although Virginia Rule 1.6 cmt. [9a]’s “noisy withdrawal” provision describes discretionary rather than required disclosure, Virginia Rule 1.6(c) contains mandatory disclosure provisions – in stark contrast to ABA Model Rule 1.6’s purely discretionary disclosure scenarios. In other words, the Virginia Rules articulate required disclosure obligations in provisions other than Virginia Rule 1.6 cmt. [9a]’s “noisy withdrawal” provision.

ABA Model Rule 4.1 cmt. [3] then turns to substantive law – explaining that “[i]n extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client’s crime or fraud.”

This language is identical to Virginia Rule 4.1 cmt. [3]’s language, with the exception of its introductory phrase “[i]n extreme cases.”

ABA Model Rule 4.1 cmt. [3] concludes by warning that “[i]f the lawyer can avoid assisting a client’s crime or fraud only by disclosing this information, then under [ABA Model Rule 4.1(b)] the lawyer is required to do so, unless the disclosure is prohibited by [ABA Model] Rule 1.6.”

Those two sentences do not easily match up. If “substantive law” requires a lawyer to disclose protected client confidential information, and “[i]f the lawyer can avoid assisting a client’s crime or fraud only by disclosing this information,” then it would seem that the lawyer’s failure to disclose the information would result in his being “deemed to have assisted the client’s crime or fraud.” And such “substantive law” presumably would consider that a crime or fraud.

Lawyers presumably could not rely on an ABA Model Rule 1.6 defense as exonerating them for staying silent if “substantive law” requires the disclosure “to avoid” the lawyer’s “being deemed to have assisted the client’s crime or fraud.” So if a lawyer complies with ABA Model Rule 1.6 by staying silent, that might help her avoid an ethics charge – but would not seem to be much of a defense to a criminal or civil claim under “substantive law” that would interpret such silence as “assist[ing] the client’s crime or fraud.”

# RULE 4.2

## Communication With Persons Represented By Counsel

### Rule

#### Virginia Rule 4.2

Virginia Rule 4.2 addresses lawyers' communications with represented persons.

Virginia Rule 4.2 is commonly called the "ex parte communication" rule or some other similar label.

That single 48 word provision generates as much confusion and real-life dilemmas as any sentence in the Virginia Rules (or in the ABA Model Rules).

Virginia Rule 4.2 contains numerous words that generate issues about the Rules' meaning and effect. And because black letter Virginia Rule 4.2 does not provide any useful guidance for the Rule's application to communications in the corporate context, Virginia Rule 4.2's Comments play a key role in lawyers' understanding of what they may and may not do in that important setting. Virginia Rule 4.2 cmt. [7] partially addresses those issues, and almost certainly is the most substantively important Comment to any of the Virginia Rules (the same is true of ABA Model Rule 4.2 cmt. [7]).

On January 6, 2021, the Virginia Supreme Court replaced unique and confusing Virginia Rule 4.2 cmt. [7] with ABA Model Rule 4.2 cmt. [7]'s language. On the same day, the Virginia Supreme Court approved an extensive compendium legal ethics opinion providing guidance on several Virginia Rule 4.2 provisions. Virginia LEO 1890 (1/6/21).

Many if not most litigators face ex parte communication rule issues in nearly every case they litigate. The core conflicts rules (Virginia and ABA Model Rules 1.7 and 1.9) undoubtedly take up more of most lawyers' time as they strive to practice in compliance with the ethics rules. But conflicts issues most frequently arise when lawyers decide whether or not to take a matter. Declining the matter normally eliminates the issue. In contrast, ex parte communication issues arise in the heat of battle, when lawyers must decide whether they may safely take a step that undoubtedly would serve their client.

It is no wonder that iconic law professor Geoffrey Hazard published a law review article essentially suggesting a complete re-write of ABA Model Rule 4.2 – so lawyers could understand its limitations. Geoffrey C. Hazard, Jr. & Dana Remus Irwin, Toward A Revised 4.2 No-Contact Rule, 60 Hastings L.J. 797 (Mar. 2009).

Virginia Rule 4.2's single sentence contains numerous phrases and words that deserve attention, and sometimes generate confusion. In fact, nearly every key word implicates a subtle and often difficult analysis.

First, Virginia Rule 4.2 begins with the phrase: "[i]n representing a client." Thus, the ex parte communication rule applies only when lawyers act in a representational role. As this document explains elsewhere, the Virginia Rule 4 series contains various introductory phrases that presumably are intended to have a synonymous meaning. Virginia Rule 4.1 begins with the phrase: "[i]n the course of representing a client." Virginia Rule 4.3(a) begins with the phrase: "[i]n dealing on behalf of a client." Virginia Rule 4.4(a) begins with the phrase: "[i]n representing a client."

For purposes of applying Virginia Rule 4.2's opening phrase, it can be difficult to assess whether a lawyer communicating ex parte with a person does so "[i]n representing

a client.” For instance, a lawyer representing herself in a lawsuit against a painter who allegedly broke her large picture window while painting her house presumably may not communicate ex parte with the painter if the lawyer knows that the painter is represented in the matter involving the broken window. The lawyer whose window was broken would in that situation be “representing a client” – herself. But it seems odd that the same prohibition presumably would not apply if the lawyer retains a friendly colleague to nominally represent her in the matter. On its face, the ex parte communication rule would not cover such communications, because the lawyer herself would be the “client” and therefore she would not be “representing a client” in ex parte communications with the painter. That scenario demonstrates that the ex parte communication rule does not only rest on the worry that lawyers should not be permitted to communicate ex parte with a represented person because those lawyers can use their persuasive talents and crafty questions to gain an advantage in that unfair setting. The lawyer who has hired a friend to represent her has the same wily skills when she communicates ex parte with the painter as she would have been representing herself.

Aside from that elemental issue, it can be difficult to determine if a lawyer is “representing a client” in some settings. Is a lawyer serving as a guardian “representing a client” for ex parte communication purposes? Does a lawyer serving as a bankruptcy trustee fall within that category? A corporate lawyer who moves entirely to the business side presumably is free of the ex parte communication rule limitations. But what about an in-house corporate lawyer who “wears two hats” – serving both in the law department and in some other pure corporate role, such as Director of Human Resources. May that

lawyer freely communicate ex parte with a represented former employee by claiming that he is wearing his “Director of Human Resources” hat when doing so?

These are only a few of the difficult issues triggered by Virginia Rule 4.2’s four-word introductory phrase: “[i]n representing a client.”

Second, Virginia Rule 4.2 contains the word “communicate.” The word “communicate” obviously includes oral, written and electronic communications. But does a lawyer “communicate” with a person by silently listening to a speakerphone conference call her client has with a represented person not accompanied by a lawyer. In other words, does a lawyer “communicate” without saying anything, but instead only listening?

Although Virginia Rule 4.2 (and ABA Model Rule 4.2) do not contain the old ABA Model Code of Professional Responsibility phrase “or cause another [to communicate],” some states (notably, New York) continue to use that phrase. But even without that phrase, “communicate” is not necessarily limited to the lawyer’s own communication. Lawyers can “communicate” through another. As explained below, lawyers may be tempted to subtly hint that their clients may freely communicate with represented counterparties or transactional adversaries, to suggest that their clients do so, to generally discuss what their clients might want to say during such permissible ex parte communications, to prepare more detailed “bullet points” to raise in such communications, and to even “script” every word of such a communication. Virginia Rule 4.2 cmt. [4] addresses this issue – which itself implicates the enormous difficulty of assessing what role a lawyer may play in her client’s unaccompanied communication with another represented person who is not accompanied by his lawyer. The Virginia Bar dealt with this significant issue in a legal ethics opinion. Virginia LEO 1870 (10/4/13) generally

explained that lawyers may provide some guidance to their clients about the content of ex parte communications their clients may freely have with a represented person, but essentially prohibited such lawyers from “scripting” their clients’ otherwise permissible ex parte communications with such a represented person. That is a difficult line to draw.

Third, Virginia Rule 4.2 describes the taboo topic of prohibited ex parte communications: “about the subject of the representation.” That phrase presumably is intended to be synonymous with the word “matter” – which appears just a few words later in one-sentence Virginia Rule 4.2. One would think that Virginia Rule 4.2 (and ABA Model Rule 4.2) would have used the same word to describe the same thing – the proscribed topic of ex parte communications. Instead, Virginia Rule 4.2 describes the communicating lawyer’s prohibited topic as “the subject of the representation” and the target person’s proscribed topic on which he is represented as “the matter.” This mismatch probably does not generate much debate, because the terms seem so obviously intended to be synonymous. But it would have been somewhat clearer if Virginia Rule 4.2 had stated that “a lawyer shall not communicate about a matter with a person . . . represented by another lawyer in that matter” (emphasis added).

Although the linguistic inconsistency does not itself create much confusion, there can be difficulty in analyzing exactly what topics are off-limits. In other words, how does a communicating lawyer determine if her ex parte communication is in the same “matter” on which the target of the communication is represented by another lawyer? Can a plaintiff’s lawyer representing her client suing a motorist communicate ex parte about her client’s civil claim if she knows that the defendant motorist is represented by a lawyer in

a parallel criminal action against the motorist? Presumably the factual context of both the civil and the criminal charge are identical.

Fourth, Virginia Rule 4.2 contains the word “person.” That seems obvious enough, but highlights the sometimes misunderstood principle that Virginia Rule 4.2 applies in non-litigation contexts. The word “party” would have generated confusion about that topic – because the word “party” can denote either a party to litigation or a “third party” in any context.

Some lawyers mistakenly think that the ex parte communication rule only applies to litigation adversaries. To be sure, that is when ex parte communication issues most frequently arise. But on its face (and in its application), Virginia Rule 4.2 applies even in the friendliest settings. For instance, two long-time friends might be separately represented by their own lawyers in putting together some completely agreed-upon transaction. Virginia Rule 4.2 still requires the lawyer for one of the friends to obtain the other friend’s lawyer’s consent to communicate ex parte with the client’s friend. Of course, if no one objects to such ex parte communications, there is a “no harm no foul” aspect to that scenario. But careful lawyers might agree at the beginning of the transaction negotiation and consummation process to give mutual consents to the other lawyer communicating with their clients.

In the electronic age, the issue of “Reply All” emails has triggered some controversy. That is discussed below.

Although the word “person” does not trigger that possible dilemma, it spawns an even more complicated set of issues when the target “person” works for a corporate

adversary. As mentioned above, Virginia Rule 4.2 cmt. [7] (and ABA Model Rule 4.2 cmt. [7]) address this issue, but with sparse guidance.

Fifth, Virginia Rule 4.2 contains the word “knows.” The Virginia Rule Terminology section defines “knows” as “denot[ing] actual knowledge of the fact in question,” although “[a] person’s knowledge may be inferred from circumstances.” Notably, Virginia Rule 4.2 does not contain a negligence standard such as “knows or reasonably should know,” or some other yardstick such as “knows or it is obvious.”

Sixth, Virginia Rule 4.2 contains the phrase “to be represented by another lawyer” (emphasis added). Thus, Virginia Rule 4.2 applies the present tense. A target person is fair game for ex parte communications if she “had been represented” by a lawyer in the matter. But when interpreting the present-tense representation issue in light of the “knows” standard, bars understandably have essentially added back into the analysis an objective “reasonable lawyer” standard. For instance, does a plaintiff’s lawyer “know” that the defendant is still “represented by another lawyer” a week after the defendant lost at trial? Does that lawyer “know” that the defendant is still “represented by another lawyer” in a matter that was recently tried – after the deadline for a notice of appeal has passed?

Indeed, because a client can terminate a lawyer for any reason (or no reason at all), does the communicating lawyer ever really “know” that a counterparty outside the litigation context is still “represented by another lawyer” from day to day? One might think that a communicating lawyer is always free to communicate ex parte with a person who might be represented by a lawyer – and avoid any ethics issues by asking that person at the beginning of any communication if he is “represented by another lawyer in the matter.” Of course, even that is an ex parte communication. And in a scenario other than litigation

(where the target person is represented by “counsel of record”), a communicating lawyer presumably cannot call the target person every day and ask the same question.

Seventh, Virginia Rule 4.2 contains the term “another lawyer.” That might conceivably make interpreting Virginia Rule 4.2 a bit easier, but the word “another” seems superfluous. The target person clearly would not be represented by the communicating lawyer – so of course the issue is whether the target person is “represented by another lawyer in the matter” (emphasis added).

Eighth, Virginia Rule 4.2 contains the phrase “in the matter” – referring to the target person’s “representat[ion] by another lawyer.” The term “matter” is discussed above, in connection with the communicating lawyer’s presumably synonymous “subject of the representation” Rule 4.2 phrase. But it is important to realize that a communicating lawyer may communicate ex parte with a person who has a lawyer on a “matter” different from the “matter” in which the communicating lawyer represents his client. Many persons have lawyers, and all or nearly all corporations have lawyers. The fact that they are “represented by another lawyer” does not render them off-limits for ex parte communications that focus on a “matter” in which they may not be represented. For example, a lawyer whose client’s car was damaged by a motorist may communicate ex parte with the motorist even if that lawyer knows to a certainty that the motorist is currently represented by a domestic relations lawyer in a divorce, by a trust and estates lawyer in estate planning, in a real estate lawyer in connection with buying a new house, etc. The communicating lawyer’s knowledge of those representations might place some substantive limits on the otherwise permissible ex parte communication’s content, but it would not totally preclude the ex parte communication. The communicating lawyer would

face that preclusion only if she knows that the motorist was then represented by “another lawyer” in the automobile accident “matter.”

Ninth, Virginia Rule 4.2 contains a phrase that seems clear on its face but has a counterintuitive impact on the analysis: “unless the lawyer has the consent of the other lawyer.” Of course, the “other lawyer” is the target person’s lawyer. He must consent to the communicating lawyer’s ex parte communications with the person he represents “in the matter.” That may be Virginia Rule 4.2’s clearest phrase, despite using the word “lawyer” twice in eight words to mean two different lawyers. But the phrase’s counterintuitive application seems odd, even if linguistically clear. The Virginia Rules repeatedly recognize that clients’ upper hand in their attorney-client relationships. Among other things, clients can fire their lawyers for any reason (or no reason) at any time. And of course clients can settle cases or take other steps over their lawyers’ strenuous objections.

For instance, Virginia Rule 1.2(a) contains a blunt requirement that “[a] lawyer shall abide by a client’s decision . . . whether to accept an offered settlement in a matter.” As this document explains in its summary, discussion and analysis of Virginia Rule 1.2, presumably that same client-centric principle applies to clients’ offer to settle a matter, not just to the client’s acceptance of the adversary’s settlement offer. ABA Model Rule 1.2(a) contains a more logical, unconditional statement of such ultimate client authority: “[a] lawyer shall abide by a client’s decision whether to settle a matter.” But under either formulation, clients can settle cases – even over their lawyer’s objection. For example, a client pursuing a multi-million dollar slam-dunk contingency fee case who discovers that

he has terminal cancer can settle the case over the objections of his lawyer (who stands to lose an enormous contingent fee).

But oddly, the same absolute client authority does not apply in the Rule 4.2 context. Even though a client has the power to settle a matter over her lawyer's objection, and fire the lawyer at any time and for any reason, a client's consent is not sufficient to allow a communicating lawyer's ex parte communication with that client – if that client is “represented by another lawyer in the matter.” So a communicating lawyer would not be free of the Virginia Rule 4.2 prohibition (and any resulting ethics charges) by obtaining the unconditional uncoerced consent of the world's wealthiest or smartest person to communicate ex parte with her lawyer – if she is “represented by another lawyer” in the matter the communicating lawyer wanted to discuss with her. Presumably she could ask the communicating lawyer to hold for a few minutes, call her lawyer to fire him, and then get back on the line with the communicating lawyer. But to require that sort of “form over substance” step to allow the communicating lawyer to proceed with the discussion seems ridiculous. Presumably this counterintuitive principle is intended to protect the lowest common denominator of clients, who could essentially be bamboozled into giving a consent to the communicating lawyer's discussion with her about the matter on which he is represented.

This is a remarkable limitation on client authority – perhaps the most draconian limit in the entire Virginia Rules (or ABA Model Rules). And the limit is even more severe than it might appear. If the represented client accurately tells the communicating lawyer that she has fired her lawyer, the communicating lawyer cannot take that statement at face value. Instead, most state bars require that the communicating lawyer confirm the

termination by communicating with the target person’s now-former lawyer. It would be easy to imagine that the now-former lawyer will not go out of her way to respond to such an inquiry.

Although it addressed what may be unique principles applicable to a limited-scope representation, ABA LEO 472 (11/30/15) inexplicably indicated that a lawyer communicating ex parte with a person who might have formerly been represented by a lawyer on a limited matter may safely take that person’s word that the representation either has ended or did not encompass the same “matter” on which the communicating lawyer who represents her client and wants to communicate: “[i]f the person [targeted by the communicating lawyer] discloses representation under a limited-scope agreement and does not articulate either that the representation has concluded (as would be the case if the person indicates that, yes, a lawyer drafted documents, but is not providing any other representation), or that the issue to be discussed is clearly outside the scope of the limited-scope representation, then the lawyer should contact opposing counsel to determine the issues on which the inquiring lawyer may not communicate directly with the client receiving limited-scope services” (emphasis added). This guidance seems inconsistent with every bar’s and court’s interpretation of ABA Model Rule 4.2’s “unless the lawyer has the consent of the other lawyer” standard. It is unclear whether ABA LEO 472 (11/30/15) intended to have more general application to all ex parte communication contexts. If so, that change has not shown up in any visible way.

Tenth, Virginia Rule 4.2 contains the word “consent,” as part of the phrase discussed immediately above. Although the need for the target person’s lawyer’s consent is (as mentioned above) perhaps the clearest part of Virginia Rule 4.2, the word “consent”

embedded in that requirement might also generate confusion. As in other ethics areas, presumably the other lawyer's silence in response to a request for consent does not amount to "consent." And presumably communicating lawyer's request for consent must include sufficient background information for the consent to be "informed." The Virginia Rules Terminology section does not define the word "informed consent" (as does ABA Model Rule 1.0(e)). But notably, ABA Model Rule 4.2 does not require that the other lawyers consent be "informed." That issue is discussed below.

Virginia Rule 4.2 does not describe what constitutes the other lawyer's "consent." As in other contexts, lawyers' use of electronic communications has triggered a fascinating issue. If a lawyer and her client agree to meet with a counterparty and his client in a conference room to negotiate a deal, either lawyer presumably would feel stupid by explicitly asking for the other lawyer's consent to communicate with his or her client, who is sitting across the negotiation table. Such communications are not really "ex parte" because each client is accompanied by a lawyer sitting next to the client. But state bars have wrestled with a somewhat analogous situation – lawyers who copy their clients on emails to an adversary's lawyer. Can the adversary's lawyer respond by sending a "Reply All" email in response?

In the era when people sent letters, presumably no lawyer would have thought she could freely send a hard copy response to the other lawyer's client without that other lawyer's consent. But in the electronic age, communications of that sort seem more akin to the conference room setting mentioned above. In the hard copy letter era, the ethics rules essentially required that all communications funnel through lawyers, so they could explain to their clients what those mean. In a conference room setting, lawyers can

immediately do so – either in front of the counterparty and her lawyer or stepping outside for a moment. And in the electronic age, lawyers may immediately or at least quickly explain to their client what the counterparty’s lawyer communication meant, what she was doing, etc.

A more reasonable approach would characterize a lawyer’s copying her client on an email to the other client’s lawyer as essentially an invitation for a “Reply All” response. To be sure, the sending lawyer can avoid any troublesome issues by leaving her client off her email. But that wise move seems contrary to electronic communication common practice. No doubt Virginia Rule 4.2’s word “consent” will generate more issues as communications continue to evolve.

Eleventh, Virginia Rule 4.2 contains a phrase representing another exception that allows communicating lawyers to communicate ex parte with a person the lawyer knows to be represented by a lawyer in that matter: “or is authorized by law to do so.” That phrase obviously imports extrinsic law into the ethics analysis. But there still might some question about that exception. For example, the law might “authorize” or even “require” companies to communicate with employees when the company intends to close a factory, etc. Does such a law “authorize” the company’s lawyer to communicate with those workers, some of whom the company’s lawyer might “know” are represented by their own lawyer in connection with the factory closure? There might be other similar scenarios. Does a contractually-permissible or even contractually-required communication meet the “authorized by law” standard? Presumably a lawyer contemplating whether such ex parte communications fall within the exception can try to avoid any issue by arranging for the permitted or required communication to come from his client instead of from him. But in

those settings, the lawyer would undoubtedly draft the permitted or required communications. And that implicates the issue discussed above – what role lawyers may play in their clients’ otherwise permissible communications with a person that the lawyer knows is represented by a lawyer in that matter.

**ABA Model Rule 4.2** contains language that is essentially identical to Virginia Rule 4.2. ABA Model Rule 4.2 contains a few more words than Virginia Rule 4.2 (52, instead of 48), but implicates the same numerous issues.

In contrast to Virginia Rule 4.2, ABA Model Rule 4.2 contains another exception that allows lawyers to communicate ex parte with a person they know to be represented in the matter: “or is authorized to do so by . . . a court order.” But presumably Virginia Rule 4.2’s exception (“or is authorized by law to do so”) also includes a court order.

ABA Model Rule 4.2 is also missing a word that one might have expected there – even though one might not have expected it in Virginia Rule 4.2. As mentioned above, ABA Model Rule 1.0(e) defines the term “informed consent” as “denot[ing] the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” ABA Model Rule 1.0 cmt. [6] and [7] provide extensive guidance about that term “informed consent.” Notably, both of those ABA Model Rule Comments mention lawyers’ obtaining an informed consent “of a client or other person (emphasis added).” ABA Model Rule 1.0 cmt. [6] provides examples: “a former client or, under certain circumstances, a prospective client.” But those are only examples.

The ABA Model Rule’s “informed consent” standard to non-clients’ consent contrasts with the Virginia Rules. The Virginia Rules do not define “informed consent.” The standard Virginia Rules formulation is “consent after consultation,” not “informed consent.” The Virginia Terminology section defines “consultation” as “denot[ing] communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question” (emphasis added). So on its face that definition only involves lawyers’ consultation with clients, seeking those clients’ consent.

The absence of the word “informed” before ABA Model Rule 4.2’s word “consent” may at least linguistically take the “informed” standard requirement out of the communications that must precede the ex parte communication target person’s lawyer’s “consent” to the ex parte communication.

## Comment

### ABA Model Rule 4.2 Comment [1]

Virginia did not adopt ABA Model Rule 4.2 cmt. [1].

ABA Model Rule 4.2 cmt. [1] addresses the rationale for ABA Model Rule 4.2's ex parte communication rule.

ABA Model Rule 4.2 cmt. [1] begins by contending that ABA Model Rule 4.2 “contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter” against three alleged dangers: (1) “possible overreaching by other lawyers who are participating in the matter”; (2) “interference by those lawyers with the client-lawyer relationship;” and (3) “the uncounselled disclosure of information relating to the representation.”

As explained above, the first possible danger would seem to support a prohibition on lawyers' ex parte communication with a represented person even if the communicating lawyer was not acting in a representational role, but rather (as also discussed above), was instead acting as a “client” – because the lawyer had hired another lawyer to represent her. Yet such the lawyer acting in a “client” (rather than a representative) role presumably may communicate ex parte with an adversary – although obviously possessing the same skills to “overreach” during such presumably permissible ex parte communications.

The second possible danger (“interference by those lawyers with the client-lawyer relationship”) provides a more understandable rationale for ABA Model Rule 4.2's ex parte communication prohibition. But as explained above, the client's ultimate power to control the client-lawyer relationship might lead one to logically conclude that a client

herself should be able to consent to ex parte communications with a lawyer representing another person, even an adversary). But ABA Model Rule 4.2's remarkably paternalistic attitude prevents even the most sophisticated client from consenting to such ex parte communications.

The third possible danger also seems logical, although ABA Model Rule 4.4(a) prohibits a communicating lawyer from “us[ing] methods of obtaining evidence that violate the legal rights of such a [third] person” during otherwise permissible ex parte communications. Thus, ABA Model Rule 4.3(a)'s prohibition independently precludes the communicating lawyer from intruding into privileged communications between the target of the ex parte communication and her lawyer. So that content restriction prevents perhaps the most potentially damaging “uncounseled disclosure of information relating to the representation” during otherwise permissible (or even impermissible) ex parte communications.

### **ABA Model Rule 4.2 Comment [2]**

Virginia did not adopt ABA Model Rule 4.2 cmt. [2].

ABA Model Rule 4.2 cmt. [2] addresses ABA Model Rule 4.2's reach, and seems superfluous.

ABA Model Rule 4.2 cmt. [2] explains that “[t]his Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.” The phrase “the matter to which the communication relates” presumably is intended to be synonymous with two different phrases contained in black letter ABA Model Rule 4.2: “the subject of the representation”, and “the matter.” In other words, ABA Model Rule 4.2 cmt. [2] understandably notes that ex parte communications

are improper if there is an overlap between the communicating lawyer's proposed topics of communication and the target person's representation in that matter.

### **Virginia Rule 4.2 Comment [3]**

Virginia Rule 4.2 cmt. [3] addresses Virginia Rule 4.2's application regardless of who initiates the communication, and also describes two types of permissible ex parte communications.

Virginia Rule 4.2 cmt. [3] first confirms that Virginia Rule 4.2 “applies even though the represented person initiates or consents to the communication.” That explanation matches black letter Virginia Rule 4.2's application to such communications.

And as explained above, on its face black letter Virginia Rule 4.2 requires the target person's lawyer's consent to the communication. This explicit consent requirement implicitly rejects the client's own consent as permitting the communicating lawyer's ex parte communications with that client.

Virginia Rule 4.2 cmt. [3] next explains the logistics of communicating lawyers' initiation of ex parte communications. Virginia Rule 4.2 cmt. [3] explains that such a communicating “lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this [Virginia Rule 4.2].” The word “learns” presumably matches the letter Virginia Rule 4.2 phrase “knows to be represented by another lawyer in the matter” – both words denoting actual knowledge (as discussed above).

In a refreshing opinion, Virginia Supreme Court Justice Mims acknowledged that a Virginia lawyer would not be so rude as to immediately hang up, but instead could freely

disengage from an impermissible communication with the courtesy expected of a Virginia lawyer. Zarig v. Va. State Bar, 737 S.E.2d 914 (Va. 2013).

As explained above, Virginia Rule 4.2 cmt. [3]'s would seem to generally permit the communicating lawyer to initiate a communication with a target person if the communicating lawyer suspects but does not “know” that the target person is represented by a lawyer in that matter. Not surprisingly, best practices generally would call for the communicating lawyer to ask the target person before any substantive communication whether he is represented by a lawyer in the matter – and then politely terminate the communication if the target person responds affirmatively. But as explained above, that approach would only work if the communicating lawyer did not already “know” that the target person was represented by a lawyer in that matter. And that approach would not automatically immunize the communicating lawyer from an ethics charge (although presumably there would be no discipline, if there was no substantive communication).

Virginia Rule 4.2 cmt. [3] then turns to a totally different topic – describing permissible ex parte communications. Virginia Rule 4.2 cmt. [3] explains that “[a] lawyer is permitted to communicate with a person represented by counsel without obtaining the consent of the lawyer currently representing that person” in two circumstances: (1) “if that person is seeking a ‘second opinion’;” or (2) “if that person is seeking . . . replacement counsel.” Although that Virginia Rule 4.2 cmt. [3] description of such permissible ex parte communications does not explicitly state as much, the phrase “that person is seeking” implies that the person initiates communication with the lawyer, instead of vice versa. Of course, it is possible that a communicating lawyer has heard through the grapevine that a represented person is interested in a second opinion or a replacement counsel. But it

seems more likely that the represented person would be initiating such communications with a lawyer.

Virginia Rule 4.2 cmt. [3]’s description of those acceptable ex parte communications makes sense. Otherwise, a client questioning her lawyer’s decisions could never obtain a “second opinion” from another lawyer about her current lawyer’s conduct. Similarly, a represented client could never interview possible replacements for her current lawyer with whom she has become dissatisfied.

**ABA Model Rule 4.2 cmt. [3]** contains language identical to Virginia Rule 4.2 cmt. [3]’s first two sentences.

ABA Model Rule 4.2 cmt. [3] does not contain Virginia Rule 4.2 cmt. [3]’s concluding sentence – describing permissible ex parte communications seeking a “second opinion” or “replacement counsel.”

#### **Virginia Rule 4.2 Comment [4]**

Virginia Rule 4.2 cmt. [4] describes permissible ex parte communications, including the key ability of clients to communicate with clients.

Virginia Rule 4.2 cmt. [4] begins by understandably explaining that Virginia Rule 4.2 “does not prohibit communication with a represented person, or an employee or agent of a represented person, concerning matters outside the representation.” That should seem obvious – given black letter Virginia Rule 4.2’s phrases “the subject of the representation” (limiting the communicating lawyer’s communications) and “the matter” (denoting the target person’s representation by another lawyer). Virginia Rule 4.2 cmt. [4] provides an example: “[f]or example, the existence of a controversy between an organization and a private party, or between two organizations, does not prohibit a lawyer

for either from communicating with nonlawyer representatives of the other regarding a separate matter.” The example continues Virginia Rule 4.2 cmt. [4]’s first sentence’s somewhat odd reference to a scenario involving a represented person’s employees or agents. Such a context implicates a different issue – whether ex parte communications with a represented person’s employees or agents fall within Virginia Rule 4.2’s reach. That issue is separate from Virginia Rule 4.2’s inapplicability to ex parte communications with a target person about matters on which that target person is not represented.

And Virginia Rule 4.2 cmt. [4] compounds this strange mix of factors by containing an example representing a tiny subset of scenarios in which an ex parte communication issue might arise. That example might imply that the described ex parte communication passes muster under Virginia Rule 4.2 only because the communicating lawyer communicated with “non-lawyer representatives” rather than with a represented person himself (or a certain level of decision-maker within an organization). Mixing the “matter” overlap issue and the represented person “representative” issue might generate confusion.

Virginia Rule 4.2 cmt. [4] then turns to a key issue involving Virginia Rule 4.2’s ex parte communication prohibition. Virginia Rule 4.2 cmt. [4] bluntly states that “parties to a matter may communicate directly with each other.” Virginia Rule 4.2 cmt. [4]’s unfortunate use of the word “parties” might unintentionally reignite misunderstanding about Virginia Rule 4.2’s reach outside the litigation context (where there are “parties”). The phrase “parties to a matter” obviously refers beyond the litigation setting, but a phrase such as “persons involved in a matter” might have avoided possible confusion about whether Virginia Rule 4.2 applies only in a litigation context.

Virginia Rule 4.2 cmt. [4] misses the chance to address a key issue that ABA Model Rule 4.2 cmt. [4] discusses – what role a lawyer may play in suggesting, discussing with, or even “scripting” her client’s otherwise permissible communication with a represented person. Instead, the Virginia Bar has provided some guidance on that important issue – which is discussed more fully below.

Virginia Rule 4.2 cmt. [4] concludes with a strange description of two circumstances permitting otherwise prohibited ex parte communications.

The second exception matches black letter Virginia Rule 4.2’s “authorized by law to do so” exception: “a lawyer having . . . legal authorization for communicating with the other party is permitted to do so.”

But Virginia Rule 4.2 cmt. [4]’s first listed exception describes a mysterious exception not found in black letter Virginia Rule 4.2: “a lawyer having independent justification . . . for communicating with the other party is permitted to do so” (emphasis added). Virginia Rule 4.2 cmt. [4] gives no clue about the source, meaning, or scope of this “independent justification” exception (which also appears in ABA Model Rule 4.2 cmt. [4]). Black letter Virginia Rule 4.2 identifies two exceptions: (1) consent by the target person’s lawyer; and (2) legal authorization. The term “independent justification” implies that the communication’s permissibility does not rest on the target person’s lawyer’s consent (but instead is “independent”). And the term “independent justification” obviously is not intended to be synonymous with “legal authorization – because Virginia Rule 4.2 cmt. [4] also explicitly lists the “legal authorization” exception. There seems to be little if any case law or legal ethics opinions addressing this curious “independent justification” exception.

**ABA Model Rule 4.2 cmt. [4]** contains language similar to that in Virginia Rule 4.2 cmt. [4].

Among other things, ABA Model Rule 4.2 cmt. [4] also contains that odd “employee or agent” reference, and the example involving what certainly is a tiny subset of the scenarios that are even tinier than the Virginia Rule 4.2 cmt. [4] description, as explained below, when a communicating lawyer may freely communicate *ex parte* with a person about a matter in which the target person is not represented by a lawyer.

Like Virginia Rule 4.2 cmt. [4], ABA Model Rule 4.2 cmt. [4] assures that clients may always communicate with other clients.

Perhaps most importantly, like Virginia Rule 4.2 cmt. [4], ABA Model Rule 4.2 cmt. [4] contains the same mysterious and unexplained exception allowing *ex parte* communications if the communicating lawyer has “independent justification . . . for communicating with a represented person.”

But ABA Model Rule 4.2 cmt. [4] differs from Virginia Rule 4.4 cmt. [4] in several ways.

First, in contrast to Virginia Rule 4.2 cmt. [4], example of a communicating lawyer’s freedom to communicate *ex parte* with “non-lawyer representatives” of “an organization” in a controversy between the organization “and a private party,” ABA Model Rule 4.2 cmt. [4] uses even a narrower example – when there is “a controversy between a government agency and a private party.” That makes ABA Model Rule 4.2 cmt. [4]’s example even less likely to provide useful guidance, because it is unclear why ABA Model Rule 4.2 would apply differently in the “government agency” setting – considering what black letter ABA Model Rule 4.2 explicitly makes clear: that a lawyer representing a client may freely

communicate *ex parte* with a person represented by a lawyer, as long as the communication does not relate to a “matter” on which the target person is represented by a lawyer.

Second, ABA Model Rule 4.2 cmt. [4] is somewhat less explicit in describing the permissibility of certain *ex parte* communications that Virginia Rule 4.2 cmt. [3] permits. In contrast to Virginia Rule 4.2 cmt. [3]’s explanation that a lawyer may communicate with a person when that person is “seeking a ‘second opinion’ or replacement counsel,” ABA Model Rule 4.2 cmt. [4] contains a more generic statement permitting that type of *ex parte* communication: “[n]or does this [ABA Model Rule 4.2] preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter.” ABA Model Rule 4.2 cmt. [4]’s description of such permissible *ex parte* communications makes more sense than Virginia Rule 4.2 cmt. [3]’s two specific examples. As in Virginia Rule 4.2 cmt. [4], it seems likelier that a person “seeking” a “second opinion” or “replacement counsel” would initiate communications with another lawyer – rather than vice versa. But conceivably another lawyer might have heard that such a person is seeking a second opinion or replacement counsel, and initiate such a communication.

Third, in contrast to Virginia Rule 4.2 cmt. [4], ABA Model Rule 4.2 cmt. [4] contains a sentence warning that “[a] lawyer may not make a communication prohibited by this [ABA Model Rule 4.2] through the acts of another.” Surprisingly, ABA Model Rule 4.2 cmt. [4] refers to ABA Model Rule 8.4(a). ABA Model Rule 8.4(a) explains that “[i]t is professional misconduct for a lawyer to . . . violate or attempt to violate the [ABA Model] Rules of Professional Conduct, knowingly assist or induce another to do so, or do so

through the acts of another.” ABA Model Rule 4.2 cmt. [4]’s axiomatic statement points to a warning, because it precedes the next sentence also found in Virginia Rule 4.2 cmt. [4]: “[p]arties to a matter may communicate directly with each other.” As explained above, ABA Model Rule 4.2 cmt. [4]’s unfortunate use of the word “[p]arties” could generate some confusion, but by now most lawyers understand that ABA Model Rule 4.2’s ex parte communication rule applies outside a litigation setting (where there are “parties”).

ABA Model Rule 4.2 cmt. [4]’s combination of the ABA Model Rule 8.4(a)-based warning and the acknowledgement that clients may always speak with clients introduces enormously difficult and subtle issue that all bars have dealt with – often reaching differing conclusions.

On one end of this continuum, a client may freely on his own reach out to a represented person, even if the client knows that the target person is represented by a lawyer in the matter that the communicating client wants to address. On the other end of the continuum, a lawyer might direct her client to communicate ex parte with the represented person, then prepare a careful “script” for her client to use during such communications – including trying to convince that represented person to make some harmful acknowledgement, or even sign away important legal rights in a document that the communicating client’s lawyer prepared.

In between these two ends of such a spectrum, countless questions can arise. May a lawyer prohibited from communicating ex parte himself with a represented person: (1) subtly raise the possibility of direct client-to-client communications by saying something such as “I wish there was a way that we could work around the other side’s stonewalling lawyer – fortunately, I can’t do that”; (2) be a bit less subtle, and add the

phrase: “. . . but you can”; (3) generally discuss what the client might say during a client-initiated ex parte communication with a represented person; (4) prepare more detailed “bullet points” his client can use during such a client-initiated communication with a represented person.

In contrast to Virginia Rule 4.2 cmt. [4]’s simple statement that “parties to a matter may communicate directly with each other,” ABA Model Rule 4.2 cmt. [4]’s slightly more extensive discussion starts with the warning mentioned above, explains that clients may always speak with clients, and then provides a glimmer of guidance: “a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make.” This ABA Model Rule 4.2 cmt. [4]’s assurance seems to permit a lawyer to advise her client about the possibility of her client initiating a communication that the lawyer could not ethically make (but which the “client is legally entitled to make”). But ABA Model Rule 4.2 cmt. [4]’s guidance does not explain whether the phrase “advising a client” includes bullet point, scripts, etc., in the scenarios listed above.

Fourth, in contrast to Virginia Rule 4.2 cmt. [4]’s concluding sentence’s reference to “the other party,” ABA Model Rule 4.2 cmt. [4] contains the more appropriate (and clear) term “a represented person.”

In 2011, ABA LEO 461 (8/4/11) apparently gave lawyers quite a bit of freedom to move toward the “script” end of the permissible conduct spectrum. In contrast, several years later Virginia LEO 1870 (10/14/13) took a more cautious approach – in a legal ethics opinion that would seem to allow bullet point-type guidance, but not “scripting.”

## **Virginia Rule 4.2 Comment [5]**

Virginia Rule 4.2 cmt. [5] addresses black letter Virginia Rule 4.2’s “authorized by law” exception that allows otherwise prohibited ex parte communications.

Virginia Rule 4.2 cmt. [5] describes two situations in which the “authorized by law” exception applies.

First, communications “should be considered to be authorized by law within the meaning of [Virginia Rule 4.2]” (emphasis added) “[i]n circumstances where applicable judicial precedent has approved investigative contact prior to attachment of the right to counsel,” Virginia Rule 4.2 cmt. [5]’s sentence thus acknowledges the supremacy of case law. Virginia Rule 4.2 cmt. [5]’s opening sentence also describes case law governing communications “prior to attachment of the right to counsel.” That reference presumably refers to some cases’ inexplicable holdings allowing government lawyers to communicate ex parte with witnesses that they know are represented by lawyers in connection with the government’s investigation into possible criminal conduct. Presumably the case law recognizes that persons being investigated for possible criminal conduct and their friends could dramatically inhibit government investigatory work by lining up lawyers to represent all or many conceivable witnesses. Under Virginia Rule 4.2 (at least as applied on its face), those witnesses would be off-limits for ex parte communications by government lawyers – unless the witness’s lawyers consented to the ex parte communication. So Virginia Rule 4.2 cmt. [5] addresses that scenario under the “authorized by law” exception.

Virginia Rule 4.2 cmt. [5]’s additional condition to such “authorized by law” ex parte communications is stated as a negative: they are not prohibited by any provision of the United States Constitution or the Virginia Constitution.”

Second, Virginia Rule 4.2 cmt. [5] then changes direction, addressing civil matter contexts. Virginia Rule 4.2 cmt. [5] explains that “communications in civil matters may be considered authorized by law if they have been approved by judicial precedent.” This also acknowledges caselaw’s supremacy.

Virginia Rule 4.2 cmt. [5] concludes by assuring that “[t]his [Virginia Rule 4.2] does not prohibit a lawyer from providing advice regarding the legality of an interrogation or the legality of other investigative conduct.” Virginia Rule 4.2 cmt. [5] thus provides at least a glimmer of guidance about lawyers’ permissible actions when advising their clients about what the clients may freely do (implicating that spectrum discussed above). But Virginia Rule 4.2 cmt. [5]’s guidance seems limited to “the legality” of conduct, not to the logistics or content of a client’s ex parte communication.

**ABA Model Rule 4.2 cmt. [5]** also addresses the “authorized by law” exception – but its content and language differs dramatically from that in Virginia Rule 4.2 cmt. [5].

ABA Model Rule 4.2 cmt. [5] begins by addressing a topic not addressed in Virginia Rule 4.2 cmt. [5] – clients’ communication with the government. ABA Model Rule 4.2 cmt. [5] assures that “[c]ommunications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government.” Bars recognize that the constitutional right to petition the government trumps what otherwise might be a prohibition on lawyers’ communications with government officials. Ironically, the pertinent legal ethics opinions generally permit lawyers to communicate with high-level government officials about governmental policy, but not with lower level government employees about specific issues or logistics. In a way, that is exactly the opposite of ABA Model Rule 4.2 cmt. [7]’s (and

Virginia Rule 4.2 cmt. [7]'s) application in the private sector context governing lawyers' communications with a corporate adversary's executives and employees (discussed below).

ABA Model Rule 4.2 cmt. [5] then turns to government lawyers' communications – in both the civil and the criminal context.

ABA Model Rule 4.2 cmt. [5] first notes that “[c]ommunications authorized by law may also include investigative activities of lawyer representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings.” That is discussed above.

Thus, in contrast to Virginia Rule 4.2 cmt. [5]'s demarcation line of “prior to attachment of the right to counsel,” ABA Model Rule 4.2 cmt. [5] uses a different demarcation line: “prior to the commencement of criminal or civil enforcement.” And in contrast to Virginia Rule 4.2 cmt. [5]'s limitation to the criminal context (when there is a “right to counsel”), ABA Model Rule 4.2 cmt. [5] draws its demarcation line at both the criminal and the “civil enforcement proceedings” context.

ABA Model Rule 4.2 cmt. [5] then turns to a specific type of criminal defense lawyers' communications: “[w]hen communicating with the accused in a criminal matter, a government lawyer must comply with this [ABA Model Rule 4.2] in addition to honoring the constitutional rights of the accused.” That is an interesting observation, because it seems to require compliance with ABA Model Rule 4.2 – despite that ABA Model Rule Comment's general theme that case law might permit ex parte communications that ABA Model Rule 4.2 would not.

ABA Model Rule 4.2 cmt. [5] concludes by reinforcing the notion that ABA Model Rule 4.2 supplements other laws' applicability: “[t]he fact that a communication does not violate a state or federal constitutional right is insufficient to establish the communication is permissible under this [ABA Model Rule 4.2].”

### **ABA Model Rule 4.2 Comment [6]**

Virginia did not adopt ABA Model Rule 4.2 cmt. [6].

ABA Model Rule 4.2 cmt. [6] addresses the possibility of lawyers seeking pre-approval for certain otherwise prohibited ex parte communications.

ABA Model Rule 4.2 cmt. [6] begins by stating an obvious point: “[a] lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order.” That should go without saying. But in normal discovery, lawyers are tempted to communicate ex parte with possibly helpful but represented persons without those persons' lawyers knowing about it. Seeking a court order obviously tips them off. On the other hand, the court order would provide the communicating lawyer some assurance that the “authorized by law” exception would immunize them from ethical challenges.

ABA Model Rule 4.2 cmt. [6] concludes by explaining a different circumstance that would seem rare: “[a] lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule.” In other words, a lawyer may not only seek a court order to clarify the permissibility of an ex parte communication, but might also seek a court order authorizing what would clearly be prohibited by ABA Model Rule 4.2.

ABA Model Rule 4.2 cmt. [6] concludes with an example: “for example, where a communication with a person represented by counsel is necessary to avoid reasonably certain injury.” Interestingly, ABA Model Rule 4.2 cmt. [6] does not point to ABA Model Rule 4.2 cmt. [4]’s mysterious “independent justification” exception to the ex parte communication prohibition.

### **Virginia Rule 4.2 Comment [7]**

Virginia Rule 4.2 cmt. [7] addresses ex parte communications in the corporate context.

Until January 6, 2021, Virginia Rule 4.2 cmt. [7] contained a unique and confusing prohibition on lawyers’ communications with a represented organization’s persons “in the organization’s internal ‘control group’” or “persons who may be regarded as the ‘alter ego’ of the organization.” On that day, the Virginia Supreme Court replaced that language with ABA Model Rule 4.2 cmt. [7]’s language. But that did not necessarily end the confusion. Some Virginia federal courts do not apply Virginia Rule 4.2 cmt. [7]’s former (or current) prohibitions, but inexplicably instead look to an now-obsolete version of ABA Model Rule 4.2 cmt. [7]’s standard.

Virginia Rule 4.2 [7] begins with the phrase “[i]n the case of a represented organization.” The term “organization” normally refers to corporations, but of course has a much broader definition that includes any incorporeal entity such as partnerships, governmental agencies, etc. The word “represented” obviously refers to a lawyer’s attorney-client relationship with such an organization. As implied later in the first sentence, the representation is relevant on a matter-by-matter basis. For instance, it is crystal clear that a large corporation is “represented” on some matters. But the fact that

a plaintiff's lawyer "knows" that the corporation has a lawyer on some matters does not automatically mean that the lawyer "knows" that the corporation is "represented" in connection with a collision between the corporation's truck and the plaintiff's client's car.

Virginia Rule 4.2 cmt. [7] then lists the organization's off-limits persons.

Virginia Rule 4.2 cmt. [7] explains that "[i]n the case of a represented organization," Virginia 4.2 "prohibits communications" with the following "constituent[s] of the organization": (1) a constituent "who supervises . . . the organization's lawyer concerning the matter"; (2) a constituent "who . . . directs . . . the organization's lawyer concerning the matter"; (3) a constituent "who . . . regularly consults with the organization's lawyer concerning the matter"; (4) a constituent "who . . . has authority to obligate the organization with respect to the matter"; (5) a constituent "whose act . . . in connection with the matter may be imputed to the organization for purposes of civil . . . liability"; (6) a constituent "whose act . . . in connection with the matter may be imputed to the organization for purposes of . . . criminal liability"; (7) a constituent "whose . . . omission in connection with the matter may be imputed to the organization for purposes of civil . . . liability"; or (8) a constituent "whose . . . omission in connection with the matter may be imputed to the organization for purposes of . . . criminal liability."

Not surprisingly, the words "supervises," "directs," and "regularly consults" can trigger subtle factual issues.

Virginia Rule 4.2 cmt. [7]'s first off-limits standard is that the "constituent of the organization" deals with "the organization's lawyer concerning the matter." That standard focuses on interactions with the organization's lawyer "concerning the matter," not the

constituent's abstract ability to do so, or the constituent's place in the corporate organizational hierarchy.

Virginia Rule 4.2 cmt. [7]'s second off-limits standard focuses on a corporate constituent's "authority to obligate the organization with respect to the matter." That standard looks to the constituent's abstract authority, which presumably involves analyzing the corporation's by-laws or other internal decision-making documents or perhaps even its course of dealing. Significantly, the corporate constituent must have authority "to obligate the organization with respect to the matter," not just with respect to other matters.

Virginia Rule 4.2 cmt. [7]'s third off-limits standard focuses on legal doctrine rather than dealings with the corporation's lawyer about the matter or authority derived from internal corporate documents or perhaps from a course of dealing. Whether a constituent's "act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability" depends on extrinsic law. Presumably the "respondeat superior" doctrine might apply in both the civil and the criminal context.

Virginia Rule 4.2 cmt. [7] next includes a permissive statement rather than describing prohibited communications. Virginia Rule 4.2 cmt. [7] assures that "[c]onsent of the organization's lawyer is not required for communications with a former constituent."

At first blush, Virginia Rule 4.2 cmt. [7]'s explicit permission allowing lawyers to communicate *ex parte* with a former corporate constituent seems odd. Former employees obviously cannot bind their former employer, but they may have information the disclosure of which would harm their former employer. Presumably Virginia Rule

4.4(a)'s prohibition on lawyers "us[ing] methods of obtaining evidence that violate the legal rights of [a third person]" would preclude the communicating lawyer from intruding into such harmful information to the extent that the intrusion would violate the corporation's attorney-client privilege – which former employees presumably are bound to protect (yet whose scope they might not understand).

Virginia Rule 4.2 cmt. [7] then reverses course again – returning to the type of consent that would permit otherwise prohibited ex parte communications: "[i]f a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this [Virginia Rule 4.2]." In other words, an individual's personal lawyer may supply the consent that permits otherwise prohibited ex parte communications.

Virginia Rule 4.2 cmt. [7] then contains the following reference: "Compare [Virginia] Rule 3.4(h)." Virginia Rule Rule 3.4(h) explains that "[a] lawyer shall not...[r]equest a person other than a client to refrain from voluntarily giving relevant information to another party unless: (1) the information is relevant in a pending civil matter; (2) the person in a civil matter is a relative or a current or former employee or other agent of a client; and (3) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information."

Virginia Rule 3.4 cmt. [4] provides additional guidance as explained in this document's summary analyses and comparison of Virginia Rule 3.4. Virginia Rule 3.4(h) differs from otherwise similar ABA Model Rule 3.4(f) in two ways. First, Virginia Rule 3.4(h)(1) limits the exception's reach to information that is "relevant in a pending civil matter." ABA Model Rule 3.4(f) presumably applies the exception to criminal matters too.

Second, Virginia Rule 3.4(h)(2) permits such a “request” to a “former employee” – ABA Model Rule 3.4(f)(1) does not include former corporate client employees in the exception.

It is unclear why Virginia Rule 4.2 cmt. [7] invites lawyers to “compare” Virginia Rule 4.2 cmt. [7] with Virginia Rule 3.4(h). Perhaps Virginia Rule 4.2 cmt. [7] reminds organizations’ lawyers that they can request that one of the organization’s current or former employees not “voluntarily giv[e] relevant information to another party” whose lawyer may otherwise freely communicate ex parte with a corporate constituent who is represented by a personal counsel who consents to the ex parte communication. That really is not a comparison – it is a supplemental issue that may affect the corporate constituent’s willingness to communicate ex parte even if her lawyer consents to the ex parte communication by another lawyer.

Virginia Rule 4.2 cmt. [7] concludes with a reminder that “[i]n communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization.” Virginia Rule 4.2 cmt. [7] refers to Virginia Rule 4.4. As explained above, Virginia Rule 4.4 indicates that “[i]n representing a client, a lawyer shall not use . . . methods of obtaining evidence that violate the legal rights of such a [third] person.”

In the ex parte communication context, this prohibition prohibits lawyers engaging in otherwise permissible ex parte communications from intruding into the organization’s (a “third person”) attorney-client privilege or other evidentiary protection. In other words, a lawyer ethically communicating ex parte with an organization’s current or former employee must not engage in communications that would violate the organization’s evidentiary protection – such as asking the organization’s constituent about

communications she had with the organization’s lawyer, etc. The target person (if a layman) would not be expected to understand the evidentiary protections’ reach, but the communicating lawyer would be expected to understand them.

In some situations, the type of “legal rights of the organization” that a communicating lawyer may not violate include the organizational constituent’s contractual, fiduciary, or other duty not to disclose the organization’s confidential, trade secret or other information. In other words, such contractual obligations or fiduciary obligations presumably also must be off-limits to the communicating lawyer’s otherwise ethically permissible ex parte communications.

Lawyers of a certain age will notice that Virginia Rule 4.2 cmt. [7] does not contain a prohibition they may remember from law school – placing off-limits for ex parte communications corporate employees whose statements “constitute an admission on the part of the organization.” Virginia Rule 4.2 has never contained that murky description of persons who may not be contacted ex parte without the corporation’s lawyer’s consent. The ABA Model Rules dropped that off-limit category about twenty years ago.

Case law or even Federal Rule of Evidence 801(d)(2) might apply in that determination, but as a matter of ethics neither Virginia Rule 4.2 cmt. [7] nor ABA Model Rule 4.2 cmt. [7] prohibits ex parte communications with that category of constituents (and who do not otherwise fall within one of the off-limits categories).

Although this document does not extensively focus on case law interpreting the Virginia Rules or the ABA Model Rules, it is worth noting both the Eastern District of Virginia and the Western District of Virginia federal courts’ inexplicable application of Virginia Rule 4.2.

Starting in 1993, Eastern District of Virginia federal courts noted the similarity between black letter Virginia Rule 4.2 and black letter ABA Model Rule 4.2 – and for some reason eschewed unique Virginia Rule 4.2 cmt. [7] and instead turned to the then very different ABA Model Rule 4.2 cmt. [7]’s application in the corporate context.

As a result, Eastern District of Virginia and later Western District of Virginia cases imposed an ex parte communication prohibition that varies from Virginia Rule 4.2 cmt. [7]’s provision despite both court’s local rules’ explicit adoption of the Virginia Rules. Those Virginia federal courts thus continue to impose an ex parte communication prohibition that the Virginia Rule 4.2 never recognized and ABA Model Rule 4.2 dropped many decades ago – barring communications with “employees” “whose statement may constitute an admission on the part of the organization.” To be sure, the Virginia federal courts’ approach to Virginia Rule 4.2 cmt. [7]’s application is closer to post-January, 2021, Virginia Rule 4.2 cmt. [7]’s language (parroting ABA Model Rule 4.2 cmt. [7]) than to the earlier unique and confusing Virginia Rule 4.2 cmt. [7] prohibitions.

**ABA Model Rule 4.2 cmt [7]** contains the identical language – after the Virginia Supreme Court replaced the old and confusing Virginia Rule 4.2 cmt. [7]’s formulation with ABA Model Rule 4.2 cmt. [7]’s language.

There is one difference. ABA Model Rule 4.2 cmt. [7] contains the phrase “[c]ompare [ABA Model] Rule 3.4(f)”. ABA Model Rule 3.4(f) explains that “[a] lawyer shall not . . . request a person other than a client to refrain from voluntarily giving relevant information to another party, unless (1) the person is a relative or an employee or other agent of a client; and (2) the lawyer reasonably believes that the person’s interests will not be adversely affected by refraining from giving such information.”

As explained above, ABA Model Rule 3.4(f) differs in two ways from Virginia Rule 3.4(h): (1) it does not contain the limiting language “the information is relevant in a pending civil matter;” and (2) it does not contain Virginia Rule 3.4(h)(2)’s more expansive reference to “former” corporate client employees.

As also explained above, ABA Model Rule 4.2 cmt. [7]’s word “Compare” seems inapt.

### **Virginia Rule 4.2 Comment [8]**

Virginia Rule 4.2 cmt. [8] addresses Virginia Rule 4.2’s ex parte communication prohibition’s application outside the pending litigation context.

Virginia Rule 4.2 cmt. [8] first explains that Virginia Rule 4.2’s ex parte communication prohibition “covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.” Virginia Rule 4.2 cmt. [8]’s word “person” (in contrast to “a party”) is somewhat ironic, because elsewhere Virginia Rule 4.2 Comments use the word “party” rather than “person” (as in Virginia Rule 4.2 cmt. [4], [7]).

Virginia Rule 4.2 cmt. [8] next explains the rationale for Virginia Rule 4.2’s expansive application: “[n]either the need to protect uncounseled persons against being taken advantage of by opposing counsel nor the importance of preserving the client-attorney relationship is limited to those circumstances where the represented person is a party to an adjudicative or other formal proceeding.” That rationale parallels ABA Model Rule 4.2 cmt. [1]’s rationale for ABA Model Rule 4.2 – although Virginia did not adopt ABA Model Rule 4.2 cmt. [1]. But Virginia Rule 4.2 cmt. [8]’s sentence is awkwardly put, although seemingly clear. Interestingly, Virginia Rule 4.2 cmt. [8] uses the term “client-

attorney relationship” – representing the fourth of four presumably synonymous terms the Virginia Rules use to describe such a relationship: “client-lawyer relationship”; “lawyer-client relationship”; “attorney-client relationship”; “client-attorney relationship.”

Virginia Rule 4.2 cmt. [8] concludes by continuing its discussion of the justifiable application – this time in the pre-pending litigation setting: “[t]he interests sought to be protected by [Virginia Rule 4.2] may equally well be involved when litigation is merely under consideration, even though it has not actually been instituted, and the persons who are potentially parties to the litigation have retained counsel with respect to the matter in dispute.” This makes sense, although not very clearly articulated.

**ABA Model Rule 4.2** does not contain a similar Comment.

#### **ABA Model Rule 4.2 Comment [8]**

Virginia did not adopt ABA Model Rule 4.2 cmt. [8].

ABA Model Rule 4.2 cmt. [8] addresses the knowledge requirement triggering ABA Model Rule 4.2’s ex parte communication prohibition.

ABA Model Rule 4.2 cmt. [8] begins by stating what should be clear – from black letter ABA Model Rule 4.2: “[t]he prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in a matter to be discussed (emphasis added).” ABA Model Rule 4.2 cmt. [8] then doubles down by parroting (and also referring to) ABA Model Rule 1.0(f): “[t]his means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances (emphasis added).”

ABA Model Rule 4.2 cmt. [8] concludes with a warning that “[t]hus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the

obvious.” Presumably that focuses on the “circumstances” that might infer a lawyer’s “actual knowledge” and thus trigger the ex parte communication prohibition (and the need for “consent of counsel” or one of the two exceptions permitting otherwise prohibited ex parte communications).

### **Virginia Rule 4.2 Comment [9]**

Virginia Rule 4.2 cmt. [9] addresses Virginia Rule 4.2’s application in the investigation context and transactional context.

Virginia Rule 4.2 cmt. [9] essentially continues the flowery Virginia Rule 4.2 cmt. [8] articulation of the rationale underlying Virginia Rule 4.2’s ex parte communication prohibition. With the same rhetorical flourish, Virginia Rule 4.2 cmt. [9] begins by explaining that “[c]oncerns regarding the need to protect uncounseled persons against the wiles of opposing counsel and preserving the attorney-client relationship may also be involved where a person is a target of a criminal investigation, knows this, and has retained counsel to receive advice with respect to the investigation.”

Interestingly, Virginia Rule 4.2 cmt. [9] refers to “the attorney-client relationship.” That term presumably is intended to be synonymous with the different phrase used in the preceding Virginia Rule 4.2 cmt. [8]: “client-attorney relationship.”

Presumably the criminal investigation target’s knowledge (“knows this”) is not a prerequisite to Virginia Rule 4.2’s ex parte communication prohibition. If any person has retained counsel to receive advice “with respect to” a possible investigation, Virginia Rule 4.2 applies even if the person does not know that she is “a target of a criminal investigation.”

Virginia Rule 4.2 cmt. [9] next applies the same rationale to a different setting: “[t]he same concerns may be involved where a ‘third-party’ witness furnishes testimony in an investigation or proceeding, and although not a formal party, has decided to retain counsel to receive advice with respect thereto.” Again, such a witness’s mention of a lawyer (“counsel”) triggers Virginia Rule 4.2’s application – at least as to the matter on which he has retained counsel. So, for example, Virginia Rule 4.2 cmt. [9]’s description of the represented person “furnish[ing] testimony in an investigation or proceeding,” and status as “not a formal party” provides some helpful guidance – but does not describe the conditions for Virginia Rule 4.2’s ex parte prohibition’s application.

Virginia Rule 4.2 cmt. [9] concludes by turning to a completely different setting – explaining that “[s]uch concerns are equally applicable in a non-adjudicatory context, such as a commercial transaction involving a sale, a lease or some other form of contract.” As explained above, black letter Virginia Rule 4.2’s use of the word “person” rather than “party” highlights Virginia Rule 4.2’s application outside the litigation setting. So lawyers may not communicate ex parte with a person the lawyer knows to be represented by a lawyer in the matter, even (for example) in the context of a friendly transactional setting among life-time best friends who have each retained their own lawyer to write up an agreement upon which the friends have already agreed.

**ABA Model Rule 4.2** does not contain a similar Comment.

#### **ABA Model Rule 4.2 Comment [9]**

Virginia did not adopt ABA Model Rule 4.2 cmt. [9].

ABA Model Rule 4.2 cmt. [9] addresses lawyers’ communications with unrepresented persons.

ABA Model Rule 4.2 explains that “[i]n the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer’s communications are subject to [ABA Model] Rule 4.3.” ABA Model Rule 4.3 (like Virginia Rule 4.3) addresses lawyers’ communication with unrepresented persons – applying a different standard from the standard when lawyers communicate with persons they know to be represented by another lawyer.

As explained above, lawyers may (but not necessarily will) immunize themselves by asking a person with whom they communicate whether that person has a lawyer representing him or her on the matter. If the person answers “yes” to that question, the lawyer must terminate the communication. If the persons answers “no” to that question, the lawyer’s communication will then be governed by ABA Model Rule 4.3.

# RULE 4.3

## Dealing With Unrepresented Persons

### Rule

#### Virginia Rule 4.3(a)

Virginia Rule 4.3(a) addresses lawyers' dealings with unrepresented persons.

Virginia Rule 4.3(a) begins by identifying the lawyer's role and the third party's status: "[i]n dealing on behalf of a client with a person who is not represented by counsel" (emphasis added). Presumably the word "dealing" refers both to communications and other interactions.

Virginia Rule 4.3(a)'s phrase dealing "on behalf of a client" is one of three phrases contained in four consecutive Virginia Rules contain. Virginia Rule 4.1 begin with the phrase "[i]n the course of representing a client." Virginia Rule 4.2 begins with a phrase "[i]n representing a client." Virginia Rule 4.4(a) also begins with the phrase: "[i]n representing a client." So there seems to be an alternating series of presumably synonymous terms.

Virginia Rule 4.3(a)'s phrase "a person who is not represented by counsel" raises two issues – one linguistic and one substantive.

First, the phrase contains the word "counsel" – just two words before using the presumably synonymous word "lawyer." This contrasts with previous Virginia Rule 4.2, which contains the more logical word "lawyer" and the term "another lawyer" to distinguish

between a lawyer and another lawyer representing a person with whom the first lawyer may not communicate. Perhaps Virginia Rule 4.3 uses the different but synonymous words “counsel” and “lawyer” because the first sentence’s structure places those two words so close to one another. In any event, no one is likely to be confused.

Second, Virginia Rule 4.3(a)’s phrase “a person who is not represented by counsel” inexplicably does not focus on whether that person is “represented by counsel” in the matter about which the lawyer communicates or otherwise deals with that person. Virginia Rule 4.3(a)’s next sentence focuses on “the matter” on which the lawyer deals with the third person, but Virginia Rule 4.3(a)’s first sentence does not. One would have expected that reference, because Virginia Rule 4.3 arguably represents the other side of the coin described in Virginia Rule 4.2 – which addresses lawyers’ responsibilities when communicating with a person who is represented by counsel “in the matter” on which the lawyer wishes to communicate with that represented person. Virginia Rule 4.3(a) would have been clearer if its first sentence began with the following clause: “[i]n dealing on behalf of a client with a person who is not represented by counsel in a matter” (emphasis added). Perhaps Virginia Rule 4.3(a) assumed that limitation went without saying it – but in ethics rules it is always better to say it.

Virginia Rule 4.3(a) next describes the prohibitions on such a lawyer’s communications when “dealing on behalf of a client” with an unrepresented person: “a lawyer shall not state or imply that the lawyer is disinterested.” The word “state” seems obvious enough. It is unclear what would constitute that lawyer “imply[ing]” that she is “disinterested.”

Virginia Rule 4.3(a) then describes a scenario in which a lawyer must affirmatively communicate rather than avoid misleading statements or implications. That scenario occurs “[w]hen the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter.” The Virginia Rule Terminology defines “know” as “denot[ing] actual knowledge of the fact in question,” but “[a] person’s knowledge may be inferred from circumstances.” The phrase “reasonably should know” presumably refers to a scenario in which a reasonable lawyer would know that the unrepresented person has the described misunderstanding.

As discussed above, Virginia Rule 4.3(a)’s phrase “role in the matter” focuses on the specific subject of the lawyer’s and the unrepresented person’s communications or other interactions – which would have been clearer if it had been mentioned in Virginia Rule 4.3(a)’s first sentence. Presumably the earlier reference to the lawyer’s interestedness is intended to be synonymous with the phrase “the lawyer’s role in the matter.” That is not an exact match, but Virginia Rule 4.3(a) seems to equate those – because its first sentence prohibits the lawyer from explicitly or implicitly giving the impression that the lawyer is “disinterested,” and its second sentence requires certain affirmative disclosure if the unrepresented person “misunderstands the lawyer’s role in the matter” – in other words, if the unrepresented person believes that the lawyer is “disinterested.”

Virginia Rule 4.3(a) concludes by requiring lawyers to take defined action in that second scenario: “the lawyer shall make reasonable efforts to correct the misunderstanding.” It seems strange that lawyer must only “make reasonable efforts to correct the misunderstanding (emphasis added).” One would think that the lawyer would

be required “to correct the misunderstanding.” If the unrepresented person still misunderstands the lawyer’s role despite the lawyer’s “reasonable efforts” to correct it, the lawyer would have to keep trying. That more demanding standard would seem consistent with Virginia Rule 4.3(a)’s purpose – avoiding lawyers’ overreaching interactions with unrepresented persons.

**ABA Model Rule 4.3** also addresses lawyers’ dealings with unrepresented persons.

ABA Model Rule 4.3’s first two sentences contain language identical to Virginia Rule 4.3(a). ABA Model 4.3 thus begins with the same phrase “dealing on behalf of a client” when referring to a lawyer’s representation of a client. ABA Model Rule 4.1, ABA Model Rule 4.2, ABA Model Rule 4.3, and ABA Model Rule 4.4 contain the same alternating descriptions as the Virginia Rules of lawyers’ representation of clients when they undertake certain communications or actions (or remain silent).

ABA Model Rule 4.3’s first two sentences implicate all of the other issues discussed above.

### **Virginia Rule 4.3(b)**

Virginia Rule 4.3(b) addresses a lawyer’s impermissible and permissible “advice” to such an unrepresented person.

Virginia Rule 4.3(b) begins by warning that in certain specified circumstances “[a] lawyer shall not give advice to a person who is not represented by a lawyer.” That sentence implicates three issues.

First, Virginia Rule 4.3(b) prohibits the lawyer from giving any “advice.” This is a broader prohibition than ABA Model Rule 4.3’s prohibition (discussed below) on such a lawyer giving “legal advice” (emphasis added).

Second, presumably the word “lawyer” is intended to be synonymous with Virginia Rule 4.3(a)’s word “counsel” – although it would have been linguistically preferable to use the same word to describe the same person.

Third, as with Virginia Rule 4.3(a), Virginia Rule 4.3(b) does not focus on the person’s representation or lack of representation by a lawyer in the matter in which the communicating lawyer might give advice. Perhaps that goes without saying. In other words, Virginia Rule 4.3(b) presumably would allow the communicating lawyer to give advice about some business transaction to a person who is not represented by a lawyer in that transaction – but who has a lawyer handling a traffic ticket.

Virginia Rule 4.3(b)’s prohibition applies in certain circumstances, and contains an exception.

Virginia Rule 4.3(b)’s prohibition applies “if the interests of such person are or have a reasonable possibility of being in conflict with the interest of the client” (emphasis added). Interestingly, the unrepresented person’s “interests” are described in the plural, while the lawyer’s client’s “interest” is described in the singular. ABA Model Rule 4.3 understandably uses the plural in both places.

Virginia Rule 4.3(b)’s phrase “if the interests of such person are or have a reasonable possibility of being in conflict with the interest of the client” describes two situations: (1) the interests “are” in conflict; or (2) there is “a reasonable possibility” of their interests being in conflict. It is unclear whether the second situation involves the

time at which the lawyer interacts with the unrepresented person, or (on a more temporal basis) might in the future “have a reasonable possibility of being in conflict” with the client’s interest (emphasis added). The phrase has a temporal ring to it, and the other meaning would have been better expressed by a phrase such as “are or might reasonably be” in conflict (emphasis added).

The word “reasonable” presumably brings an objective standard to bear.

If the unrepresented person’s interests and the lawyer’s client’s interest meets one of those two conflicts standards, there is only one type of “advice” a lawyer can give to the unrepresented person: “the advice to secure counsel.”

Presumably, Virginia Rule 4.3(b)’s word “secure” is intended to be synonymous with Virginia Rule 4.3 cmt. [1]’s “obtain.” But one would think that the black letter Rule and its first Comment would have used the same word to mean the same thing.

And Virginia Rule 4.3(b) continues the presumably synonymous use of the word “lawyer” to describe the client’s lawyer, and the word “counsel” to describe the unrepresented person’s would-be lawyer.

**ABA Model Rule 4.3** last two sentences contain essentially the same language as Virginia Rule 4.3(b).

Thus, ABA Model Rule 4.3 contains the different but presumably synonymous words “lawyer” and “counsel.” ABA Model Rule 4.3 also contains the word “secure” when referring to retaining a lawyer – in contrast to the presumably synonymous word “obtain” (which appears in ABA Model Rule 4.3 cmt. [2]).

But there are several differences between ABA Model Rule 4.3’s last two sentences and Virginia Rule 4.3(b).

First, ABA Model Rule 4.3 only prohibits the lawyer from giving “legal advice” in the specified circumstances (emphasis added). This is a narrower prohibition than Virginia Rule 4.3(b)’s prohibition on such a lawyer giving “advice” (which presumably includes non-legal advice).

Second, in contrast to Virginia Rule 4.3(b)’s prohibition on lawyer’s giving “advice” (“other than the advice to secure counsel”) in the specified circumstances, ABA Model Rule 4.3’s concluding sentence adds a knowledge requirement. Thus, ABA Model Rule 4.3 prohibits the lawyer from giving “legal advice” (other than the one exception) “if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client” (emphasis added).

There are also two small linguistic differences. First, in contrast to Virginia Rule 4.3(b)’s first word “a,” ABA Model Rule 4.3’s penultimate sentence begins with the word “[t]he.” Second, in contrast to Virginia Rule 4.3(b), ABA Model Rule 4.3’s concluding sentence uses the plural word “interests” in describing both the third person’s “interests” and the lawyer’s client’s “interests.”

## Comment

### Virginia Rule 4.3 Comment [1]

Virginia Rule 4.3 cmt. [1] addresses the rationale for Virginia Rule 4.3, and one of its prohibitions.

Virginia Rule 4.3 cmt. [1] begins with an explanation that “[a]n unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client.”

The phrase “disinterested in loyalties” is odd. The issue is not whether a lawyer is “interested” or “disinterested” in loyalties. It is whether she has loyalties. In particular, whether she has a loyalty to her client “on behalf of” whom she is dealing with the unrepresented person. The second type of possible disinterestedness (as an “authority”) makes more sense.

Virginia Rule 4.3 cmt. [1] then turns to a different topic – the prohibition on what a lawyer representing a client may do when dealing with an unrepresented person.

Virginia Rule 4.3 cmt. [1]’s discussion begins with the phrase “[d]uring the course of a lawyer’s representation of a client.” That temporal description is accurate, but seems inapt in this context. It would be worth saying only if it was likely (or even remotely possible) that a lawyer would represent a client in dealing with an unrepresented person, and then continue dealing with the unrepresented person after the lawyer’s representation of the client ended. In other words, it would make sense to point to lawyers’ duties when representing a client only if it was likely that the lawyer’s representation of the client would

end – although the lawyer continued to deal with the unrepresented person. That seems unremarkably unlikely.

Virginia Rule 4.3 cmt. [1] concludes by explaining that while a lawyer is representing her client, “the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel” (emphasis added).

As a terminology matter, Virginia Rule 4.3 cmt. [1]’s concluding sentence uses the phrase “to obtain counsel” (emphasis added), which contrasts with black letter Virginia Rule 4.3(b)’s phrase “to secure counsel” (emphasis added). Presumably those terms are intended to be synonymous.

As a substantive matter, Virginia Rule 4.3 cmt. [1]’s guidance seems incorrect. Black letter Virginia Rule 4.3(b) flatly prohibits lawyers from giving advice (“other than the advice to secure counsel”) under certain conditions – “if the interests of such person are or have a reasonable possibility of being in conflict with the interest of the client.” In contrast, presumably lawyers are free to give advice (other than or in addition to “the advice to secure counsel”) in other circumstances – if the person’s interests are not in conflict with the client’s interests. So lawyers may either give advice (other than the advice “to secure counsel”) or they may not. Black letter Virginia Rule 4.3(b) does not recognize a scenario where “the lawyer should not give” advice (emphasis added) – the lawyer is either prohibited from doing so, or may freely do so.

**ABA Model Rule 4.3 cmt. [1]** also addresses the rationale for ABA Model Rule 4.3.

ABA Model Rule 4.3 cmt. [1] contains the identical first sentence as Virginia Rule 4.3 cmt. [1]. Thus, ABA Model Rule 4.3 cmt. [1] contains that odd phrase “disinterested

in loyalties” – which is discussed above as being inappropriate. The question is not whether the lawyer is interested or disinterested “in loyalties” – the question is whether the lawyer represents a client or not.

ABA Model Rule 4.3 cmt. [1] differs in several ways from Virginia Rule 4.3 cmt. [1].

First, in contrast to Virginia Rule 4.3 cmt. [1], ABA Model Rule 4.3 cmt. [1] does not contain the strange sentence adding a temporal angle to the scenario, and explaining that a lawyer “should not give” certain advice to an unrepresented person – when black letter Virginia Rule 4.3(b) either prohibits it or allows it.

Second, in contrast to Virginia Rule 4.3 cmt. [1], ABA Model Rule 4.3 cmt. [1] understandably explains that “a lawyer will typically need to identify the lawyer’s client” – “[i]n order to avoid a misunderstanding.” It is somewhat surprising that ABA Model Rule 4.3 does not always require lawyers to identify their client – not just “typically.”

Third, ABA Model Rule 4.3 cmt. [1] then turns to another scenario – where it is “necessary” for the lawyer to “explain that the [lawyer’s] client has interests opposed to those of the unrepresented person.” Black letter ABA Model Rule 4.3 requires lawyers to “make reasonable efforts to correct the misunderstanding” “[w]hen the lawyer knows or reasonably should know that the unrepresented person misunderstand the lawyer’s role in the matter.” Presumably ABA Model Rule 4.3 cmt. [1] identifies that scenario as one where it is “necessary” for the lawyer to provide the specified explanations.

Fourth, ABA Model Rule 4.3 cmt. [1] concludes by pointing to ABA Model Rule 1.13(f) “[f]or misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent.” ABA Model Rule 1.13(f) understandably states that “[i]n dealing with an organization’s directors, officers, employees, members,

shareholders or other constituents, a lawyer shall explain the identity of the client” in specified circumstances. Those circumstances are similar to those described in ABA Model Rule 4.3. ABA Model Rule 1.13(f) describes those as “when the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.” Virginia Rule 1.13(d) contains essentially identical language – although Virginia Rule 1.13(d) contains the phrase “when it is apparent” – in contrast to ABA Model Rule 1.13(f)’s language “when the lawyer knows or reasonably should know” that the organization’s interests are adverse to the constituents’ interests.

As this document explains in its summary, analysis and comparison of Rule 1.13, it seems odd that Virginia Rule 1.13(d) and ABA Model Rule 1.13(f) would on their faces only require the lawyer in that setting to “explain the identity of the client.” One would think that the lawyer’s explanation would have to be more complete, such as describing the adversity, etc.

### **ABA Model Rule 4.3 Comment [2]**

Virginia did not adopt ABA Model Rule 4.3 cmt. [2].

ABA Model Rule 4.3 cmt. [2] addresses further guidance for lawyers dealing with “unrepresented persons.”

For some reason, ABA Model Rule 4.3 cmt. [2] describes situations where there are “unrepresented persons” in the plural – in contrast to black letter ABA Model Rule 4.3 and ABA Model Rule 4.3 cmt. [1]’s use of the singular “person.”

ABA Model Rule 4.3 cmt. [2] begins by explaining that ABA Model Rule 4.3 “distinguishes between situations involving unrepresented persons whose interests may

be adverse to those of the lawyer’s client and those in which the person’s interests are not in conflict with the client’s.”

That is certainly true for ABA Model Rule 4.3’s third sentence – which focuses on that possible adversity in explaining whether lawyers may or may not give advice “other than the advice to secure counsel.” But black letter ABA Model Rule 4.3’s first sentence does not distinguish between the two situations described in ABA Model Rule 4.3 cmt. [2]. And black letter ABA Model Rule 4.3’s second sentence distinguishes between a situation where the unrepresented person “misunderstands the lawyer’s role in the matter” or does not misunderstand that role. That is a different standard, which focuses on the lawyer’s role in the matter. So it contrasts with ABA Model Rule 4.3 cmt. [2]’s two specified situations – which focus on possible adversity between the person’s interests and the client’s interests.

ABA Model Rule 4.3 cmt. [2] then turns to “the former situation” – in which the “unrepresented person” has interests that “may be adverse” to the lawyer’s clients’ interests.

ABA Model Rule 4.3 cmt. [2] then turns to “the former situation” – in which a client’s lawyer deals with “unrepresented persons whose interests may be adverse to the those of the lawyer’s client.” ABA Model Rule 4.3 cmt. [2] explains that in such a “situation, the possibility that the lawyer will compromise the unrepresented person’s interest is so great that [ABA Model Rule 4.3] prohibits the giving of any advice, apart from the advice to obtain counsel.” That ABA Model Rule 4.3 cmt. [2] sentence thus contains the phrase “obtain counsel” – rather than black letter ABA Model Rule 4.3’s presumably synonymous

phrase “secure counsel,” and contains the singular word “person” rather than using the plural “persons” contained in the preceding sentence.

ABA Model Rule 4.3 cmt. [2] then inexplicably states that “[w]hether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur.” Black letter ABA Model Rule 4.3 does not include those odd factors. Under black letter ABA Model Rule 4.3, a lawyer can either: (1) “give legal advice to an unrepresented person” if the lawyer does not know or “reasonably should know” that the person’s interests “are or have a reasonable possibility of being in conflict” with the lawyer’s client’s interests; or (2) cannot give legal advice – “other than the advice to secure counsel.” In other words, black letter ABA Model Rule 4.3 does not vary the lawyer’s ethical permission to give legal advice (“other than the advice to secure counsel”) depending on the unrepresented person’s “experience and sophistication,” or “the setting in which the behavior and comments occur.”

Additionally, it is unclear what ABA Model Rule 4.3 cmt. [2]’s second factor even means: “the setting in which the behavior and comments occur.” One cannot help but wonder what “behavior” that refers to, and what “comments” that refers to.

ABA Model Rule 4.3 cmt. [2] then turns to a totally different issue – describing what lawyers may do when dealing with unrepresented persons.

ABA Model Rule 4.3 cmt. [2] first makes the general statement that “[t]his [ABA Model Rule 4.3] does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person.” Presumably such interaction would depend upon the lawyer’s compliance with black letter ABA Model Rule 4.3’s

requirements to: (1) “make reasonable efforts to correct the misunderstanding” if “the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter”; and (2) refrain from giving “legal advice” (“other than the advice to secure counsel”) if the lawyer “knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the [lawyer’s] client.” But ABA Model Rule 4.3 cmt. [2]’s blanket statement does not explicitly remind lawyers of these requirements and prohibitions.

ABA Model Rule 4.3 cmt. [2] then describes other permissible communications lawyers may have with unrepresented persons. The description of those communications is preceded by a condition that the previous sentence does not contain: “[s]o long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person.” That disclaimer presumably would satisfy the lawyer’s obligation to “make reasonable efforts to correct the misunderstanding” if the unrepresented person misunderstands the lawyer’s role. And presumably it would not constitute “legal advice” that the lawyer could not provide the unrepresented person if there were adverse interests involved.

ABA Model Rule 4.3 cmt. [2] concludes by describing several types of communications that lawyers may have with unrepresented persons under those conditions: (1) “the lawyer may inform the person of the terms on which the lawyer’s client will enter into an agreement”; (2) “the lawyer may inform the persons of the terms on which the lawyer’s client will . . . settle a matter”; (3) “the lawyer may . . . prepare documents that require the person’s signature”; (4) “the lawyer may . . . explain the lawyer’s own view of the meaning of the document”; (5) “the lawyer may explain . . . the

lawyer's view of the underlying legal obligations." Because ABA Model Rule 4.3 cmt. [2]'s concluding sentence contains the plural word "documents," the later reference to "the document" in the singular seems to be a mismatch. The term "a document" would have been better.

It is no wonder that ABA Model Rule 4.3 cmt. [1] warns that "[a]n unrepresented persons . . . might assume that a lawyer . . . is a disinterested authority on the law even when the lawyer represents a client." That is why ABA Model Rule 4.3 cmt. [1] requires lawyers "where necessary, [to] explain that the client has interests opposed to those of the unrepresented person." But oddly, ABA Model Rule 4.3 cmt. [2] permits such lawyers to communicate all of the listed explanations and even prepare documents requiring unrepresented persons' signatures after what seems like a disclosure that would not satisfy ABA Model Rule 4.3 cmt. [1]'s standard: "[s]o long as the lawyer has explained that the lawyer represents an adverse party and is not representing the [unrepresented] person." That required disclosure does not include ABA Model Rule 4.3 cmt. [1]'s explanation "that the client has interests opposed to those of the unrepresented person." It would have been helpful for ABA Model Rule 4.3 cmt. [2] to explicitly include that extra level of explanation before allowing all of the communications and activities that a lawyer may undertake when dealing with an unrepresented person.

# RULE 4.4

## Respect For Rights Of Third Persons

### Rule

#### Virginia Rule 4.4(a)

Virginia Rule 4.4(a) addresses lawyers' misbehavior dealing with third parties and in obtaining evidence.

Virginia Rule 4.4(a) explains that “[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.”

Virginia Rule 4.4(a) thus begins with the phrase “[i]n representing a client.” Like other Virginia Rules starting with that phrase, Virginia Rule 4.4(a) applies only when lawyers act in their representational role. In other words, Virginia Rule 4.4(a) does not apply if lawyers are acting in other roles – as a client, in non-professional activities, in their personal conduct, etc.

Virginia Rule 4.4(a) prohibits two types of lawyer misconduct.

First, Virginia Rule 4.4(a) prohibits lawyers acting in a representational role from “us[ing] means that have no substantial purpose other than to embarrass, delay, or burden a third person.”

The Virginia Terminology section defines “substantial” as follows: “when used in reference to degree or extent denotes a material matter of clear and weighty importance.” ABA Model Rule 1.0(l) contains the identical language, which is the common sense meaning of that term. Inclusion of the word “substantial” means that lawyers cannot excuse such wrongful conduct by pointing to some insubstantial purpose. In other words, lawyers cannot defend themselves from allegations of Virginia Rule 4.4(a) violations only by pointing to some flimsy purpose.

Interestingly, Virginia Rule 4.4(a) does not include the word “harass” in its list of impermissible purposes. The absence of the concept of “harassment” seems strange, because several other Virginia Rule provisions understandably contain that standard: Preamble; Virginia Rule 1.7 cmt. [9]; Virginia Rule 3.1 cmt. [2]; Virginia Rule 3.4(j); Virginia Rule 3.4 cmt. [6]; Virginia Rule 3.5(a)(2)(i); Virginia Rule 3.5(a)(3); Virginia Rule 3.5 cmt. [2]; Virginia Rule 7.3(b)(2); Virginia Rule 7.3 cmt. [3].

Second, Virginia Rule 4.4(a) prohibits lawyers from “us[ing] methods of obtaining evidence that violate the legal rights of such a person.” This prohibition obviously focuses on investigation-related, pre-litigation or some other investigatory discovery or unofficial evidence-gathering. The term “violate the legal rights” phrase imports into the analysis substantive legal concepts that are not described in Virginia Rule 4.4(a).

There is no Virginia Rule Comment providing any guidance on those “legal rights.” Perhaps the most obvious example is the prohibition on lawyers engaging in improper or even illegal trespassing to gain evidence. Another example involves lawyers’ otherwise ethically permissible communications with certain current or former employees of a corporate adversary. Under Virginia Rule 4.2, lawyers may engage in such ex parte

communications with many current and former employees of such a corporate adversary, but must avoid intruding into privileged communications between the targets of such otherwise ethically permissible ex parte communications and the corporation's lawyers. Although Virginia Rule 4.2 Comments do not explicitly identify this content-based prohibition, ABA Model Rule 4.2 cmt. [7] reminds lawyers that they "must not use methods of obtaining evidence that violate the legal rights of the organization" (citing ABA Model Rule 4.4).

**ABA Model Rule 4.4(a)** contains identical language.

Thus, ABA Model Rule 4.4(a) does not contain the word "harass" in its list of prohibited actions.

The absence of the concept of "harassment" seems strange, because several other ABA Model Rule provisions understandably contain that standard: ABA Model Rule Preamble [5]; ABA Model Rule 3.5(c)(3); ABA Model Rule 7.3(c)(2); ABA Model Rule 7.3 cmt. [6]; ABA Model Rule 8.4(g); ABA Model Rule 8.4 cmt. [3].

#### **Virginia Rule 4.4(b)**

Virginia Rule 4.4(b) addresses lawyers' responsibilities on receiving an inadvertently transmitted privileged document.

Under Virginia Rule 4.4(b), "[a] lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information is privileged and was inadvertently sent shall promptly terminate review or use of the document or electronically stored information, promptly notify the sender, and abide by

the sender's instructions to return or destroy the document or electronically stored information."

Significantly, Virginia Rule 4.4(b) applies only to lawyers, not to their clients. So on its face, Virginia Rule 4.4(b) does not govern a scenario in which a lawyer's client receives an inadvertently transmitted document from an adversary (or even a friendly third person), and then intentionally transmits it to his lawyer. Such an intentionally-transmitted document does not trigger Virginia Rule 4.4(b)'s requirements. It fails the necessary "inadvertently sent" prerequisite.

But receiving lawyers in that scenario should be very careful. Judges addressing a disqualification motion, motion in limine, or even a sanctions motion might not be convinced by that argument. And the sender might even point to Virginia Rule 4.4(a), arguing that the receiving lawyers' use of the document inadvertently sent to the lawyer's client but then intentionally sent by the client to the lawyer involves the receiving lawyer "us[ing] methods of obtaining evidence that violate[s] the legal rights of [the adversary]." But on its face, Virginia Rule 4.4(b) does not cover such documents.

Virginia Rule 4.4(b) describes a scenario in which lawyers "receive[ ] a document or . . . information." In other words, the Virginia Rule does not address the scenario in which lawyers go looking for a document or information. That could be a significant difference. For instance, in ABA LEO 460 (8/14/11), the ABA explained that its parallel ABA Model Rule 4.4(b) does not apply to lawyers whose organizational client looks for and retrieves emails on the organization's server or other communication infrastructure between an organization employee and her personal lawyer. Most frequently, a company employee uses the company's email infrastructure to communicate with a personal lawyer

about an employment matter in which the employee is adverse to the company. Because the company lawyer undertaking such a search has not “received” such employee emails, the same phrase in ABA Model Rule 4.4(b) meant that its obligations did not apply.

Virginia Rule 4.4(b) applies to “a document or electronically stored information.” That presumably covers just about any type of transmission.

Virginia Rule 4.4(b) covers such “document[s] or electronically stored information” “relating to the representation of the lawyers’ client.” The phrase “relating to the representation of the lawyer’s client,” harkens to the ABA Model Rule 1.6(a)’s broad confidentiality provision: “information relating to the representation of a client.”

As described in this document’s summary and analysis of Virginia Rule 1.6, Virginia Rule 1.6 contains a far narrower range of protected information: (1) information protected by the attorney-client privilege “under applicable law,” and (2) other information “gained in the professional relationship that the client has requested to be held inviolate,” or (3) such information “the disclosure of which would be embarrassing or would be likely to be detrimental to the client.” Virginia Rule 1.6(a)’s phrase “information gained in the professional relationship” thus focuses on the source and timing of the information, not its content. Virginia Rule 1.6’s protection not only seems to cover a narrower range of documents or information, it also contains fewer content-based restrictions than ABA Model Rule 1.6. In other words, Virginia Rule 1.6 prevents disclosure based on content (privilege, clients’ request to keep secret the information, or the embarrassing or detrimental nature of the information should it be disclosed). ABA Model Rule 1.6(a) contains no similar content restriction – it covers “information relating to the representation of a client.” ABA Model Rule 1.6 contains a list of scenarios in which

disclosure of the specified protected client confidential information is required or permitted – but those are not explicitly based on content.

Virginia Rule 1.9's provisions governing lawyers' disclosure of former clients' information uses a different protection standard: "relating to the representation" (Virginia Rule 1.9(c)(2)). That seems to be a subset of the broader "related to or gained in" language in Virginia Rule 1.9(c)(1)'s limitations on lawyers' "use" (rather than "disclosure") of a former clients' protected confidential information. Neither Virginia Rule 1.9 nor its Comments address that distinction. Interestingly, the Virginia Rule governing lawyers' "use" of former clients' information thus uses an odd formulation defining the scope of that information: "information relating to or gained in the course of the representation." Virginia Rule 1.9(c)(1). That expansive definition includes the "gained in" phrase from Virginia Rule 1.6(a) and the "relating to" concept in Virginia Rule 4.4(b). It is unclear in precisely what way the Virginia Rule 4.4(b) "relating to" formulation differs from the "gained in" formulation contained in Virginia Rule 1.9(c)(1).

Parallel ABA Model Rule 1.9(c) uses the "relating to" phrase that also appears in the current-client confidentiality duty in ABA Model Rule 1.6(a).

Virginia Rule 4.4(b)'s use of the term "relating to the representation of the lawyer's client" seems counterintuitive. When Virginia Rule 1.6 and Virginia Rule 1.9 (and those ABA Model Rules) use the phrase "relating to the representation of a lawyer's client," the phrase refers to information from or about the client. When used in Virginia Rule 4.4(b), the phrase means information from anyone *but* the client – although information might be about the client.

Virginia Rule 4.4(b) also seems overinclusive. This is because on its face Virginia Rule 4.4(b) triggers the receiving lawyer's duties upon receiving inadvertently transmitted document or electronically stored information from the client, or a friendly third-party. Lawyers are most likely to receive inadvertently transmitted documents or electronically stored information from someone other than their client or their client's ally. Instead, they are most likely to receive those from an adversary or from a third party.

But even though those inadvertently received documents or electronically stored information come from an adversary, they are still "relating to the representation of the lawyer's client." Otherwise, the receiving lawyer could not use those documents to the disadvantage of an adversary (usually the sender), or would even care about them.

So the phrase "relating to the representation of the lawyer's client" properly defines the scope of documents or electronically-stored information receiving lawyers might be tempted to use to their client's advantage in some way that Virginia Rule 4.4(b) considers unfair and thus prohibits.

To be sure, on its face Virginia Rule 4.4(b) does not trigger any receiving lawyer's duties if documents or electronically stored information comes "out of the blue" and have nothing to do with the receiving lawyer's representation of her client. Such documents will not give the receiving lawyers some unfair advantage. For instance, a lawyer named John Smith who receives an inadvertently transmitted document or information from a client represented by another John Smith (but who has no connection whatsoever to the receiving John Smith) presumably has no duties under Virginia Rule 4.4(b). That is because the document or electronically stored information does not relate in any way to the receiving lawyer John Smith's representation of his client. Such a receiving lawyer

might, out of courtesy, notify the sender that through an auto-fill mistake or some other mistake the document went to the wrong “John Smith.” But presumably he would have no duty to do so.

Still, it is somewhat surprising that Virginia Rule 4.4(b) (and the parallel but substantively different ABA Model Rule 4.4(b)) do not impose any duties on lawyers receiving that sort of document or electronically stored information. Presumably such receiving lawyers would just ignore and discard them (or perhaps try to alert the sender).

The “relating to representation of the lawyer’s client” standard presumably also covers documents or electronically stored information from allies. But that scenario probably would not cause any ripples. Lawyers receiving such a document from a friendly co-defendant or transactional ally or their lawyers presumably would courteously notify those friends, and politely refrain from reading the document. But even in that friendly scenario, the receiving lawyer must comply with Virginia Rule 4.4(b).

Lawyers are unlikely to inadvertently receive “a document or electronically stored information” that favors their client or that indirectly involves the representation of her client. Receiving lawyers are most likely to receive documents or electronically stored information inadvertently sent to them by an adverse lawyer, client or third party.

Upon receiving “a document or electronically stored information relating to the representation of the lawyer’s client,” receiving lawyers must undertake certain steps under certain specified conditions.

First, the receiving lawyer must take the specified steps if the lawyer “knows or reasonably should know the document or electronically stored information is privileged” (emphasis added).

The term “knows” is defined in the Virginia Terminology section. It “denotes actual knowledge of the fact in question,” although [a] person’s knowledge may be inferred from circumstances.” In other words, “knows” means actual knowledge. The phrase “reasonably should know” denotes a negligence standard – defining what a reasonable lawyer should know.

Presumably the term “privileged” is synonymous with Virginia Rule 1.6(a)’s phrase “information protected by the attorney-client privilege under applicable law.” As explained in connection with Virginia Rule 1.6(a), the attorney-client privilege technically does not protect “information” – it protects communications *about* information. But the meaning seems clear.

Significantly, Virginia Rule 4.4(b) does not trigger the receiving lawyer’s duties if the inadvertently transmitted document or electronically stored information is not privileged – but is nevertheless protected by some other evidentiary immunity. As explained in this document’s summary and analysis of Virginia Rule 1.6, Virginia Rule 1.6 cmt. [3] describes “two related bodies of law” that protect confidentiality: (1) “[t]he attorney-client privilege (which includes the work product doctrine) in the law of evidence”; and (2) “the rule of confidentiality established in professional ethics.” The first definition is legally erroneous – the attorney-client privilege does not “include” the work product doctrine. Those are two entirely separate evidentiary protections in source, scope, and application.

ABA Model Rule 1.6 cmt. [3] correctly describes these “related bodies of law: “the attorney-client privilege, the work product doctrine and the rule of confidentiality

established in professional ethics.” Thus, ABA Model Rule 1.6 cmt. [3] separately identifies “[t]he attorney-client privilege” and “the work product doctrine.”

But presumably Virginia Rule 1.6 cmt. [3]’s erroneous definition of attorney-client privilege protection that includes work product doctrine protection applies to Virginia Rule 4.4(b)’s definition of receiving lawyers’ duties. So Virginia lawyers would be wise (if not obligated) to apply their Virginia Rule 4.4(b) obligations to inadvertently transmitted documents or electronically stored information that deserve work product doctrine protection – but not attorney-client privilege protection.

But even if lawyers go along with the plainly erroneous Virginia Rule 1.6 cmt. [3] description of privilege protection as “includ[ing] work product” doctrine protection, Virginia Rule 4.4(b) presumably cannot be stretched to include other evidentiary protections apart from the attorney-client privilege and the work product doctrine – such as the common interest doctrine, spousal privilege, etc.

It is unclear whether waiver principles affect Virginia Rule 4.4(b)’s privilege analysis. Many of not most states require a litigant withholding a document or testimony on the basis of the evidentiary attorney-client privilege to establish that the privilege has not earlier been waived. In other words, the absence of waiver usually is an element of the privilege. And every court agrees that an existing evidentiary privilege can be waived through certain disclosure, and even without disclosure (such as when an implied waiver is triggered by an “advice of counsel” defense, etc.).

Virginia Rule 4.4(b)’s impact might differ depending on which of those principles apply. For instance, the receiving lawyer might receive an inadvertently sent memorandum from the litigation adversary’s lawyer to the litigation adversary. What

would be the effect of the litigation adversary having already released that memorandum to the press, submitted it to the government, etc. Is that inadvertently sent memorandum still “privileged,” in which case Virginia Rule 4.4(b) would apply? Or would the earlier disclosure render the memorandum no longer privileged – thus exempting the receiving lawyer from Virginia Rule 4.4(b)’s requirements.

As explained below, Virginia Rule 4.4 cmt. [3] allows receiving lawyers to “contest the sender’s claim of privilege.” That contest could focus on the inherent nature of the document, or on a waiver. Does such a “contest” necessarily focus only on the inadvertent sending that resulted in the receiving lawyer having received the document? Or would such a “contest” also include other possible earlier waivers? Receiving lawyers would be wise to rely on that “contest” process to challenge privilege protection based on a waiver – either waiver caused by the inadvertent sending, or by some earlier event.

Second, the receiving lawyer must take the specified steps if the lawyer “knows or reasonably should know that document or electronically stored information . . . was inadvertently sent.”

This second requisite receiving lawyers’ duty to take specified steps under Virginia Rule 4.4(b) focuses on logistics – rather than content (like the privilege standard, discussed above).

Such lawyers must take those specified steps only if the lawyer “knows or reasonably should know that the document or electronically stored information . . . was inadvertently sent” (emphasis added). In other words, receiving lawyers are not required to undertake the specified steps if they do not know or reasonably should know that they were not the intended recipient.

Various Virginia legal ethics opinions have assessed when a lawyer knows or reasonably should know that a document she received was “inadvertently sent.” One obvious indicia is an incorrect salutation. And the content might also be an obvious sign. The sending lawyer’s pessimistic memo describing legal and factual weaknesses presumably would not be intentionally sent to the adversary’s lawyer.

But the inadvertence standard is much more difficult to assess during a litigation document production. It might be nearly impossible for a receiving lawyer to determine whether she “knows or reasonably should know” that an arguably privileged document produced along with other obviously non-privileged documents was: (1) inadvertently included because the sending lawyer did not recognize the privilege protections; or (2) instead, was intentionally included because the sending lawyer realized that a privilege claim would be frivolous or a likely loser. Of course, one way for the receiving lawyer to know for sure in either scenario (or any other scenario) is to ask the sending lawyer whether he intended to include the arguably privileged document in the production.

Interestingly, Virginia Rule 4.4(b) does not address the interplay between privilege protection and inadvertent transmission or production. In other words, it is unclear what a receiving lawyer should do if she “knows or reasonably should know” that a produced document was “privileged” but does not “know[ ] or reasonably should know” that the document was produced “inadvertently.”

In that scenario, the receiving lawyer might be put in the untenable position of essentially conducting the sending lawyer’s privilege review. That would be unfair. But under Virginia Rule 4.4(b), the producing lawyer might simply transmit (or produce hard copies of) thousands of documents – announcing to the receiving lawyer that if there are

any privileged documents in those transmitted or produced documents, the sending lawyer has included them inadvertently. What does the receiving lawyer do in that situation? The receiving lawyer reviewing those documents might immediately know that some of them are privileged. Would the receiving lawyer then have to immediately notify the sending lawyer about each of those privileged documents, and terminate her review or use of them, etc.?

That seems to be her obligation, but such a rule would not make any sense. It would impose on the receiving lawyer the duty of careful review that many understandably contend should be imposed on the sending lawyer. In fact, that is one of the chief objections to Virginia Rule 4.4(b)'s approach. In a document review context, the sending lawyer could conceivably just dump documents into a production and then warn the receiving lawyer to notify the sending lawyer if the receiving lawyer “knows or reasonably should know” that some of the documents included in the production were protected by the attorney-client privilege or the work product protection. That seems inappropriate and risks obvious mischief by the sending lawyer.

Even in another scenario that does not involve any dumping of such documents, it arguably seems strange to impose on the receiving lawyer the duty to assess privilege protection or possible inadvertent transmission of any communication – especially from the adversary's lawyer. The adversary's lawyer obviously has the duty to protect her client's protected client confidential information (including privileged communications.) That sending lawyer clearly falls short of complying with that duty by inadvertently transmitting such protected client confidential information. It is her violation (probably negligence, but perhaps worse) that causes the receiving lawyer's dilemma. But Virginia

Rule 4.4(b) imposes on the receiving lawyer the duty to analyze each received communication (and each document included in a document review) to determine both its content and the circumstances of its receipt.

In contrast to ABA Model Rule 4.4(b) (discussed below), Virginia 4.4(b) seems to impose the duty on the wrong end of the communications.

Virginia Rule 4.4(b) then turns to the required steps receiving lawyers must take if this lawyer (1) “know[s] that the document is privileged and was inadvertently sent; or (2) “reasonably should know” that the document is privileged and was inadvertently sent.

Significantly, lawyers need not take any of the four steps unless they have the required level of knowledge. Thus, the receiving lawyer who does not have the required level of knowledge does not even have to alert the sender.

Receiving lawyers covered by Virginia Rule 4.4(b) must take four steps:

First, they “shall immediately terminate review . . . of the document or electronically stored information.”

Presumably, this termination must occur immediately upon the lawyer’s knowledge or “reasonably should know” mental state. For instance, a lawyer receiving an email whose salutation is the adversary party’s name presumably should stop there. In other scenarios, the lawyer may not reach that mental state until reading a few paragraphs. In the situation involving a privileged document included in a document production, the mental state may occur at any step along the review process.

Second, the receiving lawyer “shall immediately terminate . . . use of the document or electronically stored information.” Presumably, this impermissible “use” would include transmission to someone else for his or her review. But probably such impermissible

“use” could also involve the receiving lawyers’ reliance on the inadvertently transmitted document’s content that the receiving lawyer has already read.

“Use” of a document’s content involves fascinating issues. As explained above, the Virginia Rules (and the ABA Model Rules) inexplicably address the “use” of protected current client confidential information in a totally separate rule from that governing disclosure of such current client confidential information, Virginia Rule 1.6 (and parallel ABA Model Rule 1.6) address the disclosure scenario. Under Virginia Rule 1.8 (and parallel ABA Model Rule 1.8(b), lawyers have a very different duty to avoid “use” of protected current client confidential information than they do to avoid such information’s disclosure. Those limitations are discussed elsewhere, but the key concept is that lawyers’ “use” of that information can differ dramatically from those lawyers’ disclosure of the information.

A different analysis seems to apply in a scenario in which a lawyer receives an inadvertently transmitted document. Such a receiving lawyer must immediately “terminate review” of the document. That requirement might not make sense ethically, but at least it clearly defines what the receiving lawyer must do. A receiving lawyer who must “terminate . . . use of the document or electronically stored information” presumably may not send the document along to someone else (such as a client, co-counsel, etc.). If the term “use” did not also include “disclosure” of the document, the receiving lawyer would be free to simply transmit (“disclose”) that inadvertently sent document to someone else. If the lawyer sent it to her client, that client would not be governed by any of the lawyers’ ethics rules. So it seems clear that a prohibited “use” of the document includes its disclosure to others. Thus, Virginia Rule 4.4(b) which seem to include disclosure as a

subset of prohibited “use.” This distinguishes Virginia Rule 4.4(b) from the complicated and potentially confusing distinction between “disclosure” addressed in Virginia Rule 1.6 (which uses the synonymous word “reveal”) and the prohibited “use” addressed in Virginia Rule 1.8(b).

But perhaps most importantly, it is unclear how the prohibition on a receiving lawyer’s “use” of such inadvertently transmitted information applies. For example, the receiving lawyer recognizing a document’s privilege protection and inadvertent transmission only after reading a paragraph or two may not “use” those early paragraphs’ content in any way. What does that mean? It would be easy to prohibit the lawyer from disclosing the content of those paragraphs to anyone. But what if one of those early paragraphs identifies a key helpful witness that the lawyer was not previously aware of. Must the receiving lawyer try to forget the identity of that helpful witness? Does the receiving lawyer have to assess whether at some point in the litigation she would have thought of that helpful witness – in which case she can call or subpoena the witness? The same dilemma arises if one of those early paragraphs contains derogatorily helpful information about the adversary of which the lawyer was not previously aware. Can the lawyer “use” that damaging information when deposing the adversary? Or does that lawyer have to forego such questioning because she learned of the harmful information from the inadvertently transmitted privileged document. Does that lawyer have to consider whether she would have asked that sort of question anyway – because she always does when she deposes an adversary?

As another example, suppose that the receiving lawyer learned while reading a transmission or a privileged document before reaching Virginia Rule 4.4(b)’s “knows or

reasonably should know” standard about some previously unknown meeting at Dulles airport between the adversary’s agent and some foreign banker. Once the receiving lawyer becomes bound to following the Virginia Rule 4.4(b)’s prohibitions, what does the receiving lawyer do with that information? She must “immediately terminate . . . use of” that information. Presumably that would prohibit the lawyer from asking during depositions about the meeting, filing a document request seeking other documents relating to the meeting, propounding requests for admissions about the meeting, etc. But at what point can the lawyer implicitly “use” the information? For instance, can the receiving lawyer propound interrogatories, document requests or requests for admissions about “all meetings between the adversary or any of his agents and any foreigners at any locations in America”? Maybe the receiving lawyer was motivated by the content of the inadvertently transmitted document to think of asking for such information. But the receiving lawyer might have asked for such generic information in any event. How is the adversary to know?

All and all, it seems unfair to place such restrictions and require such mental gymnastics on a receiving lawyer who understandably read a few paragraphs of a privileged communication that the sending lawyer sent in violation of the sending lawyer’s Virginia Rule 1.6 duty to protect client confidences.

Third, a receiving lawyer bound by Virginia Rule 4.4(b) must “promptly notify the sender” of the receiving lawyer’s receipt of the inadvertently sent, privileged “document or electronically stored information.” The word “promptly” is not defined, but there is case law in legal ethics opinions to guide the receiving lawyer. The term “sender” presumably includes the lawyer or other third person who addressed the document, produced

documents in litigation, etc. As explained below, Virginia Rule 4.4 cmt. [2] explicitly disclaims Virginia Rule 4.4's application to lawyers who receive a document that has been "inappropriately obtained by the sending person." In that case, the "sender" isn't really the source of the document – just the transmitter of someone else's document that the "sender" inappropriately obtained. And in some situations the "sender" might not be identifiable. For instance, a lawyer might find some document left on the lawyer's proverbial door step in a brown envelope. In those situations, there is no "sender" whom the lawyer can notify. Presumably in those situations, lawyers would notify the presumed owner of the document. It is surprising that Virginia Rule 4.4(b) does not cover those documents – whose transmission implicates other issues.

Receiving lawyers' required notification obviously must comply with other ethics rules. For instance, under Virginia Rule 4.2, the receiving lawyer presumably could not send an ex parte notice to a sender whom the receiving lawyer "knows to be represented by another lawyer in the matter." Perhaps the receiving lawyer could argue that such a notice is exempted from the ex parte communication prohibition by Virginia Rule 4.2's "authorized by law" exception allowing such communications, even with a represented party. Receiving lawyers would be wise to err on the side of caution, and notify the sender's lawyer rather than the sender himself.

Fourth, a receiving lawyer bound by Virginia Rule 4.4(b) must "abide by the sender's instructions to return or destroy the document or electronically stored information." Interestingly, Virginia Rule 4.4 cmt. [3] (discussed below) recognizes a third option that would seem to violate Virginia Rule 4.4(b)'s requirement – sequestering such

a document until its privilege status can be determined. It is unusual for a Virginia Rule Comment to so plainly allow violation of a black letter Virginia Rule requirement.

**ABA Model Rule 4.4(b)** describes the identical scenario as that governed (in part) by Virginia Rule 4.4(b).

Like Virginia Rule 4.4(b), ABA Model Rule 4.4(b) applies to lawyers who receive documents or electronically stored information “relating to the representation of the lawyer’s client.” Thus, ABA Model Rule 4.4(b) uses the phrase “relating to the representation of the lawyer’s client” that is more in line with the ABA Model Rule 1.6(a) definition of protected client confidential information. As explained above, ABA Model Rule 1.6(a) defines as protected client confidential information “information relating to the representation of a client.” This contrasts with Virginia Rule 1.6(a)’s definition.

And like Virginia Rule 4.4(b), ABA Model Rule 4.4(b) triggers its requirement if the receiving lawyer “knows or reasonably should know” that the document or electronically stored information was “inadvertently sent.”

But ABA Model Rule 4.4(b) differs from Virginia Rule 4.4(b) in several highly significant ways.

As explained in detail below, Virginia Rule 4.4(b) applies to a smaller set of inadvertently transmitted documents (based on their content), but imposes a much more stringent duty on lawyers who receive such documents. Virginia Rule 4.4(b) triggers those stringent duties only if the documents are privileged (in contrast to ABA Model Rule 4.4(b)’s application to *all* documents, whether privileged or not). Virginia Rule 4.4(b) requires the receiving lawyers to notify the sender, immediately stop reading or using the inadvertently sent privileged documents, and abide by the sender’s instructions about

what to do with the inadvertently received privileged documents. ABA Model Rule 4.4(b) only requires the first of those steps.

First, in contrast to Virginia Rule 4.4(b), ABA Model Rule 4.4(b) applies to inadvertently transmitted documents or electronically stored information that are not privileged. To this extent, ABA Model Rule 4.4(b) is much broader than Virginia Rule 4.4(B). Under ABA Model Rule 4.4(b) a lawyer receiving an obviously inadvertently sent lunch menu for the adversary's deposition preparation session with a witness would be obligated to comply with ABA Model Rule 4.4(b). That document obviously isn't privileged, but it clearly "relat[es] to the representation of the lawyer's client" – to the extent that any of the adversary's documents do so. Thus, under ABA Model Rule 4.4(b), such a receiving lawyer must "promptly notify the sender" if the lawyer receives even an innocent non-protected inadvertently sent document.

Second, and perhaps more significantly, in contrast to Virginia Rule 4.4(b), ABA Model Rule 4.4(b) only requires the receiving lawyer to "promptly notify the sender." Thus, ABA Model Rule 4.4(b) does not require the receiving lawyer to "immediately terminate review or use of the document or electronically stored information . . . and abide by the sender's instructions to return or destroy the document or electronically stored information.

This is an enormously important difference. ABA Model Rule 4.4(b) rejects the duty imposed on the receiving lawyer by Virginia Rule 4.4(b) and other similar state ethics rules. The ABA adopted that Virginia-type duty (although always applying it even to non-privileged inadvertently sent documents) from 1992 until 2002. But in 2002 the ABA reversed course, and returned to its pre-1992 approach – placing the burden on the

sending lawyer and not on the receiving lawyer. Today about one-quarter to one-third of the states adopt the Virginia approach, and the rest of them follow the ABA Model Rule approach.

Among other things, the ABA Model approach seems somewhat inconsistent with lawyers' laudable desire to be professional – meaning courteous and civil. It might seem fundamentally unfair to take advantage of an adversary's mistake – which could be egregious. But lawyers frequently must do that. For instance, it seems clear that a lawyer who knows that her adversary's lawyer is about to miss some case-dispositive appellate deadline (and therefore lose the chance to appeal, clearly committing malpractice) must stay silent – unless the lawyer's client consents to her warning the adversary's lawyer of the impending disastrous mistake.

Lawyers might be inclined to return unread or destroy inadvertently sent privileged document – because that lawyer would hope for a similar favor in return if he ever made a similar mistake. That totally understandable impulse seems inappropriate under the ethics rules. Lawyers cannot favor their own interests at the expense of their client's interests – because the lawyer might make some mistake in the future and would hope to be relieved of its consequences.

Lawyers must also ignore whatever reputational harm they might receive in the legal community or even outside that community by taking advantage of an adversary's obviously mistakenly sent important damaging document. That worry also inappropriately focuses on the lawyer's own interests at the expense of the lawyer's client's interests in the matter.

But to be sure, there is an appeal to an old-fashioned “gentlemen don’t read gentlemen’s mail” approach. In that sense, Virginia lawyers are fortunate because they are ethically compelled to act in that seemingly generous and professional way. But it is difficult to justify that in light of lawyers’ duty to diligently represent their clients.

## Comment

### Virginia Rule 4.4 Comment [1]

Virginia Rule 4.4(c)(1) addresses lawyers' responsibilities to balance their duties to their clients and their responsibilities to others.

Virginia Rule 4.4 cmt. [1] first understandably explains that a lawyer's responsibility to her client "requires a lawyer to subordinate the interests of others to those of the client." But the Virginia Rule Comment then notes that such responsibility "does not imply that a lawyer may disregard the rights of third persons."

Virginia Rule 4.4 cmt. [1] concludes with a frustrating disclaimer that "[i]t is impractical to catalogue all a third person's such rights" – but then mentions that such rights include: (1) "legal restrictions on methods of obtaining evidence from third persons;" and (2) "unwarranted intrusions into privileged relationships, such as the client-lawyer relationship."

As a linguistic matter, Virginia Rule 4.4 cmt. [1]'s use of the phrase "client-lawyer relationship" is interesting. That is yet another variation of the Virginia Rules' description of such a relationship. Virginia Rule 1.16(e) uses the phrase "lawyer-client relationship." Virginia Rule 4.2 cmt. [8] uses the term "client-attorney relationship," and the very next Virginia Rule 4.2 cmt. [9] uses the different phrase "attorney-client relationship." Presumably all of those phrases are intended to be synonymous.

Although Virginia Rule 4.4 cmt. [1] does not identify the source of such third persons' "rights," they presumably focus on Virginia Rule 4.4(a)'s implicit recognition of "a third person[s]" rights to be free from the misconduct identified in Virginia Rule 4.4(a). Presumably the first such "right" (based on "legal restrictions on methods of obtaining

evidence from third persons”) refers to Virginia Rule 4.4(a). It would not seem fair to accuse lawyer of “us[ing] methods of obtaining evidence that violate the legal rights of such a [third] person” because the lawyer opened an email from the adversary’s lawyer or began to read a document in a big document production, etc. And the same seems to be true of accusing the receiving lawyer of violating the other “right” (freedom from “unwarranted intrusion[ ] into privileged relationships, such as the client-lawyer relationship”) by taking such simple steps as reading an e-mail or reviewing a produced document.

It is far easier to accuse the sending lawyer of violating her various duties of competence, diligence and confidentiality. Perhaps Virginia Rule 4.4 cmt. [1] did not “catalogue” such third persons’ “rights” because it is difficult to find any of those in the ethics rules, not because it would be “impractical” to list them.

**ABA Model Rule 4.4 cmt. [1]** contains the identical language.

### **Virginia Rule 4.4 Comment [2]**

Virginia Rule 4.4 cmt. [2] addresses lawyers’ obligations under Virginia Rule 4.4(b) in situations involving inadvertently sent privileged documents or electronically stored information.

Virginia Rule 4.4 cmt. [2] starts with an acknowledgement “that lawyers sometimes receive a document or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers.” That sentence helpfully provides some useful guidance. First, it equates the Virginia Rule 4.4(b) black letter term “inadvertently” to the more common term “mistakenly.” Second, it confirms that the next black letter

Virginia Rule 4.4(b) phrase “inadvertently sent” includes document productions, not just transmission of contemporaneous emails or other documents.

Virginia Rule 4.4 cmt. [2] next provides further guidance on the term “inadvertently sent.” The Virginia Rule Comment explains that documents or electronically stored information meet that standard “when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted.” That makes sense.

Of course, those scenarios are only a small subset of the scenarios covered by Virginia Rule 4.4(b). As explained above, on its face Virginia Rule 4.4(b) covers inadvertently sent documents or electronically stored information transmitted by any third party – even a friendly co-defendant or a transactional ally. As further explained above, those scenarios normally do not cause any problems, but they are nevertheless covered by Virginia Rule 4.4(b).

Virginia Rule 4.4 cmt. [2] then repeats the two prerequisites for lawyers’ obligation to take some steps under Virginia Rule 4.4(b). The Virginia Rule Comment adds a brief reference to the rationale for the immediate notification requirement: “in order to permit that person to take protective measures.”

That language makes sense in ABA Model Rule 4.4 cmt. [2] – which only requires the receiving lawyer to notify the sending person of the inadvertent transmission (of privileged or non-privileged documents). As explained above (and below), ABA Model Rule 4.4(b) puts the burden on the sending lawyer to take appropriate remedial steps upon receiving such a notification.

But that language seems inappropriate in Virginia Rule 4.4 cmt. [2] – because Virginia Rule 4.4(b) differs so dramatically from ABA Model Rule 4.4(b)'s much more limited duty. Virginia Rule 4.4(b) requires the receiving lawyer to take protective actions – in addition to notifying the sender. The receiving lawyer must “immediately terminate review or use of the document or electronically stored information.” That essentially freezes the situation until the receiving lawyer notifies the sender and waits for the sender to provide instructions about whether the receiving lawyer should “return or destroy the document or electronically stored information.” But perhaps the “protective measures” the sending lawyer could seek might include some determination of privilege protection, some additional prohibition imposed on the receiving lawyer, etc.

Virginia Rule 4.4 cmt. [2] then addresses the first of the two receiving lawyers' triggering knowledge or “reasonably should know” constructive knowledge: the transmission's inadvertence.

That Virginia Rule Comment sentence starts with an odd phrase: “[r]egardless of whether it is obvious that the document or electronically stored information was inadvertently sent.” That introduction seems strange, because if it is “obvious” that such a document was inadvertently sent, Virginia Rule 4.4(b) immediately triggers the receiving lawyer's responsibilities. But after that introductory clause, Virginia Rule 4.4 cmt. [2] then makes the obvious point (although stated poorly) that “the receiving lawyer knows or reasonably should know that the document or information was inadvertently sent if the sender promptly notifies the receiving lawyer of the mistake.” That seems obvious. Of course, in that scenario the receiving lawyer “knows” of the inadvertence, so there is no need to use the phrase “or reasonably should know.” But either way, the receiving lawyer

must comply with Virginia Rule 4.4(b)'s responsibilities. But that scenario probably represents a tiny subset of the situations covered by Virginia Rule 4.4(b). It involves the sending lawyer (or other person) immediately recognizing his mistake. That might happen in the case of emails, but seems very unlikely in the context of document productions.

Virginia Rule 4.4 cmt. [2] next acknowledges that Virginia Rule 4.4(b) does not apply “[i]f the receiving lawyer lacks actual or constructive knowledge” that the document was inadvertently sent. Presumably the term “constructive knowledge” comes from what the receiving lawyer “reasonably should know.” But one would have thought that the Virginia Rule Comment would use the black letter Rule’s phrase “knows or reasonably should know.” The term “constructive knowledge” might not be an exact match with the “reasonably should know” standard.

Significantly, a receiving lawyer without the required level of knowledge is not required to take any of the specified steps. For example, a receiving lawyer who strongly suspects but does not “know” or “reasonably should know” that a communication or document she just received was both inadvertently sent and privileged does not have to alert the sender.

Virginia Rule 4.4 cmt. [2] then turns to the second of two receiving lawyers’ triggering knowledge (or “reasonably should know” constructive knowledge): that the inadvertently transmitted document is privileged. The Virginia Rule Comment comes at that issue obliquely, explaining that “the lawyer may know that the document or electronically stored information was inadvertently sent but not that it is privileged” – in “that case, the receiving lawyer has not duty under this rule.”

That is an incorrect statement of black letter Virginia Rule 4.4(b). Virginia Rule 4.4(b) requires a receiving lawyer to take the specified steps even if the lawyer does not “know” that the pertinent document is “privileged.” The receiving lawyer must take the specified steps if he either: (1) “know[s]” that the inadvertently document is privileged; or (2) “reasonably should know,” that the inadvertently transmitted document is privileged. It is strange that the Virginia Rule Comment would omit this “reasonably should know” standard as it relates to the privilege issue. The immediately preceding sentence acknowledges that standard (although using the possibly inapt “constructive knowledge” standard) as it relates to the inadvertence issue. Of course, the black letter Virginia Rule’s “reasonably should know” standard trumps the Virginia Rule Comment’s articulation lacking that alternative standard.

Under Virginia Rule 4.4(b), the receiving lawyer must following the prescribed steps when the receiving lawyer: (1) “knows” that the document was inadvertently sent or (2) “reasonably should know” that the document was inadvertently sent” and either: (3) “knows” that the document is privileged; or (4) “reasonably should know” that the document is privileged.

Virginia Rule 4.4 cmt. [2] next describes a scenario that Virginia Rule 4.4 does not cover. The Virginia Rule Comment explains that Virginia Rule 4.4 “does not address” the scenario in which a lawyer receives a document or electronically stored information “that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person.” That presumably covers documents intentionally sent by such a person. Perhaps the best example is a document purloined by a disloyal employee “whistleblower,” and intentionally sent to the employer’s adversary’s lawyer.

Virginia Rule 4.4(b)'s inapplicability to that scenario does not come from the purloined nature of the document – it comes from the thief's intentional rather than unintentional transmission. Presumably Virginia Rule 4.4(b) does apply to the inadvertent transmission of such a purloined document to an improper recipient. But that scenario seems far-fetched.

Virginia Rule 4.4 cmt. [2] then turns (without what would have been a helpful paragraph break) to a definition of “document or electronically stored information.” The Virginia Rule Comment helpfully notes that the definition includes “paper documents” and “email.” Importantly, the definition also includes “metadata.”

Virginia Rule 4.4 cmt. [2] concludes with an explanation that lawyers receiving an electronic document containing metadata must comply with Virginia Rule 4.4(b) “only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer and that it contains privileged information.” This conclusion properly acknowledges that the “reasonably should know” standard applies to the privilege analysis – in contrast to Virginia Rule 4.4 cmt. [2]'s earlier sentence, discussed above. As explained elsewhere, the phrase “privileged information” is not technically correct. Information is not privileged – communications are privileged. But presumably lawyers would consider those terms synonymous.

The issue of metadata has split the states nearly 50-50 on the issue of whether a receiving lawyer may search for metadata (referred to as “mining”) in electronically received documents. In essence, metadata is invisible electronic data that accompanies the visible document, but cannot be instantly seen by the receiving lawyer. Instead, the receiving lawyer has to take some additional steps to find the electronic data that

accompanies the visible electronic document. That might be as simple as right-clicking, or it might be as complex as hiring a technically proficient consultant to find the invisible accompanying electronic data. Interestingly, many if not most of the states that prohibit such metadata mining have rejected the Virginia Rule 4.4(b) approach – and instead adopted the ABA Model Rule 4.4(b) approach. Those states' policy does not make much sense. Metadata is either intentionally included with the visible electronic document or unintentionally included with it. In either scenario, ABA Model Rule 4.4(b) does not prohibit receiving lawyers from looking for it. At most, it might require receiving lawyers to notify the sending person of the metadata's transmission.

Virginia Rule 4.4 cmt. [2]'s inclusion of metadata along with the visible electronically transmitted communication confirms Virginia's consistent approach to metadata and to visible documents. But difficult as it would be to determine if documents (electronic or not) were inadvertently sent, it could be even more difficult to determine if invisible electronic data accompanying that document was inadvertently sent. And the problem of determining if such metadata is "privileged" is even more difficult. Unless the receiving lawyer knows who created the metadata, she would have difficulty determining if it deserves privilege protection. This difficulty presumably means that receiving lawyer generally will not "know" or "reasonably should know" that the metadata was both inadvertently sent and was privileged (both of which are required to trigger the receiving lawyer's Virginia Rule 4.4(b) duties.

**ABA Model Rule 4.2 cmt. [2]** begins with a description of the same scenario as in Virginia Rule 4.4 cmt. [2].

Like the Virginia Rule Comment, ABA Model Rule 4.4 cmt. [2] describes a scenario where “a document or electronically stored information [is] mistakenly sent or produced by opposing parties or their lawyers.” As explained above in connection with Virginia Rule 4.4 cmt. [2], that is a subset of ABA Model Rule 4.4(b)’s reach – which covers inadvertently transmitted documents even from friendly co-defendants, transactional allies, a court, a stranger, or anyone else.

ABA Model Rule 4.2 cmt. [2] contains the same language as Virginia Rule 4.4 cmt. [2] describing examples of a document’s or electronically stored information’s inadvertent sending: “when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted.”

ABA Model Rule 4.4 cmt. [2] explains that the receiving lawyer’s duty in such a scenario is limited to prompt notification to the sender, “in order to permit that person to take protective measures.” Of course, that properly describes the much more limited receiving lawyer’s responsibility – compared to Virginia Rule 4.4(b)’s broader duties in that situation.

Significantly, ABA Model Rule 4.4 cmt. [2] then explains that it is a “matter of law beyond the scope of these Rules” whether: (1) the receiving lawyer “is required to take additional steps, such as returning the document or electronically stored information;” and (2) “the privileged status of a document or electronically stored information has been waived.” Thus, ABA Model Rule 4.4(b) does not prohibit the lawyer from reading, using or retaining documents or other information the lawyer knows or reasonably should know was inadvertently sent to her.

It is less surprising that the privilege waiver issue would be governed by other law. In most states, and in federal courts, the waiver analysis usually focuses on whether the sender (1) was careful in transmitting documents or preparing for a document production; (2) in a document production context, carefully followed the privilege review procedures; (3) how many documents were inadvertently transmitted or produced; (4) how quickly the sending lawyer or other person sought to retrieve the inadvertently transmitted or produced documents.

As mentioned above, this approach differs from the ABA Model Rule approach from 1992 until 2002 – which required receiving lawyers to stop reading such documents, and return them or otherwise follow the sender’s direction. The current ABA Model Rule 4.4(b) approach also differs from some states’ approach, which still follow that older ABA Model Rule standard – including Virginia.

ABA Model Rule 4.4 cmt. [2] then addresses a scenario in which the “lawyer who receives a document or electronically stored information . . . knows or reasonably should know [that the “document or electronically stored information”] may have been inappropriately obtained by the sending person.” ABA Model Rule 4.4 cmt. [2] follows the Virginia Rule 4.4 cmt. [2] approach in explaining that ABA Model Rule 4.4(b) does not govern such scenarios.

ABA Model Rule 4.4 cmt. [2] concludes by defining “metadata” as within the scope of ABA Model Rule 4.4(b) – using language identical to Virginia Rule 4.4 cmt. [2]. But of course under ABA Model Rule 4.4(b), lawyers receiving such metadata must comply with the very limited notification requirement under ABA Model Rule 4.4(b) only if they know or reasonably should know that metadata “was inadvertently sent to the receiving lawyer”

(and not including the additional privilege condition contained in Virginia Rule 4.4(b) and mentioned in Virginia Rule 4.4 cmt. [2]).

### **Virginia Rule 4.4 Comment [3]**

Virginia Rule 4.4 cmt. [3] addresses Virginia Rule 4.4(b)'s additional responsibilities imposed on receiving lawyers beyond just notifying the sender of the inadvertent transmission. As explained above (and below), ABA Model Rule 4.4(b) does not impose those additional requirements.

Virginia Rule 4.4 cmt. [3] begins by noting that “[p]reservation of lawyer-client confidences is . . . a vital aspect of the legal system.” That Virginia Rule Comment could refer to the ethics confidentiality duty, the attorney-client privilege evidentiary protection, or both. Virginia Rule 1.6 cmt. [3] explains that “[t]he principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics.” As explained above, on its face that term “privileged” does not include work product, which comes from an entirely separate evidentiary protection. The work product doctrine clearly extends evidentiary protection beyond lawyer-client confidences. The work product doctrine can cover clients’, lawyers’, or even third parties’ documents that are not confidential – but instead are interviews with accident witnesses, pictures of accident scenes, collection of intrinsically unprotected things such as documents obtained from third parties, etc. So Virginia Rule 4.4 cmt. [3]’s use of the phrase “lawyer-client confidences” might mean that the term “privilege” in black letter Virginia Rule 4.4(b) intentionally excludes work product. But as explained above, Virginia Rule 1.6 cmt. [3]’s description of the work product doctrine as “included” in attorney-client

privilege should prompt careful Virginia lawyers to treat inadvertently transmitted work product doctrine-protected documents in the same way as they treat inadvertently transmitted privileged documents.

After noting this legally significant protection, Virginia Rule 4.4 cmt. [3] relies on that importance to note “that it is appropriate to require that lawyers not take advantage of a mistake or inadvertent disclosure by opposing counsel to gain an undue advantage.” (referring to Virginia LEO 1702.) Again, this describes a scenario that is only a subset of scenarios governed by Virginia Rule 4.4(b) – which is not limited to documents inadvertently transmitted or produced by “opposing counsel” or opposing parties.

Virginia Rule 4.4 cmt. [3] explains that in that scenario, receiving lawyers are “prohibited from informing the lawyer’s client of relevant, though inadvertently disclosed, information.” That sentence provides some guidance as to the meaning of Virginia Rule 4.4(b)’s prohibition on the receiving lawyer’s “use” of inadvertently transmitted privileged documents. As explained above, such “use” presumably includes disclosure, in contrast to other Virginia Rules’ distinction between disclosure and use. Of course, presumably Virginia Rule 4.4(b)’s prohibition would prohibit the receiving lawyer from disclosing the inadvertently transmitted privileged document to anyone, not just the lawyer’s client. And the prohibition would cover even irrelevant inadvertently transmitted privileged documents. Virginia Rule 4.4(b)’s prohibition also presumably covers information contained in the inadvertently sent document, not just the inadvertently sent document itself.

Virginia Rule 4.4 cmt. [3] also provides an example of receiving lawyers’ conduct – explaining that a receiving lawyer “is prevented from using information that is of great

significance to the client’s case.” That is a good example, but of course Virginia Rule 4.4(b)’s prohibition applies even to information that is not “of great significance to the client’s case.”

Virginia Rule 4.4 cmt. [3] next notes that Virginia Rule 4.4(b)’s duties “override[ ] the lawyer’s communication duty under [Virginia] Rule 1.4.” Virginia Rule 1.4 generally requires lawyers to keep a client “reasonably informed about the status of a matter” (Virginia Rule 1.4(a)), and “inform the client of facts pertinent to the matter” (Virginia Rule 1.4(c), etc. Virginia Rule 4.4(b) relieves a receiving lawyer of such a duty in a situation involving inadvertently sent privileged information.

Virginia Rule 4.4 cmt. [3] then refers back to Virginia Rule 4.4 cmt. [1] – stating that “diligent representation of the client’s interests does not authorize or warrant intrusions into privileged communications.” The term “intrusions” seems somewhat inapt, because the receiving lawyer has not affirmatively “intruded” into anyone’s privileged communications. But perhaps the receiving lawyer’s reading of inadvertently transmitted privileged communications could fairly be seen as such an intrusion. The use of “privileged communications” again fails to mention work product doctrine-protected documents.

Virginia Rule 4.4 cmt. [3] then turns to logistics. The Virginia Rule Comment first assures that the prohibited “use” of inadvertently sent privileged communications does not include the receiving lawyer’s “use” of a process available “[w]here applicable discovery rules, agreements, or other law permit the recipient to contest the sender’s claim of privilege.” In that scenario, “the recipient may sequester the document or information pending resolution of that process.”

This is an odd way of permitting receiving lawyers to undertake that obviously fair and understandable process. One might have thought that such sequestration would be identified as an exception to the “use” prohibition. That would make more sense than contending that the term “use” does not apply to what even the Virginia Rule Comment itself describes just eight words earlier as “use of such a process” to challenge the sender’s privilege protection.

In any event, it is unclear how that sequestration and privilege-challenging process would work.

Under Virginia Rule 4.4(b), the receiving lawyer must immediately stop reading an inadvertently sent document once the lawyer “knows or reasonably should know” that: (1) the document “is privileged” and (2) was inadvertently sent. Black letter Virginia Rule 4.4(b) does not trigger that obligation when the lawyer “knows or reasonably should know” that the document might be privileged, but only if it “is privileged” (emphasis added). So if the receiving lawyer “knows or reasonably should know” that the document “is privileged,” how can the receiving lawyer “contest the sender’s claim of privilege”?

Perhaps the receiving lawyer’s appropriate challenge to the sender’s privilege does not go to the document’s content as a privileged communication, but rather to the sender’s waiver of the privilege through the inadvertent transmission or production. That may be a technical – but important – distinction. In most states (presumably including Virginia), the privilege’s owner must establish all the elements of a privilege – which includes absence of waiver. So technically an inadvertent production not only waives any otherwise applicable privilege, it might abort the document’s original privilege protection.

But there still seems to be a mismatch between black letter Virginia Rule 4.4(b) and Virginia Rule 4.4 cmt. [3]’s acknowledgement that recipients can “contest the sender’s claim of privilege.” Virginia Rule 4.4(b) triggers the receiving lawyer’s responsibilities only when the receiving lawyer “knows or reasonably should know” that the privilege protects the document. That presumably ends the question of whether the privilege applies in the affirmative. If the receiving lawyer thinks that the privilege does not apply (either based on the document’s content or on the inadvertent transmission’s effect of aborting or waiving the underlying privilege), then the receiving lawyer has no obligation at all – and does not need to contest the sender’s privilege claim.

The same impediment would seem to block the receiving lawyer’s “contest” of the sender’s privilege based on the sender’s waiver of that privilege through the inadvertent transmission. But as with the privilege issue, the receiving lawyer must comply with Virginia 4.4(b)’s requirement only if the receiving lawyer either “knows or reasonably should know” that the document or electronically stored information “was inadvertently sent.” That is the moment when the receiving lawyer must stop reading the document.

It is uncertain which knowledge or “reasonably should know” moment will occur first to the receiving lawyer – its inadvertent transmission or its privilege content. It is only when the receiving lawyer meets the latter of those two elements that the lawyer must stop reading the document and take the required Virginia Rule 4.4(b) steps. It seems likely that the inadvertence knowledge (or “reasonably should know” standard) requirement will hit first. That might be obvious from the salutation, or from the document’s first few sentences. Because privileged protection depends on content, it seems likely that the privilege standard will hit second. But once the receiving lawyer

satisfies both the privilege and the inadvertent transmission knowledge requirement, her review must stop. After that, how can the receiving lawyer challenge either the sender's privilege assertion or challenge sender's inadvertent transmission assertion? A receiving lawyer will already have either known or had "constructive knowledge" that the document is privileged and was inadvertently transmitted.

Apart from this mismatch, it is unclear how the "contest" process would work logistically. If the recipient "may sequester the document or information pending resolution of that process," how does the receiving lawyer challenge the sender's privilege claim – at least a privilege claim based on the document's content? Presumably, the receiving lawyer can only use what little privilege content the receiving lawyer read before complying with Virginia Rule 4.4(b)'s requirement to stop reading it. If Virginia Rule 4.4(b) and Virginia Rule 4.4 cmt. [3] allow the receiving lawyer to read the rest of the inadvertently transmitted privileged document as part of the contest of the sender's privilege, that is not at all clear. Perhaps the receiving lawyer may not read the document herself, but may invite the court to review the sequestered document *in camera* to determine if the content of the document deserves privilege protection.

Virginia Rule 4.4 cmt. [3] concludes with a reminder that receiving lawyers "must abide by the sender's instructions to return or destroy the document" when there is no opportunity for sequestration – as "[w]hen there is no such applicable law [presumably allowing the receiving lawyer to contest the sender's privilege], such as in a matter that does not involve litigation" (citing Virginia LEO 1871 (7/24/13)). That seems appropriate, although it does not include the possibility that even in a non-litigation matter, a receiving lawyer might contest the sender's privilege claim and initiate a proceeding to seek judicial

determination of such a privilege claim. Perhaps that seems like such an unlikely scenario that Virginia Rule 4.4 cmt. [3] did not consider it.

**ABA Model Rule 4.4** does not have a similar Comment, because ABA Model Rule 4.4(b) imposes duties on lawyers who receive inadvertently transmitted documents even if they are not privileged. So privilege protection does not enter into the receiving lawyer's analysis of her obligations.

### **ABA Model Rule 4.4 Comment [3]**

Virginia did not ABA Model Rule 4.4 cmt. [3]. This is obviously because Virginia Rule 4.4(b)'s responsibilities differ dramatically from ABA Model Rule 4.4(b)'s much more limited responsibilities imposed on lawyers who receive inadvertently transmitted communications.

ABA Model Rule 4.4 cmt. [3] addresses lawyer's discretion under ABA Model Rule 4.4(b).

ABA Model Rule 4.4 cmt. [3] first explains that “[s]ome lawyers may choose to return a document or delete electronically stored information unread (emphasis added).” The ABA Model Rule Comment then provides a remarkable example: “when the lawyer learns before receiving it that it was inadvertently sent.” In other words, even a lawyer notified by the sender or otherwise learning that the lawyer is about to receive a document or electronically stored information not meant for her but instead sent inadvertently, the lawyer “may choose” to return the document unread. Presumably a lawyer may likewise “choose” not to return it unread- but may read it and “choose” to rely on it. Such lawyers presumably would have a duty under ABA Model Rule 4.4(b) to notify the sender that the lawyer has received the inadvertently sent document or electronically stored information

– although presumably the lawyer would not even have that duty if the lawyer does not “know or reasonably should know” before receiving the document that it was “inadvertently sent.”

Most lawyers would never even consider opening and reading an email or an overnight pouch if they knew beforehand that it had been inadvertently sent to them. Even if those receiving lawyers thought to rely on ABA Model Rule 4.4 cmt. [3]’s permissive language, they presumably would be deterred by the possibility that a court would sanction them for doing so – even if their doing so would not violate the ethics rules.

ABA Model Rule 4.4 cmt. [3] then provides a glimmer of discretion to lawyers who might feel unprofessional or otherwise awkward by refraining from reading and relying on inadvertently sent documents or electronically stored information. The ABA Model Rule Comment explains that “the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer” – in situations “[w]here a lawyer is not required by applicable law” to return or delete such document or information. This should come as a relief to receiving lawyers who would feel inspired by civility or courtesy concerns to refrain from reading and relying on such inadvertently sent documents (especially that they know before receiving them that they were inadvertently sent).

But even then, receiving lawyers cannot be assured that they always have such discretion under ABA Model Rule 4.4 cmt. [3] – because that ABA Model Rule Comment says that such a decision is only “ordinarily reserved” to the lawyer. Receiving lawyers must assess whether the pertinent jurisdiction’s ethics rules reserve that discretion to them.

ABA Model Rule 4.4 cmt. [3] refers to ABA Model Rule 1.2 and ABA Model Rule 1.4. ABA Model Rule 1.2(a) addresses the scope of a representation and allocation of authority between clients and lawyers. Perhaps this reference is intended to focus on lawyers' primary decision-making (after consulting with the client) "as to the means by which [the client-selected objectives] are to be pursued." Interestingly, only one bar seems to have required lawyers who have received an inadvertently transmitted document to consult with their client about what they should do. It is easy to predict the client instructing the lawyer to read and rely on the inadvertently transmitted document – even if it is privileged (and perhaps even more vigorously if it is privileged). The client is not likely to give much weight to the receiving lawyer's plea to the contrary, based on that receiving lawyer's worry that he might make the same mistake and would in that situation appreciate the other side's forbearance. The client is likely to respond to her lawyer who has received such an inadvertently transmitted document that if he makes a mistake the client will sue him for malpractice – and then repeat her instruction to have her lawyer read and rely on the inadvertently transmitted document her lawyer received.

ABA Model Rule 1.4 focuses on lawyers' duty to communicate with their clients. That reference also presumably either requires or encourages receiving lawyers to advise their clients that they received an inadvertently transmitted communication that might assist in the lawyer's representation of the client. It would seem that such communications would yield the same result – the client is not likely to be sympathetic to the lawyer's desire to be "professional," and instead instruct the lawyer to diligently represent the client and take advantage of ABA Model Rule 4.4(b)'s ethical freedom to review and rely on such inadvertently transmitted documents.

# RULE 5.1

## Responsibilities Of Partners And Supervisory Lawyers

### Rule

#### Virginia Rule 5.1(a)

Virginia Rule 5.1(a) addresses institutional managerial lawyers' duty to assure their institutional lawyer's ethics rules compliance.

Virginia Rule 5.1(a) first defines such institutional managerial lawyers as: (1) "partner(s) in a law firm"; (2) "lawyer[s] who individually or together with other lawyers possess[ ] managerial authority."

The Virginia Rules Terminology section defines "partner" as: "a member of a partnership or shareholder or member of a professional entity, public or private, organized to deliver legal services, or a legal department of a corporation or other organization."

The Virginia Rules Terminology section defines "law firm" as a "professional entity, public or private, organized to deliver legal services, or a legal department of a corporation or other organization." That definition in turn refers to a Comment in Virginia Rule 1.10 – without specifying which one. Virginia Rule 1.10 addresses imputation of an individually disqualified lawyer to other lawyers in a "firm." In one of the mismatches between the Virginia Rules and the ABA Model Rules, Virginia Rule 1.10 cmt. [1] – [1d] essentially parallels ABA Model Rule Comments found in an entirely different place within the ABA Model Rules – ABA Model Rule 1.0 cmt. [2] – [4]. This document summarizes, analyzes

and compares Virginia Rule 1.10's Comments in its analysis of that Rule, and ABA Model Rule 1.0's provisions in its analysis of that ABA Model Rule.

Virginia Rule 1.10 cmt. [1] unsurprisingly notes that “[w]hether two or more lawyers constitute a firm as defined in the [Virginia] Terminology section can depend on the specific facts.” Virginia Rule 1.10 cmt. [1] explains that lawyers “who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm.” But lawyers who hold themselves out as a firm or “conduct themselves as a firm” would be regarded as a “firm.” Notably, “associated lawyers” might or might not be considered a “firm,” depending on: (1) “[t]he terms of any formal agreement” between them; and (2) “the fact that they have mutual access to information concerning the clients they serve.” The “associated” status is significant for imputation purposes and other analysis.

Significantly, Virginia Rule 1.10 cmt. [1a] explains that “there is ordinarily no question that the members of [“the law department of an organization”] constitute a firm within the meaning [Virginia] Rules of Professional Conduct.”

The bottom line is that the term “partner” and the term “law firm” used in Virginia Rule 5.1(a) include far more than traditional partners in a traditional law firm. Instead, the terms (and therefore Virginia Rule 5.1(a)'s reach) cover lawyers and groups of lawyers in private practice, in-house corporate practice, the government, and in many other settings.

Virginia Rule 5.1(a) also defines lawyers other than “partners” in a law firm. Virginia Rule 5.1(a) thus describes the ethics responsibility of “a lawyer who individually or together with other lawyers possess managerial authority.” That phrase presumably

denotes lawyers in any of those settings who have some institutional supervisory authority over other lawyers.

Virginia Rule 5.1(a) next describes both types of such institutional managerial lawyers' duties.

Virginia Rule 5.1(a) requires that all of those lawyers in all of those settings “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 [Virginia] Rules of Professional Conduct” (emphasis added). This duty involves institutional-type “measures,” in contrast to the more direct supervisory duty described below (in Virginia Rule 5.1(b)). In other words, this duty presumably would include establishing systems to check for conflicts, to educate lawyers about the ethics rules, to measure compliance of the firms' lawyers with their ethics responsibilities, to encourage lawyers to report their colleagues' lapses, to punish firm lawyers for any lapses, etc.

It certainly makes sense for institutional managerial lawyers to take such reasonable steps in connection with their institution's lawyers' professional conduct – both in their representational role and in their non-representational role. But the Virginia ethics Rules also govern (to a much lesser extent) lawyers' non-representational and non-professional conduct. For instance, Virginia Rule 8.4(b) bluntly states that “[i]t is professional misconduct for a lawyer to . . . commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law.” Virginia Rule 8.4(c) similarly states that “[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law.” Virginia Rule 8.4 cmt. [2] provides

guidance about misconduct. For instance, Virginia Rule 8.4 cmt. [2] mentions “willful failure to file an income tax return.” Virginia Rule 8.4 cmt. [2]’s next sentence seems to include in a similar list of professionally punishable conduct: “offenses concerning some matters of personal morality, such as adultery and comparable offenses” (although it would seem more logical to exclude those from the misdeeds subjecting lawyers to possible professional discipline). Regardless of that issue, requiring institutional managerial lawyers to take reasonable steps assuring that their institution’s lawyers comply with such Virginia Rule 8.4 provisions presumably requires them to check on their colleagues’ income tax filings, etc. Another example that state bars have addressed involves domestic violence. Virginia Rule 5.1(a)’s requirements would seem to require institutional managerial lawyers’ reasonable steps to deter their institution’s lawyers from engaging in such misconduct, among many other non-professional misdeeds.

The term “reasonable” appears twice in this description of such institutional managerial lawyers’ duty. This emphasis on institutional managerial lawyers’ duty highlights the flexibility they have when overseeing other lawyers.

Thus, their colleagues’ ethics lapses do not automatically result in such institutional managerial lawyers’ responsibility for those lapses. As long as the institutional managerial lawyers make “reasonable” efforts, they will have fulfilled their ethical duty.

But institutional managerial lawyers’ failure to comply with their institutional educational and compliance obligations can result in those institutional managerial lawyers’ discipline. Theoretically, they could be disciplined even if no other lawyer in the firm violates the ethics rules. That seems unlikely, but possible – because such institutional managerial lawyers’ duty is to put those institutional steps in place, and failure

to do so constitutes a direct ethics violation rather than triggering the derivative responsibility for their lawyers' ethics violation (which is discussed below).

**ABA Model Rule 5.1(a)** contains essentially the same language as Virginia Rule 5.1(a).

ABA Model Rule 5.1(a) thus presumably requires institutional managerial lawyers to take reasonable steps assuring that their institution's lawyers do not violate the ABA Model Rule provisions deeming it professional conduct to engage in non-professional conduct such as income tax evasion, domestic violence, etc.

But there are some differences.

In contrast, to Virginia Rule 5.1(a)'s use of the word "or" when referring to law firm partners and other institutional managerial lawyers, ABA Model Rule 5.1(a) uses the word "and." That does not seem to change the ABA Model Rule's reach.

Also in contrast to Virginia Rule 5.1(a), ABA Model Rule 5.1(a) contains the phrase "in a law firm" after the phrase "managerial authority." That seems implicit in Virginia Rule 5.1(a).

As explained above, the ABA Model Rules also define "partner" and "firm" – but in the ABA Model Rule Terminology section (ABA Model Rule 1.0). In contrast to the Virginia Rules Terminology section (which does not assign numbers to its Terminology definitions), the ABA Model Rules number its Terminology section.

ABA Model Rule 1.0(g)'s definition of "partner" differs somewhat from Virginia Terminology section's definition. ABA Model Rule 1.10(g) definition explains that the term "partner" "denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law." This

is a much narrower definition than that in the Virginia Rules' Terminology section. The Virginia Rule definition does not explicitly include "member[s] of an association authorized to practice law," but such lawyers seem to be implicitly included in the broader Virginia definition of "partner": "a member of a partnership or a shareholder or a member of a professional entity, public or private, organized to deliver legal services, or a legal department of a corporation or other organization." Although the ABA Model Rule 1.0(g) definition of "partner" does not mention in-house lawyers, the ABA Model Rule definition of "firm" specifically includes law departments, and thus presumably would include such law departments' managing lawyers. Perhaps most importantly, the Virginia Rule definition of "partner" explicitly includes "public" professional entities. ABA Model Rule 1.0(g)'s definition of "partner" does not include managers of public entities. But the ABA Model Rule definition of "firm" includes government organizations' law departments (ABA Model Rule 1.0 cmt. [3]), so such public entity institutional managerial lawyers would also presumably be covered by ABA Model Rule 5.1(a) term "other lawyers [who] possess[ ] comparable managerial authority in a law firm."

As with the definition of "partner," the ABA Model Rules assign a Rule number to its definition of "firm": ABA Model Rule 1.0(c). The ABA Model Rule definition is broader than the Virginia Rule definition contained in the Virginia Terminology section. ABA Model Rule 1.0(c) explains that the term "firm" "denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization." As explained above, ABA Model Rule 1.0 cmts. [2] –

[4] provide commentary on the term “firm” – essentially matching the Virginia Rules Comments appearing in Virginia Rule 1.0 cmts. [1] – [1d].

The bottom line is that the ABA Model Rules essentially match the broad scope of the term “partner” and “law firm”, and thus pose the same duty on institutional managerial lawyers as in Virginia Rule 5.1(a).

### **Virginia Rule 5.1(b)**

Virginia Rule 5.1(b) addresses the duty imposed on lawyers having more direct supervisory authority than those lawyers having institutional managerial authority addressed in Virginia Rule 5.1(a). In other words, these lawyers have day-to-day supervision of other lawyers.

Under Virginia Rule 5.1(b), lawyers “having direct supervisory authority over another lawyer” must “make reasonable efforts to ensure that the other lawyer conforms to the [Virginia] Rules of Professional Conduct.”

As explained above in connection with institutional managerial lawyers, direct supervisory lawyers presumably also must take reasonable steps to assure that their direct reports do not engage in the vaguely-described misconduct unrelated to those reports’ professional role.

Virginia Rule 5.1(b)’s use of the singular “other lawyer” emphasizes this close personal supervisory role. Of course, a direct supervisory lawyer may play a similar role with several subordinate lawyers.

Virginia Rule 5.1(b)’s imposition of an ethics duty on these direct supervisory lawyers contrasts with Virginia Rule 5.1(a)’s requirement that institutional managerial lawyers’ put in place “measures” giving “reasonable assurance” that all of the institutions’

lawyers comply with the Virginia ethics Rules. Direct supervisory lawyers must make “reasonable” [direct] efforts to ensure” that the lawyers they supervise comply with the Virginia Rules. That obviously involves a more hands-on duty. But as with Virginia Rule 5.1(a), the duty only requires such direct supervisory lawyers to “make reasonable efforts to ensure” that their subordinate lawyers comply with the Virginia Rules.

As with Virginia Rule 5.1(a), theoretically a direct supervisory lawyer could violate Virginia Rule 5.1(b) even if a subordinate lawyer does not violate the ethics rules. Again, that seems unlikely – but it is possible.

**ABA Model Rule 5.1(b)** contains the identical language.

Thus, ABA Model Rule 5.1(b) also implicates direct supervisory lawyers’ presumed responsibility to take reasonable steps assuring that their direct reports do not engage in what amounts to non-professional misconduct.

### **Virginia Rule 5.1(c)**

Virginia Rule 5.1(c) addresses lawyers’ derivative liability for another lawyer’s ethics violation.

Virginia Rule 5.1(c) ethics liability contrasts with Virginia Rule 5.1(a)’s and Virginia Rule 5.1(b)’s duty to put in place reasonable institutional measures or reasonable day-to-day measures for such lawyers’ direct reports. Those other duties are direct, and do not involve the institutional managerial lawyers’ or direct supervisory lawyers’ responsibility for another lawyer’s ethics violation. Institutional managerial lawyers’ or direct supervisory lawyers’ ethics violation would be in failing to take the required steps – rather than sharing responsibility for what some other lawyers did or did not do.

Virginia Rule 5.1(c) describes two scenarios in which lawyers will be derivatively responsible for other lawyers' ethics violation. The scenarios involve lawyers' pre-violation action or post-violation action.

**ABA Model Rule 5.1(c)** contains the identical language.

### **Virginia Rule 5.1(c)(1)**

Virginia Rule 5.1(c)(1) describes the first scenario in which a lawyer "shall be responsible" for some another lawyer's ethics violation (not the lawyer's own violation).

Significantly, Virginia Rule 5.1(c)(1) refers generically to a "lawyer" who engages in such pre-violation or post-violation action. This contrasts with Virginia Rule 5.1(c)(2) – which addresses inaction (discussed below).

As explained below, Virginia Rule 5.1(c)(2) on its face governs only institutional managerial lawyers or direct supervisory lawyers, not other lawyers. Presumably this difference is deliberate. The distinction presumably means that a lawyer who does not have the type of institutional managerial or direct supervisory responsibility that places them in the Virginia Rule 5.1(c)(2) category will not be "responsible for another lawyer's violation of the [Virginia] Rules of Professional Conduct" if they know about the other lawyer's violation and do not do anything about it. Of course, such inaction might violate some other ethics rules.

Under Virginia Rule 5.1(c)(1), a lawyer "shall be responsible" for some other lawyer's ethics violation if that lawyer "orders or, with knowledge of the specific conduct, ratifies the conduct involved." It is not surprising that a lawyer will be responsible for another lawyer's ethics violation if he or she orders it.

Significantly, neither Virginia Rule 5.1(c)'s introductory phrase, nor the specific scenario described in Virginia Rule 5.1(c)(1), requires that the lawyer ordering the other lawyer's ethics violation "knows" that the conduct violates the ethics rules. Many Virginia Rules contain a knowledge requirement. For example, Virginia Rule 3.3 (addressing lawyers' tribunal-related conduct) begins with the phrase "[a] lawyer shall not knowingly . . ." Virginia Rule 4.1 (requiring truthfulness in dealing with others) begins with the phrase "[i]n the course of representing a client, a lawyer shall not knowingly." There are many other similar examples in the Virginia Rules. And the Virginia Terminology section defines "know" as "denot[ing] actual knowledge of the fact in question," although "[a] person's knowledge may be inferred from circumstances." So it seems noteworthy that Virginia Rule 5.1(c)(1) on its face does not require that the lawyer ordering the other lawyer's conduct "know" that the latter's conduct violates the ethics rules.

As mentioned above, Virginia Rule 5.1(c)(1) applies to any lawyer, presumably lawyers in a law firm without institutional managerial or direct supervisory authority. In fact, Virginia Rule 5.1(c)(1) on its face applies to lawyers who are not even in the same firm. Upon reflection, this somewhat counter-intuitive reach makes sense. Lawyers should face ethics responsibility if they order or ratify any other lawyer's ethics violation – even if those other lawyers are not in the same firm. Virginia Rule 5.1(c)(1) could theoretically even apply to a subordinate lawyer who orders or ratifies a supervisor's ethics violation. That type of responsibility would mirror Virginia Rule 8.4(a)'s description as "professional misconduct" for any lawyer to "violate or attempt to violate the [Virginia] Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." That generic provision likewise is not limited to lawyers in the same firm.

Virginia Rule 5.1(c)(1) warns that lawyers “shall be responsible for” another lawyer’s ethics violation if “with knowledge of the specific conduct,” they “ratif[y] the conduct involved.” The word “involved” seems superfluous – of course Virginia Rule 5.1 applies to the “conduct involved.” Notably, Virginia Rule 5.1(c)(1)’s scenario requires that the lawyer ratifying the conduct know exactly what the other lawyer did (the “specific conduct”) – not just generally knowing what he or she did.

Virginia Rule 5.1 (c)(1) does not explain what type of conduct amounts to ratification. And Virginia Rule 5.1’s Comments do not provide any guidance about the ratification issue.

But the key point is that, like the scenario in which a lawyer orders another lawyer to violate the ethics rules, Virginia Rule 5.1(c)(1)’s ratification scenario does not require that the ratifying lawyer “know” that the other lawyer’s action violates the ethics rules.

**ABA Model Rule 5.1(c)(1)** contains the identical language.

### **Virginia Rule 5.1(c)(2)**

Virginia Rule 5.1(c)(2) addresses the second scenario in which lawyers “shall be responsible for another lawyer’s violation of the [Virginia] Rules of Professional Conduct.”

Virginia Rule 5.1(c)(2) describes the possible responsibility of both types of lawyers identified in Virginia Rule 5.1(a) and Virginia Rule 5.1(b). As explained above, this limitation to lawyers with institutional managerial authority under Virginia Rule 5.1(a) or direct supervisory authority under Virginia Rule 5.1(b) contrasts with Virginia Rule 5.1(c)(1) – which on its face applies to any lawyer with or without such institutional managerial or direct supervisory authority. Virginia Rule 5.1(c)(1) on its face seems to apply even to a lawyer who is not in the same firm.

Virginia Rule 5.1(c)(2) describes the responsibility under certain circumstances of either: (1) a lawyer who “is a partner or has managerial authority in the law firm in which the other lawyer practices”; and (2) a lawyer who has “direct supervisory authority over the other lawyer.” The first category are lawyers whose institutional managerial responsibility is defined in Virginia Rule 5.1(a). Interestingly, Virginia Rule 5.1(c)(2) uses the phrase “in the law firm” after the phrase “managerial authority” – even though Virginia Rule 5.1(a) does not have that phrase in that spot (in contrast to ABA Model Rule 5.1(a)). The second category of lawyers described in Virginia Rule 5.1(c)(2) are those having “direct supervisory authority” – whose more hands-on duty is covered by Virginia Rule 5.1(b).

In contrast to Virginia Rule 5.1 (c)(2)’s explicit application to “a partner or [a lawyer with] managerial authority in the law firm in which the other lawyer practices” (emphasis added), the other type of lawyer at risk for derivative ethics responsibility (a lawyer with “direct supervisory authority over the other lawyer”) does not explicitly require that the direct supervisory lawyer be “in the law firm.” Presumably that requirement is implicit.

Virginia Rule 5.1(c)(2) next explains that lawyers in either category “shall be responsible for another lawyer’s violation of the [Virginia] Rules of Professional Conduct”: if (1) they “know[ ] of the conduct at a time when its consequences can be avoided or mitigated”; and (2) they “fail[ ] to take reasonable remedial action.”

As with the rest of Virginia Rule 5.1, an institutional managerial lawyer or a direct supervising lawyer must “know[ ] of the conduct” – but there is no requirement that they “know” that the conduct violates the ethics rules.

To be responsible for the other lawyer's ethics violation, such a lawyer must "know[ ] of the conduct" "at a time when its consequences can be avoided or mitigated." Importantly, this time period presumably is after the conduct has occurred. In other words, an institutional managerial lawyer or direct supervisory lawyer will be judged by her: (1) action or inaction both before the other lawyer engages in an ethics violation (if he or she "orders" it) or afterwards by "ratify[ing] the unethical conduct (both under Virginia Rule 5.1(c)(1)); and (2) inaction after the conduct – "when its consequences can be avoided or mitigated." Of course, "avoided" means there is no consequences from the other lawyer's ethics violation. And "mitigated" presumably means that the consequences of the other lawyer's ethics violation can be partially avoided.

Institutional managerial lawyers or direct supervisory lawyers "shall be responsible" for the other lawyer's ethics violation if they "fail[ ] to take reasonable remedial action." The term "reasonable remedial action" presumably is synonymous with the slightly different term "reasonable remedial measures" used in Virginia Rule 3.3(a)(4) (which lawyers must undertake after becoming aware that they have offered material false evidence to a tribunal).

Thus, Virginia Rule 5.1(c)(1) renders a lawyer responsible for another lawyer's ethics violation if the former "ratifies" the latter's conduct. Although the term "ratifies" is not defined, presumably it requires more than inaction – which Virginia Rule 5.1(c)(2) covers (albeit applying that concept to a narrower range of lawyers than those covered by Virginia Rule 5.1(c)(1)). In other words, the term "ratifies" presumably means some affirmative action rather than inaction.

**ABA Model Rule 5.1(c)(2)** contains essentially the same language.

In contrast to Virginia Rule 5.1(c)(2)'s phrase "is a partner or has managerial authority in the law firm," ABA Model Rule 5.1(c)(2) contains essentially the same phrase: "is a partner or has comparable managerial authority in the law firm" (emphasis added).

## Comment

### Virginia Rule 5.1 Comment [1]

Virginia Rule 5.1 cmt. [1] addresses the duty of lawyers described in both Virginia Rule 5.1(a) and (b) to take reasonable measures to assure that other lawyers comply with the Virginia ethics rules.

Virginia Rule 5.1 cmt. [1] first explains that Virginia Rule 5.1(a) “applies to lawyers who have managerial authority over the professional work of a firm.” Presumably the term “professional work” distinguishes those managerial lawyers from managerial lawyers who manage the law firm colleagues’ non-professional work – perhaps business-oriented responsibilities.

Virginia Rule 5.1 cmt. [1] then essentially quotes the definition of “partner” in the Virginia Terminology section (discussed above). The only difference is Virginia Rule 5.1 cmt. [1]’s inclusion of “lawyers who have intermediate managerial responsibilities in a firm.” The term “intermediate managerial responsibilities” is not defined. It is an odd term. Such “intermediate” managerial responsibility is still managerial responsibility. So even “intermediate” managerial authority would presumably be covered by Virginia Rule 5.1(a).

Virginia Rule 5.1 cmt. [1] concludes with the obvious point that Virginia Rule 5.1(b) “applies to lawyers who have supervisory authority over the work of other lawyers.” Interestingly, Virginia Rule 5.1 cmt. [1]’s concluding sentence’s phrase “supervisory authority over the work of other lawyers” is deliberately different from the Virginia Rule Comment’s first sentence’s phrase “managerial authority over the professional work of a firm.” Perhaps Virginia Rule 5.1 cmt. [1]’s concluding sentence was intended to include “work” other than “professional work.” It seems unlikely, but the word choice is intriguing.

**ABA Model Rule 5.1 cmt. [1]** addresses the same issue.

ABA Model Rule 5.1 cmt. [1] essentially parrots the ABA Model Rule definition of “partner” – which the ABA Model Rules include in numbered ABA Model Rule 1.0(g). Like Virginia Rule 5.1 cmt. [1], ABA Model Rule 5.1 cmt. [1] explains that the lawyers covered by ABA Model Rule 5.1(a) include “lawyers who have intermediate managerial responsibilities in a firm” – without defining that term.

Also, like Virginia Rule 5.1 cmt. [1], ABA Model Rule 5.1 cmt. [1] concludes with the explanation that ABA Model Rule 5.1(b) “applies to lawyers who have supervisory authority over the work of other lawyers in a firm.” Virginia Rule 5.1 cmt. [1] does not contain the phrase “in a firm,” but presumably has the same meaning.

Like Virginia Rule 5.1 cmt. [1], ABA Model Rule 5.1 cmt. [1]’s first sentence uses the phrase “authority over the professional work of a firm,” while the ABA Model Rule Comment’s concluding sentence uses the phrase “supervisory authority over the work of other lawyers in a firm” – without the adjective “professional.” As explained above, it seems unlikely that the deliberate choice was designed to have a substantive impact.

### **Virginia Rule 5.1 Comment [2]**

Virginia Rule 5.1 cmt. [2] addresses the steps institutional managerial lawyers must take under Virginia Rule 5.1(a).

Virginia Rule 5.1 cmt. [2] begins by explaining that such institutional managerial lawyers must “make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the [Virginia] Rules of Professional Conduct.” Virginia Rule 5.1 cmt. [2] then provides examples: (1) “policies and procedures . . . designed to detect and resolve conflicts of

interest”; (2) “policies and procedures . . . designed to . . . identify dates by which actions must be taken in pending matters”; (3) “policies and procedures . . . designed to . . . account for client funds and property”; (4) “policies and procedures . . . designed to . . . ensure that inexperienced lawyers are properly supervised.”

The first set of “policies and procedures” focuses on avoiding conflicts of interest (which are primarily governed by Virginia Rules 1.7, 1.8 and 1.9). The second set of “policies and procedures” focuses on competence (primarily governed by Virginia Rule 1.1) and diligence (primarily governed by Virginia Rule 1.3). The third set of “policies and procedures” focuses on properly handling client funds and property (primarily governed by Virginia Rule 1.15). The fourth set of “policies and procedures” focuses on supervising “inexperienced lawyers” (primarily governed by Virginia Rule 5.1 itself, but also covered in other ethics rules).

**ABA Model Rule 5.1 cmt. [2]** contains the identical language.

### **Virginia Rule 5.1 Comment [3]**

Virginia Rule 5.1 cmt. [3] addresses factors used to assess whether institutional managerial lawyers governed by Virginia Rule 5.1(a) have taken the required “reasonable efforts” to ensure that their colleagues comply with the ethics rules.

Virginia Rule 5.1 cmt. [3] first recognizes that “the firm’s structure and nature of its practice” can affect whether such institutional managerial lawyers must take “[o]ther measures” to comply with their Virginia Rule 5.1(a) duty. Presumably the “[o]ther measures” are those other than the ones listed in the preceding Virginia Rule 5.1 cmt. [2].

Virginia Rule 5.1 cmt. [3] next contrasts “a small firm” (in which “informal supervision and periodic review ordinarily will suffice”) with “a large firm,” or “in practice

situations in which difficult ethical problems frequently arise.” The Virginia Rule Comment’s use of the word “or” seems to imply that even small firms might face ethics problems that “frequently arise.” In those three settings, “more elaborate measures may be necessary.”

Virginia Rule 5.1 cmt. [3] then explains that both “large or small” firms “may also rely on continuing legal education in professional ethics.” That seems obvious.

Virginia Rule 5.1 cmt. [3] concludes with two disparate concepts. First, Virginia 5.1 cmt. [3] notes that “the ethical atmosphere of a firm can influence the conduct of all its members.” Second, Virginia 5.1 cmt. [3] notes that “the partners or those lawyers with managerial authority may not assume that all lawyers associated with the firm will inevitably conform to the [Virginia] Rules.” The first point is obvious, but important – essentially recognizing that “the tone at the top” plays a role. The second point recognizes that institutional managing lawyers must stay alert to colleagues’ conduct. The term “associated with the firm” is discussed elsewhere in the Virginia Rules, and has an uncertain meaning.

Interestingly (and perhaps significantly), this is Virginia Rule 5.1’s first and only reference to lawyers being “associated with [a] firm.” The Virginia Rules sometimes use the word “with” in describing a lawyer’s “association” with a firm or another lawyer. For instance, Virginia Rule 5.5(d)(4)(i) uses the phrase “association with a lawyer” in describing a lawyer’s permissible practice of law in a state where that lawyer is not licensed (but who “associates with” a lawyer who is licensed in that other state). In contrast, sometimes the Virginia Rules use the word “in” when addressing one lawyer’s “association” with a law firm or another lawyer. For instance, Virginia Rule 1.10(a)

generally imputes one lawyer's individual disqualification to other lawyers "associated in a firm." Presumably, Virginia Rule 5.1 cmt. [3]'s phrase "associated with the firm" is intended to be synonymous with the phrase "associated in the firm." Virginia 5.1 cmt. [3] would have been more clear if it used the unambiguous word "in" rather than the word "with." But even so, it does not make much sense to address the risk that "all lawyers associated with the firm" will follow the Virginia Rules. As explained elsewhere in this document, it seems clear (although not explicitly addressed) that law firms can employ lawyers who are not "associated" with their law firm colleagues. Lawyers practicing in a firm but not "associated" with their law firm colleagues presumably are those who are not given access to all of the firm's clients' protected client confidential information.

If all lawyers employed by or practicing in a law firm were automatically "associated" with their colleagues, rules like Virginia Rule 5.1 cmt. [3] presumably would contain the phrase "all lawyers in the firm" – not adding the limiting word "associated." For instance, Virginia Rule 5.1(a) uses the broader term "all lawyers in the firm" (emphasis added). Virginia Rule 5.1 cmt. [2] uses a similar broad term: "all lawyers in the firm" (emphasis added) Notably, neither reference requires that those lawyers to be "associated with" other lawyers in the firm.

Ironically, it seems more likely that institutional managerial lawyers would be less safe assuming that non - "associated" lawyers would "inevitably conform to the [Virginia] Rules." Those non-"associated" lawyers are likely to be those working in some remote locations, not tied into the law firm's internal computer links, etc. They are less likely to receive ethics instructions or warnings, etc., than lawyers who are "associated" with their law firm colleagues.

**ABA Model Rule 5.1 cmt. [3]** contains similar language.

Like Virginia Rule 5.1 cmt. [3], ABA Model Rule 5.1 cmt. [3] differentiates between small law firms and large law firms.

ABA Model Rule 5.1 cmt. [3] differs in two ways from Virginia Rule 5.1 cmt. [3].

First, in contrast to Virginia Rule 5.1 cmt. [3]'s reference to “a small firm” (in which “informal supervision and periodic review ordinarily will suffice”), ABA Model Rule 5.1 cmt. [3] describes the scenario of “a small firm of experienced lawyers,” and mentions the “periodic review of compliance with the required systems.” This obviously describes a narrower scenario than that in Virginia Rule 5.1 cmt. [3].

Second, in contrast to Virginia Rule 5.1 cmt. [3], ABA Model Rule 5.1 cmt. [3] contains a sentence describing what amounts to an internal ethics hotline process: “[s]ome firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee.” ABA Model Rule 5.1 cmt. [3] then refers to ABA Model Rule 5.2 – which addresses responsibilities of subordinate lawyers (which Virginia did not adopt).

#### **Virginia Rule 5.1 Comment [4]**

Virginia Rule 5.1 cmt. [4] addresses the concept of derivative ethical responsibility for another lawyer’s ethics violation.

Virginia Rule 5.1 cmt. [4] makes the obvious point that Virginia Rule 5.1(c) “expresses a general principle of personal responsibility for acts of another.” In a sense, that is a type of respondeat superior concept.

Virginia Rule 5.1 cmt. [4] then points to Virginia Rule 8.4(a). Virginia Rule 8.4(a) explains that “[i]t is professional misconduct for a lawyer to . . . violate or attempt to violate

the [Virginia] Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.” Virginia Rule 8.4(a)’s term “knowingly” seems to require some knowledge that the conduct violates the ethics rules (although that concept is not explicit – Virginia Rule 8.4(a) might only require that the lawyer is “knowingly” aware of the acts, without knowing that they violate the ethics rule). To the extent that Virginia Rule 8.4(a) recognizes an ethics violation only if the lawyer “knows” that she is violating the ethics rules through the actions of another, it stands in contrast to Virginia Rule 5.1(c) – which on its face does not require such knowledge that the other lawyer’s conduct violates the Virginia Rules.

**ABA Model Rule 5.1 cmt. [4]** contains the identical language.

### **Virginia Rule 5.1 Comment [5]**

Virginia Rule 5.1 cmt. [5] addresses application of Virginia Rule 5.1(c)(2) – which makes institutional managerial lawyers or direct supervisory lawyers derivatively responsible for another lawyer’s ethics violations under specified circumstances.

Virginia Rule 5.1 cmt. [5] first explains that Virginia Rule 5.1(c)(2) “defines the duty of a lawyer having direct supervisory authority over performance of specific legal work by another lawyer.”

Black letter Virginia Rule 5.1(c)(2) does not contain the phrase “performance of specific legal work by another lawyer,” so Virginia Rule 5.1 cmt. [5] provides that useful guidance. However, one would think that a lawyer with “direct supervisory authority” over another lawyer would be governed by Virginia Rule 5.1(c)(2) even if she did not possess such “supervisory authority over performance of specific legal work by another lawyer.” In other words, a lawyer having direct supervisory authority may give specific legal work

to a subordinate, but may also play more of an administrative supervisory role monitoring but not directly supervising work that the subordinate performs for other law firm colleagues. Thus it is unclear whether Virginia Rule 5.1 cmt. [5] describes a subset of such direct supervisory lawyers' responsibility, or defines the limit of such direct supervisors' authority.

Virginia Rule 5.1 cmt. [5] next makes the obvious point that “[w]hether a lawyer has such supervisory authority in particular circumstances is a question of fact.”

Virginia Rule 5.1 cmt. [5] then explains that private law firm partners “have at least indirect responsibility for all work being done by the firm.” This contrasts with “a partner in charge of a particular matter [who] ordinarily has responsibility for the work of other firm lawyers engaged in the matter.” Presumably the former type of lawyer (having only “indirect responsibility”) would not be covered by Virginia Rule 5.1(c)(2), while the latter type of lawyers would be governed by that Virginia Rule. Of course, the former type of lawyer might have institutional managerial responsibility, and therefore be covered by Virginia Rule 5.1(a). Those lawyers could be responsible for violating their duty to put in place institutional policies and procedures – even if they would not be derivatively liable for another lawyer’s misconduct.

Virginia Rule 5.1 cmt. [5] then understandably notes that “[a]ppropriate remedial action by a partner or managing lawyer would depend on the immediacy of the partner’s involvement and the seriousness of the misconduct.” As discussed above, the term “partner” is broadly defined in the Virginia Terminology section – which is broader than ABA Model Rule 1.0(g)’s definition. Interestingly, Virginia Rule 5.1 cmt. [5] repeatedly uses both the word “supervisor” and the word “partner.” Those terms presumably are

meant to be synonymous, although it would have been more clear if Virginia Rule Comment 5.1 cmt. [5] had used a consistent term.

Virginia Rule 5.1 cmt. [5] next turns to what a direct supervisory lawyer must do. Virginia Rule 5.1 cmt. [5] explains that “[t]he supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred.” This sentence confirms that Virginia Rule 5.1(c)(2) governs direct supervisory lawyers’ conduct after the other lawyer has already violated the ethics rules. As explained above, the term “knows” focuses on such a supervising lawyer’s knowledge of the “misconduct.” This does not automatically require that the direct supervisory lawyer “knows” that the conduct is “misconduct” (in other words, that it violates the Virginia Rules). Knowledge that the other lawyer’s conduct violates the ethics rules does not appear in black letter Virginia Rule 5.1(c). Perhaps Virginia Rule 5.1 cmt. [5]’s use of the term “misconduct” is an effort to backdoor such a knowledge requirement into direct supervisory lawyers’ duty. Virginia Rule 5.1 cmt. [5] provides an example: “if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.”

That negotiation scenario presumably also implicates Virginia Rule 4.1(a), which indicates that a negotiating lawyer “shall not knowingly”... make a false statement of fact or law.” Such a negotiating lawyer might also violate Virginia 8.4(e), which warns that “[i]t is professional misconduct for a lawyer to... engage in conduct involving dishonesty, fraud, deceit or misrepresentation” – “which reflects adversely on the lawyer’s fitness to practice law.” Subordinate lawyers who lie during negotiations presumably would face

discipline under either of those Virginia Rules (and perhaps others). Her direct supervisory lawyer who has some post-lie role in the negotiations might face discipline under Virginia Rule 4.1(b) – which states that “a lawyer shall not knowingly...fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.” The supervising lawyer’s silence in that context presumably would assist the client’s negotiation fraud – which the subordinate lawyer assisted through her lie. Virginia Rule 8.4(c)’s or general anti-deception principles might also apply to that silent supervisor.

**ABA Model Rule 5.1 cmt. [5]** is similar to Virginia Rule 5.1 cmt. [5], but differs in several ways.

First, in contrast to Virginia Rule 5.1 cmt. [5]’s introductory sentence describing the duty of lawyers with “direct supervisory authority over performance of specific legal work by another lawyer,” ABA Model Rule 5.1 cmt. [5]’s introductory sentence also includes “a partner or other lawyer having comparable managerial authority in a law firm.” Thus, ABA Model Rule 5.1 cmt. [5] has a much broader reach than the Virginia Rule 5.1 cmt. [5].

Second, in contrast to Virginia Rule 5.1 cmt. [5]’s statement that private law firm “[p]artners” have “at least indirect responsibility” for their law firm’s colleagues’ work, ABA Model Rule 5.1 cmt. [5] refers to “[p]artners and lawyers with comparable authority” – making the same point later in the same sentence (by using the phrase “a partner or manager in charge of a particular matter).

Third, in contrast to Virginia Rule 5.1 cmt. [5]’s description of a partner’s “[a]ppropriate remedial action,” ABA Model Rule 5.1 cmt. [5] also includes a “managing lawyer” in that analysis. Perhaps these differences do not have any substantive effect,

but ABA Model Rule 5.1 cmt. [5] more clearly extends the ethical duty to lawyers who manage other lawyers although they may not be partners.

### **Virginia Rule 5.1 Comment [6]**

Virginia Rule 5.1 cmt. [6] addresses the possible impact of subordinate lawyers' ethics violations.

Virginia Rule 5.1 cmt. [6] first explains that such “[p]rofessional misconduct by a lawyer under supervision could reveal” a direct supervisory lawyer’s violation under Virginia Rule 5.1(b), “even though [the subordinate lawyer’s misconduct] does not entail a violation of [Virginia Rule 5.1(c)] because there was no direction, ratification or knowledge of the violation” (emphasis added). This obviously refers to Virginia Rule 5.1(b)’s description of direct supervisory lawyers’ duty to “make reasonable efforts to ensure” that subordinate lawyers comply with the Virginia Rules. And as explained above, such direct supervisory lawyers might be guilty of an ethics violation by failing to make such “reasonable efforts” – even if no subordinate ever violates the Virginia Rules. That is why Virginia Rule 5.1(c) involves direct rather than derivative ethics responsibility.

Virginia Rule 5.1 cmt. [6] uses the odd word “reveal” because a subordinate’s ethics violation might lead to discovering that the direct supervisory lawyer never made the required “reasonable efforts.” Such discovery might “reveal” the direct supervisory lawyer’s failure, even though the direct supervisory lawyer had no knowledge of and no role whatever in the subordinate lawyer’s ethics violation that triggered the inquiry. The word “reveal” presumably means that the subordinate’s ethics conduct might “bring to light” her supervisor’s separate ethics violation. Used in this sense, the word “reveal” has a very different meaning from its use in Virginia Rule 1.6(a). Virginia Rule 1.6(a) explains

that lawyers “shall not reveal” certain protected client confidential information. The word “reveal” in that setting presumably is intended to be synonymous with “disclose.”

**ABA Model Rule 5.1 cmt. [6]** contains the identical language.

### **Virginia Rule 5.1 Comment [7]**

Virginia Rule 5.1 cmt. [7] addresses both institutional managerial lawyers and direct supervisory lawyers’ other possible responsibility for their colleagues ethics violations.

Virginia Rule 5.1 cmt. [7] first references Virginia Rule 5.1 itself and Virginia Rule 8.4(a). As explained above, the latter deems it “professional misconduct for a lawyer to . . . violate or attempt to violate the [Virginia] Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.”

Virginia Rule 5.1 cmt. [7] then assures (at least from an ethics standpoint) that apart from Virginia Rule 5.1 and Virginia Rule 8.4(a), a lawyer “does not have disciplinary liability for the conduct of a partner, associate or subordinate.” In other words, there is no per se respondeat superior liability.

Virginia Rule 5.1 cmt. [7] concludes with a warning that “[w]hether a lawyer may be liable civilly or criminally for another lawyer’s conduct is a question of law beyond the scope of these [Virginia] Rules.”

**ABA Model Rule 5.1 cmt. [7]** contains the identical language.

### **ABA Model Rule 5.1 Comment [8]**

Virginia did not adopt ABA Model Rule 5.1 cmt. [8].

ABA Model Rule 5.1 cmt. [8] addresses individual lawyers' continuing obligation to comply with the ABA Model Rules.

ABA Model Rule 5.1 cmt. [8] reminds lawyers that ABA Model Rule 5.1's duties "imposed . . . on managing and supervising lawyers not alter the personal duty of each lawyer in a firm to abide by the [ABA Model] Rules of Professional Conduct."

ABA Model Rule 5.1 cmt. [8] then refers to ABA Model Rule 5.2(a). ABA Model Rule 5.2(a) addresses subordinate lawyers' responsibilities. Virginia did not adopt ABA Model Rule 5.2.

# ABA MODEL RULE 5.2

## Responsibilities of a Subordinate Lawyer

Virginia did not adopt ABA Model Rule 5.2.

### Rule

#### ABA Model Rule 5.2(a)

ABA Model Rule 5.2(a) addresses lawyers' responsibilities when acting "at the direction of another person."

ABA Model Rule 5.2(a) first confirms that "[a] lawyer is bound by the [ABA Model] Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person." In other words, lawyers may not rely on the so-called "Nuremberg defense" – by trying to avoid ethical responsibility because they were "just following orders."

Significantly, the term "another person" is not limited to supervising lawyers. The ABA certainly knew how to use the term "supervisory lawyer" – it appears in the next sentence (ABA Model Rule 5.2(b)). Presumably the word choice intends to denote a broader range of other persons. So ABA Model Rule 5.2(a)'s term "lawyer" include lawyers who act "at the direction of another person" – including another lawyer or presumably even a non-lawyer such as a client. The bottom line is that each lawyer is herself responsible for complying with the ethics rules.

### **ABA Model Rule 5.2(b)**

ABA Model Rule 5.2(b) addresses subordinate lawyers' permissible actions taken at a supervising lawyer's direction.

Under ABA Model Rule 5.2(b), “[a] subordinate lawyer does not violate the [ABA Model] Rules of Professional Conduct if that [subordinate] lawyer acts in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty.” This ABA Model Rule implicates two issues.

First, ABA Model Rule 5.2(b)'s description of a scenario in which the “subordinate lawyer “acts in accordance with supervisor lawyer’s direction clearly describes only a subset of ABA Model Rule 5.2(a)'s situation – which describes any lawyer’s (not just a subordinate lawyers’s) action taken “at the direction of another person” (not just a supervisory lawyer, and not just a lawyer). Presumably these distinctions are deliberate.

Second, although the language is not clear, presumably ABA Model Rule 5.2(b)'s “subordinate lawyer” has acted in a way that would otherwise violate the ABA Model Rules – or else the supervisory lawyer’s role would never become an issue.

Supervisory lawyers’ responsibilities are governed by ABA Model Rule 5.1. In sum, ABA Model Rule 5.1(a) requires institutional managerial lawyers to put in place reasonable institutional policies and procedures that ensure that all lawyers in the institution comply with the ethics rules. ABA Model Rule 5.1(b) requires direct supervisory lawyers to also take reasonable steps to assure that their direct subordinate lawyers comply with the ethics rules. ABA Model Rule 5.1(c) describes situations where either type of lawyer (institutional managerial lawyers or direct supervisory lawyers) can be

“responsible” (thus presumably subject to professional discipline) for violations for other lawyers’ ethical violations (essentially imposing derivative ethical responsibility, rather than the direct ethical responsibility defined by ABA Model Rule 5.1(a) and (b).

ABA Model Rule 5.2(b) essentially assures that subordinate lawyers may safely act when ordered to do so by a direct supervisory lawyer – if the direct supervisory lawyer’s direction involves his or her “reasonable resolution of an arguable question of professional duty.” In other words, a subordinate lawyer may face ethical discipline for complying with a direct supervisory lawyer’s direction to clearly violate the ethics rules. But if there is a close question, ABA Model Rule 5.2(b) gives direct supervisory lawyer what might be called the “benefit of the doubt,” and thus also gives the subordinate lawyer ethical leeway to rely on that “benefit of the doubt” to avoid ethics discipline.

The direct supervisory lawyer’s own freedom from discipline in such a situation is not explicit in ABA Model Rule 5.2(b), but presumably follows from its terms.

## Comment

### ABA Model Rule 5.2 Comment [1]

ABA Model Rule 5.2(b) cmt. [1] addresses direct supervisory lawyers' involvement as a mitigating factor in subordinate lawyers' ethics violations.

ABA Model Rule 5.2 cmt. [1] first warns that subordinate lawyers are “not relieved of responsibility for [an ethics] violation by the fact that the lawyer acted at the direction of a supervisor.” That articulates ABA Model Rule 5.2(a)'s principle that lawyers will face the consequences of violating the ABA Model Rules “notwithstanding that the lawyer acted at the direction of another person.” Thus, ABA Model Rule 5.2(b) cmt. [1] addresses only a direct supervisory lawyer's direction, which is a subset of black letter ABA Model Rule 5.2(a)'s description of a scenario where a subordinate lawyer “acted at the direction of another person” (presumably including a “person” other than a direct supervisory lawyer, such as a client).

ABA Model Rule 5.2(b) cmt. [1] then assures that “the fact [that the lawyer “acted at the direction of a supervisor”] may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the [ABA Model] Rules.” This is somewhat ironic. Some ABA Model Rules (and most parallel state rules, including Virginia's Rules) discipline lawyers only for their “knowing” violation of an ethics rule. This is the standard mentioned in ABA Model Rule 5.2 cmt. [1].

But ABA Model Rule 5.1(c) does not on its face require that either the institutional managerial lawyer or direct supervisory lawyer “know” that one of her colleague's actions violates the ethics rules. Under ABA Model Rule 5.1(c)(1), those institutional managerial lawyers or direct supervisory lawyers must have “knowledge of the specific conduct” that

they order or ratify – not “know” that the conduct violates the ABA Model Rules. And under ABA Model Rule 5.1(c)(2), such institutional managerial lawyers or direct supervisory lawyer must “know[ ] of the conduct” – not that the conduct violates the ABA Model Rules. So ABA Model Rule 5.1(c) does not on its face require that the direct supervisory lawyer know that either their actions or their colleagues’ actions violate the ethics rules. Perhaps that is implicit.

ABA Model Rule 5.2 cmt. [1] next provides an example of a scenario in which a subordinate lawyer’s compliance with a direct supervisory lawyer’s direction is relevant in analyzing the subordinate lawyer’s knowledge. The scenario involves a subordinate lawyer who “filed a frivolous pleading at the direction of a supervisor.” In that scenario “the subordinate [lawyer] would not be guilty of a professional violation unless the subordinate knew of the document’s frivolous character” (emphasis added).

That seems like an inappropriate example. ABA Model Rule 3.1 bluntly states that “[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.” That seems to be an objective standard. ABA Model Rule 3.1 does not start with the phrase “[a] lawyer shall not knowingly....” That was obviously a deliberate choice. Just two ABA Model Rules later, ABA Model Rule 3.3 (dealing with candor toward the tribunal) starts with the phrase “[a] lawyer shall not knowingly...” (emphasis added). Similarly, ABA Model Rule 4.1 (addressing lawyers’ statements to others) begins with the phrase: “[i]n the course of representing a client a lawyer shall not knowingly...” (emphasis added).

So under ABA Model Rule 3.1's objective standard, a subordinate lawyer presumably violates ABA Model Rule 3.1 by filing the frivolous pleading. And under ABA Model Rule 5.1(c)(1), the direct supervisory lawyer who ordered the filing ("with knowledge of the specific conduct") also violated ABA Model Rule 3.1.

### **ABA Model Rule 5.5 Comment [2]**

ABA Model Rule 5.5 cmt. [2] addresses what might be called ABA Model Rule 5.2(b)'s "benefit of the doubt" standard when subordinate lawyers follow a direct supervisory lawyer's direction in a close ethics question.

ABA Model Rule 5.2 cmt. [2] first acknowledges that direct supervisory lawyer "may assume responsibility for making the judgment" in "a matter involving professional judgment as to an ethical duty." ABA Model Rule 5.2 cmt. [2] explains why: "[o]therwise a consistent course of action or position could not be taken." That seems like a strange rationale. Direct supervisory lawyers and subordinate lawyers can agree to act on consensus, assuring "a consistent course of action or position" – without one of them making a final judgment.

ABA Model Rule 5.2 cmt. [2] next understandably explains that "[i]f the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it." ABA Model Rule 5.2 cmt. [2] then recognizes that "if the question [presumably an ethics "question"] is reasonably arguable, someone has to decide upon the course of action." The ABA Model Rule Comment explains that in such circumstances "[t]hat authority [to "decide upon the course the action"] ordinarily reposes in the supervisor." Thus, "a subordinate may be guided accordingly."

ABA Model Rule 5.2 cmt. [2] concludes with an example: “if a question arises whether the interests of two clients conflict under [ABA Model] Rule 1.7, the supervisor’s reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.”

Of course, an ethics issue never arises unless someone raises it. ABA Model Rule 5.52 cmt. [2]’s conclusion makes sense from a professional discipline standpoint, but also seems somewhat inapt. Like the pleading-related ABA Model Rules discussed above, ABA Model Rule 1.7(a)’s core conflicts provision does not on its face contain a knowledge requirement. ABA Model Rule 1.7(a) bluntly states that “a lawyer shall not represent a client if the representation involves a concurrent conflict of interest”. Such a “concurrent conflict of interest exists” if (as ABA Model Rule 1.7(a)(1) states) “the representation of one client will be directly adverse to another client.” ABA Model Rule 1.7(a)(2) is somewhat more ambiguous. But neither ABA Model Rule 1.7(a) conflict provision requires that the lawyer “knows” that a concurrent conflict of interest exists.

Some ABA conflicts rules contain a knowledge requirement. For instances, ABA Model Rule 1.10(a)’s imputation rule prohibits lawyers from “knowingly” representing a client if any associated law firm colleague could not do so. But ABA Model Rule 1.7 does not contain a knowledge requirement.

Disciplinary authorities presumably would take a forgiving approach if a lawyer did not know that (for instance) the defendant she sued was a current firm client – because her firm’s conflict system did not disclose that representation. But the lawyer filing such a lawsuit clearly would have violated ABA Model Rule 1.7 even without such knowledge.

The same would be true of a subordinate lawyer who filed the pleading at a direct supervisory lawyer' direction.

So under ABA Model Rule 5.2 generally, and as described in ABA Model Rule 5.2 cmt. [1] and [2], the assurance to subordinate lawyers seems to focus on disciplinary authorities' leeway in punishing ethics violations – rather than on analyzing whether the lawyers violated the pertinent ABA Model Rules.

# **RULE 5.3**

## **Responsibilities Regarding Nonlawyer Assistants**

ABA Model Rules 5.3 is entitled “Responsibilities Regarding Nonlawyer Assistance” - which cleverly emphasizes the Rule’s application to independent contractors, in addition to nonlawyer employees.

### **Rule**

#### **Virginia Rule 5.3**

Virginia Rule 5.3 governs lawyers’ interactions “[w]ith respect to a nonlawyer employed or retained by or associated with a lawyer.” Presumably the phrase “[with] respect to” applies Virginia Rule 5.3’s requirements to all lawyers’ dealings with the specified nonlawyers.

Virginia Rule 5.3(a) describes three types of nonlawyers: (1) “a nonlawyer employed by . . . a lawyer;” (2) “a nonlawyer . . . retained by . . . a lawyer;” and (3) “a nonlawyer . . . associated with a lawyer.” The first category presumably refers to nonlawyers on a lawyer’s payroll. There might be a question about whether a temporary nonlawyer employee would fall into that category. That issue may not matter much, because presumably such a “temp” would otherwise fall into the “retained by” category. The second “retained by” category presumably refers to nonlawyers who are not payroll employees, but rather independent contractors who work with a lawyer and receive payment by the hour or through a fixed fee.

The third category (nonlawyers “associated with a lawyer”) is the least clear of the categories. Presumably the word “associated” differentiates the other two categories of nonlawyers – meaning that such an “associated” nonlawyer would not be on the lawyer’s payroll and would not be “retained” by the lawyer and paid in some other way. Otherwise, Virginia Rule 5.3 presumably would not explicitly include that as a separate category. On the other hand, perhaps the word “associated” in Virginia Rule 5.3’s context describes an overlap with either the “employed by” or “retained by” category. Those other two words focus on the employment/compensation aspect of lawyers’ relationships with nonlawyers. The “associated with” standard seems to focus more on the work arrangement, not the employment/compensation arrangement.

Thus, the word “associated” raises several complicating questions. As the ABA Model Rules General Notes discuss, neither the ABA Model Rules nor the Virginia Rules define the key word “associated.” But that word plays a critical role in assessing the imputation of an individual lawyer’s prohibition on a representation – among other things. On their face, some ABA Model Rules (and the Virginia Rules) recognize that some lawyers are “associated” with their law firm colleagues and some are not. In the lawyer context, the term “associated” can include lawyers who are not in the same firm (Virginia Rule 1.5 cmt. [7]) or even in the same state (Virginia Rule 5.5(d)(4)(i)).

Analyzing whether a nonlawyer is “associated” with a lawyer is equally (if not more) confusing. It would seem that Virginia Rule 5.3’s word “associated” does not include nonlawyers who are “employed” by a lawyer or “retained” by a lawyer. So there must be some other undefined relationship between the “associated” nonlawyer and the lawyer. One can only guess what that is. Normally nonlawyers do not assist lawyers for free. So

it would seem that such nonlawyers are either employed or retained by a lawyer who relies on the nonlawyer's work.

All in all, Virginia Rule 5.3's word "associated" denotes an unclear relationship, which of course compounds the difficulty of analyzing Virginia Rule 5.3's application and effect.

**ABA Model Rule 5.3** contains a different title: "Responsibilities Regarding Nonlawyer Assistance" (emphasis added). That ingenious switch from the previous ABA Model Rule 5.3 word "assistants" (which Virginia Rule 5.3 has retained) to "assistance" makes it clear that lawyers who are not classically employed "assistants" are covered by ABA Model Rule 5.3.

Other than the title, ABA Model Rule 5.3's introductory sentence contains language identical to Virginia Rule 5.3's introductory sentence.

Thus, ABA Model Rule 5.3 has the same three nonlawyer categories contained in Virginia Rule 5.3 - and therefore triggers the same uncertainty about what the "associated with" category refers to.

### **Virginia Rule 5.3(a)**

Virginia Rule 5.3(a) addresses institutional managerial lawyers' responsibility to take reasonable steps assuring that nonlawyers they supervise act consistently with lawyers' ethic rules.

Virginia Rule 5.3(a) defines those lawyers subject to this responsibility as: "a partner or a lawyer who individually or together with other lawyers possesses managerial authority in a law firm." That sort of institutional managerial responsibility differs from "direct supervisory authority" described in Virginia Rule 5.3(b) (discussed below).

Virginia Rule 5.3(a) contains a similar but not identical description of those institutional managerial lawyers contained in Virginia Rule 5.1 – which identifies and then describes the duties of institutional managerial lawyers who supervise lawyers rather than nonlawyers. In contrast to Virginia Rule 5.1(a)'s introductory phrase “[a] partner in a law firm, or a lawyer . . . ,” Virginia Rule 5.3(a) begin its description with “a partner or a lawyer . . . .” As discussed in connection with Virginia Rule 5.1, the term “partner” and “law firm” are defined in the Virginia Terminology section. Presumably Virginia Rule 5.3(a)'s phrase “a partner or a lawyer” is intended to be synonymous with Virginia Rule 5.1(a)'s phrase “a partner in a law firm or a lawyer.”

In contrast to Virginia Rule 5.1(a)'s phrase “possesses managerial authority,” Virginia Rule 5.3(a) contains term “managerial authority in a law firm.”

Virginia Rule 5.3(a) next describes what those institutional managerial lawyers must do: “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” (emphasis added).

Virginia Rule 5.3(a) oddly uses the phrase the “person's conduct” instead of “a nonlawyer's conduct.” Thus, institutional managerial lawyers must put in place institutional policies and processes giving “reasonable” assurance that nonlawyers “employed or retained by or associated with” the lawyers act in a way that is “compatible with the professional obligations of the lawyer.”

This essentially parallels institutional managerial lawyers' duties when supervising lawyers – described in Virginia Rule 5.1(a). As described in this document's summary and analysis of Virginia Rule 5.1, the word “reasonable” is used twice in Virginia Rule

5.1(a) - as in Virginia 5.3(a). These words give such institutional managerial lawyers substantial leeway in assuring such institutional policies and procedures.

The key difference between Virginia Rule 5.3(a) and Virginia Rule 5.1(a) is that the former Rule requires institutional managerial lawyers to take such reasonable steps to ensure that nonlawyers' conduct is "compatible with the professional obligations of the lawyer" (emphasis added). This contrast with the Virginia Rule 5.1(a)'s phrase: "all lawyers in the firm conform to the [Virginia] Rules of Professional Conduct" (emphasis added).

Presumably Virginia Rule 5.3(a)'s word "compatible" is deliberately different from Virginia Rule 5.1(a)'s word "conform." The ABA Model Rules have the same distinction, as do all or nearly all state's ethics rules. Certainly the drafters intentionally chose different words. But it is unclear what difference they intended.

There are three possibilities. First, the word "compatible" might intend exactly the same meaning as "comply" – but recognizes that technically nonlawyers are not bound by lawyers' ethics rules. As explained below, Virginia Rule 5.3(c) seems to imply the identical conduct requirement. But people can "comply" with a rule that does not legally require such behavior. Compliance might be voluntary – but would still be considered "compliance." So if Virginia Rule 5.3 and Virginia Rule 5.1 intended to have the same meaning, Virginia Rule 5.3(a) presumably could have contained the word "comply."

Second, perhaps Virginia Rule 5.3(a)'s word "compatible" was intended to define a somewhat lower standard of compliance with the Virginia ethics rules. In other words, Virginia Rule 5.3(a) requires nonlawyers to come pretty close to compliance with lawyers ethics rules but, not strictly "comply" with every ethics rule in the same way as lawyers

(as Virginia Rule 5.1(a) requires of lawyers). As explained below, unique Virginia Rule 5.3 cmt. [1]'s concluding sentence seems to take that approach – recognizing that in some situations nonlawyers may engage in conduct that would violate lawyers' ethics rules. The ABA Model Rules do not contain a similar provision, yet ABA Model Rule 5.3(a) also contains the word “compatible” – which differs linguistically from ABA Model Rule 5.1(a)'s word “conform.”

Third, perhaps Virginia Rule 5.3(a)'s (and ABA Model Rule 5.3(a)'s) word “compatible” is intended to define nonlawyers' compliance with some but not all of the Virginia Rules applicable to lawyers. In other words, the word “compatible” would demand nonlawyers' compliance with the Virginia Rules applicable to lawyers' conduct when those nonlawyers engage in the same conduct in which lawyers engage – but not other conduct. For example, nonlawyers would be required to protect client confidential information in the same way lawyers would. But nonlawyers would not be required to comply with those Virginia Rules governing lawyers' non-representational and even non-professional roles (primarily found in Virginia Rule 8.4).

This approach does not require nonlawyers' watered-down compliance with lawyer ethic rules when such nonlawyers do what lawyers do when representing their clients. Instead, it entirely excludes nonlawyers' obligation to comply with the ethics rules applicable to lawyers when they act outside their representational role.

This third option sounds like the most logical. But if so, the word “compatible” is inapt. That word seems to imply a watered-down obligation - rather than obligation to comply with some of the ethics rules applicable to lawyers, but not others. Virginia Rule 5.3 (and parallel ABA Model Rule 5.3) could have used the word “comply” – but make it

clear that such compliance was only required when nonlawyers do what lawyers do when representing their clients.

So it remains unclear whether the words “compatible” and “comply” are intended to be synonymous, or intended to describe different levels or different areas of required conduct.

Notably, ABA Model Rule 5.3(a) also contains the word “compatible” in describing nonlawyers’ behavior measured by the ABA Model Rules lawyer requirements – which contrasts with ABA Model Rule 5.1(a)’s word “conform” in describing lawyers behavior requirement.

**ABA Model Rule 5.3(a)** contains essentially the identical language as Virginia Rule 5.3(a).

Thus, most importantly, ABA Model Rule 5.3(a) requires specified lawyers to “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” (emphases added).

As explained above, the term “the person’s” seems inapt. The word “nonlawyers” would seem more appropriate.

And most importantly, ABA Model Rule 5.3(a)’s word “compatible” presumably means one of the three possibilities mentioned above.

There are several minor differences between ABA Model Rule 5.3(a) and Virginia Rule 5.3(a).

First, in contrast to Virginia Rule 5.3(a)'s introductory phrase "a partner or a lawyer..." ABA Model Rule 5.3(a) begins with the phrase "a partner, and a lawyer..." Those two phrases presumably intend to have the same meaning.

Second, in contrast to Virginia Rule 5.3(a)'s phrase "managerial authority" (describing partners' or other lawyers' role in a law firm), ABA Model Rule 5.3(a) contains the term "comparable managerial authority" (emphasis added). That additional word does not seem material.

### **Virginia Rule 5.3(b)**

Virginia Rule 5.3(b) addresses the responsibilities of lawyers who directly supervise nonlawyers.

Under Virginia Rule 5.3(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." This essentially parallels Virginia Rule 5.1(b)'s language, although that Virginia Rule understandably contains the term "another lawyer" rather than the term "the nonlawyer."

Rule 5.3(b)'s term "the nonlawyer" seems odd – the phrase "a nonlawyer" would seem more appropriate (emphases added).

More importantly, as discussed above, Virginia Rule 5.3(b) contains the term "compatible with the professional obligations of the lawyer," in contrast to Virginia Rule 5.1(b)'s phrase "conforms to the [Virginia] Rules of Professional Conduct" (emphasis added). As discussed above, it is unclear whether the term "compatible" is synonymous with "conforms," or instead whether the terms allow nonlawyers to engage in conduct that would not exactly conform to lawyers' ethics rules in all settings.

**ABA Model Rule 5.3(b)** contains the identical language.

### **Virginia Rule 5.3(c)**

Virginia Rule 5.3(c) addresses lawyers' ethical responsibility for nonlawyers' misconduct. Virginia Rule 5.3(c) describes two scenarios where lawyers are ethically responsible for nonlawyers' actions that would violate lawyers' ethics rules.

Virginia Rule 5.3(c) addresses lawyers' derivative liability for a nonlawyer's ethics violations, rather than the direct liability for failing to properly manage an institution (Virginia Rule 5.3(a)) or directly supervise a nonlawyer (Virginia Rule 5.3(b)).

As with Virginia Rule 5.3(a) and (b), Virginia Rule 5.3(c) essentially parrots Virginia Rule 5.1(c), – which describes two situations in which a lawyer will be ethically responsible for another lawyer's ethics violations.

As in Virginia Rule 5.3(b), Virginia Rule 5.3(c) oddly contains the phrase “such a person” instead of “such a nonlawyer.”

Not surprisingly, Virginia Rule 5.3(c) addresses lawyers' derivative ethical responsibility for nonlawyers' misconduct “that would be a violation of the [Virginia] Rules of Professional Conduct if engaged in by a lawyer.” This contrasts with Virginia Rule 5.1(c)'s phrase “for another lawyer's violation of the [Virginia] Rules of Professional Conduct.” As explained above in connection with the linguistic distinction between “compatible with” and “conforms to,” Virginia Rule 5.3(c)'s formulation does not label such nonlawyers' misconduct a violation of lawyers' ethics rules.

Significantly, Virginia Rule 5.3(c) explains that lawyers may be ethically disciplined under certain circumstances if a nonlawyer engages in any conduct that would violate any provision in the Virginia Rules of Professional Conduct. Thus, for purposes of

punishing lawyers for nonlawyers' misconduct, Virginia Rule 5.3(c) describes an exact match between the conduct required by nonlawyers and the conduct required by lawyers. This tends to confirm that the term "compatible with" used in Virginia Rule 5.3(a) and Virginia Rule 5.3(b) is essentially synonymous with Virginia Rule 5.1(a)'s and (b)'s term "conforms to."

**ABA Model Rule 5.3(c)** contains the identical language.

### **Virginia Rule 5.3(c)(1)**

Virginia Rule 5.3(c)(1) describes the first situation in which a lawyer will be ethically responsible for nonlawyers' misconduct that would violate the ethics rules if the nonlawyers were lawyers: "the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved" (emphasis added).

As a linguistic matter, it seems that the word "the" is unnecessary. Other Virginia Rules contain the word "knowledge" without the preceding word "the."

And as explained in connection with parallel Virginia Rule 5.1(c)(1), the word "involved" seems superfluous – of course that is the "conduct" referred to in Virginia Rule 5.3(c)(1).

Virginia Rule 5.3(c)(1) also raises substantive issues, as discussed in connection with Virginia Rule 5.1(c)(1), Virginia Rule 5.3(c)(1) does not on its face contain a knowledge requirement focusing on the ethical impropriety. In other words, it is not necessary for the lawyer ordering or ratifying nonlawyers' misconduct to know that the misconduct would violate the ethics rules if the nonlawyer were a lawyer. The only knowledge requirement in Virginia Rule 5.3(c)(1) is that the lawyer has "knowledge of the specific [nonlawyer's] conduct" that the lawyer orders or ratifies.

**ABA Model Rule 5.3(c)(1)** contains the identical language.

Thus, ABA Model Rule 5.3(c)(1) contains the seemingly unnecessary words “the” and “involved.”

And ABA Model Rule 5.3(c)(1) also contains the substantive limitation to the supervising lawyer’s knowledge to “the specific conduct” – thus explicitly excluding a requirement that such a supervising lawyer have “knowledge” that the “specific conduct” violates the ABA Model Rules.

### **Virginia Rule 5.3(c)(2)**

Virginia Rule 5.3(c)(2) describes the second scenario in which a lawyer will be ethically responsible for nonlawyers’ conduct that would violate the ethics rules if the nonlawyers were lawyers.

Significantly, Virginia 5.3(c)(2) applies to only a subset of lawyers covered by Virginia Rule 5.3(c)(1). That previous provision applies to any lawyer. In contrast, Virginia Rule 5.3(c)(2) only applies to a “lawyer [who] 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.”

Thus, presumably Virginia Rule 5.3(c)(2) does not apply to a lawyer who “orders or, with knowledge of the specific conduct, ratifies the conduct” of a nonlawyer over whom the ordering or ratifying lawyer has no institutional managerial authority or direct supervisory authority. Presumably, this distinction is intended. And such a distinction would make sense. Virginia 5.3(c)(1) understandably renders any lawyer ethically responsible for nonlawyer misconduct that the lawyer orders or ratifies (per that

provision). But Virginia 5.3(c)(2) renders only some lawyers ethically responsible for nonlawyers' misconduct through inaction - as opposed to action.

Such lawyers will be ethically responsible for nonlawyers' misconduct (that would violate the ethics rules if they were lawyers) if the lawyer “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.”

Most significantly, Virginia Rule 5.3(c)(2) renders an institutional managerial lawyer or direct supervising lawyer derivatively responsible for nonlawyers' misconduct if such a lawyer “knows or should have known” of the nonlawyers' misconduct “when its consequences can be avoided or mitigated but fails to take reasonable remedial action” (emphasis added). This contrast with Virginia Rule 5.1(c)(2)'s phrase “knows of the conduct.” In other words, Virginia Rule 5.3(c)(2) contains a “should have known” (essentially a negligence) standard that does not appear in the Virginia Rule 5.1(c)(2)'s language governing institutional managerial lawyers' and supervising lawyers' ethical responsibility for lawyers' ethics violations.

Because Virginia Rule 5.3 and Virginia Rule 5.1 are essentially the same in other respects (except for the obvious differences based on the former's application to nonlawyers rather than to lawyers), presumably the addition of the “should have known” phrase in Virginia Rule 5.3(c)(2) was deliberate. Interestingly, neither ABA Model Rule 5.1(c)(2) nor ABA Model Rule 5.3(c)(2) contain the phrase “or should have known.”

The “or should have known” obviously increases the situations in which lawyers might be ethically responsible for nonlawyers' misconduct that would violate the ethics rules if they were lawyers. Perhaps this expanded liability is based on the assumption

that lawyers more closely supervise nonlawyers and therefore should be held liable for their misconduct if they were sloppy in such supervision. In other words, nonlawyers do not act with the independence of lawyers, so perhaps lawyers who manage nonlawyers or directly supervise nonlawyers have a greater duty to monitor their conduct to make sure that they act in a way that is “compatible with” lawyers’ ethics duties. Unfortunately, there is no explanation for this critical distinction.

Significantly, Virginia Rule 5.3(c)(2) also limits the nonlawyers subject to its provision.

Virginia Rule 5.3(c)(2) only applies to nonlawyers who are “employed” in a law firm. Of course, that is only one of the three categories of nonlawyers covered by Virginia Rule 5.3 – which also applies to nonlawyers “retained by or associated with a lawyer.”

This presumably deliberate narrowing of Virginia Rule 5.3(c)(2)’s derivative liability makes some sense. A lawyer who “is a partner or has managerial authority in the law firm” should have some responsibility for the law firm’s employees. It seems less understandable to make those lawyers derivatively responsible for nonlawyers’ conduct if those nonlawyers are not employees.

But if the law firm “retains” but does not “employ” such a nonlawyer, the question is much closer. And as discussed above, it is unclear what the “associated with a lawyer” category means, so it is difficult to assess the fairness of lawyers’ derivative responsibility for nonlawyers who are somehow “associated with a lawyer” (whatever that means).

Virginia Rule 5.3(c)(2)’s second situation in which a lawyer might be derivatively responsible for a nonlawyer’s unethical conduct makes more sense – if the lawyer “has direct supervisory authority over the person.” It would make sense for such a direct

supervisor lawyer to face possible derivative ethical responsibility whether a nonlawyer whom the lawyer “directly supervises” is an employee, is “retained by” the lawyer, or is “associated with” the lawyer (whatever that means). Those lawyers’ direct involvement with a nonlawyer may justify those lawyers’ exposure to such derivative ethical responsibility.

Both types of lawyers (institutional managerial lawyers, and direct supervisory lawyers) face such possible derivative ethics responsibility only if they meet the specified knowledge standard (discussed above).

**ABA Model Rule 5.3(c)(2)** contains essentially the same language as Virginia Rule 5.3(c)(2).

Thus ABA Model Rule 5.3(c)(2) applies only to a subset of lawyers. This limitation makes sense, because ABA Model Rule 5.3(c)(2) renders lawyers ethically responsible for their inaction, in contrast to ABA Model Rule 5.3(c)(1)’s application to any lawyer’s action.

And like Virginia Rule 5.3(c)(2), ABA Model Rule 5.3(c)(2) only applies to nonlawyers who are “employed.” That is a subset of nonlawyers who are “employed or retained by or associated with a lawyer” – as stated in ABA Model Rule 5.3’s introductory sentence. It is unclear why ABA Model Rule 5.3(c)(2) is limited in that way.

But ABA Model Rule 5.3(c)(2) differs from Virginia Rule 5.3(c)(2) in one linguistic way and one substantive way.

In a slight linguistic contrast to Virginia Rule 5.3(c)’s phrase “lawyer is a partner or has managerial authority in the law firm . . . ,” ABA Model Rule 5.3(c)(2) contains the phrase “or has comparable managerial authority.”

More significantly, ABA Model Rule 5.3(c)(2) does not contain Virginia Rule 5.3(c)(2)'s phrase "or should have known" in describing the circumstance in which managerial lawyers and supervising lawyers may be ethically responsible for nonlawyers' misconduct if they do not take "reasonable remedial action" when the nonlawyers' misconduct's "consequences can be avoided or mitigated." Thus, ABA Model Rule 5.3(c)(2) requires lawyers' actual knowledge of the nonlawyers' conduct, and does not also include a negligence "or should have known" standard. That standard (which Virginia Rule 5.3(c)(2) contains, obviously expands the circumstances in which lawyers may be ethically responsible for nonlawyers' misconduct.

## Comment

### **Virginia Rule 5.3 Comment [1]**

Virginia Rule 5.3 cmt. [1] addresses lawyers' duties when managing or supervising "employees [and] independent contractors."

Virginia Rule 5.3 cmt. [1] begins by acknowledging that "[l]awyers generally employ assistants in their practice" (emphasis added). As explained above, the word "employ" could either denote a permanent payroll-type employment, or a temporary "by the hour" type employment. But the latter situation might more appropriately fit the "retained by" black letter Virginia Rule 5.3 category. Virginia Rule 5.3 cmt. [1] provides examples: "including secretaries, investigators, law student interns, and paraprofessionals."

Virginia Rule 5.3 cmt. [1]'s second sentence seems inconsistent with the first. It begins with the phrase "[s]uch assistants, whether employees or independent contractors" (emphasis added). One would have thought that the word "employ" in Virginia Rule 5.3 cmt. [1]'s first sentence would by definition have excluded independent contractors – especially given the phrase "whether employees or independent contractors" appearing such a few words later. If Virginia Rule 5.3 cmt. [1]'s first sentence's word "employ" did not intend to refer only to employees, a phrase such as "rely or" "used the services of" would have been preferable. This highlights the confusion about whether Virginia Rule 5.3 applies only to lawyers' employees, or also applies to non-employee independent contractor such as private investigators that are not on the lawyers' payroll.

As explained above, that presumably is the reason ABA Model Rule 5.3's title contains the word "Assistance" rather than the older word (still found in Virginia Rule 5.3's title "Assistants").

Presumably, Virginia Rule 5.3 cmt. [1]'s first sentence does not refer to or address the third category of nonlawyers conspicuously included in Virginia Rule 5.3's introductory sentence: "a nonlawyer...associated with a lawyer" (emphasis added). This obviously and therefore presumably intentional absence compounds the confusion about the meaning of the word "associated" - in Virginia Rule 5.3 specifically and in the Virginia Rules generally.

Virginia Rule 5.3 cmt. [1]'s first sentence probably should have used the word "retain" rather than "employ." Interestingly, as explained below, ABA Model Rule 5.3 cmt. [2] also uses that confusing formulation – although the ABA Model Rule makes it clear both in its title and in several other places that its requirements apply to lawyers working with non-employee independent contractor nonlawyers.

Virginia Rule 5.3 cmt. [1] next states that such "assistants...act for the lawyer in rendition of the lawyer's professional services" (emphasis added). That is an odd phrase. Under agency law, such nonlawyers only rarely "act for the lawyer in rendition of the lawyer's professional services." In fact, their doing so might involve the unauthorized practice of law. That phrase would have been more clear if it used a term such as "assist the lawyer in rendition of the lawyer's professional services" (emphasis added).

Virginia Rule 5.3 cmt. [1] then describes lawyers' obligation to give such assistants ("whether employees or independent contractors") "appropriate instruction and supervision concerning the ethical aspects of their employment" (emphasis added). The

word “employment” compounds the confusion about whether Virginia 5.3 cmt [1] limits its guidance only to a subset of the nonlawyers whose conduct is governed by Virginia Rule 5.3.

Virginia Rule 5.3 cmt. [1] provides an important example: “particularly regarding the obligation not to disclose information relating to representation of the client.” Interestingly, the term “relating to representation of the client” is the ABA Model Rule 1.6(a) broad formulation for confidentiality. Virginia’s Rule 1.6(a) uses a different formulation, protecting (1) “information protected by the attorney-client privilege under applicable law;” (2) “other information gained in the professional relationship that the client has requested be held inviolate;” and (3) “other information gained in the professional relationship . . . the disclosure of which would be embarrassing or would be likely to be detrimental to the client.”

Virginia Rule 5.3 cmt. [1]’s next indicates that lawyers “should be responsible for [nonlawyer assistants’] work product.” It is unclear what this means. Virginia Rule 5.3(c) uses the word “responsible” in describing lawyers’ possible ethical discipline for nonlawyers’ specified misconduct. Of course, that term could also refer to managing or supervisory lawyer’s oversight, direction or approval of such nonlawyers’ work product. Virginia Rule 5.3 cmt. [1]’s word “responsible” in the context of nonlawyers’ work product sounds like it might be the latter use. But such institutional managerial or supervisory lawyers presumably would also be “responsible” (meaning subject to ethical discipline) for any nonlawyers’ work product – related misconduct, as imposed by Virginia Rule 5.3(c).

Virginia Rule 5.3 cmt. [1] explains that “[t]he measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline” (emphasis added). The word “employed” is inapt in this sentence. The sentence awkwardly mentions “measures employed” – in a Virginia Rule Comment that mentions persons “employed” (or not being employed) (emphases added). Aside from this arguable grammatical misstep, it is unclear how lawyers would supervise nonlawyers differently from lawyers – although the former “do not have legal training and are not subject to professional discipline.” Presumably it means that lawyers must be more deliberate, careful and extensive in their training of nonlawyers than in their supervision of other lawyers.

Virginia Rule 5.3 cmt. [1] concludes with a significant and apparently unique provision that recognizes occasional circumstances when nonlawyers may engage in conduct that would almost certainly violate the Virginia Rule on their face - but in which lawyers frequently engage, without discipline.)

Virginia Rule 5.3 cmt [1]’s concluding sentence assures that: “[a]t the same time, however, [Virginia Rule 5.3] is not intended to preclude traditionally permissible activity such as misrepresentation by a nonlawyer of one’s role in a law enforcement investigation or a housing discrimination ‘test.’”

This is Virginia’s partial answer to a problem that has vexed the ABA and the profession generally for decades. Virginia Rule 4.1(a) bluntly states that “[i]n the course of representing a client a lawyer shall not knowingly . . . make a false statement of fact or law.” ABA Model Rule 4.1(a) takes a narrower view – but nevertheless flatly prohibits lawyers acting in a representational role from “mak[ing] a false statement of material fact

or law to a third person.” Virginia Rule 8.4(c) states that “[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on the lawyer’s fitness to practice law.” This prohibition on dishonest conduct applies when lawyers act in any role, not just in the representational role covered by Virginia Rule 4.1(a). In other words, Virginia Rule 8.4(c) applies whenever lawyers do anything, in their professional role or in their personal life unrelated to their professional role. Parallel ABA Model Rule 8.4(c) is remarkably absolute: “[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”

These prohibitions also apply to nonlawyers through whom the lawyers act. Virginia Rule 8.4(a) confirms that “[i]t is professional misconduct for a lawyer to . . . violate or attempt to violate the [Virginia] Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another” (emphasis added). ABA Model Rule 8.4(a) contains the identical language.

Yet everyone knows that lawyers either themselves engage in deception, or direct others to engage in deception. Civil rights lawyers themselves participate in, and their nonlawyer assistants participate in, deceptive conduct designed to detect housing discrimination. In fact, detecting such invidious illegal conduct requires deceptive conduct – establishing fake identities of identical persons to see if they are treated differently when seeking housing. And of course prosecutors participate in criminal sting operations that likewise necessarily involve deceptive conduct.

The ABA in particular and the profession in general have never been able to reconcile these harsh and unconditional flat anti-deception rules with this commonplace,

understandable and entirely justifiable deceptive conduct. In fact, it is almost surely preferable for lawyers to be involved in housing discrimination tests, criminal sting operations, etc. – to maximize legally compliant conduct.

Perhaps less commonly, lawyers also advise their clients about other types of deception in arguably less socially-worthy contexts. Case law supports lawyers' ability to engage in deception to uncover intellectual property "palming off" misconduct, etc. Apparently only one bar (the New York County Bar) has declined to condemn all such deceptive conduct in such a commercial setting. New York County LEO 737 (5/23/07) Although perhaps not as justifiable as the socially-worthy situations, this type of lawyer-induced deception occurs every day as well.

Some states have explicitly changed their ethics rules to permit some deception – usually limited to government prosecutors, etc.

Virginia Rule 5.3 cmt. [1]'s last sentence thus tiptoes toward an acknowledgement that such deception does not violate the ethics rules when engaged in by a nonlawyer. Virginia Rule 5.3 cmt. [1]'s concluding sentence does not go so far as to acknowledge that lawyers themselves can engage in deception – although they almost certainly do.

**ABA Model Rule 5.3 cmt. [2]** is essentially identical to Virginia Rule 5.3 cmt. [1], but with one large exception.

Thus, ABA Model Rule 5.3 cmt. [2]'s first sentence contains the confusing word "employ" – which is only one of three relationships ABA Model Rule 5.3's introductory sentence mentions: "employed or retained by or associated with." And like Virginia 5.3 cmt. [1], ABA Model Rule 5.3 cmt. [2]'s concluding sentence contains the inapt word "employed" when referring to "measures" that supervising lawyers take.

Also like Virginia Rule 5.3 cmt. [1], ABA Model Rule 5.3 cmt. [2]’s second sentence contains the odd statement that nonlawyers “act for the lawyer in rendition of the lawyer’s professional services” (emphasis added). As discussed above, that description seems inaccurate, or at least inapt.

Also like Virginia Rule 5.3 cmt. [1], ABA Model Rule 5.3 cmt. [1] contains the potentially confusing requirement that lawyers “should be responsible for [nonlawyers] work product.” As discussed above, it is unclear whether the phrase “responsible for” refers to substantive involvement in a supervising of nonlawyers’ creation of work product, or instead refers to lawyers’ being “responsible” for any nonlawyers’ misbehavior related to their work product.

But there is a significant difference between ABA Model Rule 5.3 cmt. [2] and Virginia Rule 5.3 cmt. [1].

In stark contrast to Virginia Rule 5.3 cmt. [1], ABA Model Rule 5.3 cmt. [2] does not contain Virginia Rule 5.3 cmt. [1]’s concluding sentence describing nonlawyers’ acceptable deceptive conduct. At some point, the ABA may have to address the dramatic mismatch between undeniable everyday reality and: (1) ABA Model Rule 4.1’s prohibition on most false statements; and (2) ABA Model Rule 8.4(c)’s unqualified prohibition on “conduct involving dishonesty, fraud, deceit, or misrepresentation”.

### **ABA Model Rule 5.3 Comment [1]**

Virginia did not adopt ABA Model Rule 5.3 cmt. [1].

ABA Model Rule 5.3 cmt. [1] addresses supervising and managing lawyers’ responsibilities.

ABA Model Rule 5.3 cmt. [1] begins by focusing on lawyers “with managerial authority within a law firm” - who must “make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters act in a way compatible with the professional obligations of the lawyer” (emphasis added). The phrase “nonlawyers outside the firm” “presumably” refers to black letter ABA Model Rule 5.3’s “retained by” category, and perhaps the mysterious undefined “associated with” category. It parallels the clever ABA Model Rule 5.3 title change from “Assistants” to “Assistance.”

ABA Model Rule 5.3 cmt. [1] next refers to ABA Model Rule 1.1 cmt. [6] and ABA Model Rule 5.1 cmt. [1]. Both of those ABA Model Rule Comments address lawyers working with other lawyers, not with nonlawyers. The former addresses lawyers cooperating with other lawyers from other law firms in representing their clients. The latter addresses lawyers’ duties when managing and supervising lawyers within the same law firm. Presumably ABA Model Rule 5.3 cmt. [1] mentions those other ABA Model Rules Comments to remind lawyers that they must apply the same standards to their supervision of nonlawyers, although that is not clear.

Somewhat ironically, ABA Model Rule 5.1 (which actually governs lawyers’ working with other lawyers) does not cite those other ABA Model Rule Comments.

ABA Model Rule 5.3 cmt. [1] then confirms that ABA Model Rule 5.3(b) “applies to lawyers who have supervisory authority over such nonlawyers within or outside the firm.” The term “inside the firm” presumably refers to nonlawyers “retained by...a lawyer.” But like the remainder of ABA Model Rule 5.3, ABA Model Rule 5.3 cmt. [1] does not provide any hint of what constitutes the undefined relationship “associated with a lawyer” that is

one of three relationships mentioned in black letter ABA Model Rule 5.3's introductory sentence.

ABA Model Rule 5.3 cmt. [1] concludes with a similar statement about ABA Model Rule 5.3(c) – explaining that the provisions of that ABA Model Rule apply to conduct of such nonlawyers within or outside the firm “that would be a violation of the [ABA Model] Rules of Professional Conduct if engaged in by a lawyer.” That description tends to support the conclusion that ABA Model Rule 5.3(a)'s “compatible” standard requires nonlawyers to act in the same way as lawyers act when lawyers represent clients (but perhaps not when lawyers act in a non-representational or even in a non-professional role).

### **ABA Model Rule 5.3 Comment [3]**

Virginia did not adopt ABA Model Rule 5.3 cmt. [3].

ABA Model Rule 5.3 cmt. [3] addresses nonlawyers “outside the firm [who] assist the lawyer in rendering legal services to the client.” The phrase “assist the lawyer in rendering legal services to the client” makes much more sense than ABA Model Rule 5.3 cmt. [2]'s second sentence's phrase “act for the lawyer in rendition of the lawyer's professional services.” (emphasis added)

ABA Model Rule 5.3 cmt. [3] next provides examples of such “nonlawyers outside the firm”: (1) “the retention of an investigative or paraprofessional service”; (2) “hiring a document management company to create and maintain a database for a complex litigation”; (3) “sending client documents to a third party for printing or scanning”; and (4) “using an Internet-based service to store client information.” Perhaps these are the type of nonlawyers who are “associated with a lawyer” (ABA Model Rule 5.3's introductory

sentence’s term). But despite ABA Model Rules’ failure to define the key word “associated” anywhere, it seems inapt to say that a third party that prints and scans client documents is somehow “associated with the lawyer who arranges for that service. So the mystery continues.

ABA Model Rule 5.3 cmt. [3] then explains that “[w]hen using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer’s professional obligations.” That essentially parrots ABA Model Rule 5.3(a) and (b). The reference to “the services [that] are provided” presumably limits what would otherwise be quite a chore. For instance, lawyers presumably would not be expected to “make reasonable efforts” to ensure that a cloud data service provider’s conduct is “compatible with the lawyer’s professional obligation” in all respects. It would be reasonable for lawyers to take such steps focusing on the cloud data service provider’s confidentiality protections, etc. – but not all of the other ABA Model Rules governing lawyers’ representational, professional and even non-representational and non-professional conduct.

ABA Model Rule 5.3 cmt. [3] then understandably explains that “[t]he extent of this obligation [to “make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer’s professional obligations”] will depend upon the circumstances.” ABA Model Rule 5.3 cmt. [3] provides examples as “including”: (1) “the education, experience and reputation of the nonlawyer”; (2) “the nature of the services involved”; (3) “the terms of any arrangements concerning the protection of client information”; and (4) “the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality.” As discussed

above, limiting lawyers' duty to certain "circumstances" understandably focuses on the type of services such nonlawyers will provide.

One might wonder how a nonlawyer's "reputation" would affect a lawyer's obligations. Perhaps the inclusion of that term permits lawyers to rely in part on such nonlawyers' "reputation" in vetting and supervising them.

ABA Model Rule 5.3 cmt. [3] refers to several ABA Model Rules: ABA Model Rule 1.1 (addressing competence); ABA Model Rule 1.2 (addressing allocation of authority); ABA Model Rule 1.4 (addressing lawyers' duty to communicate with their clients); ABA Model Rule 1.6 (the core ABA Model Rule confidentiality provision); ABA Model Rule 5.4(a) (addressing fee-sharing with nonlawyers, among other things); ABA Model Rule 5.5(a) (addressing nonlawyers' unauthorized practice of law, among other things).

ABA Model Rule 5.3 cmt. [3] concludes with warning that lawyers "retaining or directing a nonlawyer outside the firm...should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer." This obligation makes sense. Presumably lawyers would help fulfill their ABA Model Rule 5.3 obligations by engaging in such communications – either through written guidelines, or oral communications.

#### **ABA Model Rule 5.3 Comment [4]**

Virginia did not adopt ABA Model Rule 5.3 cmt. [4].

ABA Model Rule 5.3 cmt. [4] addresses clients' involvement in selecting nonlawyer assistants.

ABA Model Rule 5.3 cmt. [4] begins by explaining that lawyers "ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between

the client and the lawyer” – “[w]here the client directs the selection of a particular nonlawyer service provider outside the firm.” This scenario presumably describes clients’ selection of nonlawyer service providers, and helpfully suggests that lawyers and their clients should agree about who should monitor such nonlawyer service providers. ABA Model Rule 5.3 cmt. [4] refers to ABA Model Rule 1.2, which generally addresses allocation of authority between clients and their lawyers.

Because clients might not be familiar with all of their lawyers’ ethics duties, it would seem improper in many situations for lawyers to delegate to their clients full responsibility for monitoring nonlawyers’ actions to assure those nonlawyers’ compatibility with lawyers’ ethics duties. In fact, that would seem to be a non-delegable duty (although perhaps lawyers could call upon clients to monitor the factual aspects of such nonlawyer assistant’s conduct, rather than that conduct’s compatibility with lawyers’ ethics duties).

ABA Model Rule 5.3 cmt. [4] concludes by explaining that “lawyers and [litigation] parties may have additional obligations that are a matter of law beyond the scope of these [ABA Model] Rules” – when “[m]aking such an allocation in a matter pending before a tribunal.” That recognition presumably refers to tribunals’ imposition of additional requirements governing nonlawyers assisting the litigation parties’ lawyers - such as confidentiality provisions covering nonlawyers who compile or maintain information.

# RULE 5.4

## Professional Independence Of A Lawyer

### Rule

#### Virginia Rule 5.4(a)

Virginia Rule 5.4(a) addresses lawyers' sharing their fees with nonlawyers and practicing with nonlawyers.

Virginia Rule 5.4(a) bluntly states that “[a] lawyer or law firm shall not share legal fees with a nonlawyer,” except in four situations.

**ABA Model Rule 5.4(a)** contains the same general prohibition, and also includes four exceptions – although they differ from Virginia Rule 5.4(a)'s exceptions.

#### Virginia Rule 5.4(a)(1)

Virginia Rule 5.4(a)(1) addresses the first of the four exceptions to the general prohibition on lawyers sharing their legal fees with nonlawyers.

Virginia Rule 5.4(a)(1) allows a lawyer to “share legal fees with a nonlawyer” pursuant to “an agreement by a lawyer with the lawyer’s firm, partner or an associate [that] provide[s] for the payment of money, over a reasonable period of time after the lawyer’s death, to the lawyer’s estate or to one or more specified persons.” In essence, Virginia Rule 5.4(a)(1) allows a law firm to pay deceased colleague’s estate or beneficiary an amount representing work in process, etc. The amount presumably might even

include some value for the law firm's goodwill, to the extent that the law firm determined or agreed the amount was attributable to their late colleague's efforts when she practiced at the firm.

**ABA Model Rule 5.4(a)(1)** contains the identical language.

### **Virginia Rule 5.4(a)(2)**

Virginia Rule 5.4(a)(2) addresses the second of the four exceptions to the general prohibition on lawyers sharing their legal fees with nonlawyers.

Virginia Rule 5.4(1)(2) allows lawyers to share "legal fees with a nonlawyer" when a lawyer completes a "deceased, disabled, or disappeared" lawyer's "unfinished legal business." The lawyer completing such "unfinished legal business" may pay the "deceased, disabled or disappeared" lawyer's "estate or other representative." Not surprisingly, the amount must be limited to "that portion of the total compensation that fairly represents the services rendered by the deceased, disabled or disappeared lawyer."

The term "estate" obviously refers to a scenario involving a deceased lawyer. The term "other representative" presumably refers either to that situation or to other scenarios where a lawyer does not continue practicing but has not died.

Presumably this calculation would normally arise in a contingent fee or a fixed fee case, in which the now-unavailable lawyer's estate will be entitled to the amount that the lawyer would have earned if he was still practicing or otherwise available. Thus, a lawyer who worked with either a law firm colleague or another firm's lawyer on a contingent fee case would be entitled to (and perhaps even obligated to) substitute the now-unavailable lawyer's estate for the lawyer in whatever fee arrangement they had made.

### **ABA Model Rule 5.4(a)(2)**

ABA Model 5.4(a)(2) describes a different scenario.

ABA Model Rule 5.4(a)(2) explains that a lawyer who “purchases the practice of a deceased, disabled, or disappeared” lawyer under ABA Model Rule 1.17 may pay the “agreed-upon purchase price” to the “deceased, disabled or disappeared” lawyer’s “estate or other representative.”

The term “estate” obviously refers to the scenario involving a deceased lawyer. The term “other representative” presumably refers either to that situation or other scenario where a lawyer does not continue practicing but who has not died.

ABA Model Rule 5.4(a)(2) differs dramatically from Virginia Rule 5.4(a)(2). ABA Model Rule 5.4(a)(2) focuses on lawyers’ ABA Model Rule 1.17 ethically-compliant purchase of the practice of a lawyer who for one of three possible reasons cannot continue to represent his former clients. This contrasts with Virginia Rule 5.4(a)(2)’s description of a scenario in which lawyers complete the “unfinished legal business” of a lawyer who can no longer practice law for one of the same three reasons.

Presumably this might include a purchase under Virginia Rule 1.17. But Virginia Rule 5.4(a)(2) pointedly does not mention such a purchase.

### **Virginia Rule 5.4(a)(3)**

Virginia Rule 5.4(a)(3) addresses the third of the four exceptions to the general prohibition on lawyers sharing their legal fees with nonlawyers.

Virginia Rule 5.4(a)(3) allows lawyers to “share legal fees with a nonlawyer” included “in a compensation or retirement plan, even though the plan is based in whole or in part on a profitsharing arrangement.”

Lawyers sharing their fees with nonlawyer law firm colleagues present an interesting scenario that requires a subtle and slightly illogical distinction. Most lawyers practicing by themselves or in law firms earn all or nearly all of their income from fees. So when they pay their nonlawyer employees, they obviously are “sharing” their fee income with nonlawyers. But there is nothing wrong with that. Virginia Rule 5.4(a)(3) describes a “profitsharing arrangement.” Presumably such arrangements involve lawyers paying all of their other bills, and then sharing some of what is left (“profit”) with their nonlawyer colleagues. But ironically, in nearly every situation the vast majority of those pre-profit “expenses” are also payments to those nonlawyer colleagues. Virginia Rule 5.4(a)(3)’s approval of such profit-sharing with nonlawyer colleagues is based on this intellectually artificial distinction.

In addition to this questionable differentiation between normal salary payments to nonlawyer colleagues based on fee income and generally improper profit-sharing fee income with those nonlawyer colleagues, there is another scenario addressed in several legal ethics opinions but not in the ethics rules. Lawyers practicing by themselves or in law firms obviously can pay a “bonus” (out of fee income, in nearly every situation) to nonlawyer colleagues for their hard work, extra effort, etc. If such bonuses are on top of the regular agreed-upon salary, that bonus money clearly comes from “fees.” Most legal ethics opinions prohibit lawyers or their law firms from rewarding nonlawyer colleagues who attract business by paying them a percentage of the fee or net income generated by

that business. But presumably there would be nothing wrong with paying a “bonus” to that nonlawyer colleagues based on her dedication to the firm, etc. So such “bonuses” presumably are nearly impossible to police.

Another subtle issue involves the type of profit-sharing arrangement the ethics rules permit. Legal ethics opinions have gradually moved from insisting that profit-sharing arrangements involve all nonlawyer colleagues of a certain category firmwide to a looser, more liberal approach – permitting profit-sharing arrangements with only a subset of nonlawyer colleagues (such as litigation department paralegals, etc.).

The bottom line is that lawyers and their law firms can so easily funnel firm money (all or nearly all of which was generated by “fee” income) to nonlawyer colleagues that the fee-sharing prohibition presumably only deters lawyers from paying (and especially memorializing the payment to) nonlawyer colleagues a percentage of fees earned in a particular matter or group of matters.

**ABA Model Rule 5.4(a)(3)** contains the identical language, although it uses the term “profit-sharing” with a hyphen rather than the Virginia Rule 5.4(a)(4)’s word “profitsharing”.

#### **Virginia Rule 5.4(a)(4)**

Virginia Rule 5.4(a)(4) addresses the fourth of four exceptions to the general prohibition on lawyers sharing their legal fees with nonlawyers.

Virginia Rule 5.4(a)(4) allows lawyers to “share legal fees with a nonlawyer” when a lawyer “accept[s] discounted payment of his fee from a credit card company on behalf of a client.” Thus, this common arrangement does not constitute otherwise impermissible

fee sharing. This arrangement hardly sounds like fee-sharing, and presumably would not implicate the arguable risk that the fee-sharing credit card company would somehow improperly interfere with the lawyer's judgment. But the Virginia Bar apparently determined that lawyers deserved protection from any ethics challenge to such an arrangement.

**ABA Model Rule 5.4** does not contain a similar provision.

#### **ABA Model Rule 5.4(a)(4)**

Virginia did not adopt ABA Model Rule 5.4(a)(4).

ABA Model Rule 5.4(a)(4) allows lawyers to share legal fees with nonlawyers when a lawyer shares “court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.”

#### **Virginia Rule 5.4(b)**

Virginia Rule 5.4(b) addresses the prohibition on lawyers forming partnerships with nonlawyers.

Virginia Rule 5.4(b) prohibits lawyers from “form[ing] a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.” This is the rule that prevents multidisciplinary practice arrangements – under which lawyers and nonlawyers form a partnership to provide both legal services and non-legal services.

The ABA rejected proposals to allow such multidisciplinary arrangements in 2000 and 2002, and the Virginia Bar rejected a similar proposal in 2002. As with the easily-skirted prohibition on sharing fees with non-lawyer colleagues, lawyers clearly may hire

as law firm employees other non-lawyer professionals. For instance, a law firm might hire an engineer who assists lawyers or their clients in various engineering tasks. Such an engineer cannot partner with the lawyer, but of course can earn a salary for her work. The work presumably could bill the engineer out at an hourly rate, and pay the engineer a “bonus” for good work or extra effort. As long as those arrangement do not violate the engineer’s professional regulations, the arrangement could in effect amount to a de facto partnership in the sense that a lawyer and the engineer would work together and each earn an income from their work. Of course, whether the engineer partnered with the lawyer or otherwise worked with the lawyer as an employee or as an independent contractor, the lawyer could not let the engineer interfere with the lawyer’s professional judgment.

**ABA Model 5.4(b)** contains the identical language.

### **Virginia Rule 5.4(c)**

Virginia Rule 5.4(c) addresses the prohibition on lawyers allowing certain nonlawyers to interfere with their professional judgment.

Virginia Rule 5.4(c) prohibits a lawyer from “permit[ing] a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgement in rendering such legal services.”

Virginia Rule 5.4(c) echoes Virginia Rule 1.8(f), which allows lawyers to be paid by non-clients if: (1) the client consents; (2) “there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship,” and (3) the

lawyer protects the client's Virginia Rule 1.6(a) – protected client confidential information.

Virginia Rule 1.8 cmt. [11] provides further guidance about such arrangements.

Virginia Rule 5.4(c) applies to a broader range of situations than Virginia Rule 1.8(f) involving third parties who might impermissibly interfere with lawyers' professional judgment. Virginia Rule 5.4(c) prohibits lawyers from allowing interference by "a person who recommends, employs, or pays the lawyer. Virginia Rule 1.8(f) only prohibits lawyers from allowing interference by a third person "compensat[ing]" the lawyer.

In contrast to Virginia Rule 1.8(f)(2)'s understandable generic term "interference," Virginia Rule 5.4(c) contains the odd phrase "direct or regulate." The term "interference" makes more sense. The word "direct" would seem to involve the nonlawyer demanding the lawyer to take a certain step or avoid a certain step – rather than the more subtle influence implied in the word "interference." And the term "regulate" seems even more inapt. That word normally refers to a formal, often repetitive, direction. One would have thought that these parallel Virginia Rules (Virginia Rule 1.8(f)(2) and Virginia Rule 5.4(c)) would have used the same terminology when referring to the same prohibition.

**ABA Model Rule 5.4(c)** contains the identical language.

### **Virginia Rule 5.4(d)**

Virginia Rule 5.4(d) addresses the prohibition on lawyers' practice of law in certain scenarios.

Virginia Rule 5.4(d) prohibits lawyers from "practic[ing] with or in the form of a professional corporation or association authorized to practice law for a profit" under any of three scenarios (discussed below).

The conditioning of the three prohibited scenarios on lawyers' "practice [of] law for a profit" presumably excludes from Virginia Rule 5.4(d)'s reach non-profit legal organizations. Neither black letter Virginia Rule 5.4(d) nor any Virginia Rule Comments provide any guidance on this issue.

**ABA Model Rule 5.4(d)** contains the same prohibition, but with a slightly different definition of the three impermissible scenarios (also discussed below).

### **Virginia Rule 5.4(d)(1)**

Virginia Rule 5.4(d)(1) addresses the first of the three prohibited scenarios in which lawyers may not practice law with nonlawyer colleagues.

Under Virginia Rule 5.4(d)(1), lawyers may not practice "with or in" an entity if a nonlawyer "owns any interest" in the entity, except: (1) under Virginia Rule 5.4(a)(3)'s profitsharing "compensation or retirement plan" for nonlawyer employees; or (2) under a temporary arrangement in which a lawyer's estate's fiduciary representative holds "the stock or interest of the lawyer for a reasonable time during administration."

It is unclear why Virginia Rule 5.4(d)(1) refers to Virginia Rule 5.4(a)(e)(3) – which describes nonlawyers' compensation or retirement plans. Presumably, such plans would not involve those nonlawyer employees "own[ing] any interest" in the law firm.

**ABA Model Rule 5.4(d)(1)** addresses a similar scenario, but using slightly different language.

In contrast to Virginia Rule 5.4(d)(1), ABA Model Rule 5.4(d)(1) does not contain an exception based on ABA Model Rule 5.4(a)(3) – perhaps recognizing that the

compensation or retirement plans described in ABA Model Rule 5.4(a)(3) would not involve nonlawyers owning any interest in the law firm.

### **Virginia Rule 5.4(d)(2)**

Virginia Rule 5.4(d)(2) addresses the second of the three prohibited scenarios in which lawyers may not practice law with nonlawyer colleagues.

Under Virginia Rule 5.4(d)(2), a lawyer may not practice “with or in” an entity if “a nonlawyer is a corporate director or officer thereof, except as permitted by law.”

This is an understandable but easily-avoided prohibition. It is unclear whether Virginia Rule 5.4(d)(2) focuses exclusively on such nonlawyer colleagues’ titles (which would be a somewhat ridiculously narrow focus) or on the bona fides of such nonlawyer colleagues’ role in the entity. That would be slightly less ridiculous, but also essentially unenforceable. Law firms hoping to skirt this prohibition could just use a different title for a power-wielding nonlawyer colleague – and could also avoid memorializing such nonlawyer colleagues’ influence in the entity. Of course, an entity’s nonlawyer constituents can wield power through suggestions, proposals, body language, frowns, smiles, etc.

The phrase “except as permitted by law” imports extrinsic law into the analysis. Neither black letter Virginia Rule 5.4 nor any of the Virginia Rule 5.4 Comments provide any guidance.

**ABA Model Rule 5.4(d)(2)** addresses the same basic concept, but with two differences.

First, in contrast to Virginia Rule 5.4(d)(2), ABA Model Rule 5.4(d)(2) does not contain “the except as permitted by law” exception.

Second, in contrast to Virginia Rule 5.4(d)(2), ABA Model Rule 5.4(d)(2) includes an additional type of arrangement that precludes a lawyer from practicing law in an entity: if a nonlawyer “occupies the position of similar responsibility [as a corporate director or officer] in any form of association other than a corporation.” This ABA Model Rule 5.4(d)(3) explanation thus focuses on the bona fides of such nonlawyer colleagues’ role, in contrast to parallel Virginia Rule 5.4(d)(2)’s sole focus on titles.

### **Virginia Rule 5.4(d)(3)**

Virginia Rule 5.4(d)(3) addresses the third of the three scenarios in which lawyers may not practice law with nonlawyer colleagues.

Under Virginia Rule 5.4(d)(3), lawyers may not practice law “with or in” an entity if “a nonlawyer has the right to direct or control the professional judgement of a lawyer.” The phrase “has the right to direct or control” (emphasis added) seems to denote some institutional power – perhaps derived from the organization’s governing documents. The phrase presumably differs from such a nonlawyer’s informal interference (not based on the “right” to do so, but rather on the power to do so).

Virginia Rule 5.4(d)(2) contains the phrase “direct or control” in describing the impermissible role of nonlawyer colleagues. This couplet differs from Virginia Rule 5.4(c)’s phrase “direct or regulate” in describing third parties’ impermissible conduct. As explained above in connection with that rule, the word “direct” is less apt than Virginia Rule 1.8(f)(2)’s more generic word “interference.” The word “control” is akin to the word

“regulate” that appears in Virginia Rule 5.4(c). But the word “control” seems more comprehensive than the word “regulate.”

Between Virginia Rules 1.8(f)(2), 5.4(c) and 5.4(d)(3), the Virginia Rules confusingly use the following four words to describe essentially the same thing: “interference;” “direct;” “regulate;” “control.” Presumably all of those words are intended to have the same meaning – nonlawyers’ “interference” with lawyers’ independent judgment while representing their clients. The proliferation of words to mean essentially the same thing does not make much sense. One would think that the term “interference” would be more appropriate in all of those settings.

**ABA Model Rule 5.4(d)(3)** contains the identical language.

## Comment

### Virginia Rule 5.4 Comment 1

Virginia Rule 5.4 cmt. [1] addresses the rationale for Virginia Rule 5.4.

Virginia Rule 5.4 cmt. [1] first notes that Virginia Rule 5.4 “express[es] traditional limitations on sharing fees” – explaining that such limitations “are to protect the lawyer’s professional independence of judgement.” That rationale is based on the common but dubious notion that nonlawyers sharing in lawyers’ fees will somehow influence the lawyers’ judgement.

Virginia Rule 5.4 cmt. [1] then explains that lawyers’ “obligation to the client” is not “modif[ied]” because a non-client pays the lawyer’s “fee or salary or recommends employment of a lawyer.” Presumably the word “salary” refers to in-house lawyers or other lawyers who do not technically earn a “fee” while representing their clients. The word “modified” is odd. A “modification” presumably could decrease or increase lawyers’ “obligation to the client.” Virginia Rule 5.4 cmt. [1] presumably focuses on the former. One would have thought that a word such as “diminished” or “affected” would have been more appropriate.

Virginia Rule 5.4 cmt. [1] concludes with a reference to Virginia Rule 5.4(c) and Virginia Rule 1.8(f) – explaining that any arrangements in which non-clients pay a lawyer “should not interfere with the lawyer’s professional judgement” (emphasis added). As explained above, the word “interfere” seems more appropriate than the terms used elsewhere in black letter Virginia Rule 5.4: “direct;” “regulate;” “control.” As in other areas, Virginia Rule 5.4 cmt. [1]’s word “should” seems inappropriate – although ABA Model Rule 5.4 cmt. [1] also uses the word “should.” The word “must” would seem preferable.

**ABA Model Rule 5.4 cmt. [1]**, contains identical language.

For instance, ABA Model Rule 5.4 cmt. [1] also states that “such arrangements should not interfere with the lawyer’s professional judgement” (emphasis added). As explained above, the word “must” would seem preferable.

In contrast to Virginia Rule 5.4 cmt. [1], ABA Model Rule 5.4 cmt. [1] does not refer to ABA Model Rule 1.8(f).

### **ABA Model Rule 5.4 Comment 2**

Virginia did not adopt ABA Model Rule 5.4 cmt. [2].

ABA Model Rule 5.4 cmt [2] addresses the rationale for ABA Model Rule 5.4.

ABA Model Rule 5.4 cmt. [2] explains that ABA Model Rule 5.4 “also expresses traditional limitations on permitting a third party to direct or regulate the lawyer’s professional judgment in rendering legal services to another.”

Oddly, ABA Model Rule 5.4 cmt. [2] concludes with a reference to ABA Model Rule 1.8(f). That ABA Model Rule contains essentially the same language as Virginia Rule 1.8(f). Such a reference would seem more appropriate in ABA Model Rule 5.4 cmt. [1], as in the Virginia Rule.

# **RULE 5.5**

## **Unauthorized Practice of Law; Multijurisdictional Practice of Law**

### **Rule**

#### **Virginia Rule 5.5(a)**

Virginia Rule 5.5(a) is a unique provision not found in the ABA Model Rules, which in certain circumstances prohibits lawyers, law firms or professional corporations from employing lawyers whose licenses have “been suspended or revoked for professional misconduct.”

In essence, Virginia Rule 5.5(a) and its companion, Virginia Rule 5.5(b), are understandably punitive provisions presumably designed to prevent disciplined lawyers from continuing to benefit from relationships with clients whom they represented while misbehaving in such a serious way as to cause their suspension or disbarment. The Virginia Rules are quite broad, and might be seen as making disciplined lawyers pariahs.

Unfortunately, neither Virginia Rule 5.5(a) nor its companion, Virginia Rule 5.5(b), are accompanied by any Comments.

Virginia Rule 5.5(a) prohibits “[a] lawyer, law firm or professional corporation” from “employ[ing] in any capacity” certain disciplined lawyers (defined below). The prohibition on “employ[ing] in any capacity” applies to lawyers during “[the] period of [those lawyers’] suspension or revocation.” In other words, while such lawyers’ licenses are suspended

or revoked, the law firms and other entities may not employ those lawyers “in any capacity.”

Only a certain category of lawyers, law firms or professional corporations are prohibited from employing such disciplined lawyers. Virginia Rule 5.5(a) specifically describes those lawyers and legal entities who may not employ such disciplined lawyers. The hiring prohibition applies to any “lawyer, law firm or professional corporation” with whom the “disciplined lawyer was associated . . . at any time on or after the date of the acts which resulted in [the disciplined lawyer’s] suspension or revocation.” In other words, a law firm cannot employ “in any capacity” one of its former associated lawyers who worked at the law firm at the time the lawyer was misbehaving or any time after the lawyer misbehaved. The timing focuses on the disciplined lawyer’s misbehavior, not the time at which the misbehavior was detected and resulted in the lawyer’s discipline.

Of course, under Virginia Rule 5.5(a), such lawyers, law firms or professional corporations may employ disciplined lawyers (in any capacity, including that of a lawyer) once their suspension or revocation is over – and those lawyers may freely practice law again. But those firms may face Virginia Rule 5.5(b) restrictions as to whom they may represent.

Virginia Rule 5.5(b) (discussed below) also takes a punitive approach – prohibiting any law firm that employs such a disciplined lawyer from representing certain clients (thus presumably deterring those law firms from hiring the disciplined lawyer).

Virginia Rule 5.5(a)’s complicated prohibition implicates several terms, which require understanding and analyzing the Virginia Rule’s words.

First, Virginia Rule 5.5(a) uses the word “lawyer.” Virginia Rule 5.5(a) indicates that a lawyer or law firm “shall not employ . . . a lawyer whose license has been suspended or revoked” under the specified circumstances. The Virginia Rule raises an interesting conceptual question: is a lawyer whose license is “revoked” for “professional misconduct” still called a “lawyer”? The Virginia Rule seems to say “yes,” because it prohibits the hiring law firm from employing “a lawyer whose license has been suspended or revoked.” One might think that the term “former lawyer” would make more sense, but the semantic issue does not confuse the Rule’s application.

Second, Virginia Rule 5.5(a) uses the term “professional corporation.” That is a legally defined term, and therefore easy to understand.

Third, Virginia Rule 5.5(a) uses the word “firm.” The Virginia Rule Terminology section defines “law firm” as “a professional entity, public or private, organized to deliver legal services, or a legal department of a corporation or other organization.” That definition is essentially the same (although seems to be slightly narrower) than the ABA Model Rule 1.0(c) definition.

Virginia Rule 1.10 is accompanied by several Comments which provide further guidance on the definition of a “firm.” In one of the most confusing mismatches between the Virginia Rules and the ABA Model Rules, Virginia Rule 1.10 cmts. [1] – [1d] parallel to a certain extent Comments found in a completely different spot in the ABA Model Rules: ABA Model Rule 1.0 cmts. [2] – [4]. This document’s summaries and analyses of Virginia Rule 1.10’s Comments summarize and analyze those Comments. Importantly for purposes of applying Virginia Rule 5.5(a), it is worth noting that Virginia Rule 1.10 cmt. [1] begins by noting that “[w]hether two or more lawyers constitute a firm as defined in the

[Virginia] Terminology section can depend on the specific facts.” For example, “two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm” – but those practitioners would be considered a firm “if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm.” Virginia Rule 1.0 cmt. [1] then introduces the concept of “associated” lawyers. Unfortunately, the term “associated” is not defined anywhere in the Virginia Rules or the Virginia Rule Comments (or in the ABA Model Rules or the ABA Model Rule Comments) – although the term “associated” has enormously consequential meaning in analyzing conflicts of interest’s imputation, among other issues. Virginia Rule 1.0 cmt. [1] notes that “[t]he terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve.” Virginia Rule 1.0 cmt. [1] concludes by describing various scenarios where “[a] group of lawyers could be regarded as a firm” and other circumstances where they would not be regarded as a firm. The bottom line is that the Virginia Rules’ definition of “firm” is unclear.

Fourth, Virginia Rule 5.5(a) uses the phrase “in any capacity.” Significantly, Virginia Rule 5.5(a) limits lawyers or law firms’ hiring of such “suspended or revoked” lawyers “in any capacity.” Presumably this includes non-legal jobs. Thus, a lawyer or law firm (or similar entity) cannot continue to employ (and cannot hire back) – in any role – one of its lawyers who was “associated” (a term discussed below) with that lawyer or law firm when or after he or she engaged in the misconduct that cost that lawyer his or her license. This contrast with the next rule (Virginia Rule 5.5(b), which includes a specific list of jobs – “consultant, law clerk, or legal assistant” – that such a disciplined lawyer

might understandably seek at another law firm, and that will trigger consequences for that other law firm.

Fifth, Virginia Rule 5.5(a) uses the terms “suspended” and “revoked.” Virginia Rule 5.5(a) applies to lawyers “whose license has been suspended or revoked for professional misconduct.” Rules of the Virginia Supreme Court Part Six, section iv, paragraph 13 (effective December 1, 2019) defines “Suspension” as “the temporary suspension of an Attorney’s License for either a fixed or indefinite period of time.” That rule defines “Revocation” as “any revocation of an Attorney’s License.” That Rule also explains that “Disbarment” has the same meaning as “Revocation.” So Virginia Rule 5.5(a)’s phrase “suspended or revoked” includes the perhaps more commonly used term “disbarred.”

Interestingly, Virginia Rule 5.5(d)(1) (discussed below) uses the phrase “disbarred or suspended.” Presumably that Virginia Rule’s use of “disbarred” is synonymous with the word “revoked” used just three provisions earlier. Virginia Rule 5.5 would be easier to understand if it used consistent terms.

Sixth, Virginia Rule 5.5(a) uses the term “professional misconduct.” Virginia Rule 5.5(a) applies to lawyers whose licenses have been “suspended or revoked” – “for professional misconduct.” Although the Virginia Rule does not define that term, it would seem inherent in such lawyers’ suspension or revocation (or disbarment). In other words, by definition, lawyers’ licenses are suspended or revoked because of their “professional misconduct.” This is not to say that the underlying misconduct must be related to their representational role or even their professional role. Lawyers may be professionally punished for misconduct unrelated to their legal practice. Virginia Rule 8.4 cmt. [1] explains that “[m]any kinds of illegal conduct reflect adversely on fitness to practice law,

such as offenses involving fraud and the offense of willful failure to file an income tax return.” In contrast, “some kinds of offense carry no such implication.” Virginia Rule 8.4 cmt. [1] notes that “[t]raditionally, the distinction was drawn in terms of offenses involving ‘moral turpitude.’” In other words, misconduct involving “moral turpitude” might result in professional discipline, while other types of misconduct might not. Virginia Rule 8.4 cmt. [1] then explains that “[a]lthough a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate a lack of those characteristics relevant to law practice.” Virginia Rule 8.4 cmt. [1] concludes with examples: “[o]ffenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice” – and even “[a] pattern of repeated offenses . . . of minor significance when considered separately, can indicate indifference to legal obligation.”

So lawyers may have their licenses suspended or revoked “for professional misconduct” involving misbehavior having nothing to do with their representation of clients or other professional activities. The Virginia Rule applies to them regardless of what caused their license’s suspension or revocation.

Seventh, Virginia Rule 5.5(a) uses the word “associated.” Virginia Rule 5.5(a) prohibits law firms and others from hiring lawyers (or former lawyers) during the period of the suspension or revocation of their licenses – if those lawyers had some connection with that lawyer or law firm at specified times. The hiring prohibition applies only “if the disciplined lawyer was associated with such lawyer, law firm, or professional corporation” at specified times (emphasis added). As mentioned above, the term “associated” is

unfortunately not defined in the Virginia Rules or the Virginia Rule Comments – despite its enormous significance in several contexts.

Interestingly, and perhaps deliberately, Virginia Rule 5.5(b) (discussed below) uses an entirely different definition of a relationship between a law firm and lawyers. Virginia Rule 5.5(b) applies in the specified way to lawyers “with whom the disciplined lawyer practiced.” That is a much more common sense commonly used term than the term “associated with.” Presumably the Virginia Rule 5.5(b) statement is broader than the term “associated with” – which implies a much more intimate relationship. Lawyers might be considered to have “practiced” with other lawyers in an office-sharing arrangement or other looser form than the type of close relationship apparently required to meet the “associated with” standard. So determining whether a disciplined lawyer “was associated with such lawyer, law firm, or professional corporation” might be difficult. The term presumably requires a closer relationship than the “practiced with” relationship used in Virginia Rule 5.5(b).

It is unclear whether Virginia Rule 5.5(a) applies only if the misbehaving lawyer “was associated with” the lawyer, law firm or professional corporation as a “lawyer” at the time that he misbehaved. It is also not clear why the misbehaving lawyer had to have been “associated with” the law firm at the time of his misbehavior. Lawyers presumably can work for a law firm without being “associated” with the firm. For example, contract lawyers can work in privilege review sites without access to the firm’s computer system and confidential information about other clients. And of course lawyers can be employed by law firms in non-legal positions – such as paralegals, file clerks, marketing staff, etc. And those lawyers acting in non-legal roles can have their licenses suspended or revoked

for misconduct unrelated to dealing with clients. Virginia Rule 8.4 and Virginia Rule 8.4 cmt. [2] makes that clear. One would think that Virginia Rule 5.5(a) would apply to those lawyers who engaged in misconduct in their non-legal role (and who were thus not “associated with” the law firm at the time of the misbehavior). In other words, Virginia Rule 5.5(a) presumably should bar a law firm from employing “in any capacity” a lawyer whose license was suspended or revoked for misconduct at that law firm even if that lawyer was not “associated” with the law firm at the time of the misconduct. Lawyers who were employed by a law firm as paralegals, file clerks, privilege reviewers, etc. – and thus not “associated with” those law firms – presumably should be barred from later working at those law firms if they were employed there (but not “associated” with the law firm) when they engaged in the misconduct.

Eighth, Virginia Rule 5.5(a) uses a temporal phrase: “at or any time on or after the date of the acts which resulted in suspension or revocation.” The Virginia Rule prohibits lawyers, law firm or professional corporations from employing “in any capacity” lawyers whose licenses have been suspended or revoked if those disciplined lawyers were “associated” with that lawyer, law firm or professional corporation certain times: “at or any time on or after the date of the acts which resulted in suspension or revocation.” Thus, the Virginia Rule focuses on “acts” – not on the time the lawyer was disciplined for those acts. So the “acts” might have occurred long before the disciplinary authorities discovered and punished the lawyers’ wrongful “acts.” The most obvious example of that understandable temporal connection would involve a lawyer who “was associated” with a law firm “on . . . the date of the acts which resulted in suspension or revocation.” It makes

sense that the law firm with which that lawyer was “associated” at the time of the misconduct cannot continue employing “in any capacity.”

But Virginia Rule 5.5(a)’s complicated timing situation might result in an anomaly that may be so rare as to not deserve attention. On its face, Virginia Rule 5.5(a) prevents a law firm from hiring any lawyer who was “associated” with that law firm “after the date of the acts which resulted in suspension for revocation. For instance, a lawyer might have engaged in misconduct (either professional or otherwise) in law firm A. The lawyer may then move to law firm B, at which he does not engage in any misconduct. He is later caught and punished for his misconduct that occurred while he was employed at law firm A. Under Virginia Rule 5.5(a), he may not be employed by law firm B, because he was “associated with” that law firm “after the date of the acts [(which occurred when he was employed at law firm A)] which resulted in suspension or revocation”. Perhaps this broad punitive approach rests on the assumption that the lawyer is such a bad character that any law firm where he worked after his misconduct should be prohibited from hiring him in any capacity while his license is suspended or revoked.

### **Virginia Rule 5.5(b)**

Virginia Rule 5.5(b) is also a unique provision not found in the ABA Model Rules. As explained above, the previous Rule (Virginia Rule 5.5(a)) prohibits law firms and others from hiring their own former lawyers whose licenses have been suspended or revoked. Virginia Rule 5.5(b) extends the punitive policy by essentially discouraging other law firms from hiring such disciplined lawyers – by prohibiting those law firms from representing specified clients.

Under Virginia Rule 5.5(b), “[a] lawyer, law firm or professional corporation” may employ a lawyer whose “license is suspended or revoked for professional misconduct.” As explained below, the Virginia Rule mentions three possible jobs: “a consultant, law clerk, or legal assistant” – although it is difficult to imagine that a lawyer or other entity could not employ such misbehaving lawyers in other capacities.

But despite being free to employ such misbehaving lawyers in those three roles (or presumably other roles), a lawyer or a legal entity pays a heavy price.” Under Virginia Rule 5.5(b) they “shall not represent any client represented by the disciplined lawyer.” And there is more – such law firms likewise “shall not represent any client represented by...any lawyer with whom the disciplined lawyer practiced on or after the date of the acts which resulted in suspension or revocation.”

This is a remarkably punitive provision. Virginia LEO 1852 (12/9/09) provides additional guidance for this unique Virginia provision.

Like Virginia Rule 5.5(a), Virginia Rule 5.5(b) contains several moving parts, and uses terms that deserve attention.

The key impact of hiring such a misbehaving lawyer is its dramatic effect on a hiring law firm’s inability to represent certain clients.

First, the definition of “lawyer, law firm or professional corporation” is discussed above in connection with Rule 5.5(a). It is important to recognize that Virginia Rule 5.5(a) and 5.5(b) apply to different lawyers, law firms or professional corporations. By definition, Virginia Rule 5.5(b) only applies to law firms, etc. who can employ such disciplined lawyers – thus excluding from its application any lawyer, law firm or professional corporation prohibited from doing so by Virginia Rule 5.5(a).

Second, in contrast to Virginia Rule 5.5(a)'s broad prohibition to those law firms and others "employ[ing] in any capacity" the disciplined lawyers, Virginia Rule 5.5(b) inexplicably applies to law firms, etc. who employ such disciplined lawyers only in certain very limited capacities: "as a consultant, law clerk, or legal assistant." It is difficult to imagine that a hiring law firm can avoid the client-representation prohibitions in Virginia Rule 5.5(b) by hiring a disciplined lawyer but giving her a title other than "consultant, law clerk, or legal assistant." That would not make any sense. But Virginia Rule 5.5(b)'s list is obviously deliberate, because it differs so dramatically from the "any capacity" definition in Virginia Rule 5.5(a). So law firms, etc. considering hiring such disciplined lawyers would be wise to consider whether such a move would restrict what clients they can represent. There is no Virginia Rule Comment explaining the stark difference between the designated employment definitions in the two successive Virginia Rules.

Third, the phrase "suspended or revoked" is discussed above, in connection with the identical phrase in Virginia Rule 5.5(a).

Fourth, as in Virginia Rule 5.5(a), the punitive effect of hiring a disciplined lawyer "as a consultant, law clerk, or legal assistant" applies only as long as the lawyer's license is "suspended or revoked." If the lawyer ever returns to full good status with the Virginia Bar, the law firm or others employing that now-restored lawyer presumably are free to represent any clients (just as the law firms and others governed by Virginia Rule 5.5(a) are free to hire the now-restored lawyer).

First, Virginia Rule 5.5(b) prohibits the hiring law firm or others from working for "any client represented by the disciplined lawyer" as of a certain time – discussed below (emphasis added). The term "represented" is undefined. Presumably it is applied

broadly, so that any representational work (however minor) a disciplined lawyer provided to that client would trigger the “represented by” standard.

But the term is narrower than Virginia Rule 5.5(a)’s hiring prohibition. On its face, that prong presumably would not apply to clients for whom the disciplined lawyer worked in a non-representational role (perhaps as a file clerk, etc.). Virginia Rule 5.5(a) prevents a law firm from hiring one of its former lawyers who had worked in a non-representational role such as law clerk, paralegal, receptionist, etc. It is clear under Virginia Rule 5.3 that “a nonlawyer [can be] employed or retained by or associated with a lawyer.” In other words, lawyers can be “associated” with non-lawyers, and vice versa. So Virginia Rule 5.5(a) on its face applies to lawyers “associated” with the disciplined lawyer who had engaged in misconduct in a non-lawyer role. Thus, Virginia Rule 5.5(a) does not require that the disciplined lawyer had represented any clients while being associated with the law firm that is now prohibited from hiring him. But Virginia Rule 5.5(b) is narrower. The first type of clients the hiring law firm may not represent are those who had been “represented by the disciplined lawyer.”

Second, Virginia Rule 5.5(b) also prevents the law firm or others hiring disciplined lawyer (in the specified roles) from representing any clients whom had been “represented . . . by any lawyer with whom the disciplined lawyer practiced” as of a certain time (discussed below) (emphasis added). Virginia Rule 5.5(b) thus confusingly introduces yet another description of an individual lawyer’s relationship with her law firm. Virginia Rule 5.5(a) uses the term “employ,” and also uses the term “associated with.” That inconsistency seems inappropriate. Virginia Rule 5.5(b) uses a third description of a relationship: “with whom the disciplined lawyer practiced.” The phrase “any lawyer with

whom the disciplined lawyer practiced” seems remarkably broad. Pointedly, that relationship does not even necessarily require the lawyers to have practiced together in a law firm. It certainly does not seem to require the sort of professionally intimate relationship required to satisfy the “associated with” standard. As explained above, Virginia Rule 1.10 cmt. [1] explains that “two practitioners who share office space and occasionally consult or assist each other would ordinarily not be regarded as constituting a firm.” Presumably they would not be considered “associated with” each other. But such lawyers might be considered to have “practiced” together. It would have been helpful for the Virginia Rules to have provided some guidance about any differences between these various role descriptions. The term “practiced with” clearly casts a broader net than Virginia Rule 5.5(a)’s “associated with” standard.

Thus, Virginia Rule 5.5(b)’s provision is surprisingly punitive. It seems understandable that a law firm hiring a lawyer whose license has been suspended or revoked would be prohibited from representing one of that lawyer’s former clients. Presumably that prohibition is designed to prophylactically prevent such disciplined lawyers from bringing their clients with them to another firm, and continue assisting them in a supposedly nonlegal capacity (or even crossing the line into the prohibited practice of law, because that line is so difficult to draw and so easy to keep secret). But Virginia Rule 5.5(b) goes further. It prohibits the hiring law firm from representing any clients currently or formerly represented by the disciplined lawyer’s previous firm (“any lawyer with whom the disciplined lawyer practiced”).

For instance, suppose that a lawyer practicing in the Reston office of a multi-office Virginia firm engaged in misconduct while practicing only in that office. If that lawyer was

hired by another law firm, Virginia Rule 5.5(b) would prohibit that law firm from representing any clients who had at the specified time represented by disciplined lawyer's law firm's Galax office – even if the disciplined lawyer had never represented those clients, heard of those clients, or ever been to Galax. In other words, Virginia Rule 5.5(b)'s broad prohibition puts off limits to the hiring law firm any clients who have been represented by any lawyer the disciplined lawyer “practiced with” at the specified time – even if the disciplined lawyer had never worked for those clients. Perhaps this broad prohibition is based on the worry that the disciplined lawyer might attract his former firm's clients to the hiring firm through reputation or force of personality.

Virginia Rule 5.5(b) uses the same temporal standard as Virginia Rule 5.5(a). The clients who are off-limits to the hiring law firm are those who had been represented by the disciplined lawyer or by any other lawyer with whom the disciplined lawyer practiced “on or after the date of the acts which resulted in suspension or revocation.” This broad reach as discussed above in connection with Virginia Rule 5.5(a). It extends the Virginia Rule 5.5(b) prohibition to law firms who may have innocently employed the misbehaving lawyer after he committed the wrongful acts – but at which he did not commit any wrongful acts. The clients of those innocent law firms would be off-limits to the hiring law firm because the disciplined lawyer would have practiced in that innocent law firm after the date of his wrongful acts – when if those acts were not discovered and resulted in his license's suspension or revocation only when he was practicing at the innocent law firm, or (even more starkly) was practicing at yet another law firm to whom he later moved. In other words, a misbehaving lawyer who moves from firm to firm after his wrongful acts but

before he is caught and punished essentially places off-limits to the hiring law firm any of those innocent law firms' clients.

### **Virginia Rule 5.5(c)**

Virginia Rule 5.5(c) addresses the general multijurisdictional practice prohibition.

Under Virginia Rule 5.5(c), “[a] lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.”

Although it might have been more clear if Virginia Rule 5.5(c) contained the word “Virginia” instead of the phrase “a jurisdiction,” it should be safe to presume that the Rule governs lawyers in Virginia.

It might also seem logical to include that the term “that jurisdiction” is synonymous with the term “a jurisdiction” – both of which refer to the jurisdiction “in” which a lawyer might practice. But Virginia legal ethics opinion inexplicably explains otherwise – in a way that expands non-Virginia lawyers’ ability to practice systematically and continuously in Virginia without being admitted in Virginia. In Virginia LEO1856 (9/19/11), the Virginia bar (and Virginia Supreme Court, which approved this LEO on (11/2/16) explained that Virginia Rule 5.5(c)’s “language looks to the law of the host state or country to determine if the foreign [non-Virginia] lawyer is practicing in violation of the regulation of the legal profession in that jurisdiction.” So far so good. Virginia LEO 1856 (9/19/11) then provides an example: “New York law should govern whether a foreign lawyer not authorized to practice in New York may advise New York clients on matters involving New York law.” But the next sentence introduces a confusing concept that seems to contradict black letter

Virginia Rule 5.5(c): “[t]he foreign lawyers physical presence in Virginia may not be a sufficient basis to apply Virginia’s rules under New York’s rules governing foreign lawyer practice.” That might make sense if the hypothetical lawyer was not practicing “in” Virginia. But Virginia Rule 5.5(c) on its face applies to such a lawyer.

This abstract inconsistency with Virginia Rule 5.5(c)’s plain language impacts non-Virginia lawyers ability to practice in Virginia under Virginia Rule 5.5(d)(2)(1) – discussed below.

**ABA Model Rule 5.5(a)** contains identical language.

### **Virginia Rule 5.5(d)**

Virginia Rule 5.5(d) introduces the topic multijurisdictional practice of law.

Virginia Rule 5.5(d) uses and defines the term “foreign lawyer” – which is the unique, odd and potentially confusing definition that Virginia’s Rule 5.5 multijurisdictional rule inexplicably uses. Using the term “foreign lawyer” to include non-Virginia but United States lawyers is counterintuitive, and no other states seems to have done it.

Multijurisdictional practice involves a lawyer practicing law where he or she is not licensed. It is a subset of unauthorized practice of law. Theoretically, it is just as unethical and illegal (in most states) for a lawyer to practice where he or she is not licensed than for a non-lawyer to practice law.

Perhaps ironically, Virginia lawyers do not have to familiarize themselves with Virginia’s multijurisdictional practice provisions contained in Virginia Rule 5.5. It is non-Virginia lawyers who must familiarize themselves with Virginia’s Rules, because they are not licensed in Virginia.

Before turning to Virginia’s unique and complicated multijurisdictional practice provisions, it is worth noting all of the varied and potentially confusing descriptions of Virginia Rule 5.5’s discussion of a lawyer’s relationship with a jurisdiction.

Under Virginia Rule 5.5 (and as discussed in its Comments), lawyers can be: (1) “licensed” in a jurisdiction (which usually but not automatically means that they may practice law without limitation anywhere in the jurisdiction on any type of law); (2) “admitted” in a jurisdiction to practice law without limitation anywhere in the jurisdiction and on any type of law; (3) “admitted” in a jurisdiction but not “authorized” to practice in that jurisdiction (such as Virginia Rule 5.5 cmt. [7]’s example of an admitted lawyer “on inactive status” who is not authorized to practice where admitted); (4) “admitted” in a jurisdiction, but limited in where the lawyer can practice (such as being “admitted” *pro hac* in a specific court and for a specific purpose), or limited to the type of law that the lawyer may handle (such as being “admitted” to give advice about foreign law, etc.); (5) “authorized” by the jurisdiction to practice law without limitation anywhere in the jurisdiction and on any type of law; (6) “authorized” by the jurisdiction to practice in only certain practice areas; or (7) “authorized” by some other type of authority outside the jurisdiction (such as U.S. Constitution’s Supremacy Clause, which allows lawyers licensed in any U.S. jurisdiction to practice purely federal law in any other U.S. jurisdiction, without that jurisdiction’s specific license, admission or explicit authority).

These different phrases appear throughout black letter Virginia Rule 5.5. For instance, Virginia Rule 5.5(d)(1) describes lawyers “licensed by the Supreme Court of Virginia or authorized under its rules to practice law generally in the Commonwealth of Virginia.” Virginia Rule 5.5(d)(3)(i) describes lawyers “not admitted to practice law in

Virginia.” Virginia Rule 5.5(d)(4)(i) describes lawyers “admitted to practice without limitation in Virginia.” Virginia Rule 5.5(d)(4)(ii) describes lawyers “authorized by law or order to appear in such proceeding or reasonably expects to be so authorized.” Virginia Rule 5.5(d)(4)(iii) describes lawyers “admitted to practice” (handling matters for which the forum does not require *pro hac* admission). Virginia Rule 5.5(d)(4)(iv) describes non-Virginia lawyers “admitted to practice . . . in a jurisdiction.” Virginia Rule 5.5(d)(5) describes lawyers that “are not authorized to practice” under Virginia Rule 5.5.”

Use of the term “admitted” rather than “authorized” makes far more sense when used in Virginia Rule 5.5(d)(4)’s provisions explaining what non-Virginia lawyers may do temporarily and occasionally in Virginia. For instance, Virginia Rule 5.5(d)(4)(iii) deals with ADR proceedings in Virginia, which non-Virginia lawyers may handle in Virginia as long as the services “arise out of or are reasonably related” to the non-Virginia lawyer’s practice in a jurisdiction where the lawyer is “admitted to practice.” The next Virginia Rule provision (Virginia Rule 5.5(d)(4)(iv)) uses the same “admitted to practice” language in its catch-all provision allowing non-Virginia lawyers to temporarily and occasionally practice law in Virginia under certain conditions. In those provisions, the term “admitted” makes more sense. If the term “authorized” were used, it would allow such lawyers to essentially “piggy-back” on a temporary or restricted authorization in another jurisdiction to temporarily practice law in Virginia.

Virginia Rule 5.5 cmt. [1] explains that lawyers “may be admitted to practice law” either on “a regular basis” or “authorized by court rule or order or by law to practice for limited purpose or on a restricted basis.” But the very next Virginia Rule Comment uses the word “authorized” in a way that obviously means generally authorized to practice in

the Commonwealth, and then uses the word “admitted” in a restricted sense – describing lawyers admitted to practice in this state pro hac vice. Virginia Rule 5.5 cmt. [7] describes the word “admitted” as “authoriz[ing] the practice in the jurisdiction in which the lawyer is admitted” – presumably for all purposes. But that Virginia Rule Comment then excludes from the definition lawyers who are “technically admitted” but “not authorized to practice” at all (because “the lawyer is on an inactive status). Virginia Rule 5.5 cmt. [8] uses the word “admitted” in the general sense. But Virginia Rule 5.5 cmt. [9] explains that lawyers “not admitted to practice generally in a jurisdiction may be authorized” to practice in a limited basis. That Virginia Rule Comment then switches back to describe “authority” that tribunal or agency may exercise by granting “admission pro hac vice” or even “in formal practice” allowing a lawyer to practice before a “tribunal or agency.” That Virginia Rule Comment then explains that a lawyer “who is not admitted to practice” may nevertheless “obtain admission pro hac vice.” Virginia Rule 5.5 cmt. [10]’s first sentence uses both the words “authorized” and “admitted” – as does that Virginia Rule Comment’s concluding sentence.

The Virginia Rule Comments have the same hodge-podge use of different terms that may mean different things.

**ABA Model Rule 5.5** does not have a similar provision.

### **Virginia Rule 5.5(d)(1)**

Virginia Rule 5.5(d)(1) contains an elaborate definition of “foreign lawyer.”

First, the term includes a person: “authorized to practice law” in any US State, Territory or D.C. – “by the duly constituted and authorized governmental body.”

(emphasis added). The singular “the” seems to create the presumption that the term “authorized to practice law” means essentially the same thing as “admitted” to practice law for all purposes. For instance, out-of-state lawyers may be “authorized to practice law” under a court’s *pro hac* order. Virginia Rule 5.5(d)(1) might have included such authorization if it had used the plural when describing “duly constituted and authorized governmental” bodies – rather than the singular.

Second, Virginia Rule 5.5(d)(1)’s term “foreign lawyers” includes lawyers “authorized to practice law” by “a foreign nation.” This fairly simple standard differs from the ABA Model Rules standard (discussed below) – which also examines the *bona fides* of such a foreign country’s regulation of its legal profession. It is also somewhat inconsistent with Virginia’s “foreign legal consultant” standard in Virginia Rule 1A Rule A: 7. Section (a)(1) of that rule permits such a “foreign legal consultant” to engage in the limited practice of law in Virginia, as long as that consultant “is a member in good standing of a recognized legal profession in a foreign nation, the members of which are admitted to practice as attorneys or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a governmental authority.” Much like ABA Model Rule 5.5(d)(1), Virginia’s foreign legal consultant provision includes an examination of a foreign country’s regulation of its lawyers – in contrast to Virginia Rule 5.5(d)(1)’s more succinct non-judgmental standard.

For either type of person, the definition also excludes several categories of lawyers. The excluded lawyers are those: (1) “licensed” in Virginia; (2) “authorized under [Virginia Supreme Court] rules to practice law generally” in Virginia; or (3) “disbarred or suspended from practice in any jurisdiction.”

The first exclusion from Virginia Rule 5.5(d)'s includes any Virginia-licensed lawyers. Presumably the term "licensed" is synonymous with the term "admitted." This makes sense, because Virginia-licensed lawyers are free to practice permanently or temporarily in Virginia, even if they are domiciled in some other jurisdiction. Of course, that other jurisdiction (where they are domiciled) might find those lawyers are acting improperly by practicing (virtually) in Virginia. States take different positions on whether lawyers may practice law while being domiciled in that state – as long as those lawyers do not represent clients in that state or provide legal advice about the state's law. For instance, Colorado seems to prohibit that conduct, while Arizona explicitly permits it.

The second exclusion from Virginia Rule 5.5(d)'s application (those "authorized under [(Virginia Supreme Court)] rules to practice law generally" in Virginia) presumably involves the ethics rules – such as the rules allowing lawyers from any US jurisdiction to freely practice purely federal law in Virginia, etc. Perhaps the term "rules" also covers the Virginia Supreme Court's other rules, including unauthorized practice of law rules, court rules, etc. The term "authorized under [the Virginia Supreme Court's] rules to practice law generally in the Commonwealth of Virginia" seems to be a mismatch with the concepts described in Virginia 5.5 cmt. [1] – which differentiate between lawyers: (1) "admitted" to practice . . . "on a regular basis;" and (2) "authorized" . . . to practice for a limited purpose or on a restricted basis. The phrase "authorized . . . to practice law generally" supports the presumption that the phrase excludes limited authorization to practice law in Virginia, as with a *pro hac* order.

The third exclusion from Virginia Rule 5.5 includes a "foreign lawyer" who has been "disbarred or suspended from practice in any jurisdiction" – not just the jurisdiction where

they primarily practice. For instance, lawyers licensed in multiple jurisdiction might be disbarred in one, but not in others. To be sure, most states impose reciprocal punishment, and punish lawyers licensed in that state for misconduct in other states. But states obviously have different rules, impose different sanctions, etc. The key here is that a lawyer who has been “disbarred or suspended from practice” in any state is outside the “foreign lawyer” definition of Virginia Rule 5.5(d)(1). In other words, lawyers who have been disbarred or suspended in one jurisdiction but still allowed to practice in another jurisdiction are excluded from the definition of “foreign lawyer” and therefore cannot take advantage of Virginia Rule 5.5’s conditions for being allowed to practice temporarily or permanently in Virginia.

Conceivably (and perhaps more likely), some foreign government might disbar or suspend the license of a non-US lawyer. There could be any number of reasons for that – such as political retribution, violation of that other country’s unfair or obscure requirements, etc. Virginia Rule 5.5(d)(1)’s definition of “foreign lawyer” excludes those lawyers too – in addition to the less likely situation in which a US lawyer licensed in more than one US jurisdiction loses the ability to practice law in one of those jurisdictions while retaining it in other jurisdictions.

As explained above, Virginia Rule 5.5(d)(1)’s term “disbarred” presumably is synonymous with the term “licensed. . . revoked” that appears just three provisions earlier – in Virginia Rule 5.5(a). Virginia Rule 5.5 is confusing enough with its various and differing terms, but would be clearer if Virginia Rule 5.5 used the same term to mean the same thing.

**ABA Model Rule 5.5(e)** contains a dramatically different definition of “foreign lawyer.” The ABA Model Rules’ references to “foreign lawyer” use the common sense, common usage and intuitive meaning of that word: a non-US lawyer.

ABA Model Rule 5.5(e) indicates that a “foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction.”

Even excluding Virginia Rule 5.5(d)(1)’s odd definition of “foreign lawyer” (which includes U.S. lawyers), the Virginia definition of non-US lawyers differs from ABA Model Rule 5.5’s definition of non-US lawyers. Virginia Rule 5.5(d) describes such “foreign lawyers” as persons “authorized to practice law by the duly constituted and authorized governmental body of ... a foreign nation.” ABA Model Rule 5.5(e)(1) includes additional conditions: “the members of which [“a recognized legal profession in a foreign jurisdiction”] are admitted to practice as lawyers or counselors at law or the equivalent, and subject to effective regulation and discipline by a duly constituted professional body or a public authority.” This conditional definition contrasts with Virginia Rule 5.5(d)(1)’s more succinct definition of “foreign lawyer.” In that way, the ABA Model Rule is similar to Virginia’s “foreign legal consultant” provision discussed above – which also requires an examination of a foreign country’s *bona fides* in regulating its lawyers. The ABA Model Rule 5.5(e)(1) definition seems to allow – or even require – an examination of those other countries’ regulation of its lawyers.

ABA Model Rule 5.5(e)(2) uses a more shorthand definition of in-house lawyers “lawfully practicing ... under the laws of a foreign jurisdiction.” This presumably defers to the foreign jurisdiction for determining those lawyers’ authorization to practice in-house in those other jurisdictions. It presumably is safe to assume that those in-house lawyers

must also satisfy the more detailed requirement in ABA Model Rule 5.5(e)(1) – being “subject to effective regulation and discipline by a duly constituted professional body or a public authority.”

Thus, with both of those ABA Model Rules, determining such non-US lawyers’ bona fides might require an assessment of whether those other countries have “effective regulation and discipline” of such lawyers.

### **Virginia Rule 5.5(d)(2)(i)**

Virginia Rule 5.5(d)(2)(i) addresses non-Virginia lawyers (both from other US jurisdictions and from foreign countries) practicing law in Virginia on more than a temporary basis.

Virginia Rule 5.5(d)(2)(i) prohibits such lawyers from “establish[ing] an office or other systematic and continuous presence in Virginia for the practice of law.” The Virginia Rule contains an exception: “except as authorized by these Rules or other law.”

The reference to “other law” presumably includes both Virginia and United States law. Thus, it includes the US Constitution-based “Supremacy Clause” – which permits lawyers licensed in any US jurisdiction to practice “systematically and continuously” in Virginia if they limit their practice to purely federal law. And several Virginia statutes allow non-lawyers to practice law, such as corporate employees allowed to appear in some courts on their employer corporations’ behalf, etc.

Significantly, a 2011 Virginia legal ethics opinion dramatically expands non-Virginia lawyers’ freedom to practice “systematically and continuously” in Virginia while providing advice to their clients beyond purely federal law. Presumably this essentially

common law expansion (approved by the Virginia Supreme Court) relies on the “except as authorized by these Rules” phrase mentioned above. Although it essentially comes out of the blue, this expansive multijurisdictional practice approach opens Virginia to non-Virginia lawyers’ systematic and continuous presence to a surprising extent that most states would never permit.

In Virginia LEO 1856 (9/19/11) (approved by the Virginia Supreme Court on (11/2/16)), the Virginia Bar noted that two pre-Rule 5.5 Virginia UPL Opinions explained that a non-Virginia lawyer “maintaining an office in Virginia...would not [be engaged in the] unauthorized practice if: (1) the lawyer advised clients on matters involving the law of the jurisdiction in which he/she was admitted to practice” (referring to Virginia UPL Opinion 201) (2001). The Virginia Bar also pointed to earlier Virginia UPL Opinion 195, which along with Virginia UPL Opinion 201 “were approved and adopted by the Supreme Court of Virginia.” Virginia LEO 1856 (9/19/11) understandably reasoned that Virginia Rule 5.5 “embraced...the Virginia law that was in effect” when Virginia adopted Rule 5.5 in March, 2009. Virginia LEO 1856 (9/19/11) thus concluded that non-Virginia lawyers “licensed to practice in other U.S. jurisdictions and based in the multijurisdictional law firm in Virginia would not be engaging in unauthorized practice of law in violation of [Virginia] Rule 5.5 so long as they limited their practice to the law of the jurisdiction/s where they are licensed.” In case there was any doubt, Virginia LEO 1856 (9/19/11) repeated this welcoming standard in its conclusion: “if their [non-Virginia lawyers’] practice is limited to matters involving the law of the state or country in which they are admitted to practice, [non-Virginia] lawyers may practice in Virginia on a systematic and continuous basis.”

It is difficult to find support for this conclusion in Virginia Rule 5.5, but Virginia LEO 1856 (9/19/11) could not be any clearer, and presumably the Virginia Supreme Court's November 2, 2016 approval of the Virginia Legal Ethics Opinion sealed the deal.

Notably, Virginia Rule 5.5(d)(2)(i) notes that such prohibited “systematic and continuous presence in Virginia for the practice of law” “may occur even if the Foreign Lawyer is not physically present in Virginia.” This Virginia Rule essentially acknowledges that a lawyer may establish a virtual “systematic and continuous presence in Virginia for the practice of law” without ever setting foot in Virginia. For example, a Maryland lawyer might represent only Virginia clients – communicating with them and providing all of her legal services to the Virginia clients through electronic communications. Such a lawyer clearly would be practicing law “systematically and continuously” in Virginia, despite no physical presence in Virginia.

**ABA Model Rule 5.5(b)(1)** contains essentially the same provision.

ABA Model Rule 5.5(b)(1) prohibits lawyers “not admitted to practice in this jurisdiction” from “establish[ing] an office or other systematic and continuous presence in this jurisdiction for the practice of law” – “except as authorized by these Rules or other law.”

In contrast to Virginia Rule 5.5(d)(2)(i), ABA Model Rule 5.5(b)(1) is prefaced with the phrase “who is not admitted to practice in this jurisdiction.” That concept appears in Virginia Rule 5.5(d)(1)'s definition of “foreign lawyer” – which includes lawyers who are “neither licensed by the Supreme Court of Virginia or authorized under its rules to practice law generally in the Commonwealth of Virginia.”

So both the ABA Model Rules and the Virginia Rules exclude from their respective Rule 5.5 multijurisdictional practice rule lawyers who are admitted or otherwise authorized to “establish an office or other systematic and continuous presence” for the practice of law in the jurisdiction. Of course, those lawyers do not need to rely on ABA Model Rule 5.5 or Virginia Rule 5.5.

In contrast to Virginia Rule 5.5(d)(2)(i)’s acknowledgement that lawyers may impermissibly “establish an office or other systematic and continuous presence in Virginia for the practice of law” – “even if ... not physically present in Virginia,” black letter ABA Model Rule 5.5(b)(1) does not contain that concept. But ABA Model Rule 5.5 cmt. [4] contains the same acknowledgment: “[p]resence may be systematic and continuous even if the lawyer is not physically present here.”

### **Virginia Rule 5.5(d)(2)(ii)**

Virginia Rule 5.5(d)(2)(ii) prohibits “foreign lawyers” (“except as authorized by these Rules or other law”) from “hold[ing] out to the public or otherwise represent that the Foreign Lawyer is admitted to practice law in Virginia.”

That phrasing (whose essence also appears in ABA Model Rule 5.5(b)(2)) seems deliberately narrow. Being “admitted to practice law in Virginia” presumably means that a lawyer is a member of the Virginia Bar. But lawyers can practice in Virginia without being admitted to the Virginia Bar. Such lawyers are “authorized” to practice law in Virginia even if they are not “admitted to practice law” in Virginia. For instance, Virginia Rule 5.5(d)(1) includes within its definition of “foreign lawyer” lawyers who are “neither licensed by the Supreme Court of Virginia or authorized under its rules to practice law

generally in the Commonwealth of Virginia.” The term “licensed” seems to equate to being “admitted” in Virginia, and contrasts with the other possible option – under which such lawyers are otherwise “authorized” to practice in Virginia. Indeed, Virginia Rule 5.5 itself allows lawyers who are not “admitted to practice law” in Virginia to be “authorized” to practice law in Virginia. So perhaps one might think that Virginia Rule 5.5(d)(2)(ii)’s prohibition on “holding out” would more broadly prohibit such lawyers from improperly representing that they are either: (1) “admitted to practice law in Virginia” or (2) otherwise “authorized” to practice law in Virginia.

But perhaps this distinction is intentional. Lawyers holding themselves out as “admitted” in Virginia convey a more permanent and intimate relationship with Virginia than those holding themselves out as “authorized” to practice in Virginia. That may be too subtle a distinction, but perhaps deliberate.

It is also worth mentioning that any lawyer’s false statements about either her admission or her authorization might violate Virginia Rule 4.1(a) or Virginia Rule 8.4(c). Virginia Rule 4.1(a) prohibits lawyers from “knowingly mak[ing] a false statement of fact or law” “[i]n the course of representing a client.” Virginia Rule 8.4(c) applies outside the representational context, and considers it “professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer’s fitness to practice law.”

**ABA Model Rule 5.5(b)(2)** contains identical language.

ABA Model Rule 5.5(b)(2) prohibits lawyers who are “not admitted to practice in this jurisdiction” from “hold[ing] out to the public or otherwise represent[ing] that the lawyer is admitted to practice law in this jurisdiction.”

ABA Model Rule 5.5(b)(2)'s limitation of the “holding out” prohibition to claims that the lawyer “is admitted to practice law in this jurisdiction” rather than “authorized” to practice law in this jurisdiction tends to support the presumption that the narrow holding out prohibition was deliberate. As explained above, claiming to be “admitted” in a jurisdiction implies a more permanent and intimate relationship with a jurisdiction than “authorized” to practice there.

Presumably any false statements about admission or authorization would be prohibited by the catch-all prohibition in ABA Model Rule 4.1(a) and the generic ABA Model Rule 8.4(c) prohibition on deception (applicable to lawyers acting in any capacity).

In contrast to Virginia Rule 5.5(d)(2)(ii), ABA Model Rule 5.5(b)(ii) does not contain the same exception: “except as authorized by these Rules or other law.” Virginia Rule 5.5(d)(2) places that exception in its introduction both to the “systematic and continuous” presence prohibition and the “hold[ing] out” prohibition. ABA Model Rule 5.5(b) applies the “authorized by these Rules or other law” exception only to the “systematic and continuous” presence prohibition. This distinction may not make much difference, because it is difficult to imagine that either the ABA Model Rules or “other law” would allow such essentially inaccurate “holding out.”

### **Virginia Rule 5.5(d)(3)**

Virginia Rule 5.5(d)(3) addresses non-Virginia lawyers' obligation to disclose their practice limitations.

Virginia Rule 5.5(d)(3) requires non-Virginia lawyers (both US lawyers and non-US lawyers) to “inform the client and interested third parties in writing” of three things: (1)

that such lawyers are not “admitted to practice law in Virginia;” (2) the “jurisdiction(s) in which the lawyer is licensed to practice;” and (3) the lawyer’s “office address in the foreign jurisdiction.”

It is unclear what the term “interested third parties” means. Perhaps it means third parties “interested” in hiring the lawyer, such as potential clients. Or perhaps it means “interested” in the course or outcome of the legal matter, such as adversaries, other third parties that might be affected by the representation, etc.

If the term “interested third parties” means the latter, it would be easy to see the possibility for enormous problems for a client who hires a non-Virginia lawyer. For instance, a Virginia resident who hires a non-Virginia lawyer to plan and then seek a divorce from his wife obviously would not want that lawyer to disclose the still-secret divorce plans to his wife (in any way, let alone “in writing”).

Interestingly, Virginia Rule 5.5(d)(3) requires disclosure to “the client and interested third parties,” but Virginia Rule 5.5(d)(4)’s introductory phrase mentions non-Virginia lawyers’ permissible “temporary and occasional” practice in Virginia – “after informing the client as required in [Virginia Rule 5.5(d)]3(i) – (iii)”. Of course, that disclosure is only a subset of the disclosures required in Virginia Rule 5.5(d)(iii) – which requires disclosure to “the client and interested third parties.” It is unclear whether that is a mistake, or an intentional narrowing of the disclosure obligation (this is discussed below).

Virginia Rule 5.5(d)(3)’s affirmative duty to disclose these practice limitations has the same narrow focus as the prohibition on inaccurately “holding out” contained in Virginia Rule 5.5(d)(2)(ii). It does not require the “foreign lawyer” to disclose that she is

not “authorized” to practice in Virginia – she is only required to disclose that she is not “admitted to practice law in Virginia.” As explained above, this limited prohibition may be intentional – prohibiting non-Virginia lawyers from claiming that they are “admitted” in Virginia, but presumably allowing them to say that they are “authorized” to practice law in Virginia.

And of course the requirement that such lawyers identify their “office address in the foreign jurisdiction” has the same counter-intuitive meaning as all of the other implications of using the term “foreign lawyer” – meaning lawyers licensed or authorized to practice in other US jurisdictions. Thus, such a “foreign lawyer” temporarily practicing law in Bristol, Virginia, might have to disclose in writing that his “office address” in “the foreign jurisdiction” is down the block in the “foreign jurisdiction” of Bristol, Tennessee.

Both Virginia Rule 5.5(d)(4) and the parallel ABA Model Rule 5.5(c) describe four types of “temporary and occasional” (or “temporary,” in the ABA Model Rules) practice in the jurisdiction. These are further discussed immediately below.

**ABA Model Rule 5.5 cmt. [20]** also addresses out-of-state lawyers’ disclosure obligation. Black letter ABA Model Rule 5.5 does not deal with that issue.

ABA Model Rule 5.5 cmt. [20] explains that lawyers from other jurisdictions “may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction” (emphasis added). The ABA Model Rule Comment provides an example: “when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction.” ABA Model Rule 5.5 cmt. [20] refers to ABA Model Rule 1.4(b), which requires lawyers (among other things) to “explain a matter to the extent reasonably

necessary to permit the client to make an informed decisions regarding the representation.”

Thus, ABA Model Rule 5.5 cmt. [20] indicate that lawyers “may” have to disclose to their clients a “subset” of the type of information that Virginia Rule 5.5(d)(3) requires lawyers to disclose to the “client and interested third parties in writing.”

The ABA Model Rule 5.5 approach (articulated in an ABA Model Rule Comment rather than the black letter Rule) differs from the Virginia Rule 5.5 approach in two ways. First, the ABA Model Rule approach only explains that disclosure “may” be required, in contrast to Virginia Rule 5.5(d)(3)’s required disclosure. Second, the ABA Model Rule approach only requires disclosure to the client, in contrast to Virginia Rule 5.5(d)(3)’s requirement of disclosure to “the client and interested third parties” (although Virginia Rule 5.5(d)(4) only mentions disclosure to the client – without mentioning interested third parties).

#### **Virginia Rule 5.5(d)(4)**

Virginia Rule 5.5(d)(4) focuses on non-Virginia US and non-US lawyers “provid[ing] legal services on a temporary and occasional basis in Virginia.”

Virginia Rule 5.5(d)(4)’s use of the term “occasional” is significant. Presumably the additional term “occasional” means that the permissible “temporary” practice of law by non-Virginia lawyers in Virginia cannot be repetitive. Virginia Rule 5.5 does not define the term “occasional,” so it is unclear when such non-Virginia lawyers’ “temporary” practice would be so repetitive as to no longer be “occasional.”

Virginia Rule 5.5(d)(4) allows such “temporary and occasional” provision of legal services in Virginia only after such lawyers “inform the client as required in [Virginia Rule 3.3(a)] 3 (i) – (iii).” Thus, such lawyers’ “temporary and occasional” practice in Virginia must be preceded by making the Virginia Rule 5.5(d)(3) disclosures to “the client.” Of course, that is a subset of those to whom foreign lawyers must disclose the specified information by Virginia Rule 5.5(d)(3) – which requires disclosure to “the client and interested third parties.”

This presumably deliberate choice may involve a conscious temporal calculation. Before doing any work for Virginia clients, presumably such “foreign lawyers” must make the required disclosure to them. Once those “foreign lawyers” begin to interact with “interested third parties,” presumably the “foreign lawyers” must make the disclosure to them too. The lack of a definition of “interested third parties” makes this analysis more difficult. But it would make sense that a “foreign lawyer” hired to plan and then pursue a lawsuit against an adversary on behalf of a Virginia client would have to make the required disclosures to the client before beginning the work, but would not have to inform the future adversary of the required information – which would prejudice the client if the adversity was not already apparent. Virginia Rule 5.5(d)(4) does not provide any explanation of this possible temporal dilemma. Either way, the mismatch seems odd and is not explained.

**ABA Model Rule 5.5(c)** introduces its parallel provision for such “temporary” practice by lawyers who are “admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction.”

ABA Model Rule 5.5(c) differs from Virginia Rule 5.5(d)(4) in two ways – one of which could be very significant.

First, Virginia includes this limitation in its definition of “foreign lawyers” in Virginia Rule 5.5(d)(1). But as explained above, the Virginia definition also includes non-US lawyers. Thus, under Virginia Rule 5.5(d)(4), non-US lawyers may temporarily practice in Virginia under its terms – in contrast to ABA Model Rule 5.5(c)’s provision allowing only US lawyers to temporarily practice in the jurisdiction. Instead, ABA Model Rule 5.5(d) (discussed below) defines what non-US lawyers may do in the jurisdiction. Under ABA Model Rule 5.5(d), non-US lawyers may only act as in-house lawyers, or as “authorized by federal or other law” in the state.

Second, in contrast to Virginia Rule 5.5(d)(4)’s provision allowing non-US lawyers to “temporarily and occasionally” practice in Virginia under certain conditions, ABA Model Rule 5.5(d)(4) only permits US lawyers to “temporarily” practice in the jurisdiction, under certain conditions.

Thus, Virginia Rule 5.5(d)(4) is more limited than the ABA Model Rules – allowing only “temporary and occasional” rather than “temporary” practice in the jurisdiction. But Virginia Rule 5.5(d)(4)’s deliberate use of the phrase “temporary and occasional” rather than ABA Model Rule 5.5(c)’s term “temporary” presumably has some meaning.

### **Virginia Rule 5.5(d)(4)(i)**

Virginia Rule 5.5(d)(4)(i) describes the first situation in which a non-Virginia (or non-U.S.) lawyer may provide legal services “on a temporary and occasional basis” in Virginia.

Virginia Rule 5.5(d)(4)(i) allows such “temporary and occasional” practice if the lawyer provides legal services “in association with” a lawyer who is either: (1) admitted in Virginia “without limitation;” or (2) admitted under the Virginia Corporate Counsel Rule (Part I of Rule IA:5).

The phrase “are undertaken in association” continues the Virginia Rules’ varied, potentially confusing and unfortunately undefined use of the word “associated.” As explained throughout this document, the word “associated” plays a critical role in determining such key issues as whether an individual lawyer’s disqualification is imputed to other lawyers with whom that lawyer is “associated” (under Virginia Rule 1.10, Virginia Rule 1.11 and Virginia Rule 1.12). In those settings (as in Virginia Rule 5.5(a) (discussed above), the word “association” refers to a relationship among lawyers who are practicing together in the same firm. In Virginia Rule 5.3, even a non-lawyer “may be employed or retained by or associated with a lawyer.” And here in Virginia Rule 5.5(d)(4)(i), the term “in association” obviously means lawyers who are not in the same firm. So the word “associated” could either refer to lawyers practicing together, lawyers practicing separately in different firms, and even non-lawyers.

The first category of Virginia lawyers with whom non-Virginia lawyers can “associate” under Virginia Rule 5.5(d)(5)(i) are lawyers “admitted to practice without limitation in Virginia.” Virginia Rule 5.5(d)(4)(i)’s phrase “admitted to practice without limitation” is clear on its face. That term clearly refers to fully licensed Virginia lawyers who may generally practice in Virginia, as opposed to those “admitted” for a limited purpose, such as “admitted” *pro hac* by a Virginia court. But the words “without limitation” casts some doubt on the single word “admitted” (without those extra two words) used

elsewhere. For instance, Virginia Rule 5.5(d)(3)(i) requires disclosure by non-Virginia lawyers that the lawyer “is not admitted to practice law in Virginia.” It is unclear whether the absence of the two extra words “without limitation” means that the “admitted” reference holds a different meaning. In other words, does the single word “admitted” used in that Virginia Rule and elsewhere in the Virginia Rules have the same meaning as Virginia Rule 5.5(d)(4)(i)’s lengthier phrase “admitted to practice without limitation”?

The second category of Virginia lawyers with whom non-Virginia lawyers can “associate” under Virginia Rule 5.5(d)(4)(i) are lawyers “admitted” under “Part I of Rule 1A:5 of this Court” (the “Virginia Corporate Counsel” Rule). That Rule allows U.S. lawyers licensed in some jurisdiction to practice Virginia as in-house lawyers, after completing certain forms and subject to certain limitations. Such lawyers may represent the lawyer’s employer – “including its subsidiaries and affiliates.” They may also appear before Virginia courts or tribunals as their employer’s counsel.

Interestingly, the specific and exclusive reference to Part I of the Corporate Counsel Rule presumably means that “association” with in-house lawyers registered under Part II of the Corporate Counsel Rule would not suffice to allow such non-Virginia or non-US lawyers to temporarily and occasionally provide legal services in Virginia. A Part II Corporate Counsel registrant must (among other things) limit his or her practice to “business and legal services related to issues confronting his or her Employer at a regional, national or international level with no specific nexus to Virginia.” That standard is confusing at best. It is not clear why the Corporate Counsel Rule deals with “business . . . services.” The term “no specific nexus to Virginia” is ambiguous. There seems to be no reported punishment of Corporate Counsel registrants having violated that limitation,

so perhaps the ambiguity is merely theoretical. He or she may “not provide legal advice or services to any person other than his or her Employer” That Rule also mentions the lawyer’s employer’s “subsidiaries and affiliates,” so such registrants may provide legal services to the employer’s corporate family – the same as Corporate Counsel under Part I. Such registrants may not appear in Virginia courts except under some other rule (presumably such as the *pro hac* rule).

Significantly, such Virginia-based lawyers associated with out-state lawyers temporarily and occasionally practicing in Virginia must “actively participate[ ] in the matter.” In other words, the Virginia-based lawyer cannot be a mere mail drop, figurehead or “hired from the waist down” (as some call it). Virginia Rule 5.5(d)(4)(i) does not define that required degree of participation. Local counsel participation can range from occasionally answering questions posed by the non-Virginia lawyer to shadowing the Virginia lawyer wherever she goes and whatever she does.

**ABA Model Rule 5.5(c)(1)** contains essentially the same provision. Like Virginia Rule 5.5(d)(4)(i), ABA Model Rule 5.5(c)(1) requires that the local lawyer “actively participate[ ] in the matter.”

In contrast to Virginia Rule 5.5(d)(4)(i), ABA Model Rule 5.5(c)(i) does not refer to a local lawyer admitted to practice “without limitation” in the local jurisdiction, and does not refer to corporate counsel with limited authority to practice in the state.

### **Virginia Rule 5.5(d)(4)(ii)**

Virginia Rule 5.5(d)(4)(ii) describes the second situation in which non-Virginia lawyers may provide legal services on a “temporary and occasional” basis in Virginia.

Under Virginia Rule 5.5(d)(4)(ii), lawyers may engage in such “temporary and occasional” practice in Virginia: (1) if the legal services “are in or reasonably related to a pending or potential proceeding before a tribunal in Virginia or another jurisdiction”; and (2) if the non-Virginia lawyer “or a person [the non-Virginia lawyer] is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized.”

Virginia Rule 5.5(d)(4)(ii) thus covers litigators who are preparing for or involved in tribunal-based proceedings. It provides a broad range of permissible conduct, because it covers such non-Virginia lawyers’ legal services in Virginia: (1) that are “in” a “pending or potential proceeding” in a tribunal in Virginia or in some other jurisdictions; or (2) are “reasonably related” to a “pending or potential proceeding” before a tribunal in Virginia or in some other jurisdiction. Such permissible “temporary and occasional” provision of legal services in Virginia are permissible if: (1) the non-Virginia lawyer is “authorized by law or order to appear in such proceeding” (presumably a pending proceeding, although perhaps even a “potential proceeding”); (2) a “person” being assisted by the non-Virginia lawyer is so authorized; or (3) either the non-Virginia lawyer or the “person” being assisted by the non-Virginia lawyer “reasonably expects to be so authorized” to appear in such proceeding (which presumably covers both “pending” and “potential” proceedings).

The Virginia Rules do not explicitly define the term “tribunal.” Virginia Rule 8.5(b)(1) gives a hint of that term’s meaning – referring to “a proceeding in a court, agency, or other tribunal.” So courts and agencies clearly count as “tribunals” under the Virginia Rules. ABA Model Rule 1.0(m) contains a much broader definition of “tribunal.” ABA Model Rule 1.0(m) states that the term “tribunal” “denotes a court, an arbitrator in a

binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity.” ABA Model Rule 1.0(m) then explains that such “[a] legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party’s interests in a particular matter.” Interestingly, there is no ABA Model Rule 1.0 Comments providing any further guidance. But most significantly, legislative bodies are considered “tribunals” in the ABA Model Rules if they are acting in an “adjudicative capacity.”

There is no guidance for determining if a non-Virginia lawyer could “reasonably expect” to be admitted in a Virginia tribunal or another jurisdiction’s tribunal. Being admitted *pro hac* is not automatic. States take different positions on both the process and on the availability of such admission to out-of-state lawyers. For instance, some states limit the number of times each year that individual lawyers or even their firms can be admitted *pro hac* in that state’s courts. Virginia Rule Part 1A, Rule 1A:4 contains Virginia’s *pro hac* rules. Perhaps one reason for Virginia Rule 5.5(d)(4)(ii)’s expansive reach is the supervisory role that tribunals play or will play in governing such lawyers’ conduct.

Virginia Rule 5.5(d)(4)(ii) therefore permits non-Virginia lawyers to interview witnesses before or during litigation, to take depositions in Virginia, etc.

Non-Virginia lawyers relying on this broad permission to practice “temporarily and occasionally” in Virginia should keep in mind Virginia’s choice of law rule. Virginia Rule 8.5(b)(1) indicates that the Virginia Bar exercising its disciplinary authority applies the rules of the host jurisdiction of a “court, agency, or other tribunal” for “conduct in

connection with a proceeding” in such a tribunal “before which a lawyer appears.” There is an exception in Virginia Rule 8.5(b)(1): “unless the rules of the court, agency, or other tribunal provide otherwise.”

The Virginia choice of laws rule differs from ABA Model Rule 8.5 in two significant ways.

First, in contrast to Virginia Rule 8.5(b)(1)’s application to conduct by a lawyer who “appears” before a “court, agency, or other tribunal,” ABA Model Rule 8.5(b) applies to conduct of any lawyer (presumably even if that lawyer has not “appeared”) whose conduct is “in connection with a matter pending before a tribunal.” Thus, it is unclear if the Virginia choice of laws rule applies to lawyers who have not “appeared” before a tribunal, but who are assisting a lawyer who has appeared. For instance, associates on the so-called “home team” might be working full time on research or drafting.

Second, in contrast to Virginia Rule 8.5(b)(1)’s reference to conduct “in connection with a proceeding,” ABA Model Rule 8.5(b)(1) applies to “conduct in connection with a matter pending before a tribunal.” Thus, it is unclear whether the Virginia Rule applies to conduct before the proceeding is “pending.” The question is whether the phrase “in connection with” necessarily would apply only to “pending” proceedings. It would seem to have a broader reach – either substantively or temporally, or both.

**ABA Model Rule 5.5(c)(2)** contains essentially the same substantive language. Of course, as explained above, the ABA Model Rule is limited to US lawyers. This dramatically contrasts with the Virginia Rule, which applies to both to non-Virginia US lawyers and to non-US lawyers.

### **Virginia Rule 5.5(d)(4)(iii)**

Virginia Rule 5.5(d)(4)(iii) describes the third situation in which non-Virginia lawyers may provide legal services on a “temporary and occasional” basis in Virginia.

Virginia Rule 5.5(d)(4)(iii) focuses on alternative dispute resolution proceedings. The Virginia Rule permits non-Virginia lawyers to temporarily and occasionally practice law in Virginia if their legal services “are in or reasonably related to pending or potential arbitration, mediation or other alternative dispute resolution proceeding in Virginia or another jurisdiction.”

Unlike the broad tribunal-related permissible “temporary and occasional” practice of law in Virginia Rule 5.5(d)(4)(ii), this ADR-focused provision has two limitations.

First, the non-Virginia lawyer’s provision of legal services in Virginia must “arise out of or are reasonably related to” the non-Virginia lawyer’s practice in a jurisdiction in which he is “admitted to practice.” That limitation does not appear in the preceding provision that focuses on tribunal proceedings. Thus, non-Virginia lawyers must point to some relationship to their practice in their home state (or home country) to satisfy Virginia Rule 5.5(d)(4)(ii)’s standard.

The Virginia Rules apparently do not define the term “admitted to practice,” in contrast to the ABA Model Rules as discussed below.

As explained above, Virginia Rule 5.5(b)(4)(i)’s inclusion of the phrase “admitted to practice without limitation” casts some doubt on the meaning of the term “admitted” without that extra explanation. But the term “admitted to practice without limitation” probably is synonymous with the simple word “admitted.”

As explained below, Virginia Rule 5.5 cmt. [7] pointedly does not include phrases found in ABA Model Rule 5.5 cmt. [7] defining what the term “admitted” means, although both that Virginia Rule Comment and that ABA Model Rule Comment both mention the same exclusion: a lawyer who is “technically admitted” but who is not unauthorized to practice law because she is on “inactive status.”

Second, the temporary and occasional legal services in Virginia permitted under Virginia Rule 5.5(d)(4)(iii)’s ADR-focused provision may not be “services for which the forum requires pro hac vice admission.” Those legal services presumably would be covered under the preceding provision, which is tribunal-focused. Most ADR proceedings do not require pro hac admission, unless they are court-annexed.

**ABA Model Rule 5.5(c)(3)** contains identical substantive language. As with other ABA Model Rules, ABA Model Rule 5.5(c)(3) applies only to US lawyers. This contrasts with the Virginia Rule’s application to non-Virginia US lawyers and to non-US lawyers.

Significantly, states disagree about the number of ADR proceedings out-of-state lawyers can handle in those states without the lawyer no longer only providing “temporary” legal services in those states – but instead establishing an improper “systematic and continuous” presence in those states. Not surprisingly, Florida is among the most restrictive. In Florida, Florida Rule 5.5 explains that non-Florida lawyers filing more than three separate arbitration demands or responses in Florida during a calendar year “is presumed to be providing legal services on a regular, not temporary basis.”

### **Virginia Rule 5.5(d)(4)(iv)**

Virginia Rule 5.5(d)(4)(iv) describes the fourth situation in which non-Virginia lawyers may provide legal services on a “temporary and occasional” basis in Virginia.

Virginia Rule 5.5(d)(4)(iv) amounts to a catch-all provision not covered by Virginia Rule 5.5(d)(4)(ii)’s tribunal-focused provision, or Virginia Rule 5.5(d)(4)(iii)’s ADR-focused provision. Significantly, this catch-all Virginia Rule does not refer to Virginia Rule 5.5(d)(4)(i) – which authorizes non-Virginia lawyers to “temporarily and occasionally” practice law in Virginia if they associate with a Virginia lawyer. Thus, the limitations in Virginia Rule 5.5(d)(4)(iv) do not apply to that separate situation, presumably because a Virginia lawyer will be alongside the non-Virginia lawyer in the latter’s temporary and occasional practice in Virginia.

Virginia Rule 5.5(d)(4)(iv) requires that such “temporary and occasional” practice of law in Virginia must either: (1) “arise out of or [be] reasonably related to the representation of a client” by the non-Virginia lawyer “in a jurisdiction” in which the lawyer is “admitted to practice;” or (2) be legal services “governed primarily by international law”.

Although perhaps not intended, Virginia Rule 5.5(d)(4)(iv)’s requirement of non-Virginia lawyers’ relationship with their home jurisdiction (or another jurisdiction where they are admitted) seems to be narrower than the requirement in the preceding provision (Virginia Rule 5.5(d)(4)(iii)). Virginia Rule 5.5(d)(4)(iv) requires that the non-Virginia lawyer’s “temporary and occasional” practice of law in Virginia “arise out of or are reasonably related to the representation of a client” by that non-Virginia lawyer in a jurisdiction where she is admitted to practice (emphasis added). The preceding ADR-focused Virginia Rule 5.5(d)(4)(iii) provision uses a different standard to describe that

requirement. Under that Rule, the “temporary and occasional” legal services in Virginia must “arise out of or are reasonably related to” the non-Virginia lawyer’s “practice in a jurisdiction” where she is admitted (emphasis added). Thus, non-Virginia lawyers handling Virginia ADR proceedings must only establish that their temporary and occasional legal services in Virginia arise out of or are reasonably related to their “practice” where they are admitted, while the catch-all Virginia Rule 5.5(a)(4)(iv) provision requires such lawyers to demonstrate that their temporary and occasional Virginia-based legal services “arise out of or are reasonably related to” their “representation of a client” in a jurisdiction where they are admitted.

The “representation of a client” standard seems narrower. It would seem to require that the non-Virginia lawyer must already be representing a client in the jurisdiction where she is admitted to practice. In other words, the client must be in that jurisdiction too. The “practice” standard would seem to allow such non-Virginia lawyers to point to their practice where they are admitted, even if their clients are not located there. The lawyer’s practice might involve an area of the law, not a representation of a specific client. It would seem far more demanding to require that the lawyer’s representation of the pertinent client be “in” a jurisdiction with the lawyer is authorized to practice than to require only that the Virginia representation be related to the lawyer’s “practice” in that jurisdiction.

The ABA Model Rules avoid this issue by using the same “practice” standard (“representation of a client”) standard in both ADR-based ABA Model Rule 5.5(c)(3) and the catch-all provision, ABA Model Rule 5.5(c)(4).

Virginia Rule 5.5(d)(4)(iv)’s term “international law” scenario is not carefully defined. For instance, it is unclear what standard should be used to judge whether the

legal services in Virginia “are governed primarily by international law.” That clearly does not require that the legal services be governed “solely” by international law. But one is left to wonder how the “primary” standard applies.

And Virginia Rule 5.5(d)(4)(iv) contains its own restriction – such legal services must be subject to “the foregoing limitations.” It is unclear whether the “foregoing limitations” refer to the phrase earlier in that sentence – requiring that the legal services “arise out of or are reasonably related to” such lawyers’ “representation of a client” in a jurisdiction in which they are “admitted to practice.” That seems more likely than the other “foregoing limitations” excluding from Virginia Rule 5.5(d)(4)(iv)’s reach legal services that are not within those two earlier Virginia Rule provisions. Those are theoretically “limitations,” but references to those earlier provisions seem to be included to emphasize the catch-all nature of Virginia Rule 5.5(d)(4)(iv). In other words, the references to those earlier Virginia Rule provisions tends to assure non-Virginia lawyers that even if they cannot comply with those earlier provisions’ limitations, they can rely on the catch-all Virginia Rule 5.5(a)(4)(iv)’s provision.

But the phrase allowing non-Virginia lawyers to “temporarily and occasionally” practice law in Virginia if their legal services “are governed primarily by international law” likewise does not make much sense if that phrase also includes the “foregoing limitation[ ]” requirement that the legal services “arise out of or are reasonably related to” such non-Virginia lawyers’ representation of clients in jurisdictions where they are admitted to practice. If non-Virginia lawyers meet the “arise out of or are reasonably related to” standard, they can “temporarily and occasionally” practice in Virginia under the first portion of Virginia Rule 5.5(d)(4)(iv). That permission presumably applies regardless

of what law governs that other client representation. The permissive first portion of Virginia Rule 5.5(d)(4)(iv) does not refer to the governing law – but instead refers to the other representation. If the Virginia Rule was intended to allow non-Virginia lawyers to practice “temporarily and occasionally” in Virginia if the representation is “governed primarily by international law,” the Virginia Rule would not have included the “foregoing limitations.” It would have allowed non-Virginia lawyers to practice “temporarily and occasionally” in Virginia if the matter is “governed primarily by international law” – even if there was no relationship between the matter and the non-Virginia lawyer’s representation of a client in a jurisdiction where she is admitted to practice. This catch-all provision allows non-Virginia lawyers to “temporarily and occasionally” practice law in Virginia without active participation by a Virginia lawyer, without being admitted or expecting to be admitted in a Virginia tribunal, and without participating in a ADR proceedings in Virginia or another jurisdiction. Not surprisingly, it presumably focuses mostly on non-litigation lawyers.

To make matters more confusing, Virginia Rule 5.5(d)(4)(iv)’s phrase uses the plural: “subject to the foregoing limitations.” So perhaps those “limitations” refer both: (1) to the earlier references to the other two Virginia Rules; and (2) to the “arise out of or are reasonably related to the representation of a client” limitation. It seems linguistically improper to consider the “arise of out or are reasonably related” standard to constitute “limitations” in the plural. Instead, the “arise out of are reasonably related to” standard seems to be an option – either one or the other applies.

All in all, Virginia Rule 5.5(d)(4)(iv)’s “subject to the foregoing limitations” phrase is unexplained and confusing.

**ABA Model Rule 5.5(c)(4)** contains essentially the same catch-all concept. But there are several differences from Virginia Rule 5.5(d)(4)(iv).

First, in contrast to Virginia Rule 5.5(d)(4)(iv), ABA Model Rule 5.5(c)(4) requires that the temporary practice of law in the jurisdiction must “arise out of or are reasonably related to the lawyer’s practice” in a jurisdiction where she is “admitted to practice.” This differs from the Virginia Rule 5.5(d)(4)(iv)’s articulation that the “temporary and occasional” practice in Virginia must “arise out of or are reasonably related to the representation of a client” in a jurisdiction in which the non-Virginia lawyer is admitted to practice. As explained above, the term “lawyer’s practice” seems broader than the Virginia Rule’s reference to the lawyer’s “representation of a client.” The former is not tied to a particular client, while the latter seems to require the ongoing representation of a client who is located in that jurisdiction.

Second, in contrast to Virginia Rule 5.5(d)(4)(iv), ABA Model Rule 5.5(c)(4) does not contain any reference to the circumstance in which lawyers from other US jurisdictions can practice in the state when the legal services “are governed primarily by international law.”

### **Virginia Rule 5.5(d)(5)**

Virginia Rule 5.5(d)(5) addresses foreign legal consultants.

Virginia Rule 5.5(d)(5) excludes two categories of lawyers from either the “systematic and continuous presence in Virginia for the practice of law” (under Virginia Rule 5.5(d)(2)) or the “temporary and occasional” practice of law in Virginia (under Virginia 5.5(d)(4): (1) foreign legal consultants “practicing under Rule 1A:7;” and (2) corporate

counsel registrants “practicing under Part II of Rule 1A:5.” Those category of in-house lawyers must look elsewhere for their authorization to practice law in Virginia – presumably the cited Virginia Rules.

Interestingly, in-house counsel looking to Part I of the Virginia Supreme Court Rules presumably are authorized to practice under Virginia Rule 5.5. Perhaps this approach comes from the definition of “foreign lawyer” in Virginia Rule 5.5(d)(1) – which excludes from that definition lawyers who are either “licensed by the Supreme Court of Virginia or authorized under its rules to practice law generally in the Commonwealth of Virginia.” In-house lawyers relying on Part I are in a sense authorized to “practice law generally” in Virginia, although there is a limit on whom they can represent. And Virginia Rule 5.5(d)(4)(i) seems to recognize that there is a distinction between in-house lawyers relying on Part I of the corporate counsel rule and lawyers who are “admitted to practice without limitation in Virginia.” That Virginia Rule explicitly mentions both of those possibilities (using the word “or”), implying that former are not included within the latter’s definition. So to a certain extent, Part I-approved in-house lawyers are not explicitly recognized by black letter Virginia Rule 5.5. This contrasts with ABA Model Rule 5.5(d)(1)’s explicit provision recognizing that in-house lawyers may under certain conditions establish a “systematic and continuous presence” in the jurisdiction.

### **ABA Model Rule 5.5(d)**

Virginia did not adopt ABA Model Rule 5.5(d).

ABA Model Rule 5.5(d) addresses out-of-state lawyers’ “systematic and continuous presence in this jurisdiction” as in-house lawyers.

Interestingly, ABA Model Rule 5.5 first deals with out-of-state lawyers' "temporary" practice in a jurisdiction (ABA Model Rule 5.5(c)), and then addresses such lawyers' "systematic and continuous presence" (ABA Model Rule 5.5(d)). Virginia Rule 5.5 deals with those two options in the opposite order.

ABA Model Rule 5.5(d) addresses two circumstances in which lawyers from other states or countries may "provide legal services through an office or other systematic and continuous presence in this jurisdiction." The ABA Model Rule allows lawyers' "systematic and continuous" practice of law in the jurisdiction, although lawyers presumably could also in the right circumstances rely on the exception for temporary practice in the jurisdiction.

To meet ABA Model Rule 5.5(d)'s requirements, the lawyer must either: (1) be a lawyer admitted in another US jurisdiction or a foreign jurisdiction and "not disbarred or suspended from practice in any jurisdiction or the equivalent thereof;" or (2) be "a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction."

The odd and presumably deliberate use of the term "lawyer" in the first option and the different term "person" in the second option makes one wonder whether the ABA Model Rules permit a non-lawyer lawfully "practicing as an in-house counsel under the laws of a foreign jurisdiction" to take advantage of ABA Model Rule 5.5(d) to systematically and continuously practice in a U.S. jurisdiction.

Under either circumstance, such lawyers (or person) "may provide legal services through an office or other systematic and continuous presence" in one of the two situations: (1) "through an office" or (2) through "other systematic and continuous

presence.” The latter presumably refers to either a systematic and continuous physical presence (in an “office”) or a “systematic and continuous” virtual presence.

### **ABA Model Rule 5.5(d)(1)**

ABA Model Rule 5.5(d)(1) describes the first permissible situation – in which such lawyers provide legal services “to the lawyer’s employer or its organizational affiliates” that “are not services for which forum requires pro hac vice admission.”

Thus, ABA Model Rule 5.5(d)(1) would essentially allow US or even certain foreign lawyers to systematically and continuously practice law in a jurisdiction without the sort of registration and dues-paying process that nearly every state (including Virginia) has imposed on such in-house lawyers.

The term “organizational affiliates” is similar to the Virginia Corporate Counsel Rule’s reference to such Virginia corporate counsel or corporate counsel registrants’ employer – “including its subsidiaries and affiliates.” Virginia Rule 1A:5 Part I

This first ABA Model Rule 5.5(d)(1) scenario contains a special limitation for non-US lawyers relying on that provision. Such non-US lawyers providing “advice on the law of this or another U.S. jurisdiction or of the United States” must provide such advice “based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice.” Thus, non-U.S. lawyers may not on their own provide advice about United States law (state-based or federal). Instead, they must base their advice to their employer or its organizational affiliates on the advice of a U.S. lawyer who is authorized to provide such advice in the jurisdiction. ABA Model Rule 5.5(d)(1)’s use of the phrase “duly licensed and authorized by the jurisdiction” continues the potentially

confusing terminology discussed above – involving the term licensed, authorized without limitation, authorized, admitted, etc.

ABA Model Rule 5.5(d)(1) introduces another term: “duly licensed.” The ABA Model Rule does not use the phrase “licensed and duly authorized by the jurisdiction.” So it is unclear what “duly licensed” means. And if one is “licensed” (let alone “duly licensed”), one would think that such a lawyer would automatically be “authorized by the jurisdiction” to provide advice.

And even this limitation has a further limitation. Under ABA Model Rule 5.5(d)(1), U.S. lawyers who must be involved in giving such “advice on the law of this or another jurisdiction or of the United States” must be one “who is duly licensed and authorized by the jurisdiction to provide such advice” (emphasis added). This presumably means the jurisdiction about whose law the lawyers are giving advice. This presents a limitation that would not otherwise exist, because under the ABA Model Rules it seems clear that a lawyer licensed in one U.S. jurisdiction can provide legal advice about the law of another U.S. jurisdiction where he or she is not licensed – as long as that does not involve the physical or virtual provision of legal services in that other jurisdiction. In other words, a lawyer handling a matter in Virginia between Virginia litigants in a Virginia court (and/or Virginia counterparties in a Virginia transaction) can provide advice about Delaware or New York law.

But ABA Model Rule 5.5(d)(1) apparently would not permit such a non-U.S. lawyer to rely on a Virginia-admitted lawyer to satisfy the requirement in ABA Model Rule 5.5(d)(1) that a U.S. lawyer be involved in giving such advice – because that Virginia lawyer would not be “duly licensed and authorized by the jurisdiction [Delaware or New

York] to provide such advice” – even though acting independently of any non-U.S. lawyers’ involvement the Virginia lawyer would be free to give such advice about the law of Delaware or New York. Thus, the phrase “by the jurisdiction” seems to impose a limitation on non-U.S. lawyers’ provision of advice while working with a U.S. lawyer.

### **ABA Model Rule 5.5(d)(2)**

ABA Model Rule 5.5(d)(2) describes the second situation in which U.S. or non-U.S. lawyers may provide legal services “through an office or other systematic and continuous presence.” Such in-house lawyers may provide such legal services if the lawyer is authorized by federal or other law or rule to provide” such services “in this jurisdiction.”

That catch-all provision presumably recognizes the U.S. Constitution’s Supremacy Clause implications – which prohibits states from interfering with lawyers’ practice in a state as long as the lawyer practices purely federal law. ABA Model Rule 5.5(d)(2) also recognizes that other law may allow such a “systematic and continuous” presence. That may include provisions allowing military members’ spouses to practice in the state, etc.

Virginia lawyers looking for a similar provision in Virginia Rule 5.5 probably would focus on Virginia Rule 5.5(d)(2), which prohibits non-Virginia lawyers from establishing a “systematic and continuous presence in Virginia” – but includes an exception in the introductory clause: “except as authorized by these Rules or other law.” Those presumably include the US Constitution’s Supremacy Clause and other federal and Virginia laws.

In contrast to ABA Model Rule 5.5(d)'s handling of in-house counsel in its black letter rule, Virginia deals with such in-house lawyers in its separate Part 1A, Rule 1A:5 Virginia Corporate Counsel provision and Corporate Counsel Registrants provision. As explained above, the former category of lawyers are specifically excluded from the reach of Virginia Rule 5.5 by Virginia Rule 5.5(d).

### **ABA Model Rule 5.5(e)(1)**

Virginia did not adopt ABA Model Rule 5.5(e)(1).

ABA Model Rule 5.5(e)(1) provides background information for ABA Model Rule 5.5(d). ABA Model Rule 5.5(e)(1) requires that foreign lawyers taking advantage of the previous ABA Model Rule's provision allowing them to practice law systematically and continuously as an in-house in a jurisdiction must be either: (1) be members "in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and subject to the effective regulation and discipline by a duly constituted professional body or a public authority" or (2) be a person "otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction" and "authorized to practice under this rule by, in the exercise of its discretion, [the highest court of this jurisdiction]."

The first category of non-U.S. lawyers includes several conditions, which obviously requires some assessment of the other country's admission, regulation and disciplinary process. This contrast with Virginia Rule 5.5(d)(1)'s simpler reference to such non-U.S. lawyers "authorized to practice law by the duly constituted and authorized governmental body of . . . a foreign nation." The Virginia Rule thus looks only at the other country's

authorization process, not its regulation or disciplinary process. This category also tends to confirm that the word “person” in ABA Model Rule 5.5(d) might include non-lawyers (discussed above) – because ABA Model Rule 5.5(e)(1) defines the term “foreign lawyer” as including persons who “are admitted to practice as lawyers or counselors at law or the equivalent” (emphasis added).

### **ABA Model Rule 5.5(e)(2)**

Virginia did not adopt ABA Model Rule 5.5(e)(2).

ABA Model Rule 5.5(e)(2) provides an alternative to ABA Model Rule 5.5(e)(1) – under which non-U.S. lawyers who may permissibly practice as in-house lawyers in the U.S. The ABA Model Rule includes those “otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction” – as long as they are “authorized to practice under this rule” by, in the exercise of discretion, “[the highest court of this jurisdiction]” – in brackets. This means that the ABA Model Rule suggests that as an appropriate institution, but invites states who adopt the ABA Model Rules to select another institution. But as long as a jurisdiction’s designated institution approves it, any “person” practicing as an in-house lawyer under the laws of a non-U.S. jurisdiction may similarly provide legal services as an in-house counsel in the United States on a “systematic and continuous” basis.

## Comment

### Virginia Rule 5.5 Comment [1]

Virginia Rule 5.5 cmt. [1] addresses the general context of multijurisdictional practice (lawyers practicing law in states where they are not licensed). Multijurisdictional practice is a subset of unauthorized practice of law.

Virginia Rule 5.5 cmt. [1] first explains that lawyers may only practice where they are “authorized to practice.” They may either be: (1) “admitted to practice . . . on a regular basis,” or (2) “authorized” to practice “for a limited purpose or on a restricted basis” by “court rule or order or by law.”

Virginia Rule 5.5 cmt. [1] shares the same frustrating deficiency as several other Virginia Rule Comments. The Virginia Rule Comment explains when lawyers may practice “in a jurisdiction” – rather than providing helpful advice on what lawyers may or may not do in Virginia. The Virginia Rule Comment thus parrots a much more generic ABA Model Rule Comment, rather than providing specific advice to non-Virginia lawyers or non-U.S. lawyers seeking guidance on what they may do in Virginia – not in some generic “jurisdiction.”

Virginia Rule 5.5 cmt. [1] follows the pattern of black letter Virginia Rule 5.5 and its Comments (also found in black letter ABA Model Rule 5.5 and its Comments) of using various potentially confusing terms describing lawyers’ relationship with jurisdictions.

Virginia Rule 5.5 cmt. [1] uses the terms “admitted” and “authorized,” which appear elsewhere in the black letter Virginia Rule 5.5 and the Virginia Rule 5.5 Comments. The word “admitted” presumably refers to lawyers who have obtained a license from the Virginia Supreme Court. The term “authorized” can refer to a more limited ability to

practice law pursuant to rules or laws. Thus, Virginia Rule Comment 5.5 cmt. [1] explains that a lawyer “admitted” may practice law “on a regular basis,” while a lawyer “authorized” to practice law may do so on “a limited purpose or on a restricted basis.” But there might be some confusion about these terms. For instance, Virginia Rule 5.5(d)(4)(i) allows non-Virginia lawyers to temporarily and occasionally practice in Virginia if they undertake the legal services in association “with a lawyer who is admitted to practice without limitation in Virginia.” Presumably the term “without limitation” is synonymous with the term “on a regular basis” that is used in Virginia Rule 5.5 cmt. [1].

But it would have been more helpful to use the same terms. Significantly, lawyers can be “authorized” to practice in Virginia either “without limitation” or “with limitation.” For instance, lawyers from any state are free to practice purely federal law in Virginia without being licensed in Virginia, under the U.S. Constitution’s Supremacy Clause. In addition, non-Virginia lawyers may be “authorized” to practice in Virginia through some rule or regulation. For instance, spouses of military personnel stationed in Virginia may practice law under such a specific regulation.

Virginia Rule 5.5 cmt. [1] concludes by essentially repeating the prohibition in Virginia Rule 5.5(c) on lawyers practicing in a jurisdiction where they are not authorized to do so, or assisting another in such impermissible practice of law.

**ABA Model Rule 5.5 cmt. [1]** contains essentially the same language.

It makes sense for the ABA Model Rules to use such generic language. The ABA Model Rules frequently contain a general statement, explicitly inviting states to either choose from among bracketed options or implicitly inviting states to describe their own law. Of course it does not help a state’s lawyer to know that other states take different

positions on some issues – that lawyer normally justifiably wants to know what her state’s position is.

In contrast to the Virginia Rule 5.5 cmt. [1], ABA Model Rule 5.5 cmt. [1] provides an example of lawyers’ impermissible assistance: “a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person’s jurisdiction.”

### **Virginia 5.5 Comment [1a]**

Virginia 5.5 cmt. [1a] addresses the definition of “lawyer” in Virginia Rule 5.5.

Virginia Rule 5.5 cmt. [1a] defines the term “lawyer” as used in Virginia Rule 5.5’s two provisions governing lawyers and law firms hiring lawyers whose licenses have been suspended or revoked.

Virginia Rule 5.5 cmt. [1] first explains that the term “[l]awyer denotes a person authorized by the Virginia Supreme Court or its Rules, to practice law in the Commonwealth,” and specifically includes “persons admitted to practice in this state pro hac vice.”

The first part of that definition makes sense, but the second part is odd. Presumably non-Virginia lawyers admitted to practice pro hac in Virginia would not include any lawyers whose licenses had already been suspended or revoked. And one would expect that such disciplined lawyers would likewise lose any existing pro hac status. Perhaps the definition instead is intended to focus on lawyers mentioned in Virginia Rule 5.5(a) and (b) who might hire other lawyers (as non-lawyer colleagues) whose licenses have been suspended or revoked. If that is the intended meaning, it is

consistent with the punitive nature of Virginia Rule 5.5(a) and 5.5(b), which essentially make lawyers whose licenses have been suspended or revoked pariahs.

**ABA Model Rule 5.5** does not have a similar comment.

### **Virginia Rule 5.5 Comment [2]**

Virginia Rule 5.5 cmt. [2] contains the standard ABA Model Rule 5.5 cmt. [2] definition of “the practice of law.”

Virginia Rule 5.5 cmt. [2] is almost humorous, instead of helpfully explaining Virginia’s approach to such definition. The Virginia Rule Comment uselessly states that the definition “is established by law and varies from one jurisdiction to another.” That might be interesting from an intellectual standpoint, but of course does not help Virginia lawyers. In 2019, the Virginia Supreme Court adopted an entirely new definition of the practice of law.

Virginia Rule 5.5 cmt. [2] next explains that “[w]hatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unauthorized persons.” That sentence is perhaps the most comical – acknowledging that states’ definitions of the practice of law differ, but justifying any possible definition as serving the public interest.

Virginia Rule 5.5 cmt. [2] concludes with an assurance that lawyers may employ “paraprofessionals and delegat[e] functions to them, as long as the lawyer supervises the delegated work and retains responsibility for their work” (referring to Virginia Rule 5.3). It is unclear whether the term “responsibility” means day-to-day supervision of such nonlawyer’s work creation, or rather malpractice. Although it does not appear in Virginia

Rule 1.5, ABA Model Rule 1.5(e)(1)'s fee-split provision uses the similar “joint responsibility” when describing lawyers who may ethically split fees. If fee-splitting lawyers do not both share “joint responsibility,” the fee-split must be “in proportion to the services performed by each lawyer.” ABA Model Rule 1.5 cmt. [7] explains that “[j]oint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership.” It might be fair to conclude that the term “responsibility” has the same meaning in Virginia Rule 5.5 cmt. [2].

**ABA Model Rule 5.5 cmt. [2]** contains the identical language.

### **Virginia Rule 5.5 Comment [3]**

Virginia Rule 5.5 cmt. [3] addresses an exception to the “practice of law” definition allowing lawyers to provide “professional advice and instruction” to nonlawyers “whose employment requires knowledge of law.” Virginia Rule 5.5 cmt. [3] provides examples: “claims adjusters, employees of financial or commercial institutions, social workers, accountants, and persons employed in government agencies.”

Virginia Rule 5.5 cmt. [3] seems obvious and thus unnecessary. Lawyers clearly can provide legal advice and instruction to nonlawyers who need it – that is what lawyers do. So it seems odd that Virginia Rule 5.5 cmt. [3] starts with the term “[l]ikewise” – which does not appear in the parallel ABA Model Rule Comment.

**ABA Model Rule 5.5 cmt. [3]** contains identical language, except for the absence of the introductory “likewise.”

In contrast to Virginia Rule 5.5 cmt. [3], ABA Model Rule 5.5 cmt. [3] also explains that lawyers may: (1) “assist independent nonlawyers” (an odd undefined term) “who are

authorized by the law of a jurisdiction to provide particular law-related services;” and (2) “counsel nonlawyers who wish to proceed *pro se*.”

It is unclear whether the terms “assist” and “counsel” are intentionally used to describe different lawyer services. The word “assist” seems to imply more intensive help than “counsel,” but neither term is defined.

As explained below, the use of different terms might be purposeful. The latter scenario involves lawyers helping such nonlawyers who appear before tribunals. Most bars formerly prohibited such explicit undisclosed assistance, but now generally permit it – as long as the tribunals do not require disclosure of the lawyer’s involvement. ABA Model Rule 5.5 cmt. [3] correctly notes that as a matter of ethics most states allow lawyers to “counsel” (and even to “assist”) *pro se* litigants.

But lawyers should be very wary of looking only at the ethics rules and ethics opinions when determining what they may ethically do. There seems to be no let-up in tribunals’ extremely hostile approach to lawyers providing such assistance to *pro se* litigants. This is perhaps the most obvious example of a mismatch between the ethics rules and tribunals’ attitude toward lawyer conduct. Presumably because many if not most tribunals are more forgiving in both procedural and substantive matters to *pro se* litigants than to represented litigants, tribunals presumably feel misled if a supposedly *pro se* litigant receives substantial undisclosed assistance from a lawyer – thus receiving that more liberal treatment while not actually proceeding *pro se*.

ABA Model Rule 5.5 cmt. [3]’s use of the term “counsel” in describing what lawyers may do to help nonlawyers appearing *pro se* might denote a more limited type of help than “assist.” For instance, a lawyer might “counsel” a *pro se* litigant by providing general

advice about the process, but the term “counsel” would not seem to include that lawyer ghostwriting pleadings for that nonlawyer. The term “assist” might include such ghostwriting.

### **Virginia Rule 5.5 Comment [4]**

Virginia Rule 5.5 cmt. [4] addresses non-Virginia lawyers “establish[ing] an office or other systematic and continuous presence in Virginia for the practice of law.”

Virginia Rule 5.5 cmt. [4] first repeats the concept contained in Virginia Rule 5.5(d)(2)(i) – that such a presence may be “systematic and continuous even if the [non-Virginia] Lawyer is not physically present here.” That concept does not appear in the black letter ABA Model Rule 5.5, but does appear in ABA Model Rule 5.5 cmt. [4].

Virginia Rule 5.5 cmt. [4] provides examples of such “non-physical” systematic and continuous presence, explaining that it “includes, but is not limited to, the regular interaction with residents of Virginia for delivery of legal services in Virginia through exchange of information over the Internet or other means.”

Virginia Rule 5.5 cmt. [4] then switches direction – warning that non-Virginia lawyers “must not hold out to the public or otherwise represent that [they are] admitted to practice law in Virginia” (citing Virginia Rule 7.1). Virginia Rule 7.1 prohibits “a false or misleading communication about the lawyer or the lawyer’s services.” As explained above, non-Virginia lawyers may practice law in Virginia under certain circumstances – either if they are “admitted” to practice law in Virginia for certain purposes, or otherwise “authorized” to practice law in Virginia either through some action by Virginia, or by some other power such as the U.S. Constitution’s Supremacy Clause.

Presumably Virginia Rule 5.5 cmt. [4]’s use of the term “admitted” is deliberate. Virginia Rule 5.5 cmt. [4] addresses non-Virginia lawyers’ “systematic and continuous presence in Virginia.” So a non-Virginia lawyer holding herself out as “admitted” in Virginia presumably would be representing that as she is “admitted” in Virginia to practice in such a “systematic and continuous” way. In other words, a non-Virginia lawyer saying that he is “admitted” *pro hac* would be accurate, but that would not allow him to engage in a “systematic and continuous presence in Virginia.”

Interestingly, Virginia Rule 5.5 cmt. [4] does not address non-Virginia lawyers’ representation that they are “authorized” to practice in Virginia. As explained above, such authorization presumably can come from an official Virginia action or some external power such as the U.S. Constitution’s Supremacy Clause. So non-Virginia lawyers presumably may hold themselves out as “authorized” to practice law in Virginia under either circumstance. But they cannot claim that they are “admitted” means that is true.

Virginia Rule 5.5 cmt. [4] next explains that non-Virginia lawyers may establish “an office or other systematic and continuous presence in Virginia” if their practice “is limited to areas which by state or federal law do not require admission to the Virginia State Bar.” Presumably the word “areas” refers to “areas” of legal practice, not geographic “areas.” That explicit acknowledgement is not stated clearly in black letter Virginia Rule 5.5, although Virginia Rule 5.5(d)(2)’s introductory phrase contains as an exception to the general prohibition on non-Virginia lawyers’ systematic and continuous presence in Virginia – if such practice in Virginia is “authorized by these Rules or other law.” The “other law” presumably refers to the U.S. Constitution’s Supremacy Clause or perhaps other legal principles allowing lawyers to practice systematically and continuously where

they are not licensed. The use of the term “authorized” rather “admitted” seems appropriate here. As explained above, the term “authorized” contrasts with the term “admitted.” The former can occur through operation of law or by some formal action by Virginia. The latter presumably is limited to some formal Virginia action.

Virginia Rule 5.5 cmt. [4] then includes two lists of examples. As explained below, the importance of these two explicit exceptions pale in comparison to the dramatically wider implicit exception allowing non-Virginia lawyers to practice systematically and continuously in Virginia (physically or virtually) as long as they limit their advice to the law of states where those lawyers are licensed to practice.

First, non-Virginia but US-admitted lawyers who may establish an office or other “systematic and continuous” presence to practice law in Virginia under Virginia Rule 5.5(d)(2)(4) include lawyers “whose practices are limited to federal tax practice before the IRS and Tax Court, patent law before the Patent and Trademark Office, or immigration law.” The first two examples seem appropriate. Some lawyers have suggested that “immigration law” now includes such state immigration law issues that immigration lawyers may not be able to rely on this type of exception if they practice law where they are not generally admitted – because their inability to provide state immigration law advice in a state where they are not generally admitted could prevent them from adequately representing immigration clients.

Second, non-US lawyers may establish an office or other “systematic and continuous presence” in Virginia “under Rule IA:7 as a foreign legal consultant.” That separate Virginia Supreme Court Rule allows such foreign consultants practicing in Virginia to provide advice about their home country’s law or international law.

As addressed above (in connection with black letter Virginia Rule 5.5(d)(2)(i)), despite the lack of black letter or comment language explicitly permitting it, Virginia allows non-Virginia lawyers to practice systematically and continuously in Virginia as long as they limit their advice to the law of jurisdictions where those lawyers are licensed to practice. Virginia LEO 1856 (9/19/11) explicitly explains this, citing two pre-Rule 5.5 Virginia UPL Opinions that the Virginia Supreme Court approved. And on November 2, 2016 the Virginia Supreme Court also approved Virginia LEO 1856 (9/19/11) including its crystal-clear conclusion: “if [non-Virginia lawyers’] practice is limited to matters involving the law of the state or country in which they are admitted to practice, foreign lawyers can practice in Virginia on a systematic and continuous basis.”

**ABA Model Rule 5.5 cmt. [4]** contains a much more succinct discussion.

ABA Model Rule 5.5 cmt. [4] begins with a reference to the general prohibition on lawyers from other jurisdictions “establishing an office or other systematic and continuous presence” – “[o]ther than as authorized by law or this Rule.”

ABA Model Rule 5.5 cmt. [4] then acknowledges that lawyers’ “[p]resence may be systematic and continuous even if the lawyer is not physically present here. Virginia Rule 5.5(d)(2)(i) and Virginia Rule 5.5 cmt. [4] make that same significant point.

ABA Model Rule 5.5 cmt. [4] concludes with a warning (also found in Virginia Rule 5.5 cmt. [4]) that such a lawyer “must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction” – referring to ABA Model Rule 7.1(a) (similarly to the Virginia Rule Comment’s reference to Virginia Rule 7.1(a)).

ABA Model Rule 5.5 cmt. [4]’s explanation that lawyers may not hold themselves out as “admitted to practice law in this jurisdiction” makes more sense than the similar

prohibition in Virginia Rule 5.5 cmt. [4]. The ABA Model Rule Comment applies on its face to a lawyer “who is not admitted to practice generally in this jurisdiction” (emphasis added) (found in ABA Model Rule 5.5 cmt. [4]’s introductory sentence). In contrast, Virginia Rule 5.5 cmt. [4]’s much more elaborate discussion does not apply on its face only to non-Virginia lawyers who are not admitted “generally” in Virginia.

The last concept included in Virginia Rule 5.5 cmt. [4] appears in other ABA Model Rule 5.5 Comments. As explained above, Virginia Rule 5.5 cmt. [4] concludes with a lengthy discussion of non-Virginia lawyers’ ability to “establish an office or other systematic and continuous presence in Virginia” because of their practices’ content. The Virginia Rule Comment provides examples of federal tax lawyers, patent lawyers and immigration lawyers. ABA Model Rule 5.5 cmt. [18] explains that ABA Model Rule 5.5(d)(2) recognizes that both US and non-US lawyers may systematically and continuously provide legal services in a jurisdiction “when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent.” Thus, ABA Model Rule 5.5 cmt. [18] deals with the U.S. Constitution’s Supremacy Clause implications of lawyers practicing only federal law in its ABA Model Rule 5.5 cmt. [18] rather than in ABA Model Rule 5.5 cmt. [4].

### **Virginia Rule 5.5 Comment [5]**

Virginia Rule 5.5 cmt. [5] addresses non-Virginia lawyers’ “temporary” rather than “systematic and continuous” practice of law in Virginia.

Virginia Rule 5.5 cmt. [5] uses only the word “temporary”, although black letter Virginia Rule 5.5(d)(4) and Virginia Rule 5.5 cmt. [6] both use the far more restrictive

phrase “temporary and occasional.” The term “occasional” is highly significant, and dramatically sets Virginia apart from the ABA Model Rule approach. That word obviously refers to the frequency of non-Virginia lawyers’ temporary practice of law in Virginia. This is a completely different standard from the sole term “temporary” – which focuses only on the duration of each occasion in which non-Virginia lawyers practice law in Virginia.

Virginia Rule 5.5 cmt. [5] first explains that the circumstances identified in Virginia Rule 5.5(d)(4) (which allow non-Virginia lawyers’ “temporary and occasional” practice of law in Virginia under certain circumstances) “do not create an unreasonable risk to the interests of [such non-Virginia lawyers’] clients, the public, or the courts.” The Virginia Rule Comment then notes that the absence of any specific reference in black letter Virginia Rule 5.5(d)(4) “does not imply that the conduct is or is not authorized.” Thus, Virginia Rule 5.5 cmt. [5] assures that the black letter list of permissible non-Virginia lawyers’ “temporary and occasional” services in Virginia is not exclusive.

Virginia Rule 5.5 cmt. [5] concludes with an odd statement that would seem to belong in Virginia Rule 5.5 cmt. [4]. The statement notes that non-Virginia lawyers “may not establish an office or other systematic and continuous presence in Virginia”: (1) without being “admitted to practice generally” in Virginia; or (2) “[e]xcept as authorized by this rule or other law.”

The term “admitted to practice generally” presumably is synonymous with the phrase “licensed by the Supreme Court of Virginia” that appears in Virginia Rule 5.5(d)(1) and the phrase “admitted to practice law in a jurisdiction on a regular basis” that appears in Virginia Rule 5.5 cmt. [1]. But the word “generally” is a bit confusing, because that word appears in the very different concept of authorization addressed in Virginia Rule

5.5(d)(1): “authorized under [Virginia] rules to practice law generally in the Commonwealth of Virginia” (which that provision explicitly differentiates from being “licensed by the Supreme Court of Virginia”). Thus, Virginia Rule 5.5 cmt. [5]’s final sentence arguably should not be in a Virginia Rule Comment addressing temporary practice, but instead should be in a Comment addressing “systematic and continuous” presence. The ABA Model Rules also make what seems like the wrong placement.

**ABA Model Rule 5.5 cmt. [5]** contains essentially the same language as Virginia Rule 5.5 cmt. [5].

In contrast to Virginia Rule 5.5 cmt. [5], ABA Model Rule 5.5 cmt. [5] addresses occasions in which lawyers “admitted to practice in another United States jurisdiction” may provide “legal services on a temporary basis in this jurisdiction.” This contrasts with Virginia Rule 5.5(d) and Virginia Rule 5.5 cmt. [5], which allow such temporary and occasional provision of legal services in Virginia by non-U.S. lawyers, in addition to lawyers licensed in another U.S. jurisdiction.

ABA Model Rule 5.5 cmt. [5] contains the same language as Virginia Rule 5.5 cmt. [5] in explaining that an out-of-state lawyer’s temporary practice in the jurisdiction does not create unreasonable risks, and assuring that ABA Model Rule 5.5(c)’s list of permissible temporary practice of law in the jurisdiction is not exclusive.

Like Virginia Rule 5.5 cmt. [5], ABA Model Rule 5.5 cmt. [5] also oddly concludes by explaining (in different language) the prohibition on US and foreign lawyers establishing a systematic and continuous presence “without being admitted to practice generally,” and without being able to point to an exception (under ABA Model Rule 5.5(d)(1) or ABA Model Rule 5.5(d)(2)). That focus on lawyers’ “systematic and

continuous presence” logically belongs in a Comment (such as ABA Model Rule 5.5 cmt. [4]) addressing that Rule, not a Comment addressing the very different “temporary” role in a jurisdiction.

Interestingly, ABA Model Rule 5.5 cmt. [5]’s conclusion refers to what a U.S. “or foreign lawyer[]” may or may not do in the jurisdiction – noting that ABA Model Rule 5.5(d)(1) and (d)(2) allow foreign lawyers to establish a “systematic and continuous presence” in the jurisdiction under specified conditions. This contrasts with the ABA Model Rule 5.5 cmt. [5]’s first sentence, which explains that U.S.-based lawyers may in some situations temporarily practice in the jurisdiction. This distinction makes sense in the ABA Model Rules, which do not explicitly allow non-U.S. lawyers to temporarily practice in United States jurisdictions – in contrast to Virginia Rule 5.5.

Although ABA Model Rule 5.5 cmt. [5] does not explicitly indicate as much, presumably out-of-state lawyers who can systematically and continuously practice in the jurisdiction where she is not licensed may do so temporarily. In other words, the greater right presumably includes the lesser right.

### **Virginia Rule 5.5 Comment [6]**

Virginia Rule 5.5 cmt. [6] addresses the definition of the terms “temporary” and “occasional” used in Virginia Rule 5.5(d)(4).

Virginia Rule 5.5 cmt. [6] first explains that such permissible legal services may be “temporary” “even though the [non-Virginia lawyer] provides services in Virginia on a recurring basis, or for an extended period of time.” As explained below, the “recurring” practice of law in Virginia does not go to whether such practice is “temporary” – but

instead goes to whether it is “occasional.” Virginia Rule 5.5 cmt. [6] provides an example of a permissible “temporary” presence in Virginia: “as when the [non-Virginia lawyer] is representing a client in a single lengthy negotiation or litigation.” The Virginia Comment then understandably explains that the term “temporary” refers to the “duration of the [non-Virginia lawyer’s] presence and provision of services.”

Virginia Rule 5.5 cmt. [6] concludes with an explanation that the term “occasional” refers to the “frequency with which the [non-Virginia lawyer] comes into Virginia to provide legal services.”

Virginia Rule 5.5 cmt. [6] seems somewhat self-contradictory. Virginia Rule 5.5 cmt. [6] addresses both the term “temporary” and the term “occasional,” because non-Virginia lawyers are authorized under Virginia Rule 5.5(d)(4) only to “provide legal services on a temporary and occasional basis in Virginia.” Thus, there is a key limit on a non-Virginia lawyer who “provide[s] legal services on a temporary . . . basis in Virginia” under black letter Virginia Rule 5.5(d)(4) – it must also be “occasional.” ABA Model Rule 5.5(c) allows out-of-state lawyers to provide “temporary” legal services in a jurisdiction, while Virginia Rule 5.5(a)(4) allows only “temporary and occasional” services.

But like ABA Model Rule 5.5 cmt. [6] (discussed below), Virginia Rule 5.5 cmt. [6] explains that services may be “temporary” even if a non-Virginia lawyer “provides services in Virginia on a recurring basis.” Virginia presumably copied that language from ABA Model Rule 5.5 cmt. [6] – where it made sense, because ABA Model Rule 5.5 does not contain the additional “occasional” limitation. But black letter Virginia Rule 5.5(d)(4) and Virginia Rule 5.5 cmt. [6] limit such non-Virginia lawyers’ practice of law in Virginia to “occasional” times. That the black letter Virginia Rule 5.5(d)(4) requirement that non-

Virginia lawyers may only provide “occasional” temporary legal services in Virginia seems inconsistent with the previous Virginia Rule 5.5 cmt. [6]’s sentence acknowledging that non-Virginia lawyers are free to provide temporary legal services in Virginia on a “recurring basis.” Non-Virginia lawyers presumably must assess if their permissible “recurring” temporary practice of law in Virginia is “occasional” or not. Virginia Rule 5.5 cmt. [6] does not provide any guidance on that distinction.

**ABA Model Rule 5.5 cmt. [6]** contains essentially the identical language as Virginia Rule 5.5 cmt. [6].

In contrast to Virginia Rule 5.5 cmt. [6]’s description of the permissible “occasional” practice in Virginia by non-Virginia lawyers, ABA Model Rule 5.5 cmt. [6] only addresses the term “temporary.” Because the word “occasional” does not appear in ABA Model Rule 5.5 or its Comments, there is no definition of that word in ABA Model Rule 5.5 or its Comments. As explained above, Virginia Rule 5.5(d)’s limitation of temporary practice in Virginia by non-Virginia lawyers to “occasional” temporary practice presumably has substantive effects.

As explained above, ABA Model Rule 5.5 cmt. [6] uses the same language as Virginia Rule 5.5 cmt. [6] – explaining that out-of-state lawyers may temporarily provide legal services in the jurisdiction “on a recurring basis.” That phrase makes sense in ABA Model Rule 5.5 cmt. [6], because ABA Model Rule 5.5(c) does not also require that such permissible temporary practice be “occasional” (as does Virginia Rule 5.5(d)).

## **Virginia Rule 5.5 Comment [7]**

Virginia Rule 5.5 cmt. [7] addresses the unique definition of “Foreign Lawyer” in black letter Virginia Rule 5.5(d)(1).

Virginia Rule 5.5 uses that inapt term to include both: (1) non-U.S. lawyers (the universally used and common sense use of the term); and (2) U.S. lawyers licensed in jurisdictions other than Virginia.

Virginia Rule 5.5 cmt. [7] first makes the obvious point that such a “Foreign Lawyer” must be “authorized to practice in the jurisdiction in which” they are “admitted.” In other words, such lawyers must be “authorized” to practice law, in their home state or home country.

Virginia Rule 5.5 cmt. [7] next explains that the definition of “foreign lawyers” excludes lawyers who are not authorized to practice, despite being “admitted” in their home jurisdiction. Virginia Rule 5.5 cmt. [7] provides an example, “a Foreign Lawyer who while technically admitted, is not authorized to practice because, for example, the Foreign Lawyer is on inactive status.” That makes sense. A lawyer who is “admitted” to practice law but on “inactive” status (or some similar status) is not “authorized” to practice law at that time. Lawyers who are not authorized to practice because they are on “inactive” status presumably are not considered to have been “disbarred or suspended from practice.” In the latter circumstances, those lawyers have been prohibited by some state action from practicing law – not voluntarily agreeing to refrain from practicing law under an “inactive” status.

This mismatch between a lawyer who is “admitted” but who is not “authorized” to practice highlights the apparently confusing nature of terms such as “licensed,” “authorized,” and “admitted.”

**ABA Model Rule 5.5 cmt. [7]** addresses U.S. and non-U.S. lawyers’ ability under certain conditions to practice temporarily under ABA Model Rule 5.5(c) or “systematically and continuously” under ABA Model Rule 5.5(d).

ABA Model Rule 5.5 cmt. [7] first explains that ABA Model Rule 5.5(c) (allowing temporary practice in the jurisdiction) and ABA Model Rule 5.5(d) (allowing systematic and continuous presence in the jurisdiction) apply to lawyers licensed in some U.S. jurisdictions (“which includes the District of Columbia and any state, territory, or commonwealth of the United States.”).

ABA Model Rule 5.5 cmt. [7] then notes that lawyers “admitted in a foreign jurisdiction “ may under the very specific situations described in ABA Model Rule 5.5(d) establish a “systematic and continuous” presence in the jurisdiction. That ABA Model Rule allows non-U.S. lawyers to: (1) practice as in-house lawyers in the United States (under specific conditions); or (2) provide “services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.” Significantly, ABA Model Rule 5.5(d) and ABA Model Rule 5.5 cmt. [7] do not permit non-U.S. lawyers to practice as outside lawyers (in contrast to in-house lawyers) – either temporarily or “systematically and continuously.”

In contrast to Virginia Rule 5.5 cmt. [7], ABA Model Rule 5.5 cmt. [7] explicitly defines the term “admitted,” which appears in ABA Model Rule 5.5(c), (d) and (e). ABA Model Rule 5.5 cmt. [7] explains that the word “admitted” “contemplates that the lawyer

is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.” That example also appears in Virginia Rule 5.5 cmt. [7], although not as part of an explicit definition of the term “admitted.” In other words, ABA Model Rule 5.5 cmt. [7] excludes from the definition of “admitted” lawyers those “on inactive status” – while Virginia Rule 5.5 cmt. [7] seems to exclude lawyers on “inactive” status from those who are “authorized” to practice law (Virginia Rule 5.5(d)(1)). The effect of those two approaches is the same – such “inactive” lawyers cannot practice law in Virginia either temporarily or “systematically and continuously.”

As explained above, Virginia Rule 5.5 generally suffers from a sometimes confusing juxtaposition of the terms “admitted” and “authorized.”

### **Virginia Rule 5.5 Comment [8]**

Virginia Rule 5.5 cmt. [8] addresses Virginia Rule 5.5(d)(4)(i)’s provision allowing non-Virginia (and non-US lawyers) (as the Virginia Rule Comment puts it) to temporarily practice in Virginia if they “associate[ ] with a lawyer licensed to practice [in] Virginia” – as long as the lawyer “actively participate[s] in and share[s] responsibility for the representation of the client.”

Virginia Rule 5.5 cmt. [8] discusses several issues.

First, the use of the phrase “in association with” in Virginia Rule 5.5(d)(4)(i) and “associates with” in Virginia Rule 5.5 cmt. [8] (which also appear in ABA Model Rule 5.5(c)(1) and ABA Model Rule 5.5 cmt. [8]) raises issues. The word “association” and “associates” appears in many other Virginia Rules and Virginia Rule Comments,

unfortunately without being defined anywhere. The use of the term “association” here presumably refers to lawyers who are not in the same firm. This tends to confirm Virginia Rule 1.10 cmt. [1]’s acknowledgment that “associated” lawyers may or may not be in the same firm – depending on “[t]he terms of any formal agreement” and the fact that “they have mutual access to information concerning the clients they serve.” Those same concepts appear in ABA Model Rule 1.0 cmt. [2]. This contrasts with the generally used term “associate” as a non-partner lawyer practicing law in the same firm as a partner.

Under both Virginia Rules’ and the ABA Model Rules’ imputation rules (such as Rule 1.10), one lawyer’s individual disqualification normally is imputed to all other lawyers “associated in a firm.” The same term appears in Virginia Rule 1.8(k) and ABA Model Rule 1.8(k). In those provisions, the word “associated” usually denotes lawyer’s access to confidential information. Presumably the word “associated” in the Virginia Rule 5.5 and ABA Model Rule 5.5 context does not have the same meaning. And of course, the phrase “in a firm” also makes it clear that a lawyer “associated” for purposes of Virginia Rule 5.5’s permissible multijurisdictional practice does not mean that the lawyer “associated in a firm” for conflicts of interest imputation purposes (although presumably there might be imputation of conflicts under a more fact-based analysis.)

Second, there is a mismatch between Virginia Rule 5.5 cmt. [8]’s requirement that the Virginia lawyer in the arrangement must be “admitted to practice in Virginia” (the previous sentence uses the phrase “licensed to practice [sic] Virginia”) and black letter Virginia Rule 5.5(d)(4)(i) – which requires that the Virginia lawyer be “admitted to practice without limitation.” Perhaps the “without limitations” attribute is implied, although the previous Virginia Rule 5.5 cmt. [7] explains that lawyers can be admitted to practice but

not authorized to practice because they are on “inactive” status. So presumably the term “licensed to practice in [sic] Virginia” also excludes lawyers who have a Virginia license but are on “inactive” status.

Third, Virginia Rule 5.5 cmt. [8]’s use of the term “responsibility” raises the issue discussed above – whether that means day-to-day responsibility for handling the matter, or financial/ethical “responsibility” for disciplinary and malpractice purposes. As explained above, ABA Model Rule 1.5 cmt. [7] defines the term “joint responsibility” in the admittedly different fee-split context as “entail[ing] financial and ethical responsibility for the representation as if the lawyers were associated in a partnership.”

**ABA Model Rule 5.5 cmt. [8]** contains essentially the same language as Virginia Rule 5.5 cmt. [8], although it does not use the unique and potentially confusing Virginia Rule term “Foreign Lawyer.” And ABA Model Rule 5.5 cmt. [8] refers to the pertinent ABA Model Rule – ABA Model Rule 5.5(c)(1).

### **Virginia Rule 5.5 Comment [9]**

Virginia Rule 5.5 cmt. [9] addresses Virginia Rule 5.5(d)(4)(ii)’s provision allowing non-Virginia and non-US lawyers to appear before Virginia tribunals and agencies, if their doing so is “authorized by law or order of a tribunal or an administrative agency.”

Not surprisingly, Virginia Rule 5.5 cmt. [9] requires that such lawyers must obtain authority to appear pro hac vice before such a tribunal or agency “[t]o the extent that a court rule or other law of Virginia” requires it.

**ABA Model Rule 5.5 cmt. [9]** contains essentially the same language as Virginia Rule 5.5 cmt. [9].

But the ABA Model Rule Comment has a different reach, because the introductory phrase in ABA Model Rule 5.5(c)(2) (which ABA Model Rule 5.5 cmt. [9] presumably addresses) applies only to a lawyer “admitted in another United States jurisdiction” – in contrast to Virginia Rule 5.5(4)(ii), which also covers non-U.S. lawyers in certain circumstances.

Of course, U.S. courts may decide on their own whether to allow non-U.S. lawyers to appear *pro hac vice* in a proceeding. The trend seems to be in favor of allowing such non-U.S. lawyers to appear in that limited way.

In contrast to Virginia Rule 5.5 cmt. [9], ABA Model Rule 5.5 cmt. [9] also explains that a tribunal’s or agency’s authority allowing U.S.-admitted lawyers to appear before them “may be granted pursuant to formal rules governing admission *pro hac vice* or pursuant to informal practice of the tribunal or agency.” Thus, ABA Model Rule 5.5 cmt. [9] recognizes informal local practice and course of dealing. Presumably Virginia would take the same approach, although it did not include that sentence in Virginia Rule 5.5 cmt. [9].

### **Virginia Rule 5.5 Comment [10]**

Virginia Rule 5.5 cmt. [10] addresses non-Virginia and non-U.S. lawyers’ certain “temporary” litigation-related legal services in Virginia under Virginia Rule 5.5(d)(4)(ii).

As in other Virginia Rule 5.5 Comments, Virginia Rule 5.5 cmt. [10] only mentions such non-Virginia lawyers’ “temporary” practice in Virginia – without mentioning Virginia Rule 5.5(d)(4)’s additional requirement that such “temporary” practice also be “occasional.”

Under Virginia Rule 5.5 cmt. [10], such lawyers may engage in the “temporary” practice of law in Virginia “in anticipation of a proceeding or hearing” in a jurisdiction which such lawyers are “authorized to practice law” or in which such lawyers “reasonably expect[ ] to be admitted *pro hac vice*.” Thus, it is not necessary for the “proceeding” to already be pending, or for such lawyers to already have been admitted *pro hac* in the tribunal where the proceeding is anticipated to begin. Virginia Rule 5.5 cmt. [10] provides these examples: (1) “meetings with the client,” (2) “interviews of potential witnesses,” and (3) “the review of documents.”

Virginia Rule 5.5 cmt. [10] next turns to non-Virginia and non-U.S. lawyers’ temporary practice of law in Virginia “in connection with pending litigation in another jurisdiction.” Such temporary practice in Virginia is permissible if the non-Virginia or non-U.S. lawyer “is or reasonably expects to be authorized to appear” in such “pending litigation in another jurisdiction.” Virginia Rule 5.5 cmt. [10] provides one significant example: “taking depositions in Virginia.”

Virginia Rule 5.5 cmt. [10] contains several provisions whose effect may not have been intended.

First, Virginia Rule 5.5 cmt. [10] allows “temporary” (and occasional) practice in Virginia only if the non-Virginia lawyer has appeared or expects to appear in another jurisdiction’s litigation – in connection with which that non-Virginia lawyer wishes to temporarily and occasionally practice law in Virginia. But the word “appear” normally denotes a formal filing of “notice to appear” and court recognition of such an “appearance.” Many lawyers work in large litigation matters without making an “appearance” in the case. It is difficult to imagine that Virginia Rule 5.5 cmt. [10] intends

to exclude those lawyers from the “temporary and occasional” practice of law in Virginia. For instance, some non-Virginia or non-U.S. junior lawyers may be asked to review documents in Virginia or interview witnesses in Virginia – although they would not expect to make a formal “appearance” in another jurisdiction’s litigation.

Second, and perhaps more significantly, there is a mismatch between Virginia Rule 5.5 cmt. [10]’s two scenarios: (1) “in anticipation of a proceeding or hearing in a jurisdiction in which the Lawyer is authorized to practice law or in which the . . . Lawyer reasonably expects to be admitted pro hac vice”; and (2) “in connection with a pending litigation in another jurisdiction in which the . . . Lawyer is or reasonably expects to be authorized to appear.” Virginia Rule 5.5 cmt. [10] contains oddly differing standards for those two situations. In the first situation, involving either the anticipation of a proceeding or a hearing in “a jurisdiction in which the (non-Virginia lawyer) is authorized to practice law or in which the (non-Virginia lawyer) reasonably expects to be admitted pro hac vice,” a lawyer’s temporary practice of law in Virginia thus is apparently permissible only if the “proceeding or hearing” will be in a jurisdiction where the lawyer is already “authorized to practice law” or where the lawyer “reasonably expects to be admitted pro hac vice.” In the second situation, involving “pending litigation in another jurisdiction,” the temporary practice of law in Virginia is permissible only if the lawyer already “is or reasonably expects to be authorized to appear” in that pending litigation.

It seems strange that there is no reference to temporary legal services in Virginia in “anticipation” of litigation. The “anticipation” scenario involves a “proceeding or hearing.” Perhaps “proceeding” is meant to be synonymous with “litigation.” But if so, it would seem odd to deliberately use separate words – “proceeding” and “litigation” – to

mean the same thing in the same Comment. Another possible meaning is that the term “proceeding” refers to a subset of the term “litigation.” The term “hearing” obviously refers to an event that is a subset of “litigation.” Perhaps “proceeding” refers to a “hearing” or other event in a tribunal – to distinguish it from the discovery or briefing phases of litigation.

It also seems strange that the “anticipation of a proceeding or hearing” is followed by the phrase “in a jurisdiction” – which presumably includes Virginia or some other jurisdiction. The “pending litigation” scenario is explicitly limited to “pending litigation in another jurisdiction.” So, pending litigation in Virginia is not explicitly covered, although presumably it is encompassed in the first scenario’s phrase “in anticipation of a proceeding or hearing in a jurisdiction.” Just like pending litigation in Virginia is not explicitly covered, anticipated litigation (that is not “pending”) in the other jurisdiction is not covered.

**ABA Model Rule 5.5 cmt. [10]** contains essentially the same provision as Virginia Rule 5.5 cmt. [10] addressing the “anticipation of a proceeding or hearing” scenario, including the same examples.

In contrast to Virginia Rule 5.5 cmt. [10]’s “in connection with pending litigation in another jurisdiction” scenario, ABA Model Rule 5.5 cmt. [10] describes the temporary practice of law by “a lawyer admitted only in another jurisdiction.” That phrase does not appear in Virginia Rule 5.5 cmt. [10], but is incorporated in Virginia Rule 5.5(d)(1)’s reference to “a Foreign lawyer” in that scenario.

Presumably ABA Model Rule 5.5 cmt. [10] (like Virginia Rule 5.5 cmt. [10]) equates the terms “proceeding” and “litigation.” Otherwise, ABA Model Rule 5.5 cmt. [10] would

not cover anticipated litigation in such a jurisdiction. But as in Virginia Rule 5.5 cmt. [10], it seems odd that ABA Model Rule 5.5 cmt. [10] would deliberately use different terms to define the same thing in the same Comment.

Although not specifically mentioned in ABA Model Rule 5.5 cmt. [10], black letter ABA Model Rule 5.5(c) on its face only allows U.S. lawyers to temporarily practice in a U.S. jurisdiction. Non-U.S. lawyers may systematically and continuously practice in a state (under ABA Model Rule 5.5(d)) only if they are acting as in-house lawyers, or are otherwise “authorized by federal or other law or rule” to provide services in the jurisdiction.

### **ABA Model Rule 5.5 Comment [11]**

Virginia did not adopt ABA Model Rule 5.5 cmt. [11]

ABA Model Rule cmt. [11] addresses permissible temporary practice of law in the jurisdiction by lawyers “associated with” a lawyer who “has been or reasonably expects to be admitted to appear before a court or administrative agency” – but who herself does “not expect to appear before the court or administrative agency.” ABA Model Rule 5.5 cmt. [11] provides an example: “subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.” Thus, ABA Model Rule 5.5 cmt. [11] confirms that ABA Model Rule 5.5 allows the temporary practice of law in the jurisdiction by a lawyer who does not expect to appear at the proceeding, and therefore does not need to be admitted pro hac.

As explained above, Virginia Rule 5.5 cmt. [10] in contrast only allows non-Virginia lawyers to temporarily and occasionally practice law in Virginia if such non-Virginia lawyers expect to be “admitted pro hac vice” (or, as the concluding sentence puts it,

“expects to be authorized to appear”). Presumably the Virginia Rule Comment would not be interpreted that narrowly.

### **Virginia Rule 5.5 Comment [12]**

Virginia Rule 5.5 cmt. [12] addresses non-Virginia and non-U.S. lawyers’ permissible temporary practice of law in Virginia “if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding.”

But there is an important condition. Virginia Rule 5.5 cmt. [12] requires that the ADR-related temporary practice of law in Virginia “arise out of or are reasonably related to the . . . Lawyer’s practice in a jurisdiction in which the . . . Lawyer is “admitted to practice.” Although not explicitly mentioned in Virginia Rule 5.5 cmt. [12], or in black letter Virginia Rule 5.5(d)(1)’s definition of “Foreign Lawyer,” such non-Virginia lawyers may not practice in Virginia if they are “admitted” but “on inactive status” in that other jurisdiction (a common sense principle explained in Virginia Rule 5.5 cmt. [7]. Significantly, this sort of relationship with the lawyer’s home state is not required for non-Virginia and non-U.S. lawyers to: (1) temporarily and occasionally practice in Virginia if they associate with a Virginia lawyer (Virginia Rule 5.5(d)(4)(i)) or provide legal services relating to pending or potential proceedings before a tribunal in Virginia or elsewhere (Virginia Rule 5.5(d)(4)(ii)).

This is an important distinction. Non-Virginia lawyers called out of the blue by a Virginia-based client having no relationship to the jurisdiction where those non-Virginia lawyers are admitted to practice may temporarily and occasionally practice law in Virginia

if they associate with a Virginia lawyer or if a Virginia tribunal admits them *pro hac vice* to appear in that tribunal. In the ADR setting, non-Virginia lawyers may temporarily and occasionally practice law in Virginia only if the ADR proceedings in Virginia or elsewhere “arise out of or are reasonably related to” the non-Virginia lawyer’s practice in a jurisdiction where she is admitted to practice. Thus, there must be some connection to the non-Virginia lawyer’s home jurisdiction.

Virginia Rule 5.5 cmt. [12] concludes with the understandable warning that such lawyers must “obtain admission *pro hac vice* in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so requires.”

**ABA Model Rule 5.5 cmt. [12]** contains essentially the same language.

### **Virginia Rule 5.5 Comment [13]**

Virginia Rule 5.5 cmt. [13] addresses what in essence is a catch-all permission for non-Virginia and non-U.S. lawyers to temporarily and occasionally practice law in Virginia, even if such legal services do not fall within one of the more specific provisions granting such permission.

Virginia Rule 5.5 cmt. [13] first explains that such lawyers may provide “certain legal services on a temporary basis in Virginia” if they “arise out of or are reasonably related to that lawyer’s practice in a jurisdiction” in which such lawyers are “admitted.” As elsewhere in Virginia Rule 5.5 Comments, Virginia Rule 5.5 cmt. [13] only mentions non-Virginia lawyers’ “temporary” practice of law in Virginia – without mentioning Virginia Rule 5.5(d)(4)’s equally important “occasional” standard.

Although Virginia Rule 5.5 cmt. [13] does not explicitly mention it, Virginia Rule 5.5 cmt. [7] explains that black letter Virginia Rule 5.5(d)(1)'s definition of "Foreign Lawyer" used throughout Virginia Rule 5.5 and its Comments excludes lawyers who are "admitted" in a jurisdiction – but not "authorized" to practice (for instance, if they are "on inactive status.")

Significantly, Virginia Rule 5.5 cmt. [13] uses an incorrect standard for analyzing non-Virginia lawyer relationship to a jurisdiction where they are admitted. Virginia Rule 5.5 cmt. [13] explains that such non-Virginia lawyers may practice "on a temporary basis" if the matter which they temporarily provided legal advice in Virginia "arise out of or are reasonably related to that lawyer's practice in a jurisdiction in which [the non-Virginia lawyer] is admitted" (emphasis added). This differs substantially from black letter Virginia 5.5(d)(4)(iv) – which instead requires that the matter "arise out of or are reasonably related to the representation of a client by the [non-Virginia lawyer] in a jurisdiction which the [non-Virginia lawyer] is admitted to practice" (emphasis added).

This linguistic difference could have substantive impact. Black letter Virginia Rule 5.5(d)(4)(iv)'s phrase "representation of a client . . . in a jurisdiction" seems far narrower than Virginia Rule 5.5 cmt. [13]'s phrase "practice in a jurisdiction." The client-focused standard assesses a particular person's or entity's relationship to the non-Virginia lawyer's home jurisdiction. The practice-focused standard assesses such a lawyers' legal work for clients presumably not just the client whom the lawyer wants to represent while temporarily and occasionally practicing law in Virginia. The black letter Virginia Rule 5.5(d)(4)(iv) "related to the representation of a client" standard presumably trumps the

looser Virginia Rule 5.5 cmt. [13] “arise out of or are reasonably related to that lawyer’s practice” standard.

Interestingly, Virginia Rule 5.5 cmt. [13] concludes with an explanation that such permissible temporary services “include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.” That latter type of services is not defined. This obviously imports external law into the ethics rules. As explained above, Virginia Rule 5.5 cmt. [2] contains a useless discussion of what the “practice of law” means. Lawyers obviously have to examine the separate Virginia Rule defining the “practice of law” to determine what they may or may not do in Virginia. And non-Virginia lawyers would have to look at the same source for guidance.

**ABA Model Rule 5.5 cmt. [13]** contains essentially the identical language.

The mismatches in Virginia Rule 5.5 cmt. [13] do not appear in ABA Model Rule 5.5 cmt. [13].

First, ABA Model Rule 5.5 uses the term “temporary” throughout the Rules and the Comments (in contrast to Virginia Rule 5.5(d)(4)’s phrase “temporary and occasional” – which does not appear in many of the Virginia Rule 5.5 Comments).

Second, ABA Model Rule 5.5 and its Comments occasionally require that the out-of-state lawyer’s temporary practice in the jurisdiction involve “services [that] arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice” (emphasis added). This contrasts with Virginia Rule 5.5 and its Comments, which sometimes use that standard and sometimes uses a different standard: “arise out of or are reasonably related to the representation of a client” in the non-Virginia lawyer’s jurisdiction” (emphasis added).

### **Virginia Rule 5.5 Comment [14]**

Virginia Rule 5.5 cmt. [14] addresses the type of relationship to a non-Virginia lawyer's home jurisdiction that satisfies the relationship requirement in Virginia Rule 5.5(d)(4)(iii) and (iv).

As explained above, Virginia Rule 5.5(d)(4) strangely contains two different standards for determining such a relationship. Virginia Rule 5.5(d)(4)(iii) focuses on non-Virginia lawyers' "practice" in a jurisdiction in which he is admitted, while Virginia Rule 5.5(d)(4)(iv) focuses on non-Virginia lawyers' "representation of a client" in her home jurisdiction. This contrasts with ABA Model Rule 5.5's consistent standard – both ABA Model Rule 5.5(c)(3) and (4) use the "practice in a jurisdiction" standard.

Virginia Rule 5.5 cmt. [14] explains that "[a] variety of factors evidence such a relationship" with a jurisdiction in which such non-Virginia lawyers are admitted to practice.

First, the non-Virginia lawyer's client may have been "previously represented" by the lawyer in, reside in, or "have substantial contacts with," that other jurisdiction. The focus on a non-Virginia lawyer's client matches black letter Virginia Rule 5.5(d)(4)(iv) – which requires the non-Virginia lawyer's "temporary and occasional" practice in Virginia to "arise out of" or be "reasonably related to" the non-Virginia lawyer's "representation of the client" in the non-Virginia lawyer's home jurisdiction. As explained above, that client-focused standard differs from black letter Virginia Rule 5.5(d)(4)(iii)'s focus on the non-Virginia lawyer's "practice" in her home jurisdiction (the standard found in both of the parallel ABA Model Rule provisions). Virginia Rule 5.5 cmt. [14]'s phrase "practice in a

jurisdiction” presumably could refer to practice physically “in” a jurisdiction or virtually “in” a jurisdiction. The term “substantial contacts with” is not defined, so it is unclear exactly what is required of such clients’ relationship with the non-Virginia lawyer’s home jurisdiction.

Second, the “matter” may have “a significant connection with that jurisdiction” (although also “involving other jurisdictions”). This matter-focused relationship is also undefined. It obviously requires some “connection” with the non-Virginia lawyer’s home jurisdiction. And the “connection” must be “significant.” But it is unclear what factors would guide that analysis. Perhaps the presence of witnesses, documents, or other aspects of the “matter” would be sufficient.

Third, “significant aspects of the [non-Virginia lawyer’s] work might be conducted in that jurisdiction.” This seems like a strange way to satisfy the relationship requirement. On its face, it would seem to allow lawyers to temporarily practice in any other jurisdiction, as long as the lawyers worked on the matter while in their home jurisdiction. That would probably be true in many situations, and does not on its face require any relationship to Virginia. For instance, a lawyer admitted to practice in Wyoming but wishing to temporarily practice law in Virginia theoretically could point to this catch-all provision by noting that she will be working at home in Wyoming on legal research, draft meetings, etc. The fact that her “work might be conducted in that [home] jurisdiction” says nothing about the relationship between the Virginia matter and her home state of Wyoming, other than that is where she chooses to hang out while she works. But ABA Model Rule 5.5 cmt. [14] has the same provision, so Virginia is not an outlier in adopting that inexplicable factor.

Fourth, “a significant aspect of the matter may involve the law” of the non-Virginia lawyer’s home jurisdiction. Thus, a lawyer may point to her home state’s law as the “governing law.” This provision does not indicate that the other jurisdiction’s law govern. Instead, only “significant aspects” of the Virginia-based matter must “involve” the other jurisdiction’s law. Not surprising the phrase “significant aspects” is not defined – although it would be helpful to have had guidance. But the word “involve” is inapt. Law either governs or it does not govern. Saying that in a matter “involve[s]” a jurisdiction’s law is unclear.

Fifth, Virginia Rule 5.5 cmt. [14] explains that “[t]he necessary relationship might arise when the client’s activities or the legal issues involve multiple jurisdictions.” Perhaps this scenario requires the lawyer to be admitted to practice in one of those multiple jurisdictions. But the sentence does not explicitly indicate that.

Virginia Rule 5.5 cmt. [14] then provides an example of this sort of “necessary relationship:” “when the officers of a multinational corporation survey potential business sites and seek the services [of such a lawyer] in assessing the relative merits of each.” As in the previous statement describing the possible relationship to jurisdictions where such lawyers are admitted to practice, this example similarly fails to mention that the lawyer must be admitted in one of those jurisdictions. If that is not a requirement, one wonders why it would satisfy the provision allowing the temporary and occasional practice of law in Virginia if there is some relationship with the non-Virginia or non-U.S. lawyer’s home jurisdiction (or other jurisdiction where such a lawyer are admitted to practice). For instance, a lawyer admitted only in Nebraska could point to this provision to justify the temporary practice of law in Virginia if an officer of a “multinational corporation” with U.S.

operations in Texas asks the Nebraska lawyer to “assess[ ] the relative merits” of “potential business sites in” in Maine, North Carolina and Arizona. That scenario would not involve any relationship with Nebraska, which is the underlying premise of Virginia Rule 5.5 cmt. [14] and black letter Virginia Rule 5.5(a)(4)(iv) – requiring some relationship between the lawyer’s home state and her temporary and occasional practice in Virginia.

On a more basic level, the example also seems strange. Why would it have to be a “multinational” corporation, and why do “officers” have to seek the legal services? These odd provisions in this Virginia Rule Comment come directly from ABA Model Rule 5.5 cmt. [14], discussed below.

Sixth, the final sentence in Virginia Rule 5.5 cmt. [14] allows non-Virginia lawyers to temporarily and occasionally practice in Virginia if those legal services “draw on [such lawyers’] recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law.”

Those scenarios clearly do not require any relationship with particular jurisdictions where such lawyers are admitted to practice. And it is unclear why the exception would require such lawyers’ expertise to be “recognized.” Such notoriety would seem irrelevant. Similarly, it is unclear why such expertise must be “developed through the regular practice of law on behalf of clients” in the specified matters. Presumably, even a brand-new lawyer who studied hard or who has taught but not practiced in such areas or types of law would have acquired the necessary expertise (whether “recognized” or not.)

The reference to a “particular body of federal” law presumably means any federal law. But under the U.S. Constitution’s Supremacy Clause, states generally are not

allowed to interfere with lawyers' practice of purely federal law, regardless of where they practice such law. So even if it wanted to, Virginia presumably could not prohibit non-Virginia lawyers from temporarily (or even systematically and continuously) practicing law in Virginia if they limited their practice to purely federal law.

The reference to permissible temporary and occasional practice in Virginia that “draw[s] on” non-Virginia lawyers' expertise developed through the “regular practice of law” involving a “particular body of . . . nationally-uniform” law presumably focuses on such areas as the Uniform Commercial Code, etc. But Virginia Rule 5.5 cmt. [14] does not provide any examples such as this. The similar reference to “a particular body of . . . foreign, or international law” is equally undefined.

All of these references to “a particular body . . . of law” seem inapt. They do not require any relationship to the non-Virginia lawyer's home jurisdiction – which Virginia Rule 5.5 cmt. [14] addresses, and which the penultimate sentence in that Virginia Rule Comment explicitly indicates is the “necessary relationship” that allows such non-Virginia lawyers' temporary and occasional practice of law in Virginia. The language does not require that such lawyers' home state necessarily have adopted such “nationally-uniform” law, other than perhaps an implicit assumption that it must have done so if the law is “nationally-uniform.” But there are very few “nationally-uniform” laws that do not have at least some variation from state-to-state. And of course such non-Virginia lawyers' U.S.-based home jurisdiction presumably would have nothing to do with “a particular body of . . . foreign, or international law.” So by definition those types of legal matters would have a “relationship” with the lawyer's home state only by coincidence.

Finally, it is unclear why “[t]he necessary relationship might arise” only if such non-Virginia lawyers’ earlier representation of clients involved “a particular body” of those listed laws. That limitation makes no sense in the context of federal law (as explained below). And it makes little grammatical sense in connection with the other types of law – by definition lawyers’ practice inevitably involves “a particular body” of law.

**ABA Model Rule 5.5 cmt. [14]** contains essentially the same language as Virginia Rule 5.5 cmt. [14].

As explained above, both ABA Model Rule 5.5(c)(3) (governing ADR proceedings) and ABA Model Rule 5.5(c)(4) (the catch-all provision) require that the temporary practice in the jurisdiction must “arise out of or are reasonably related to the lawyer’s practice” in a jurisdiction where she is admitted to practice. This contrasts with the Virginia Rule’s use of practice-focused standard in the Virginia ADR provision (Virginia Rule 5.5(d)(4)(iii)) and a different client-focused standard in the catch-all provision (Virginia Rule 5.5(d)(4)(iv)).

In contrast to Virginia Rule 5.5 cmt. [14], ABA Model Rule 5.5 cmt. [14] correctly refers to the two ABA Model Rule 5.5 provisions that require the out-of-state lawyer temporarily practicing in the jurisdiction to have some relationship with her home jurisdiction: ABA Model Rule 5.5(c)(3) (focusing on ADR proceeding) and ABA Model Rule 5.5(c)(4) (the catch-all provision). As explained above, Virginia Rule 5.5 cmt. [14] erroneously also refers to another Virginia Rule (Virginia Rule 5.5(d)(4)(ii)) – which focuses on non-Virginia lawyers’ tribunal-related temporary and occasional practice in Virginia. That provision does not require a relationship to the non-Virginia lawyer’s home jurisdiction.

Also in contrast to the Virginia Rule 5.5 cmt. [14], ABA Model Rule 5.5 cmt. [14] concludes with a suggestion that out-of-state lawyers should consult the separate ABA “Model Court Rule on Provision of Legal Services Following Determination of Major Disaster” if they: (1) “desir[e] to provide pro bono legal services on a temporary basis” in a disaster-stricken jurisdiction where they are not authorized to practice; or (2) normally practice in such disaster-stricken jurisdiction, but want to practice temporarily in some other jurisdiction where they are not otherwise authorized to do so.

### **Virginia Rule 5.5 Comment [14a]**

Virginia Rule 5.5 cmt. [14a] addresses the role of international or foreign law in non-Virginia lawyers’ “temporary and occasional” practice in Virginia.

Virginia Rule 5.5 cmt. [14a] explains that under Virginia Rule 5.5(d)(4)(iv), non-Virginia lawyers may provide “temporary and occasional” services in Virginia “when the services provided are governed by international law or the law of a foreign jurisdiction in which [a non-U.S. lawyer] is admitted to practice.”

Presumably this does not require such lawyers to have “recognized expertise developed through the regular practice of law on behalf of clients in matters involving . . . foreign, or international law.” If so, Virginia Rule 5.5 cmt. [14a] would be superfluous.

As explained above, Virginia Rule 5.5(d)(4)(iv)’s reference to matters “governed primarily by international law” is confusing. Under Virginia Rule 5.5(d)(4)(iv), non-Virginia and non-U.S. lawyers may understandably practice law in Virginia “on a temporary and occasional basis” if the matter “arise out of or are reasonably related to the representation of a client” by such lawyers “in a jurisdiction in which [they are] admitted to practice. But

black letter Virginia Rule 5.5(d)(4)(iv) then contains the phrase: “or, subject to the foregoing limitations, are governed primarily by international law.” The term “foregoing limitations” (which perhaps significantly is in the plural) is not defined. Perhaps the “foregoing limitations” include the exclusion of Virginia Rule 5.5(d)(4)(ii) and (4)(iii). It would have been helpful if Virginia Rule 5.5 or its comments explained what that plural reference meant. If the “foregoing limitations” include the requirement that the temporary practice in Virginia “arise[s] out of or [is] reasonably related to” such lawyers’ representation in their home jurisdiction, it should not matter whether or not the representation in Virginia is “governed primarily by international law.”

**ABA Model Rule 5.5** does not contain a similar comment.

### **ABA Model Rule 5.5 Comment [15]**

Virginia did not adopt ABA Model Rule 5.5 cmt. [15].

ABA Model Rule 5.5 cmt. [15] addresses the issue of out-of-state and non-U.S. lawyers establishing “an office or other systematic and continuous presence” in the jurisdiction under ABA Model Rule 5.5(d).

ABA Model Rule 5.5 cmt. [15] points to ABA Model Rule 5.5(d) as “identify[ing] two circumstances in which a lawyer who is admitted to practice in another United States or foreign jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, or the equivalent thereof, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law.”

ABA Model Rule 5.5 cmt. [15] also mentions a different rule (ABA Model Rule 5.5(c)) and a completely different scenario – non-U.S. lawyers temporarily practicing in

the jurisdiction. The ABA Model Rule Comment contains a “[s]ee also” citation to the ABA’s Model Rule on Temporary Practice by Foreign Lawyers. That is an interesting citation, because unlike Virginia Rule 5.5, ABA Model Rule 5.5 does not explicitly describe any scenario in which non-U.S. lawyers may temporarily practice in a jurisdiction. Presumably these two sentences in ABA Model Rule 5.5 cmt. [15] are intended to define two ABA provisions (only one of which is in the ABA Model Rules itself) under which out-of-state U.S. lawyers and non-U.S. lawyers may temporarily practice law in a jurisdiction.

ABA Model Rule 5.5 cmt. [15] next turns to the apparent subject matter of the Comment – noting that except as authorized by ABA Model Rule 5.5(d)(1) or (2), out-of-state U.S. lawyers and non-U.S. lawyers “must become admitted to practice law generally in this jurisdiction” if they want to “establish[ ] an office or other systematic or continuous presence in this jurisdiction.” Interestingly, and probably mistakenly, ABA Model Rule 5.5 cmt. [15] uses the phrase “establishes an office or other systematic or continuous presence in this jurisdiction” (emphasis added). Just two sentences earlier, ABA Model Rule 5.5 cmt. [15] uses a different phrase: “establish an office or other systematic and continuous presence in this jurisdiction” (emphasis added). That is ABA Model Rule 5.5(d)’s standard formulation.

And the phrase “must become admitted” seems strange. In most contexts like this, the ABA Model Rules use less awkward language like “must be admitted.”

### **ABA Model Rule 5.5 Comment [16]**

Virginia did not adopt ABA Model Rule 5.5 cmt. [16].

ABA Model Rule cmt. [16] addresses U.S. and non-U.S. in-house lawyers establishing “an office or other systematic and continuous presence in this jurisdiction.”

ABA Model Rule 5.5(d)(1) first explains that such lawyers may practice as in-house lawyers as long as they “are employed by a client to provide legal services to the client or its organizational affiliates.” That term is defined as “entities that control, are controlled by, or are under common control with the employer.”

ABA Model Rule 5.5 cmt. [16] next warns that “[t]his paragraph does not authorize the provision of personal legal services to the employer’s officers or employees.” Presumably the phrase “[t]his paragraph” does not refer to ABA Model Rule 5.5 cmt. [16], but rather to black letter ABA Model Rule 5.5(d)(1). An ABA Model Rule Comment could not “authorize” conduct that a black letter ABA Model Rule did not authorize. But the term “[t]his paragraph” is linguistically awkward at best. If it meant to refer to black letter ABA Model Rule 5.5(d)(1)’s paragraph, one would have thought that the ABA Model Rule Comment would simply have referred to that Rule – or used the term “[t]hat paragraph . . .” On the other hand, ABA Model Rule 5.5 cmt. [16] then takes an expansive view – explaining that its provision “applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer.” This broad coverage presumably also covers labor union lawyers, in-house lawyers working for universities, etc.

ABA Model Rule 5.5 cmt. [16] then notes the rationale for such permissible “systematic and continuous presence” of an out-of-state in-house lawyer in the jurisdiction. The ABA Model Rules Comment explains that such a liberal standard “generally serves the interests of the employer and does not create an unreasonable risk

to the client and others because the employer is well situated to assess the lawyer’s qualifications and the quality of the lawyer’s work.” In essence, ABA Model Rule 5.5 cmt. [16] understandably explains that any entity sophisticated enough to hire an in-house lawyer can take care of itself. Cynics might also recognize that such in-house lawyers are not as likely as outside lawyers to take business away from the state’s outside lawyers.

ABA Model Rule 5.5 cmt. [16] concludes with an explanation that “[t]o further decrease any risk to the client,” ABA Model Rule 5.5(d)(1) requires that non-U.S. lawyers asked to “advise on the domestic law of a United States jurisdiction or on the law of the United States . . . needs to base that advice on the advice of a lawyer licensed and authorized by the jurisdiction to provide it.” In other words, such non-U.S. lawyer must call upon a U.S. lawyer to provide advice on U.S. law. That provision arguably helps the client, and undoubtedly protects U.S. lawyers’ jobs.

The phrase “licensed and authorized” is unusual. Presumably it means a lawyer actually “licensed” in the U.S. jurisdiction, not just otherwise “authorized” to practice temporarily, systematically and continuously in that jurisdiction. In other words, a non-U.S. in-house lawyer presumably must rely on the advice of a fully licensed lawyer in that jurisdiction. As explained above, ABA Model Rule 5.5 cmt. [15] uses the different and presumably mistaken phrase “systematic or continuous presence” (emphasis added).

### **ABA Model Rule 5.5 Comment [17]**

Virginia did not adopt ABA Model Rule 5.5 cmt. [17].

ABA Model Rule 5.5 cmt. [17] reminds in-house lawyers establishing “an office or other systematic presence” that they “may be subject to [the jurisdiction] registration or other requirements, including assessments for client protection funds and mandatory continuing legal education” – referring to the ABA’s “Model Rule for Registration of In-House Counsel.” It is unclear whether the absence of the phrase “and continuous” is intended to expand the application of black letter ABA Model Rule 5.5(d). ABA Model Rule 5.5(d)’s introductory clause uses the couplet “systematic and continuous” in describing in-house lawyers’ presence in the jurisdiction.

ABA Model Rule 5.5 cmt. [17]’s acknowledgment reflects the predictable trend in states’ adoption of the permissive ABA Model Rule 5.5 provision allowing out-of-state lawyers to freely practice as in-house lawyers in a jurisdiction where they are not licensed. As they began to adopt ABA Model Rule 5.5, states began to impose requirements – such as passing a character and fitness test, registering with the state bar in some way, notifying the state bar of any employment change, and (not surprisingly) paying a big fee. Now all but a handful of states impose such requirements, which have become more elaborate since states began to adopt ABA Model Rule 5.5.

Virginia adopted such requirements in 2004, and have since then tinkered with them several times.

### **ABA Model Rule 5.5 Comment [18]**

Virginia did not adopt ABA Model Rule 5.5 cmt. [18].

ABA Model Rule cmt. [18] recognizes that out-of-state and non-U.S. lawyers may practice in a jurisdiction “in which the lawyer is not licensed when authorized to do so by

federal or other law, which includes statute, court rule, executive regulation or judicial precedent.” The ABA Model Rule Comment points to the ABA’s “Model Rule on Practicing Pending Admission.”

ABA Model Rule 5.5 cmt. [18]’s differentiation between lawyers “licensed” to practice in a jurisdiction and being “authorized” to practice in a jurisdiction highlights the narrow meaning of the phrase “licensed and authorized” that appears at the end of ABA Model Rule 5.5 cmt. [16] (discussed above). For instance, non-Virginia lawyers are “authorized” by the U.S. Constitution’s Supremacy Clause to practice purely federal law in Virginia. And several Virginia rules or regulations “authorize” non-Virginia lawyers to practice in Virginia. For example, non-Virginia lawyers married to Virginia-based military personnel are able to practice law in Virginia while the spouse is deployed in Virginia.

Virginia Rule 5.5(d)(2) contains an explicit provision allowing non-Virginia and non-U.S. lawyers to “establish an office or other systematic and continuous practice” in Virginia if they are “authorized by these [Virginia] Rules or other law.” Presumably that “other law” is as broad as the law mentioned in ABA Model Rule 5.5 cmt. [18]. Virginia Rule 5.5 cmt. [4] also addresses that permissible basis to systematically and continuously practice law in Virginia.

Because such non-Virginia and non-U.S. lawyers may systematically and continuously practice in Virginia under such authorization, presumably they may also practice “temporarily and occasionally” in Virginia under Virginia Rule 5.5(d)(4). The Virginia provisions allowing such temporary and occasional practice of law in Virginia do not explicitly recognize such temporary practice if it is authorized by federal or other law. But it would be illogical to allow such non-Virginia and non-U.S. lawyers to practice

“systematically and continuously” in Virginia but not “temporarily and occasionally” in Virginia.

### **Virginia Rule 5.5 Comment [19]**

Virginia Rule 5.5 cmt. [19] explains that a non-Virginia or non-U.S. lawyer who practices in Virginia under Virginia Rule 5.5 “is subject to the disciplinary authority of Virginia.”

Virginia Rule 5.5 cmt. [19] refers to Virginia Rule 8.5(a), which explains that lawyers are subject to Virginia’s disciplinary authority “if the lawyer provides, holds himself out as providing, or offers to provide legal services in Virginia.” Virginia Rule 8.5(a) also explains that such lawyers consent to the Virginia Supreme Court Clerk’s appointment as those lawyers’ agent “for purposes of notices of any disciplinary action by the Virginia State Bar.”

**ABA Model Rule 5.5 cmt. [19]** contains essentially the same language as Virginia 5.5 cmt. [19].

ABA Model Rule 5.5 cmt. [19] explains that lawyers subject to the jurisdiction’s disciplinary authority include lawyers practicing “in this jurisdiction pursuant to [ABA Model Rule 5.5] (c) or (d) or otherwise.” The references to the specific ABA Model Rule provisions is helpful, but unnecessary – given the broad phrase “or otherwise.”

ABA Model Rule 5.5 cmt. [19] concludes with a reference to ABA Model Rule 8.5(a) – which explains that a lawyer is subject to a jurisdiction’s “disciplinary authority” if she “provide[s]” or “offer[s] to provide any legal services in this jurisdiction.” This is somewhat narrower than Virginia Rule 8.5(a)’s reach, which also applies to lawyers “hold[ing] himself

out as providing” legal services in Virginia. ABA Model Rule 8.5 does not explicitly cover lawyers holding themselves out as providing legal services in the jurisdiction.

### **ABA Model Rule 5.5 Comment [20]**

Virginia did not adopt ABA Model Rule 5.5 cmt. [20].

ABA Model Rule 5.5 cmt. [20] explains that out-of-state or non-U.S. lawyers practicing in a jurisdiction under ABA Model Rule 5.5(c) or (d) “[i]n some circumstances . . . may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction.” ABA Model Rule 5.5 cmt. [20] provides an example – “when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction.” ABA Model Rule 5.5 cmt. [20] refers to ABA Model Rule 1.4(b). That ABA Model Rule requires that “[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”

In contrast to ABA Model Rule 5.5 cmt. [20]’s acknowledgment that such lawyers may “in some circumstances” have to inform clients of their practice limitation, Virginia Rule 5.5(d)(3) explicitly requires that such non-Virginia and non-U.S. lawyers inform the client and “interested third parties” – “in writing” – that they are “not admitted to practice law in Virginia.” In addition, Virginia Rule 5.5(a)(3) also requires such lawyers to inform clients and “interested third parties” in writing: (1) in which jurisdictions the lawyers are “licensed to practice”; and (2) their office address “in the foreign jurisdiction.” The term “interested third parties” is not defined.

## **Virginia Rule 5.5 Comment [21]**

Virginia Rule 5.5 cmt. [21] addresses non-Virginia lawyers' marketing into Virginia.

Virginia Rule 5.5 cmt. [21] first warns that that Virginia Rule 5.5(d)(4) (the provision allowing under certain conditions non-Virginia and non-U.S. lawyers to “provide legal services on a temporary and occasional basis in Virginia”) “does not authorize” such lawyers to “advertis[e] legal services to prospective clients in Virginia.”

The term “prospective clients” seems inappropriate. Virginia Rule 1.18(a) defines the term “prospective client” as “[a] person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter.” While lawyers might market to such “prospective clients,” presumably Virginia Rule 5.5 cmt. [21] is intended to address less targeted marketing into Virginia. Thus, a term such as “would-be clients” would be more appropriate.

**ABA Model Rule 5.5 cmt. [21]** contains essentially the same language as Virginia Rule 5.5 cmt. [21].

In contrast to Virginia Rule 5.5 cmt. [21]'s reference to “prospective clients” in two places, ABA Model Rule 5.5 cmt. [21] does not mention the recipients of the communications. Instead, the ABA Model Rule 5.5 cmt. [21] uses the phrase “communications advertising legal services in this jurisdiction.” That language avoids using a phrase (“prospective client”) that is defined in ABA Model Rule 1.18(a) as “[a] person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter.”

Also in contrast to Virginia Rule 5.5 cmt. [21], ABA Model Rule 5.5 cmt. [21] applies the correct references to the current ABA Model Rule marketing provisions – ABA Model Rule 7.1 – 7.3.

# RULE 5.6

## Restrictions On Right To Practice

### Rule

ABA Model Rule 5.6 has a different title: “Restrictions On Rights To Practice” (using the plural “Rights”).

#### **Virginia Rule 5.6**

Virginia Rule 5.6 addresses two situations in which a lawyer “shall not participate in offering or making” an agreement limiting a lawyer’s right to practice law.

The expansive phrase “offering or making” emphasizes the fact that a lawyer offering such an agreement violates the prohibition as much as the lawyer agreeing to the offer.

**ABA Model Rule 5.6** contains the identical language.

#### **Virginia Rule 5.6(a)**

Virginia Rule 5.6(a) addresses restrictions in partnership and employment agreements.

Virginia Rule 5.6(a) explains that lawyers “shall not participate in offering or making . . . a partnership or employment agreement that restricts the right of a lawyer to practice after termination of the relationship.” Thus, lawyers may not enter into the type of common non-competes that other professions may freely agree to under the traditional

common law approach (although statutory restrictions on all professions and even non-professional work have become increasingly common in some states). It seems odd that lawyers cannot enter into non-competes, even though in many if not most states the most highly trained and specialized doctors, engineers, astrophysicists, etc. may enter into such non-competes. The facially implausible theory is that each individual lawyer is so unique and valuable to society that clients should never be deprived of their right to hire that lawyer. This concept is not only pretentious, it seems demonstrably incorrect.

Surprisingly, the issue normally arises when a lawyer refuses to agree to such a restriction or (more commonly) when a lawyer has agreed to the restriction but now wanted to be relieved of the restriction. Of course, the latter scenario often involves a lawyer who wishes to leave the firm that purportedly imposed the restriction.

Virginia Rule 5.6 cmt [1] contains an exception: “except an agreement concerning benefits upon retirement.” Virginia Rule 5.6 cmt. [1] (discussed below) provides some, but not much, guidance on the “retirement benefits” exception.

**ABA Model Rule 5.6(a)** contains similar language.

ABA Model Rule 5.6(a) also contains the identical “benefits upon retirement” exception.

In contrast to Virginia Rule 5.6(a)’s phrase “partnership or employment agreement,” ABA Model Rule 5.6(a) uses a broader term: “partnership, shareholders, operating, employment, or other similar type of agreement.” Presumably Virginia Rule 5.6(a) would also cover the same types of partnership or employment agreements, despite not explicitly mentioning them.

### **Virginia Rule 5.6(b)**

Virginia Rule 5.6(b) addresses another improper practice limitation.

Virginia Rule 5.6(b) indicates that lawyers “shall not participate in offering or making . . . an agreement in which a restriction on the lawyer’s right to practice is part of the settlement of a controversy.”

One might wonder why a lawyer cannot agree to such a restriction. After all, lawyers are not obligated to represent anyone. And lawyers can not only turn down a client wishing to hire the lawyer, under Virginia Rule 1.16(b), a lawyer “may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client” – among other specified reasons. So lawyers cannot be forced to represent clients, and therefore logically would be able to agree in advance not to represent a client or a class of clients. If a lawyer wants to trade that restriction for a monetary benefit, that would seem to be a contractual freedom that lawyers should be free to exercise.

This scenario typically involves a defendant hoping to avoid similar lawsuits against it filed by a skillful plaintiff’s lawyer who has successfully sued the defendant and thus might be able to represent other plaintiffs seeking that lawyer’s help to file similar lawsuits. The defendant might be tempted to “sweeten the pot” in one of the settlements with that plaintiff, in return for his lawyer’s agreement not to file similar lawsuits in the future against the defendant.

Such a scenario creates an enormously difficult dilemma for the plaintiff’s lawyer. Her current client would obviously benefit from the sweetened pot – because that client would receive a large percentage of the extra money. And that current client has no

interest in assuring his lawyer's future availability to represent similarly-situated clients. But the plaintiff's lawyer normally has such an interest, and thus usually would hope that her current client rejects the "sweetened" pot, thus assuring her continued availability to represent other clients (and earn additional fees from them). But lawyers may not favor their own interests at the expense of their clients' interests. So Virginia Rule 5.5(d)'s primary rationale may be to save plaintiff's lawyers from such a dilemma.

As with the employment-related practice restriction prohibition discussed above, one might wonder how this type of settlement-based practice restriction prohibition would catch anyone's attention. Theoretically, a would-be client frustrated by a lawyer's decision not to represent the client might complain about that lawyer's earlier settlement-based restriction. But the lawyer in that scenario could simply decline to represent that would-be client without giving a reason (such as appointing to an earlier settlement-based restriction). At the other end of the temporal scale, a settlement negotiation counterparty might file an ethics complaint about the adversary's lawyer's improper demand for such a restriction. Of course, that would involve an offer, not an actual consummated practice restriction. Finally, if something goes wrong post-settlement to anger one of the settlement parties, that angered party might seek some leverage by raising the ethics issue.

Perhaps most frequently, the settlement-related practice restriction prohibition does not arise in connection with an actual concrete restriction – but rather with other ancillary restrictions. Thus, bars have dealt with settlement negotiations (or consummated agreements) that restrict a settling party's lawyer from marketing her

availability to others, using the same experts in a future case, publicizing details of a settlement other than the amount, etc.

Virginia Rule 5.6(b) contains an exception: “except where such a restriction is approved by a tribunal or a governmental entity.”

**ABA Model Rule 5.6(b)** contains essentially the same language.

But there are two differences between ABA Model Rule 5.6(a) and Virginia Rule 5.6(a).

First, in contrast to Virginia Rule 5.6(b)’s phrase “settlement of a controversy,” ABA Model Rule 5.6(b) contains the phrase “settlement of a client controversy.” Presumably those are synonymous or essentially synonymous terms.

Second, in contrast to Virginia Rule 5.6(b), ABA Model Rule 5.6(b) does not contain an exception based on a tribunal’s or governmental entity’s approval of a practice restriction. Presumably a government or tribunal-approved arrangement nevertheless would pass ethics muster, but lawyers looking to the ABA Model Rule 5.6(b) provision would have to rely on such an implicit principle rather than the explicit exception contained in Virginia Rule 5.6.

## Comment

### Virginia Rule 5.6 Comment [1]

Virginia Rule 5.6 cmt [1] addresses the rationale for the practice restriction prohibition, and the first exception.

Virginia Rule 5.6 cmt. [1] first explains that the type of practice restriction that Virginia Rule 5.6(a) prohibits “not only limits [the lawyers’] professional autonomy but also limits the freedom of clients to choose a lawyer.” Of course, the first type of limitation is accurate. But the same is true of non-competes entered into by every other professional. So that limitation does not prohibit those other professionals from entering into such agreements. In other words, other professionals can bargain away their availability to future clients in return for some financial consideration. As explained above, the second basis requires indulging the self-evidently incorrect notion that lawyers aren’t essentially fungible.

Virginia Rule 5.6 cmt. [1] concludes with a description of permissible retirement-related restrictions under Virginia Rule 5.6(a): “restrictions incident to provisions concerning retirement benefits for service with the firm.”

Numerous bars have issued legal ethics opinions explaining that the retirement exception must involve a bona fide retirement, focusing both on the withdrawing lawyers’ age and length of service at the law firm. For instance, law firms cannot define any partner’s or associate’s withdrawal as a “retirement” regardless of their age or years of service.

**ABA Model Rule 5.6 cmt. [1]** contains the identical language.

## **Virginia Rule 5.6 Comment [2]**

Virginia Rule 5.6 cmt. [2] addresses permissible tribunal and government-approved practice restrictions.

Virginia Rule 5.6 cmt [2] begins by explaining that Virginia Rule 5.6(b) prohibits lawyers from “agreeing to a restriction on their right to practice.” That is accurate. But as explained above, black letter Virginia Rule 5.6(b) on its face also prohibits lawyers from offering such a restriction.

Virginia Rule 5.6 cmt [2] then addresses the exception for tribunal-approved or governmental entity-approved restrictions. The Virginia Rule Comment provides an example of the former: “in such situations as the settlement of mass tort cases.”

Virginia Rule 5.6 cmt. [2] concludes with a requirement that a lawyer agreeing to such an approved practice restriction “must fully disclose the extent of any restriction to any future client and refer the client to another lawyer if requested to do so.”

This is an odd requirement. Perhaps most importantly, Virginia Rule 5.6 cmt. [2] purports to impose an obligation on lawyers that does not appear in black letter Virginia Rule 5.6. The Virginia Scope’s first paragraph concludes with the blunt assurance that “[c]omments do not add obligations to the [Virginia] Rules but provide guidance for practicing in compliance with the [Virginia] Rules.” So it is unclear whether Virginia Rule 5.6 cmt. [2]’s purported obligation has any effect.

In addition, Virginia Rule 5.6 cmt. [2] uses the undefined and inherently ambiguous term “future clients.” Under Virginia Rule 1.18(a), a would-be client becomes a “prospective client” (entitled to confidentiality rights and some loyalty rights) only if that would-be client “discusses with a lawyer the possibility of forming a client-lawyer

relationship.” Virginia Rule 1.18 cmt. [2] distinguishes such “prospective clients” from “[a] person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship.” It is unclear where a so-called “future client” mentioned in Virginia Rule 5.6 cmt. [2] falls along that spectrum.

**ABA Model Rule 5.6 cmt. [2]** addresses the same issue as Virginia Rule 5.6 cmt. [2], but contains a slightly different formulation.

ABA Model Rule 5.6 cmt. [2] explains that ABA Model Rule 5.6(b) “prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.”

ABA Model Rule 5.6 cmt. [3] does not address the exception for tribunal-approved or governmental entity-approved restrictions, because black letter ABA Model Rule 5.6(b) does not contain such an exception. Presumably a state bar’s disciplinary arm would not punish a lawyer for relying on a tribunal-approved or government-approved practice restriction.

### **ABA Model Rule 5.6 Comment [3]**

Virginia did not adopt ABA Model Rule 5.6 cmt. [3].

ABA Model Rule 5.6 cmt. [3] addresses another exception that black letter ABA Model Rule 5.6 does not contain.

ABA Model Rule 5.6 cmt. [3] explains that ABA Model Rule 5.6’s prohibition on lawyers’ practice restrictions “does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to [ABA Model] Rule 1.17.”

Presumably some court-approved ABA Model Rule 1.17 law practice sale itself would necessarily include practice restrictions. For instance, ABA Model Rule 1.17 cmt. [5] explains that lawyers selling an area of practice but remaining in the active practice of law in other areas must “cease accepting any matters in the area of practice that has been sold.”

ABA Model Rule 1.17 cmt. [5] provides an example: “a lawyer with a substantial number of estate planning matters and a substantial number of probate administration cases may sell the estate planning portion of the practice but remain in the practice of law by concentrating on probate administration” – although that lawyer “may not thereafter accept any estate planning matters.” So a lawyer’s sale of an area of practice necessarily amounts to a restriction on the selling lawyer’s future practice.

# ABA MODEL RULE 5.7

## Responsibilities Regarding Law-Related Services

ABA Model Rule 5.7 (which Virginia did not adopt) addresses lawyers' provision of non-legal but law-related services. ABA Model Rule 5.7 seems somewhat inconsistent with recently-revised ABA Model Rule 5.3, which addresses lawyers' duty to supervise non-lawyers assisting in those lawyers' provision of legal advice.

### Rule

#### ABA Model Rule 5.7

Virginia did not adopt ABA Model Rule 5.7.

ABA Model Rule 5.7 addresses lawyers providing non-legal but law-related services.

#### ABA Model Rule 5.7(a)

ABA Model Rule 5.7(a) explains that in two separate scenarios lawyers are “subject to the [ABA] Model Rules of Professional Conduct with respect to the provision of law-related services,” as defined in ABA Model Rule 5.7(b). Presumably the phrase “with respect to” means that lawyers are subject to the ABA Model Rules when they provide such law-related services.

ABA Model Rule 5.7(a) does a poor job of explaining the applicability of the ABA Model Rules.

All lawyers are subject to the ABA Model Rules (to the extent that the applicable states governing such lawyers' conduct have adopted the pertinent ABA Model Rule). Some of those ABA Model Rules apply to lawyers at all times – not just when those lawyers act as lawyers. Perhaps most importantly, ABA Model Rule 8.4 starts with the phrase: “[i]t is professional misconduct for a lawyer to . . .” ABA Model Rule 8.4 then lists seven prohibited types of conduct that violate the ABA Model Rules. Those prohibitions apply to lawyers' conduct even if it is unrelated to their role as lawyers.

Other ABA Model Rules apply only when lawyers are acting in legal capacity, although not necessarily in a representational capacity. This legal but non-representational role represents a small sliver of lawyers' services. For instance, under ABA Model Rule 2.4, lawyers may serve as third-party neutrals. Those lawyers “assist[] two or more persons who are not clients of the lawyer.” It is unclear how ABA Model Rule 5.7 would treat such services. Presumably those are non-representational legal services rather than law-related services.

A subset of those rules apply only when lawyers act in their representational capacity. For instance, ABA Model Rule 4.1 begins with the phrase: “[i]n the course of representing a client . . .” Similarly, ABA Model Rule 4.2 begins with the phrase: “[i]n representing a client . . .”

Lawyers providing law-related services as described in ABA Model Rule 5.7 clearly are “subject to the Rules of Professional Conduct” that apply to lawyers acting even in non-lawyer roles (such as ABA Model Rule 8.4). And those lawyers are also “subject to the Rules of Professional Conduct” that apply to lawyers acting in non-representational roles.

It would have been far more clear if ABA Model Rule 5.7(a) explained that lawyers providing law-related services “shall be subject to the Rules of Professional Conduct” that apply to lawyers representing their clients. In other words, ABA Model Rule 5.7’s point is that lawyers must provide to the recipients of their law-related services all of the rights that clients are entitled to – under the two scenarios described in ABA Model Rule 5.7(a)(1) and ABA Model Rule 5.7(a)(2).

### **ABA Model Rule 5.7(a)(1)**

ABA Model Rule 5.7(a)(1) addresses the first scenario in which lawyers providing non-legal but law-related services are subject to the ABA Model Rules.

Such lawyers must comply with the ABA Model Rules if they provide law-related services “in circumstances that are not distinct from the lawyer’s provision of legal services to clients.”

This scenario focuses on the context of such lawyers’ provision of non-legal but law-related services. An example of lawyers providing law-related services “in circumstances that are not distinct from the lawyer’s provision of legal services to clients” might be a lawyer who gives both legal and political advice to the same client in the same matter. ABA Model Rule 2.1 explains that “[i]n representing a client,” a lawyer may provide such political advice (and other non-legal advice) to the client. A distinction between legal and non-legal advice in such settings normally implicates attorney-client privilege protection – which provides an evidentiary protection only for advice that is primarily or predominantly motivated by clients’ request for legal advice. But in the ethics world, a client receiving political advice and legal advice from the same lawyer at the

same time understandably would expect to receive all of the lawyer's representational-role duties or receive either type of advice.

In contrast, a lawyer opening a barber shop or a restaurant would presumably satisfy ABA Model Rule 5.7(a)(1)'s standard that such a lawyer is providing barber services or food services "in circumstances that are . . . distinct from the lawyer's provision of legal services to clients." Significantly, ABA Model Rule 5.7(a)(1) does not contain the exception found in ABA Model Rule 5.7(a)(2), discussed below.

### **ABA Model Rule 5.7(a)(2)**

ABA Model Rule 5.7(a)(2) describes the second scenario in which lawyers providing non-legal but law-related services are subject to ABA Model Rules.

Such lawyers must comply with the ABA Model Rules if they provide law-related services through "an entity controlled by the lawyer individually or with others."

But such lawyers may avoid the application of the representational-based ABA Model Rule duties. This is because ABA Model Rule 5.7(a)(2) imposes those representational-role duties "if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist." In other words, if lawyers take those steps, they will be relieved of the representational-role duties when they provide law-related services.

ABA Model Rule 5.7(a)(2)'s use of the word "assure" seems odd. In normal usage, that word denotes some comforting explanation of protection. ABA Model Rule 5.7(a)(2)'s use of the word "assure" denotes the explanation that law-related service recipients will be denied protections that the lawyer's law services clients receive. In other words, that

is bad news, not comforting news. One might have expected ABA Model Rule 5.7(a)(2) to use the word “warn,” rather than the word “assure.”

This exception requires lawyers to explicitly warn recipients of such non-legal services that the recipients will not receive all of the client protections mandated by the ABA Model Rules. Lawyers wishing to avoid all of the duties those lawyers owe their legal clients must “take reasonable measures” to assure those recipients of two things: (1) the law-related services “are not legal services”; and (2) the recipients of such law-related services will not receive all of the “protections” that clients receiving legal services deserve from lawyers. Presumably, such law-related services clients will then decide whether to proceed with the arrangement.

And of course those recipients may presumably contract with such lawyers to receive all or some of the “protections” that clients receive from lawyers providing legal services rather than only law-related services.

ABA Model Rule 5.7(a)(2) contains an intriguing standard. Lawyers providing non-legal but law-related services will be governed by the representational-role ABA Model Rule duties if they fail to take certain “reasonable measures.” Those “reasonable measures” must “assure that a person obtaining the law-related services knows” that he is not receiving “legal services” and therefore will not receive “the protections of the client-lawyer relationship.” ABA Model Rule 1.0(f) defines “knows” as “denot[ing] actual knowledge of the fact in question.” So requiring lawyers to “take reasonable measures to assure” that the law-related service recipients have actual knowledge that they are not receiving legal services and will not receive the client-lawyer relationship protections would seem to require such lawyers to prove that those recipients have actual knowledge.

In other words, those “reasonable measures” presumably must be successful. Perhaps ABA Model Rule 5.7(a)(2) means to require only “reasonable measures” in attempting to instill such actual knowledge in law-related services recipients – even if those “reasonable measures” are unsuccessful. But the best reading seems to be that not only must the measures be “reasonable,” they must work – to assure that the recipients have actual knowledge of those two points.

### **ABA Model Rule 5.7(b)**

ABA Model Rule 5.7(b) contains an unhelpful definition of “law-related services.”

ABA Model Rule 5.7(b) defines those as: “services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.”

Thus, this two-part definition focuses both on the context and on the content of such services. It is not required that such law-related services are actually “performed in conjunction with and in substance related to” legal services. Instead, the definition covers such law-related services if they “might reasonably be performed” in that setting. The first part of that definition is inexplicable. Unfortunately ABA Model Rule 5.7(b) does not explain what services “might reasonably be performed in conjunction with and in substance” to the provision of legal services. Perhaps that definition is intended to include the example discussed above – a lawyer who provides political advice along with legal advice to a client involved in politics. The second part of the definition is understandable – it covers services that are not the practice of law, because a non-lawyer could provide those services without violating the unauthorized practice of law, statutes or regulations.

ABA Model Rule 5.7 cmt. [7] and cmt. [9] (discussed below) provide several examples of law-related services.

## Comment

### ABA Model Rule 5.7 Comment [1]

ABA Model Rule 5.7 cmt. [1] addresses the rationale for ABA Model Rule 5.7.

ABA Model Rule 5.7 cmt. [1] first explains that “there exists the potential for ethical problems” when lawyers or organizations they control provide law-related services. Most importantly, the recipient of those services might “fail [ ] to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship.”

ABA Model Rule 5.7 cmt. [1] then provides several examples of the client protections that the recipients of lawyers’ non-legal law-related services may not receive: (1) “the protection of client confidences;” (2) prohibitions against representation of persons with conflicting interests;” (3) “obligations of a lawyer to maintain professional independence.” ABA Model Rule 1.6 and ABA Model Rule 1.9 address the “client confidences” protection. ABA Model Rule 1.7 and ABA Model Rule 1.9 address conflicts. ABA Model Rule 5.4 addresses lawyer’s professional independence.

Interestingly, ABA Model Rule 5.7 cmt. [1] does not refer to the obligations contained in ABA Model Rule 1.8(a) – governing lawyers’ business transactions with their clients. ABA Model Rule 1.8(a) prohibits lawyers from entering into “a business transaction” with a client, except under specific conditions and subject to express disclosure requirements. In the case of services (rather than some other type of transactions), ABA Model Rule 1.8 seems to focus more on lawyers obtaining services from their clients – rather than vice versa. But ABA Model Rule 1.8(a) might apply in some reverse situations.

ABA Model Rule 5.7 cmt. [1] concludes by noting that the recipients of law-related services may “expect” those representational-role protections when they receive law-related services, although “that may not be the case.” ABA Model Rule 5.7 cmt. [1] confirms that ABA Model Rule 5.7’s first sentence erroneously misses the Rule’s main point – which is to address the applicability of only a subset of the ABA Model Rules (those governing lawyers’ duties to clients whom the lawyers represent.)

### **ABA Model Rule 5.7 Comment [2]**

ABA Model Rule 5.7 cmt. [2] addresses lawyers providing law-related services separate from legal services, and in other contexts.

ABA Model Rule 5.7 cmt. [2] first explains that ABA Model Rule 5.7 applies to lawyers who provide law-related services without also providing legal services. For instance, a law firm or a law firm-owned entity might provide document collection or review services, even though another law firm represents the client in the litigation. ABA Model Rule 5.7 cmt. [2] also confirms that ABA Model Rule 5.7 applies whether the law-related services are performed “through a law firm or a separate entity.” ABA Model Rule 5.7 cmt. [2] then explains that all of ABA Model Rules apply to such lawyers under the circumstances described in the Rule.

ABA Model Rule 5.7 cmt. [2] concludes with a warning that even if lawyers are not bound by all of ABA Model Rules when providing law-related services (under ABA Model Rule 5.7’s terms), they must comply with ABA Model Rules that govern lawyers in any role and at any time. ABA Model Rule 5.7 cmt. [2] mentions ABA Model Rule 8.4, which begins with the phrase “[i]t is professional misconduct for a lawyer to “engage in various misconduct. For example, ABA Model Rule 8.4(c) prohibits lawyers’ conduct “involving

dishonesty, fraud, deceit or misrepresentation.” Thus, such generally applicable ABA Model Rule prohibitions obviously apply to lawyers who provide law-related services, legal services, other services, or no services at all. As explained above, this obvious point is not clear from black letter ABA Model Rule 5.7(a).

### **ABA Model Rule 5.7 Comment [3]**

ABA Model Rule 5.7 cmt. [3] addresses lawyers’ obligations when providing law-related services in conjunction with legal services, or in circumstances distinct from the provision of legal services.

ABA Model Rule 5.7 cmt. [3] first explains that lawyers must comply with the representational-based ABA Model Rules when providing law-related services “under circumstances that are not distinct from the lawyers’ provision of legal services to clients.” In that circumstance, lawyers must provide their law-related services clients with all of the rights that legal services clients receive under the ABA Model Rules. Significantly, such lawyers apparently cannot avoid the imposition of those representational-role duties, as in the second scenario described below.

Even when lawyers provide law-related services in circumstances that are “distinct from” providing legal services, ABA Model Rule 5.7 requires them to provide all ABA Model Rule representational-role client protections unless such lawyers “take[ ] reasonable measures to assure” that the recipient “knows that the services are not legal services and that the protections of the client-lawyer relationship do not apply.” This essentially parrots black letter ABA Model Rule 5.7(a)(2).

Thus, lawyers hoping to avoid the imposition of all ABA Model Rules representational-role obligations must make two explicit disclosures to law-related

services clients: (1) the services are not “legal services;” and (2) that those clients will not receive the same protections that legal services clients receive. As explained above, the “reasonable measures,” “assure” and “knows” seem to require not just such lawyers take “reasonable measures” that fail – but require them to successfully assure that such law-related service recipients have actual knowledge of those two points.

ABA Model Rule 5.7 cmt. [3] provides an example of lawyers providing law-related services in circumstances “distinct from” the provision of legal services: “for example, through separate entities or different support staff within the law firm.” The “separate entities” scenario seems obvious, and presumably governs law-related services provided by a lobbying firm the lawyer owns, copy services provided by a copy shop the lawyer owns, etc. The other scenario seems less obvious, but potentially more confusing to clients. A law firm’s librarian might conduct market research for a law firm client, which would not amount to legal services because it does not accompany any legal services provided by the law firm’s lawyers. It would be easy for a client of such marketing services to assume that she is receiving all the rights of a law firm client, so the disclosure obligation seems sensible in such a setting.

#### **ABA Model Rule 5.7 Comment [4]**

ABA Model Rule 5.7 cmt. [4] addresses lawyers providing law-related services through an entity distinct from their law firm.

ABA Model Rule 5.7 cmt. [4] explains that “[l]aw-related services may also be provided through an entity that is distinct from that through which the lawyer provides legal services.” ABA Model Rule 5.7 cmt. [4] includes the word “also” in its first sentence

– thus apparently distinguishing that scenario from those in the preceding ABA Model Rule 5.7 cmt. [3].

ABA Model Rule 5.7 cmt. [4] describes a lawyer who “individually or with others has control of such an entity’s operations that are distinct from that through which the lawyer provides legal services.” Such lawyer must take the “reasonable measures” described above. As explained above, it is unclear whether such lawyers must just try their best, or whether they must be successful in assuring that their law-related service recipients have “actual knowledge” that they are not receiving legal services and that they will not receive representational-role protections.

ABA Model Rule 5.7 cmt. [4] concludes with an explanation that a lawyer’s “control of an entity extends to the ability to direct its operation.” That – not surprisingly – “depend(s) upon the circumstances of the particular case.” On its face, that is an odd sentence. It is not stated as a definition of what “control” means. Instead, it seems like an abstract statement of what type of “control” a lawyer might have. But presumably it is meant as a definition of “control” for purposes of analyzing ABA Model Rule 5.7 obligations.

ABA Model Rule 5.7 cmt. [4] provision presumably applies to law firms’ lobbying or consulting subsidiaries, document processing service companies owned or controlled by lawyers, etc. In contrast to that type of lawyer control, an example of a lawyer’s interest in a law-related service company that the lawyer does not control might be a company providing cloud computer services to the lawyer’s clients. If a lawyer simply invests in the company but does not control it, presumably ABA Model Rule 5.7 does not apply. But if the lawyer wholly or substantially owns and controls such an entity, the lawyer must

comply with ABA Model Rule 5.7 – and take reasonable steps to warn customers of such a company that they will not receive ABA Model Rules representational-role protections that lawyers owe to their legal services clients.

One might have thought that ABA Model Rule 5.7 cmt. [4] would mention the possible applicability of ABA Model Rule 1.8 – which governs business relationships between clients and lawyers. That relationship is addressed in the next rule – ABA Model Rule 5.7 cmt. [5] (discussed immediately below).

### **ABA Model Rule 5.7 Comment [5]**

ABA Model Rule 5.7 cmt. [5] addresses ABA Model Rule 1.8's possible applicability.

ABA Model Rule 5.7 cmt. [5] explains that ABA Model Rule 1.8(a) applies when a lawyer refers a law services client “to a separate law-related service entity controlled by the lawyer, individually or with others.”

ABA Model Rule 1.8(a) addresses lawyers who “enter into a business transaction with a client.” Such business transactions are prohibited unless: (1) the transaction and the terms are “fair and reasonable,” and “fully disclosed and transmitted in writing” to the client; (2) the lawyer advises the client in writing “of the desirability of seeking and is given a reasonable opportunity” to seek an independent lawyers’ advice about the transaction; and (3) the client “gives informed consent, in a writing signed by the client” to the transaction’s “essential terms” and to the lawyer’s role in the transaction, “including whether the lawyer is representing the client in the transaction.”

Significantly, ABA Model Rule 1.8 does not apply to regular sort of commercial transactions between lawyers and clients. ABA Model Rule 1.8 cmt. [1] explicitly states

that ABA Model Rule 1.8 “does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities’ services.” ABA Model Rule 1.8 cmt. [1] understandably notes that “[i]n such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in [ABA Model Rule 1.8] paragraph (a) are unnecessary and impracticable.” Those sort of ABA Model Rule 1.8 transactions obviously involve clients supplying services to lawyers, not vice versa.

#### **ABA Model Rule 5.7 Comment [6]**

ABA Model Rule 5.7 cmt. [6] addresses the “reasonable measures” required to warn law-related service clients that they will not receive the representational-role protections that the lawyer’s legal clients receive.

ABA Model Rule 5.7 cmt. [6] first explains that lawyers taking “reasonable measures” to warn the recipients of law-related services that they will not receive the ABA Model Rules’ protections that lawyers owe their legal services clients “should communicate” to such recipients “in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship.” This sentence uses the word “assure” twice. As explained above, the first use of “assure” seems emotionally incorrect, and the word “warn” probably would have been more accurate. The second “assure” makes more sense – because it goes to the recipient’s understanding. As explained above, it is unclear whether lawyers can comply with ABA Model Rule 5.7(a)(2)’s requirement by trying their best, or whether they must succeed in assuring that the law-related service

recipient knows that they will not receive the representational-role protections that legal services clients receive.

ABA Model Rule 5.7 cmt. [6] concludes with the suggestion that such lawyers should make such communications “before entering into an agreement for provision of or providing law-related services,” and should “preferably” make such warnings in writing.

Interestingly, ABA Model Rule 5.7 does not require such warnings to be in writing. In contrast, ABA Model Rule 1.8(a) has two requirements of writing: (1) lawyers’ explanation of the business transaction they are entering into with their client (among other things); and (2) the client’s informed consent to the arrangement. One would think that ABA Model Rule 5.7 would also have required a written explanation and a written consent.

#### **ABA Model Rule 5.7 Comment [7]**

ABA Model Rule 5.7 cmt. [7] addresses the burden lawyers must carry to prove that they made the necessary disclosures.

ABA Model Rule 5.7 cmt. [7] first indicates that “[t]he burden is upon the lawyer” to show that she has taken such reasonable measures to “communicate the desired understanding.” The word “desired” is strange. The understanding is only “desired” by the lawyer who hopes to avoid providing law-related service recipients the representational-role rights that the lawyer’s legal clients receive. Presumably those recipients would “desire” those rights, and would therefore not “desire” a disclaimer of those rights. ABA Model Rule 5.7 cmt. [7]’s use of the term “desired” thus raises the same issue as the term “assure” discussed above. Those words have a beneficial ring.

But they denote communications that deprive those recipients of representational-role protections, so they benefit only the lawyers.

ABA Model Rule 5.7 cmt. [7] concludes with a description of circumstances that “may require a lesser explanation” – a scenario involving “a sophisticated user of law-related services, such as a publicly held corporation.” This contrasts with situations involving “someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.”

The tax advice from the “lawyer-accountant” example makes some sense. But it seems likely that someone seeking and receiving advice from a “lawyer-accountant” is fairly sophisticated.

The “investigative services in connection with a lawsuit” example raises a more serious question. If the lawyer had anything to do with such “investigative services in connection with a lawsuit,” it would be natural to assume that ABA Model Rule 5.3 might (and probably would) apply to such investigators. ABA Model Rule 5.3(a) and (b) essentially treat non-lawyers (both inside and outside a law firm) as if they were lawyer subordinates when analyzing lawyers’ duty to take reasonable steps assuring that those non-lawyers act in a way “compatible with the professional obligations of the lawyer.” ABA Model Rule 5.3(c) describes situations where the lawyer will be responsible for such non-lawyers’ actions that would violate the lawyers’ ethics rules if the non-lawyers were lawyers. ABA Model Rule 5.3 cmt. [3] specifically mentions “nonlawyers outside the firm [who] assist the lawyer in rendering legal services to the client.” The next sentence provides the example of “the retention of an investigative . . . service.” It certainly is

possible that a lawyer might (directly or through a lawyer-owned separate entity) provide “investigative services in connection with a lawsuit” (described in ABA Model Rule 5.7 cmt. [7]), but it seems far more likely that the lawyer would arrange for investigative services that would assist the lawyer. That presumably would trigger ABA Model Rule 5.3 provisions. If so, ABA Model Rule 5.3(b) would require those lawyers to “make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer.” So it would seem that lawyers referring their clients to and then working with investigative services could not disclaim all of the representational-role duties that lawyers owe their clients – because those investigators’ conduct must be “compatible with the professional obligations of the lawyer.” In other words, clients receiving “investigative services in connection with a lawsuit” would necessarily receive client-type protections by reason of ABA Model Rule 5.3(b), which lawyers involved in providing those services could not disclaim.

The next Comment (ABA Model Rule 5.7 cmt. [8]) addresses that issue, but ABA Model Rule 5.7 cmt. [7]’s mention of “investigative services” probably should have triggered another reference to ABA Model Rule 5.3 in that Comment.

### **ABA Model Rule 5.7 Comment [8]**

ABA Model Rule 5.7 cmt. [8] addresses the separation of legal services from law-related services.

ABA Model Rule 5.7 cmt. [8] first explains that regardless of the circumstances or the client’s sophistication, lawyers “should take special care to keep separate the provision of law-related and legal services.” The ABA Model Rule Comment states that the goal is to “minimize the risk that the recipient will assume the law-related services are

legal services.” Of course, the “risk” in that situation is to the lawyer, who will be obligated to provide such law-related service recipients all the representational-role rights that the lawyers’ legal clients receive under the ABA Model Rules – absent a clear warning to the contrary. Using the word “risk” continues the theme of a lawyer-oriented rather than a client-oriented linguistic selection. As explained above, other ABA Model Rule 5.7 provisions use the word “assure” to denote lawyers’ disclaimer of duties to a law-related services recipient. Likewise, ABA Model Rule 5.7 uses the word “desired” to describe the same disclaimer. Those normally comforting words would not be comforting to law-related services recipients. Similarly, the word “risk” has a negative connotation. But in ABA Model Rule 5.7 cmt. [8], the negative impact would be on the lawyer – while the law-related services client would receive the benefit of lawyers’ representational protections.

ABA Model Rule 5.7 cmt. [8] next warns that “[t]he risk of such confusion is especially acute” when lawyers provide both legal services and law-related services “with respect to the same matter.” Presumably the lawyerly phrase “with respect to” is intended to mean “in.”

ABA Model Rule 5.7 cmt. [8] then addresses situations in which lawyers’ provision of legal services and non-legal services “may be so closely entwined that they cannot be distinguished from each other.” In those circumstances, it may not be possible for lawyers to satisfy ABA Model Rule 5.7(a)(2), and thus they may not be able to avoid providing the law-related service recipients all the representational-role rights that the lawyer’s legal clients receive. ABA Model Rule 5.7 cmt. [8] explains that in that situation, lawyers must assure that lawyers and non-lawyer employees “in the distinct entity that the lawyer controls” comply with all of the ABA Model Rules.

ABA Model Rule 5.7 cmt. [8]’s concludes by mentioning ABA Model Rule 5.3 – which requires lawyers to take reasonable steps to assure that non-lawyers they manage or directly supervise act in a way “compatible” with lawyers’ duties under the ABA Model Rules. As explained above, ABA Model Rule 5.3(b) imposes those requirements whether the non-lawyers assisting the lawyer in providing legal work are in the law firm or outside the law firm. And in the latter situation, ABA Model Rule 5.3(b) imposes those requirements even if the non-lawyer assisting the lawyer in providing legal service works for a separate entity that the lawyer does not control. For example, a lawyer might hire a private investigator from a separate private investigation company. Under ABA Model Rule 5.3(b), that lawyer would be responsible for taking reasonable steps to assure that the private investigator acts in a manner “compatible with” the ABA Model Rules governing lawyers. And under ABA Model Rule 5.3(c), such lawyers might be held responsible for any violations of the ethics rules by the private investigator under the circumstances described in ABA Model Rule 5.3(b).

#### **ABA Model Rule 5.7 Comment [9]**

ABA Model Rule 5.7 cmt. [9] addresses examples of law-related services.

ABA Model Rule 5.7 cmt. [9] lists several examples: (1) “title insurance;” (2) “financial planning;” (3) “accounting;” (4) “trust services;” (5) “real estate counseling;” (6) “legislative lobbying;” (7) “economic analysis;” (8) “social work;” (9) “psychological counseling;” (10) “tax preparation;” (11) “patent . . . consulting;” (12) “medical . . . consulting;” (13) “environmental consulting.” These examples of law-related services normally would be separate from lawyers’ provision of legal services. They therefore

seem to contrast with the reference to “investigative services in connection with a lawsuit,” which ABA Model Rule 5.7 cmt. [7] mentions.

### **ABA Model Rule 5.7 Comment [10]**

ABA Model Rule 5.7 cmt. [10] addresses lawyers’ duties when law-related service recipients receive the representational-role rights of clients under ABA Model Rule 5.7.

ABA Model Rule 5.7 cmt. [10] explains that lawyers who provide recipients of their law-related services the ABA Model Rules’ representational-role protections that lawyers owe their law clients, such lawyer must “take special care to heed” the conflicts rules in ABA Model Rule 1.7 through ABA Model Rule 1.11. ABA Model Rule 5.7 cmt. [10] refers specifically to: (1) ABA Model Rule 1.7(a)(2) (the “material limitation” provision indicating that lawyers face a conflict if their representation involves “a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer”); (2) ABA Model Rule 1.8(a) (prohibiting lawyers’ entering into business transactions with clients, except under very specific terms assuring full disclosure and client consent); (3) ABA Model Rule 1.8(b) (prohibiting lawyers from “us[ing] information relating to representation of a client to the disadvantage of the client” unless the client consents or some other Rule applies); (4) ABA Model Rule 1.8(f) (focusing on lawyers’ responsibilities when they are paid by a third party to represent a client); and (5) ABA Model Rule 7.1 through 7.3 (governing lawyers’ marketing and solicitation).

ABA Model Rule 5.7 cmt. [10] concludes with a warning that “lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction’s decisional law.”

### **ABA Model Rule 5.7 Comment [11]**

ABA Model Rule 5.7 cmt. [11] addresses other applicable law.

ABA Model Rule 5.7 cmt. [11] first explains that “principles of law external to the [ABA Model] Rules” “govern the legal duties owed to those receiving” law-related services – even in circumstances “[w]hen the full protections of the [ABA Model Rules themselves] do not apply.” ABA Model Rule 5.7 cmt. [11] provides an example: “the law of principal and agent.”

ABA Model Rule 5.7 cmt. [11] concludes with a warning that such external “legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients.” ABA Model Rule 5.7 cmt. [1] refers to ABA Model Rule 8.4 – which lists various prohibitions on lawyers’ misconduct that apply in all circumstances, regardless of the lawyer’s role.

# **RULE 5.8**

## **Procedures for Notification to Clients When a Lawyer Leaves a Law Firm or When a Law Firm Dissolves**

### **Rule**

#### **Virginia Rule 5.8**

Virginia Rule 5.8 addresses lawyers' and law firms' responsibilities when lawyers leave law firms or when law firms dissolve.

Virginia Rule 5.8 uses both the terms "leaving" and "departing" – presumably because they are synonymous.

Virginia Rule 5.8 does not address all of the non-ethics implications of lawyers deciding to leave their law firm, planning to do so, and eventually leaving.

Bars and courts have frequently dealt with a number of issues that arise from those frequent circumstances. These difficult issues reflect the tension between (1) lawyers' fiduciary, contractual, and perhaps other duties to their law firms and to their law firm colleagues; and (2) their freedom to leave their law firms and compete. Lawyers are the only professionals who cannot agree to non-compete provisions. Virginia Rule 5.6(a) (and similar provisions in the ABA Model Rules and in every other state), indicate that "[a] lawyer shall not participate in offering or making . . . a partnership or employment

agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement.”

The ethics opinions and case law primarily focus on that time period between a lawyer’s decision to leave her firm and her actual departure. Such lawyers’ duties to the institution and her colleagues obviously continue during that period, but she also may prepare to compete once she leaves. Legal ethics opinions and decisional law have tended to take the following approaches (although obviously with variations) – which require further research for any lawyer in this situation): (1) absent some ethics rule like Virginia Rule 5.8 (and Florida’s original provision to this effect), such lawyers almost certainly are free to advise their clients of their departure before they advise their law firms of their departure; (2) lawyers may prepare to compete by renting office space, opening bank accounts, ordering business cards for their new employment situation, etc.; (3) such lawyers may not begin competing by advising would-be client to hold off on hiring them until they withdraw from their law firm, etc.; (4) such lawyers generally may not solicit other lawyers or non-lawyers to leave when they leave – although they may announce their intended departure to lawyers and non-lawyer colleagues as long as they do not solicit them to leave with them; (5) lawyers who have decided to leave but have not yet announced their intention should avoid participation in any decision that will have office material implications after they leave (such as hiring decisions, office move or extensive renovation decisions, etc.).

Virginia Rule 5.8 likewise does not deal with withdrawing lawyers’ and their former law firms’ post-departure conduct. Legal ethics opinions and case law have focused on a number of those issues, including: (1) what files departing lawyers may take with them

unilaterally, without the lawyer's explicit to the law firm which possesses them; (2) what other files departing lawyers may take with them, such as form files, useful examples of transactional document or litigation pleadings that they might use in the future; (3) what firm and client data such departing lawyers may take with them without consent, such as client lists, financial information, profit margin calculations, etc.; (4) to what extent and for how long law firms have to make such departing lawyers' contact information available on their website or when responding to communications to the firm intended for the departing lawyer; and (5) how the withdrawing lawyer and the law firm handle income the departing lawyer would otherwise be entitled to during the time between her decision to leave (or her announcement that she is leaving) and her departure, any supplemental or bonus payments that might have accrued during the previous period before those dates, any capital or other investment in the firm that would have been entitled to she had stayed at the firm, and any additional retirement benefits.

Virginia Rule 5.8 likewise does not address departing lawyers' or law firms' duties and freedom to solicit clients, etc., after the lawyer departs from the law firm. In general, the departing lawyers and the lawyers remaining in the law firm may contact and solicit each other's clients or any other lawyers' clients as long as they comply with Virginia Rule 7.1 and 7.3 (the Virginia lawyer marketing rules). Any communication or solicitation limitation addressed by Virginia Rule 5.8 do not apply after the lawyer has departed.

Virginia Rule 4.2 generally prohibits lawyers from communicating about a matter with a person the lawyer "knows" to be represented by another lawyer in that matter. Under Virginia Rule 4.2 cmt. [3], such ex parte communications are permissible "if that person is seeking a 'second opinion' or replacement counsel." This exception is similar

to but not the same as ABA Model Rule 4.2 cmt. [4], which explains that ABA Model Rule 4.2 does not “preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter.” These provisions describe persons reaching out to lawyers, rather than vice versa, but the direction of the communication does not seem dispositive.

So presumably without the law firm’s consent a lawyer who has departed from that law firm may solicit work from a client who is represented by the law firm without violating Virginia Rule 4.2. And law firm lawyers may seek to convince clients who have decided to leave with the departing lawyer may decide to return to the law firm.

The ABA Model Rules do not contain a Rule 5.8 or any analogous provision.

Virginia Rule 5.8 seems to be modeled on an earlier provision adopted by Florida: Florida Rule 5.8.

### **Virginia Rule 5.8(a)**

Virginia Rule 5.8(a) explains that its terms govern lawyers’ and law firms’ responsibilities in those circumstances – “[a]bsent a specific agreement otherwise.”

Thus, Virginia Rule 5.8 provides the governing rules, unless the departing lawyer and the law firm specifically agree otherwise. Of course, lawyers in that situation cannot contract out of the ethics rules such as the prohibition on misrepresentations, etc. And private contractual agreements cannot avoid application of extrinsic law such as antitrust laws, etc. Interestingly, black letter Virginia Rule 5.8 does not define the term “clients of the law firm” – to whom agreed-upon joint communications must be sent or (more importantly) to whom unilateral communications must or may be sent. Presumably an agreed-upon notice would include an agreed- upon recipient list. But there could be real

acrimony about the “clients of the law firm” who must, should or can receive “[u]nilateral contact” by the departing lawyer or by the remaining lawyers under Virginia Rule 5.8(b)(1). Virginia Rule 5.8 contains differing descriptions of clients. Virginia Rule 5.8 sometimes uses the phrase “clients of the law firm” (in Virginia Rule 5.8(a)(1), 5.8(a)(2); Virginia Rule 5.8(b)(1) (“a client of the law firm”); Virginia Rule 5.8(d) (“a client of the law firm”). But Virginia Rule 5.8 also refers to clients as those of the departing lawyer individually: Virginia Rule 5.8(d) (“a client of a departing lawyer”); Virginia Rule 5.8 cmt. [2] (“the departing lawyer’s clients”).

As explained below, Virginia Rule 5.8 cmt. [3] resolves this issue: “client’ refers to clients for whose active matters the departing lawyer has primary responsibility.” Of course, there could be disagreement about that list, and Virginia Rule 5.8 cmt. [3] does not includes in that definition clients without “active matters.” Presumably those would not be considered clients, and therefore would not be covered by Virginia Rule 5.8’s provisions.

### **Virginia Rule 5.8(a)(1)**

Virginia Rule 5.8(a)(1) addresses the limits on lawyers and law firms unilaterally contacting clients in connection with a lawyer’s departure from his law firm.

Virginia Rule 5.8(a)(1) prohibits the “lawyer who is leaving a law firm” and “other lawyers in the firm” from “unilaterally contact[ing] clients of the law firm.”

The phrase “is leaving” presumably refers to the period between a lawyer’s decision to leave his law firm and the time that he leaves. The beginning of that period might be difficult to ascertain – depending on the finality of the departing lawyer’s decision (which of course can always be changed). But the phrase “is leaving” clearly seems to

refer to a period before the lawyer has actually departed. The phrase “anticipated departure” confirms this analysis.

This issue and other Virginia Rule 5.8 provisions implicate law firms’ increasingly common requirements that withdrawing lawyers provide a certain “notice period” after they announce that they intend to depart but before they depart. Ethics opinions have dealt with the enforceability of such “notice provisions,” including ABA LEO 489 (12/4/19).

The temporal prohibition applies both to lawyers who are “leaving a law firm” and lawyers who will remain at the law firm. The temporal prohibition applies to two kinds of communications.

First, the prohibition applies to communications “for purposes of notifying [“clients of the law firm”] about the anticipated departure “of the lawyer or lawyers from the law firm.” Second, the prohibition applies to communications “to solicit representation of the clients.” Those are very two different kinds of communications.

The first variety simply notifies the clients of a change in employment – presumably of the lawyers handling the client’s matter. Of course, such an announcement is an implicit invitation to the client to move with the lawyer to her new employment. But a simple notification that a lawyer will be leaving a law firm does not necessarily amount to such a solicitation. And in many if not most situations, the departure of a lawyer responsible for the client’s representation would seem to fall within the mandatory communications required by Virginia Rule 1.4. Virginia Rule 1.4(a) requires that “[a] lawyer shall keep a client reasonably informed about the status of a matter.” Virginia Rule 1.4(b) requires that “[a] lawyer shall explain a matter to the extent reasonably necessary

to permit the client to make informed decisions regarding the representation.” Virginia Rule 1.4(c) requires that “[a] lawyer shall inform the client of facts pertinent to the matter.”

The second type of prohibited communication involves those whose purpose is to “solicit representation of the clients.” The word “solicit” presumably denotes the creation of a new relationship, not continuation of an existing relationship. So presumably this prohibition on solicitation focuses mostly if not exclusively on the lawyer who is leaving the firm, not on lawyers remaining at the firm seeking to assure a continuing relationship with the client (in other words, talking the client out of moving with the departing lawyer to her new employment.)

Virginia Rule 5.8(a)’s mutual prohibition applies until “the [departing] lawyer and an authorized representative of the law firm have conferred or attempted to confer and have been unable to agree on a joint communication to the clients concerning the lawyer leaving the law firm.”

Although this prohibition on unilateral communications applies to both the lawyer who is planning to leave and to the law firm’s other lawyers, obviously it has a greater impact on the departing lawyer. Not surprisingly, lawyers considering whether to leave a law firm often want to gauge the likelihood that clients with whom they are then working might want to move a matter from the law firm to them if they decide to leave the law firm. She may wish to communicate with clients to announce her actual departure, and ask whether they will follow her out of the law firm (or solicit them to do so). It is no surprise that Virginia Rule 5.8 addresses such communications before the lawyer departs.

In essence, Virginia Rule 5.8(a)(1) has the effect of prohibiting withdrawing lawyers from notifying any of the law firm clients of their departure until the withdrawing lawyers

have “conferred or attempted to confer” with lawyers remaining at the firm. This in turn obviously requires withdrawing lawyers to notify their law firms that they are leaving, and attempt to arrange a “joint communication” to the clients about the lawyer’s departure.

Significantly, once a lawyer leaves her firm, Virginia Rule 5.8 does not govern that lawyer’s communications with clients whom she was representing while at the firm (or any other would-be clients).

This Virginia Rule 5.8(a) provision is contrary to many other bars’ approach permitting (in some circumstances) such lawyers to notify clients of their departure before notifying their law firms. Those bars’ legal ethics opinion recognize that lawyers owe their clients communications about material developments in the representations (under state parallels to ABA Model Rule 1.4) and therefore may have a duty to tell their clients about their impending departure if that would be a material development in the representation. Virginia Rule 5.8 thus takes a very different approach – limiting lawyers’ pre-departure communications with clients, except under certain conditions.

If the withdrawing lawyers and the remaining lawyers in the law firm agree on a joint communications to the clients “concerning the lawyer leaving the law firm,” then all of them act as they agreed. If they fail to agree, they defer to Virginia Rule 5.8(b) for the governing provisions. And as explained above, once a lawyer withdraws from a law firm, she is able to communicate with any of her former law firm’s clients to announce her departure and to solicit their work (as long as she complies with all of the pertinent Virginia Rules – including the marketing provision in Virginia Rules 7.1 and 7.3.

### **Virginia Rule 5.8(a)(2)**

Virginia Rule 5.8(a)(2) addresses a similar scenario when a law firm plans to dissolve. In essence, Virginia Rule 5.8(a)(2) applies to Virginia Rule 5.8(a)(1) provisions as if everyone in the law firm was withdrawing from the law firm.

Virginia Rule 5.8(a)(2) thus states that a lawyer “in a dissolving law firm” may not “unilaterally contact clients of the law firm” unless “authorized members of the law firm” have been unsuccessful in agreeing on “a method to provide notice to clients” of the firm’s dissolution.

If a law firm intends to dissolve, all or most lawyers presumably will know that. Virginia Rule 5.8(a)(2) obviously only applies to those lawyers who know of the upcoming dissolution.

### **Virginia Rule 5.8(b)**

Virginia Rule 5.8(b) addresses what amounts to a “default” rule “[w]hen no procedure for contacting clients has been agreed upon” under Virginia Rule 5.8(a)(1) or (2).

Virginia Rule 5.8(b) thus explains what departing lawyers and law firms may or must do when a departing lawyer and the law firm (or when lawyers in a dissolving law firm) have been unsuccessful in their required efforts to agree on a “joint communication” about the lawyers’ departure or the law firm’s dissolution).

### **Virginia 5.8(b)(1)**

Virginia 5.8(b)(1) addresses the permissible content of a “[u]nilateral contact” by either (1) “a lawyer who is leaving a law firm;” or (2) “by . . . a law firm.” Not surprisingly, both the withdrawing lawyer and the law firm must comply with the identical content

restrictions. The departing lawyer's and the law firm's "[u]nilateral contact" to clients: (1) shall "not contain false or misleading statements;" (2) shall "give notices to the clients that the "lawyer is leaving the firm;" and (3) must "provide options to the clients to choose to remain a client of the law firm, to choose representation by the departing lawyer, or to choose representation by other lawyers or law firms."

Virginia Rule 5.8(b)(1)'s first provision therefore prohibits lawyers from falsely disparaging the departing lawyer or the law firm, falsely stating that the departing lawyer or the law firm cannot competently handle a client's matter, or make any other "false or misleading statements."

Of course, other ethics rules also forbid "false and misleading" statements. Virginia Rule 4.1(a) states that "[i]n the course of representing a client, a lawyer shall not knowingly . . . make a false statement of fact or law." Virginia Rule 7.1 states that "[a] lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services." Virginia Rule 8.4(c) states that "[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law."

Virginia Rule 5.8(b)(1)'s second provision requires rather than prohibits content. Any unilateral communication by the departing lawyer or by the remaining lawyers "shall give notice to the clients the lawyer is leaving the law firm. That seems simple enough. The departing lawyer obviously will want to also provide her contact information and (if she has any). Although the remaining lawyers may not want to provide that information, Virginia Rule 5.8 cmt. [1] (discussed below) explains that "the client is entitled to notice that clearly provides the contact information for the departing lawyer."

Virginia Rule 5.8(b)(1)'s third provision requires either the departing lawyer or the law firm unilaterally contacting law firm clients to provide them three options: (1) "to choose to remain a client of the law firm;" (2) "to choose representation by the departing lawyer;" or (3) "to choose representation by other lawyers or law firms." It is easy to envision the departing lawyer and the law firm squabbling over the order in which those options should be presented. Presumably clients are intelligent enough to make their choice regardless of the order in which they are presented.

### **Virginia Rule 5.8(b)(2)**

Virginia Rule 5.8(b)(2) imposes essentially the same content conditions on unilateral contacts to a law firm's clients by "members of a dissolving law firm." Of course, Virginia Rule 5.8(b)(2) refers to "members of a dissolving law firm," because there will be no remaining law firm after the dissolution.

### **Virginia Rule 5.8(c)**

Virginia Rule 5.8(c) addresses the timing of either: (1) "by agreement" communications under Virginia Rule 5.8(a); or (2) "[u]nilateral" communication under Virginia Rule 5.8(a) or (b).

This provision seems out of place – one might have expected it to have been placed before the description of the required provisions in a unilateral contact by the departing lawyer, the law firm, or members of a dissolving law firm (which appear in Virginia Rule 5.8(b)(1) and (2)).

Virginia Rule 5.8(c) requires that clients be given "[t]imely notice [of either the departing lawyer's departure or the law firm's dissolution] promptly either by agreement or unilaterally."

The word “[t]imely” and the later word “promptly” in that same Virginia Rule require lawyers to quickly comply with any agreement about joint announcements of the departing lawyer’s departure or the law firm’s dissolution. Those words similarly require a quick communication if the departing lawyer and the law firm have not been able to agree on a “joint communication” or the members of a dissolving law firm have not been able to similarly agree on “a method to provide notice to clients.” In other words, under either option clients must be quickly told of the event and their options.

But in the situation involving a departing lawyer, the departing lawyer (and the law firm) may not communicate too early. As long as the departing lawyer is still with the firm, Virginia Rule 5.8(a) prohibits any unilateral communication until after the departing lawyer and the firm have tried but failed to agree on “a joint communication under Virginia Rule 5.8(a)”.

If a lawyer deciding to leave the law firm just departs, obviously there is no requirement to seek an agreement on a “joint communication” to any of the law firm’s clients. As explained above, the phrases “who is leaving the law firm” and “anticipated departure” seem to make it clear that Virginia Rule 5.8(a) applies only when the lawyer is still at the firm. Once the lawyer leaves the firm, he or she (and the firm) may communicate with any law firm clients – limited only by the Virginia marketing rules and all of the other Virginia Rules’ communication-related limitations.

A lawyer’s departure from a law firm in violation of the law firm’s “notice period” provision may implicate fiduciary duty, contractual, partnership, employment, or other extrinsic prohibitions or limitations. Ironically, many departing lawyers challenge such notice periods and other restrictions in partnership or employment agreements – although

they agreed to those provisions at the time. Because lawyers cannot enter into non-competes, those challenges sometimes succeed despite such lawyers' knowing acquiescence in the provisions beforehand. But by itself, such a departure would not seem to implicate any ethics rules.

### **Virginia Rule 5.8(d)**

Virginia Rule 5.8(d) addresses the “default” handling of clients if a client whose “active matters” were the “primary responsibility” of a lawyer who has departed has not advised the departing lawyer and the law firm what the client intends to do going forward: (1) “choos[ing] to remain a client of the law firm;” (2) “choos[ing] representation by the departing lawyer;” or (3) “choos[ing] representation by other lawyers or law firms” (under Virginia Rule 5.8(b)(1)).

Virginia Rule 5.8(d) explains that the failure of “a client of a departing lawyer” to advise the departing “lawyer and law firm of the client’s intention with regard to who is to provide future legal services” means that such a client “shall be deemed a client of the law firm unless the client advises otherwise or until the law firm terminates the engagement in writing.”

At first blush, this seem like an odd presumption. The beginning of the sentence describes such clients as those “of a departing lawyer,” yet such a client’s failure to indicate its future choice under Virginia Rule 5.8(b)(1) transforms the client into a continuing client of the law firm until the client advises the law firm otherwise or the law firm terminates the client. One might have expected the presumption to go the other way.

But upon reflection, perhaps this presumption makes sense. Law firms presumably possess such a client’s files, presumably has communicated with third parties

on behalf of such a client, and (in a litigation matter) presumably has appeared as counsel of record for such a client. Because some lawyer has to take responsibility for the client's matter without a single moment's break in such responsibility, the law firm seems better suited to take that continuing responsibility. A presumption going the other way might leave such a client in limbo.

### **Virginia Rule 5.8(e)**

Virginia Rule 5.8(e) addresses a similar situation involving a dissolving law firm.

Under Virginia Rule 5.8(e), if a dissolving law firm's client does not advise "the lawyers" of the client's future choice of legal services, "the client shall be deemed to remain a client of the lawyer who is primarily responsible for the legal services to the client on behalf of the firm" – "until the client advises otherwise."

The more logical approach differs from the Virginia Rule 5.8(d) presumption that "a client of a departing lawyer" (who presumably had been primarily responsible for providing legal services to that client) is deemed to be a continuing client of the law firm (rather than the withdrawing lawyer – unless the client indicates otherwise). As explained above, these differing presumptions may be based as much on logistics as on ethical or intellectual purity. When a lawyer leaves a law firm, clients' files normally stay with the law firm, as do non-lawyer colleagues who have been assisting the lawyer, associates who properly have not been solicited by the departing lawyer before she leaves, etc. In other words, the infrastructure and the client's property, papers and lawyer-created related documents all stay at the law firm until the client asks them to be transferred to the departing lawyer – if that is what the client chooses. The departing lawyer may not even have a physical location to which all of that can be sent until she settles in at a new

office. So in that situation, it makes sense for the client to essentially remain a law firm client until the client (perhaps encouraged by the departing lawyer) directs the law firm to send all of that somewhere else.

When a law firm dissolves, lawyers presumably each take with them what is necessary to continue to practice law. In that setting, it makes sense to divvy up all of the dissolving law firm's clients' supporting infrastructure, property, documents, etc. among the lawyers who will continue practicing in other places. Not only is that wise, it may be necessary – if the dissolving law firm abandons its location. Not until clients indicate otherwise (which they may freely do at any time, because clients can always terminate their lawyers at any time and for any reason), it makes sense for the last responsible lawyer who handled a client's matter at the dissolving law firm to take possession of that.

## Comment

### Virginia Rule 5.8 Comment [1]

Virginia Rule 5.8 cmt. [1] addresses the rationale for and the general outline of Virginia Rule 5.8.

Virginia Rule 5.8 cmt. [1] first acknowledges that “there may . . . be significant business and legal issues involved when a lawyer leaves a law firm or a law firm dissolves.” That vague reference presumably refers to any partnership or similar agreement among the lawyers (which obviously may not violate the ethics rules), and the tension between lawyers’ fiduciary responsibilities to the law firm while they are practicing there and those lawyers’ right to decide to (and prepare for) departing from a law firm and compete with their former law firm once they leave it. As mentioned above, law firms increasingly impose some type of notice period between the departing lawyer’s announcement that she is leaving and the date on which she may leave.

Virginia Rule 5.8 cmt. [1] next recognizes “the rights of the client to be fully informed and able to make decisions about their representation” – which underlies Virginia Rule 5.8’s emphasis on both the timing and the content of the required notice to clients.

Virginia Rule 5.8 cmt. [1] then oddly skips the key time period between the lawyer’s decision to depart (or announcement of her departure) and her departure – instead turning to lawyers’ and law firms’ duties “[u]pon the departure of a lawyer or the dissolution of the law firm.”

Virginia Rule 5.8 cmt. [1] understandably states that as of that time, “the client is entitled to notice that clearly provides the contact information for the departing lawyer and information about the ability and willingness of the lawyer and/or firm to continue the

presentation. The Virginia Rule Comment refers to Virginia Rule 1.16, which describes scenarios where lawyers must withdraw from a representation or may withdraw from a representation. Virginia Rule 1.16 also describes lawyers' duties when a representation terminates, under either situation.

Continuing in its discussion of post-departure (rather than pre-departure) duties, Virginia Rule 5.8 cmt. [1] thus requires that “[e]ither the departing lawyer or the law firm” must also comply with Rule 1.16’s provisions “regarding the client’s file and any other property, included advanced legal fees.”

Virginia Rule 5.8 cmt. [1] next understandably reminds that neither Virginia Rule 5.8 nor “the contract for representation” may alter individual lawyer’s “ethical obligations” to clients imposed elsewhere in the Virginia Rules.

Virginia Rule 5.8 cmt. [1] then inexplicably return to pre-departure issues. It might have been more logical for Virginia Rule 5.8 cmt. [1] to deal sequentially with the unfolding situation when a lawyer determines to leave a law firm: (1) whether the lawyer had a duty to notify the law firm at that time; (2) what such lawyers must and may do between that decision and her actual departure; (3) what others must do during that time; (4) what lawyers and law firms must do at the time of departure; and (5) what the departed lawyers and law firms must do after the departure.

But in returning to the pre-departure period, Virginia Rule 5.8 cmt. [1] reminds lawyers and law firms that “[a]ny client notification agreement, whether pursuant to this rule or otherwise, must also comport with [Virginia] Rule 5.6(a).” Virginia Rule 5.6(a) generally prohibits lawyers from “participat[ing] in offering or making . . . a partnership or employment agreement that restricts the right of a lawyer to practice after termination of

the relationship.” Thus, Virginia Rule 5.6(a)’s prohibition on practice limitations has no bearing on “any client notification agreement,” except as to its content. This reference presumably reminds lawyers that they may not agree among themselves not to solicit the other’s clients, or in some other way “restrict[ ] the right of a lawyer to practice after termination” of a partnership or employment relationship. It is an interesting question whether an agreement about lawyers’ departure from a law firm would be governed by Virginia Rule 5.6(a). The question would focus on is whether such an agreement is “a partnership or employment agreement.” Another possibly applicable provision is Virginia Rule 5.6(b), which prohibits lawyers from “participat[ing] in offering or making . . . an agreement in which a restriction on the lawyer’s right to practice is part of the settlement of a controversy.” The word “controversy” might include controversies between a law firm and a lawyer who has departed from the law firm. Virginia Rule 5.6(b) uses the word “controversy,” in contrast to ABA Model Rule 5.6(b)’s use of the phrase “client controversy.” Thus, Virginia Rule 5.6(b) would seem to have deliberately described its reach beyond controversies in which lawyers represent clients.

Virginia Rule 5.8 cmt. [1] concludes with an acknowledgement that departing lawyers “may also have fiduciary, contract or other obligations to their firms that are outside the scope of these rules.” Those of course apply to lawyers at all times. But those identified issues create the most acute dilemmas after a lawyer has decided to leave a law firm (or announced her intention to leave) – but before she has actually departed. As explained above, lawyers in that limbo scenario has some continuing duties to the law firm where they are still working, have the freedom to prepare for but not begin competing with that law firm, and of course have continuing primary duties to clients. The

terms “other obligations” presumably reminds lawyers of all of the external law affecting their relationship with and departure from law firms. ABA LEO 489 (12/4/19) addresses those issues under the ABA Model Rules (which differ from the Virginia Rules).

### **Virginia Rule 5.8 Comment [2]**

Virginia Rule 5.8 cmt. [2] addresses the requirement that clients receive “prompt communication when the lawyer primarily responsible for those clients is leaving the firm.”

Virginia Rule 5.8 cmt. [2] first acknowledges that “this rule requires the departing lawyer and the law firm to confer in order to make a joint communication to the departing lawyer’s clients.” As explained above, this reference to “the departing lawyer’s clients” is inconsistent with Virginia Rule 5.8’s references elsewhere to “clients of the law firm” or similar phrases. Presumably the phrase “departing lawyer’s clients” (as explained in Virginia Rule 5.8 cmt. [3] refers to “clients for whose active matters the departing lawyer has primary responsibility”, discussed below).

But Virginia Rule 5.8 cmt. [2] then recognizes that despite this requirement to seek a joint communication, the general “duty to communicate with clients and to avoid prejudicing the clients during the course of representation” “requires prompt communication [presumably even in the absence of a joint communication] “when the lawyer primarily responsible for those clients is leaving the firm.” In nearly every situation, these “clients” would only be a subset of the clients identified in Virginia Rule 5.8(a)(i): “clients of the law firm.”

Virginia Rule 5.8(c) cmt. [2] refers to “other Virginia rules”: Virginia Rule 1.3(c), Virginia 1.16(d); Virginia Rule 1.16(e).

Virginia Rule 1.3(c) explains that “[a] lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship” (“except as required or permitted” under several Virginia Rules). Thus, Virginia Rule 5.8 cmt. [2] recognizes the tension between its obligation that departing lawyers and their law firms attempt to agree on a joint communication and those lawyers’ arguable duty to promptly tell clients about their departure.

Virginia Rule 1.16(d) requires lawyers to “take steps to the extent reasonably practicable to protect a client’s interests” when a representation ends. Virginia Rule 1.16(e) requires lawyers to provide former clients certain specified portions of the clients’ files upon a representation’s termination.

Virginia Rule 5.8 cmt. [2] concludes by describing the requirement that any communication to such clients “shall clearly state” if “continued representation by the departing lawyer and/or by the law firm is not possible.” In those circumstances, the communication must “advise the client of the remaining options for continued representation, including the client’s right to choose other lawyers or law firms.” Virginia Rule 5.8 cmt. [2] does not define the phrase “is not possible.” It is odd that it would not be “possible” for either the departing lawyer or the law firm to continue a representation that was then ongoing. Perhaps such a continuing representation would not be “possible” because once they are separated from each other the departing lawyer and the law firm would not have the requisite personnel to handle the client’s matters, that seem far-fetched, because either the departing lawyer or the law firm could beef up staffing, quickly acquire the expertise, etc. that such a continuing representation might require.

Perhaps the “is not possible” phrase really focuses on situations in which neither the departing lawyer nor the law firm wants to keep representing a client. Perhaps neither the departing lawyers nor the law firm would like to continue representing an unprofitable client. Perhaps neither may desire to keep representing a troublesome client. In that situation, the departing lawyer and the law firm ironically may want to “stick” the other with such undesirable clients, rather than fight over who will represent those clients going forward.

In that scenario, the law firm seems like the loser. As explained above, any clients who fail to make their choice “shall be deemed a client of the law firm” under Virginia Rule 5.8(d). Perhaps the same is true of desirable clients who neither the departing lawyer nor the law firm would like to continue representing. Virginia Rule 5.8 cmt. [2] does not provide any guidance for lawyers and firms in that scenario.

### **Virginia Rule 5.8 Comment [3]**

Virginia Rule 5.8 cmt. [3] addresses the all-important definition of “client.” Presumably lawyers seeking guidance from black letter Virginia Rule 5.8 eventually would find this key definition. But it might have been preferable for the definition to be included in the black letter Rule rather than in a Comment.

Virginia Rule 5.8 cmt. [3] defines the “client” entitled to prompt notice by either an agreed-upon communication or by a unilateral communication by the departing lawyer or by the law firm as: “clients for whose active matters the departing lawyer has primary responsibility.”

ABA LEO 489 (12/4/19) uses a different standard – requiring communications to clients with whom the lawyer “has had significant contact”. The ABA LEO defines them

as clients who would “identify [ ] the departing lawyer, by name, as one of the attorneys representing the client.” This contrasts with a lawyer who “prepared one research memo on a client matter for another attorney in the firm but never spoke with the client or discussed legal issues with the client.” Virginia Rule 5.8 defines a narrower group of clients to whom the departing lawyer or the law firm owes communication about the departing lawyer’s departure.

Virginia Rule 5.8 cmt. [3] thus highlights what seems like a major Virginia Rule 5.8 weakness. Black letter Virginia 5.8 and all of its Comments define departing lawyers’ and law firms’ communications duty and post-departure duties on a client-by-client basis. But in many law firms, more than one lawyers have “primary responsibility” for a single client’s different matters. In other words, a transaction lawyer at the firm might have “primary responsibility’ for a client’s transactions, while a litigator might have “primary responsibility” for that same client’s litigation matters. Yet Virginia Rule 5.8 does not acknowledge this fact.

This is a surprising blind spot, because Virginia Rule 1.17 takes exactly the opposite approach in addressing a lawyer’s sale of all or part of a law practice. Although Virginia Rule 1.17 confusingly discusses transfer of “representations,” “matters” and “files” (as discussed in this document’s analysis of Virginia Rule 1.17), that Rule undeniably envisions the same client’s separate matters being separately addressed in purchase and sale transactions and consummations. Virginia Rule 1.17 thus plainly takes a more realistic view of lawyers’ practice than Virginia Rule 5.8. Lawyers trying to comply with Virginia Rule 5.8 may have trouble at the very beginning. This is because the Rule focuses on communications, prohibitions and duties on a client-by-client basis rather than

a matter-by-matter basis. Presumably such lawyers would muddle through, but it would have been preferable for Virginia Rule 5.8 to recognize the reality that Virginia Rule 1.7 recognizes.

As explained above, once the lawyer has departed, she and the law firm may freely communicate with any and all clients for whom the departing lawyer was primarily responsible and for whom anyone else in the law firm was primarily responsible – as long as all of the lawyers comply with the other Virginia Rules governing such communications, solicitation, etc.

#### **Virginia Rule 5.8 Comment [4]**

Virginia Rule 5.8 cmt. [4] addresses obligations that clients may face in such a departing-lawyer scenario.

Virginia Rule 5.8 cmt. [4] first acknowledges that clients “have the right to choose counsel.” But the Virginia Rule Comment then warns that “such choice may implicate obligations.” Virginia Rule 5.8 cmt. [4] then provides examples of these such “obligations”: (1) “a requirement to pay for legal services previously rendered and costs expended in connection with the representation;” and (2) “a requirement to pay” for a reasonable fee for copying the client’s file.” The latter example refers to Virginia Rule 1.16(e) – which explains that lawyers “may bill and seek to collect” from clients the cost of copying certain specified file material requested by the former client, but may not “use the client’s refusal to pay for such materials as a basis to refuse the client’s request” for those materials.

Virginia Rule 5.8 cmt. [4] concludes by noting that some clients “may be limited in their ability to choose counsel.” The Virginia Rule Comment then provides an example:

“when the lawyer is appointed by a court to represent a client, the appointed lawyer is responsible for the representation until relieved or replaced by the court.” Virginia Rule 6.2 deals with appointed lawyers, but that Virginia Rule focuses on lawyers’ attempt to avoid appointment, rather than lawyers’ relief from such representations or replacement by the court. Virginia Rule 1.16 cmts. [3] and [5] address such appointed lawyers’ withdrawal or discharge. It would have been helpful for Virginia Rule 5.8 cmt. [4] to reference those provisions – especially the Virginia Rule 1.16 provisions).

### **Virginia Rule 5.8 Comment [5]**

Virginia Rule 5.8 cmt. [5] addresses lawyers’ possible duty to notify courts of their or some other lawyer’s departure, or their law firms’ dissolution.

Virginia Rule 5.8 cmt. [5] reminds lawyers that they “may have duties to notify the court if they represent clients in litigation” – if the lawyers are involved “in either a change in law firm composition or a law firm dissolution.”

Virginia Rule 5.8 cmt. [5] concludes with a warning that lawyers acting as counsel of record “must file a motion to withdraw or a motion for substitution of counsel if he no longer represents the client” – referring to Virginia Rule 1.16(c), that Virginia Rule explains that counsel of record may not withdraw except “by leave of court, after compliance with [the court’s] notice requirements.”

# RULE 6.1

## Voluntary Pro Bono Publico Service

### Rule

#### Virginia Rule 6.1(a)

Virginia Rule 6.1(a) addresses lawyers' rendering of pro bono services.

Virginia Rule 6.1(a) contains the term "pro bono publico." That formal term also appears in Virginia Rule 6.1's title. Elsewhere, Virginia Rule 6.1 and Virginia Rule 6.1 Comments use the colloquial term "pro bono".

Virginia Rule 6.1(a) indicates that lawyers "should render at least two percent per year" of the lawyer's "professional time" to pro bono work. The term "should render" matches Virginia Rule 6.1's use of the word "[v]oluntary" in its title. But elsewhere, black letter Virginia Rule 6.1 and several Virginia Rule Comments contain the term "responsibility" – which seems to apply obligatory conduct. Presumably the "responsibility" is a moral rather than a disciplinary "responsibility".

Virginia Rule 6.1(a) defines lawyers' aspirational pro bono service goal as a percentage, rather than as a number of hours per year (ABA Model Rule 6.1's approach – discussed below). Black letter Virginia Rule 6.1(a) also describes possible pro bono services as "legal services," but also points to "voluntary activities."

Virginia Rule 6.1(a) next provides examples of such work: "poverty law, civil rights law, public interest law, and volunteer activities designed to increase the availability of pro bono legal services." Virginia Rule 6.1(a) introduces its list of acceptable pro bono

services with the word “include” - thus acknowledging that other services might also satisfy the pro bono aspirational goal.

Virginia Rule 6.1(a) thus does not focus on pro bono clients’ financial status, but rather on the type of lawyers’ legal practice – apparently regardless of the clients’ financial status. For instance, under black letter Virginia Rule 6.1(a) lawyers presumably could provide pro bono legal services in “civil rights law” or “public interest law” – even to wealthy individuals or organizations.

**ABA Model Rule 6.1** also addresses lawyers’ pro bono responsibility.

Like Virginia Rule 6.1(a). ABA Model Rule 6.1 contains the formal term “pro bono publico” (which also appears in ABA Model Rule 6.1’s title). And like Virginia Rule 6.1(a) and various Virginia Rule 6.1 Comments, several ABA Model Rule 6.1 Comments contain the simpler, more colloquial and synonymous term “pro bono.”

ABA Model Rule 6.1 begins with a blunt statement that “[e]very lawyer has a professional responsibility to provide legal services to those unable to pay.” ABA Model Rule 6.1’s term “professional responsibility” seems to describe mandatory conduct, in contrast to Virginia Rule 6.1(a)’s phrase “should render” (discussed above). But ABA Model Rule 6.1’s next sentence contains the phrase “should aspire,” and similar aspirational phrases appear throughout ABA Model Rule 6.1 and its Comments. And ABA Model Rule 6.1 cmt. [12] (discussed below) assures that “[t]he responsibility set forth in this [ABA Model] Rule is not intended to be enforced through disciplinary process”. Thus, the word “responsibility” presumably refers to a moral rather than a disciplinary responsibility.

ABA Model Rule 6.1's introductory sentence differs from Virginia Rule 6.1(a) in two significant ways.

First, ABA Model 6.1 defines this aspirational pro bono goal in number of hours, not as a percentage of professional time (as in Virginia Rule 6.1(a)). Thus, ABA Model Rule 6.1 contains an aspirational goal of “at least (50) hours” per year. ABA Model Rule 6.1's phrase “(50) hours” is stylistically different from similar ABA Model Rule references. For instance, ABA Model Rule 1.17(c)(3) contains the term “ninety (90) days.” This inclusion of both the word identifying the number and an Arabic number contained in a parentheses is typical of lawyers' drafting. But it presumably is safe to assume that ABA Model Rule 6.1's phrase “(50) hours” does not represent ABA Model Rule 6.1's suggestion of an option that a state may choose or not choose. ABA Model Rules use brackets for that articulation. For instance, ABA Model Rule 1.17(a) contains the following: “[in the geographic area] [in the jurisdiction] (a jurisdiction may elect either version.)” ABA Model Rule 6.1 does not match that state-option approach.

Second, in contrast to Virginia Rule 6.1(a)'s description of pro bono services that lawyers should provide as a type of legal services, ABA Model Rule 6.1 later defines such acceptable pro bono legal services by the types of clients who will receive the services (not the type of services such lawyers will provide).

**ABA Model Rule 6.1(a)** explains that lawyers “should provide a substantial majority of the (50) hours of legal services without fee or expectation of fee” to one of two categories of clients: ABA Model Rule 6.1(a) does not provide any guidance about the meaning of the phrase “without fee or expectation of fee.” The term “without fee” presumably refers to lawyers' not being paid for their pro bono services. The term

“without...expectation of fee” presumably means that lawyers providing pro bono services never expect from the beginning that they will be paid any fee. In other words, lawyers cannot retroactively transform legal services into their aspirational 50 hours of annual pro bono services – either by abandoning any fee claim or because the recipient of those legal services did not pay. ABA Model Rule 6.1(a) requires that lawyers not expect from the start that they will be paid any fee.

The two categories of acceptable recipients of lawyers’ 50 hours of annual pro bono services are: (1) “persons of limited means (ABA Model Rule 1.6(a)(1));” or (2) specified organizations in “matters that are designed primarily to address the needs of persons of limited means” (ABA Model Rule 6.1(a)(2)).

ABA Model Rule 6.1(a)(2) lists such organizations: “charitable, religious, civic, community, governmental and educational organizations.” ABA Model Rule 6.1(a)(2)’s list does not start with the phrase such as “including” or “for example” – which would assure that other organizations might satisfy ABA Model Rule 6.1(a)(2)’s aspirational pro bono goal.

Under ABA Model Rule 6.1(b)(2), lawyers’ services for such listed organizations satisfy the pro bono aspirational annual 50 hour requirement only if lawyers provide services to those organizations in “matters” that satisfy the defined purpose – “primarily to address the needs of persons of limited means.” Thus, ABA Model Rule 6.1(a)(2) continues ABA Model Rule 6.1’s focus on lawyers’ service directly for “persons of limited means” or indirectly for such purpose.

This contrasts with Virginia Rule 6.1(a)’s aspirational pro bono service goal that has a wider scope (discussed above).

**ABA Model Rule 6.1(b)** explains that lawyers “should” also aspire to provide “additional services” beyond those identified in ABA Model 6.1(a) (emphasis added).

These “additional services” identified in ABA Model Rule 6.1(b) presumably constitute the remainder of the aspirational 50 hour per year pro bono goal – left after lawyers devote “a substantial majority” of their aspirational pro bono legal services under ABA Model Rule 6.1(a).

The word “additional” seems inapt, and possibly confusing services described in ABA Model Rule 6.1(b) are not really “additional services” beyond the suggested 50 annual hours of pro bono legal services. Instead, the services described in ABA Model Rule 6.1(b) apparently are those that lawyers provide after providing a “substantial majority” of the suggested 50 annual hours defined in ABA Model Rule 6.1(a). The word “remaining” would have been more appropriate than the word “additional.”

This possible confusion is compounded by the last sentence in ABA Model Rule 6.1 (discussed below), which begins with the phrase “[i]n addition” – referring to lawyers’ financial contribution to specified organizations. That monetary contribution is actually in “addition” to the hours lawyers should aspire to spend – which are described in ABA Model Rule 6.1(a) and (b)(1)-(3).

Thus, ABA Model Rule 6.1 contains a form of the word “addition” to mean two very different things. ABA Model Rule 6.1(b) contains the word “additional” to mean the remainder of ABA Model Rule 6.1’s 50 hours of annual aspirational pro bono services. ABA Model Rule 6.1’s concluding sentence uses the word “addition” to mean financial contributions beyond that 50 hours of annual aspirational pro bono services. And as

explained below, it probably would have been more appropriate to assign a separate letter or number to that last sentence.

Under ABA Model Rule 6.1(b), lawyers “should...provide any additional services” through one of three options.

First, lawyers can provide such “additional services” through either “no-fee” or a “substantially reduced fee” to “individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations.” ABA Model Rule 6.1(b)(1) limits the type of work for those specified organizations that will satisfy ABA Model Rule 6.1’s remaining hours of annual aspirational pro bono work. Thus, ABA Model Rule 6.1(b)(1) allows lawyers to count towards their aspirational pro bono service goal only legal services “in matters in furtherance of their organizational purposes”.

Significantly, ABA Model Rule 6.1(b)(1)’s services are not limited to those specified organization’s “organizational purposes” dedicated to assisting or otherwise advancing the interests of “persons of limited means” (ABA Model Rule 6.1(b)(2))’s term.

ABA Model Rule 6.1(b)(1) adds an additional condition on lawyers’ ability to count their legal services provided to such organizations toward their aspirational annual pro bono goal: where the lawyers’ “standard legal fees” would either: (1) “significantly deplete the organization’s economic resources;” or (2) “be otherwise inappropriate.” The phrase “would significantly deplete the organization’s economic resources” seems clear. Presumably that condition prohibits lawyers from counting towards their aspirational pro bono goal providing such legal services to the designated list of organizations if those organizations are wealthy enough to pay the lawyer’s “standard legal fees.” In other

words, lawyers can count toward their aspirational pro bono goal only such services provided to cash-strapped organizations among the listed organizations.

In contrast, neither ABA Model Rule 6.1(b)(1) nor any ABA Model Rule 6.1 Comment explains or provides guidance about the phrase “or would be otherwise inappropriate.” If one of the listed organizations can pay a lawyer’s “standard legal fees” without “significantly depleting the organization’s economic resources,” it is difficult to imagine what would make such organization’s payment of a lawyer’s “standard legal fees” “otherwise inappropriate.”

Second, under ABA Model Rule 6.1(b)(2), lawyers can “provide any additional services” through “delivery of legal services to “persons of limited means” “at a substantially reduced fee.” This practice is often colloquially referred to as “low bono” rather than “pro bono.” Thus, ABA Model Rule 6.1(b)(2) allows lawyers’ providing such “low bono” services to “persons of limited means” to count toward the minority of their 50 hours of annual aspirational pro bono service hours – after “provid[ing] a substantial majority” of those hours as specified in ABA Model Rule 6.1(a) (addressed above).

Third, under ABA Model Rule 6.1(b)(3), lawyers can “provide any additional services” through “participation in activities for improving the law, the legal system or the legal profession.” ABA Model Rule 6.1(b)(3)’s phrase “participation in activities” presumably includes “participation” other than in providing legal services. Notably, ABA Model Rule 6.1(b)(3) does not begin with the phrase “delivery of legal services” – which is contained at the beginning of ABA Model Rule 6.1(b)(1) and at the beginning of ABA Model Rule 6.1(b)(2).

It is unclear if ABA Model Rule 6.1(b)(3)'s phrase "participation in activities" differs from the simpler term "activities." Presumably the words "participation in" denotes less involvement than the word "activities" itself.

Significantly, ABA Model Rule 6.1(b)(3) on its face is not limited to "improving the law, the legal system or the legal profession" relating to "persons of limited means" (such as legal services mentioned in ABA Model Rule 6.1(b)(2)). In other words lawyers relying on those services described in ABA Model Rule 6.1(b)(3) to satisfy their minority hours of aspirational pro bono services are not limited to legal services focusing on "persons of limited means."

In sum, ABA Model Rule 6.1 suggests that lawyers: (1) "provide a substantial majority" of their 50 hour annual pro bono goal by providing no-fee services to "persons of limited" means, or to specified organizations focusing on the needs of such persons; and (2) provide the remainder of that 50 hour annual pro bono goal in other options that focus on individuals or organizations with a certain specified policy goal, as free or reduced – rate legal services to "persons of limited means" (rather than free legal services to such persons) or generic law-improvement activities.

### **Virginia Rule 6.1(b)**

Virginia Rule 6.1(b) addresses lawyers' and other lawyer groups' ability to collectively satisfy their pro bono goal.

Virginia Rule 6.1(b) explains that "[a] law firm or other group of lawyers may satisfy their responsibility collectively" under Virginia Rule 6.1.

Virginia’s Terminology section defines “law firm” as “a professional entity, public or private, organized to deliver legal services, or a legal department of a corporation or other organization.”

That Virginia Rule definition also refers to an unidentified singular Virginia Rule 1.10’s Comment. Presumably that reference is to one of several Virginia Rule Comments: Virginia Rule 1.10 cmts. [1], [1a] and [1b]. Those Comments address the question of whether various groups of lawyers and other constituents of organizations constitute a “firm” (or presumably a “law firm”).

Neither Virginia Rule 6.1(b) nor any other Virginia Rule defines the term “other group of lawyers”. Lawyers looking for guidance might turn to Virginia Rule 1.10 cmt. [1], which explains that some lawyers that could be considered a “group” might constitute a “firm.” For instance, Virginia Rule 1.10 cmt. [1]’s concluding sentence states that “[a] group of lawyers could be regarded as a firm” for some purposes but not other purposes when applying the Virginia Rules. So clearly the term “a group of lawyers” is not synonymous with the term “firm.”

Black letter Virginia Rule 6.1(b) does not explain how “[a] law firm or other group of lawyers” may collectively satisfy their pro bono “responsibility.” Virginia Rule 6.1 cmt. [7] (discussed below) provides some guidance.

**ABA Model Rule 6.1** does not address such collective action in any black letter provision. But ABA Model Rule 6.1 cmt. [9]’s concluding sentence mentions that issue (discussed below).

### **Virginia Rule 6.1(c)**

Virginia Rule 6.1(c) addresses an alternative means for lawyers to satisfy their aspirational pro bono goal.

Virginia Rule 6.1(c) explains that “an alternative method” for lawyers to fulfill their Virginia Rule 6.1 pro bono “responsibility” is to provide “[d]irect financial support of programs that provide direct delivery of legal services to meet the needs” described in Virginia Rule 6.1(a).

**ABA Model Rule 6.1’s** last sentence states that lawyers “should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.”

ABA Model Rule 6.1 concludes with a statement that lawyers should provide financial contributions “[i]n addition” to “legal services” under ABA Model Rule 6.1(a), “legal services” under ABA Model Rule 6.1(b)(1) and (2) and “participation in activities” under ABA Model Rule 6.1(b)(3).

ABA Model Rule 6.1’s concluding sentence’s word “addition” refers to lawyers’ contributions above and beyond ABA Model Rule 6.1’s introductory sentence’s “(50) hours of pro bono publico legal services per year.” As explained above, ABA Model Rule 6.1(b) also contains the word “additional” – but that means something entirely different. ABA Model Rule 6.1(b)’s word “additional” refers to the minority of lawyers’ aspirational 50 hours of annual pro bono services – remaining after those lawyers “provide a substantial majority of the (50) hours of legal services without fee or expectation of fee” under ABA Model Rule 6.1(a).

This contrasts with ABA Model Rule 6.1’s concluding sentence’s term “[i]n addition” – presumably referring to something above and beyond those 50 hours.

ABA Model Rule 6.1's concluding sentence states that "a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means" (emphasis added). Thus, ABA Model Rule 6.1's concluding sentence returns to the focus on "persons of limited means" that ABA Model Rule 6.1(a) defines as the required recipients of ABA Model Rule 6.1(a)'s "substantial majority of the (50) hours of legal services without fee or expectation of fee" per year.

As discussed above, ABA Model Rule 6.1(b) explains that such financial contributions should be "[i]n addition" to the various legal representation and other pro bono options included in ABA Model Rule 6.1(b).

As explained above, ABA Model Rule 6.1(a) explains that lawyers should provide "a substantial majority" of their suggested 50 annual pro bono legal service hours in one of two designated types of service (described in ABA Model Rule 6.1(a)(1) and (2)). ABA Model Rule 6.1(b) then suggests that "lawyers should . . . provide any additional services through" one of three designated types of activities.

ABA Model Rule 6.1 last sentence's "[i]n addition" type of financial pro bono contributions presumably are "in addition" to the hours that are described in ABA Model Rule 6.1(a) and the remainder of hours described in ABA Model Rule 6.1(b). So ABA Model Rule 6.1's concluding sentence's word "addition" presumably refers to monetary contributions above and beyond: (1) "the substantial majority" of 50 hours of pro bono services provided pursuant to ABA Model Rule 6.1(a); and (2) the "additional services" described in ABA Model Rule 6.1(b) (the remainder of the 50 hours.)

As explained above, Virginia Rule 6.1(c) also describes lawyers' financial contributions, but as an alternative to lawyers' provision of the services, not as a suggested supplement to those services.

## Comment

### Virginia Rule 6.1 Comment [1]

Virginia Rule 6.1 cmt. [1] addresses lawyers' "personal responsibility" to provide pro bono services, the benefit of those services to the lawyer, and the aspirational pro bono goal.

Virginia Rule 6.1 cmt. [1] begins by explaining that "regardless of professional prominence or professional workload," "[e]very lawyer...has a personal responsibility to provide legal services to those unable to pay."

Although the phrase "personal responsibility" seems to describe an obligation, Virginia Rule 6.1's title (containing the word "Voluntary") and Virginia Rule 6.1(a)'s phrase "should render" confirms that lawyers' pro bono service is aspirational rather than mandatory.

Virginia Rule 6.1 cmt. [1] next assures lawyers that their "personal involvement" in such pro bono work "can be one of the most rewarding experiences in the life of a lawyer."

Virginia Rule 6.1 cmt. [1] then addresses the quantity of pro bono work Virginia lawyers should provide. In an unusual if not unique statement, Virginia Rule 6.1 cmt. [1] notes that the "Council for the Virginia State Bar urges all Virginia lawyers to contribute a minimum of two percent of their professional time annually to pro bono services."

It seems strange that Virginia Rule 6.1 cmt. [1] would not itself simply encourage lawyers' pro bono activity - rather than cite Virginia State Bar Council. Numerous Virginia Rule Comments encourage activity.

On a more linguistic level, the term “Council of the Virginia State Bar” (emphasis added) would seem more appropriate than “Council for the Virginia State Bar” (emphasis added).

Virginia Rule 6.1 cmt. [1]’s word “urges” confirms that Virginia lawyers’ pro bono goal is aspirational rather than mandatory.

The term “professional time” presumably is synonymous with the term “legal services” contained in black letter Virginia Rule 6.1(a) and in Virginia 6.1 cmt. [1]’s first sentence.

Virginia Rule 6.1 cmt. [1] concludes with a description of the type of legal representation that would satisfy this aspirational goal: “[p]ro bono legal services consist of any professional services for which the lawyer would ordinarily be compensated, including dispute resolution as a mediator or third party neutral” (emphasis added). This is an awkwardly-put sentence. Pro bono services obviously do not “consist of” any professional services for which the lawyer normally would be compensated. Lawyers might not expect to be compensated for representing family members, neighbors, religious organizations, etc. Many if not most of those would not constitute appropriate pro bono services. Only a certain subset of “professional services for which the lawyer would ordinarily be compensated” satisfies Virginia Rule 6.1’s aspirational pro bono standards.

Virginia Rule 6.1(a) (discussed above) describes (although not exhaustively) the type of legal services that constitute pro bono services.

Virginia Rule 6.1 cmt. [1]’s concluding sentence presumably means that lawyers may count toward their annual pro bono aspirational goal time in which they act as “a mediator or third party neutral” rather than as a lawyer in a representational role.

**ABA Model Rule 6.1 cmt. [1]** addresses lawyers’ general pro bono aspirational goal, and the ABA’s approach to that goal.

ABA Model Rule 6.1 cmt. [1] begins by using the same language as contained in Virginia Rule 6.1 cmt. [1] – stating that lawyers have “a responsibility to provide legal services to those unable to pay,” and noting that lawyers providing such services find that doing so “can be one of the most rewarding experiences in the life of a lawyer.”

ABA Model Rule 6.1 cmt. [1] next notes that the ABA “urges all lawyers” to provide a minimum of 50 pro bono hours annually. ABA Model Rule 6.1 cmt. [1] then explains that states may “decide to choose a higher or lower number of hours of annual service,” which “may be expressed as a percentage of a lawyer’s professional time.” That is the approach Virginia Rule 6.1(a) adopts. As explained above, Virginia Rule 6.1(a) sets Virginia lawyers’ pro bono aspirational goal as two percent of the lawyer’s annual professional time.

In contrast to Virginia Rule 6.1 cmt. [1], ABA Model Rule 6.1 cmt. [1] explains that lawyers may or may not meet ABA Model Rule 6.1’s aspirational goal of pro bono hours each year, although the aspirational number of hours of annual pro bono service represents an annual “average” that lawyers should render “during the course of his or her legal career.”

ABA Model Rule 6.1 cmt. [1] concludes with an explanation that the aspirational number of pro bono hours per year “can be performed in civil matters or in criminal or

quasi-criminal matters” for which the government is not required to provide funds – providing as an example “post-conviction death penalty appeal cases.”

### **Virginia Rule 6.1 Comment [2]**

Virginia Rule 6.1 cmt. [2] addresses the definition of “[p]ro bono service in poverty law.”

Virginia Rule 6.1 cmt. [2] begins by explaining that such pro bono “poverty law” services “consist of free or nominal fee” legal services for persons “who do not have the financial resources to compensate a lawyer” (emphasis added). That seems like a strange definition. The term “poverty law” would seem to define a type of substantive law – not legal services provided to individuals suffering in poverty. That would seem to be the meaning of Virginia Rule 6.1(a)’s reference to “poverty law” – included in Virginia Rule 6.1(a)’s list “poverty law, civil rights law, public interest law.”

In any event, Virginia Rule 6.1 cmt. [2]’s reference to and discussion of “poverty law” focuses on the first of black letter Virginia Rule 6.1(a)’s list of legal services.

Virginia 6.1 cmt. [2] identifies lawyers’ participation in “legal aid referral programs” as “typical examples of ‘poverty law.’”

Virginia Rule 6.1cmt [2] concludes with an explanation that as long as lawyers establish in advance the “free or nominal fee” nature of their legal services, they may also satisfy this “poverty law” characterization by providing legal services “for persons whose incomes exceed legal aid guidelines, but who nevertheless have insufficient resources to compensate counsel.” As explained below, that concept also appears in ABA Model Rule

cmt. [3], which describes clients “whose incomes and financial resources are slightly above the [legal services] guidelines.”

Virginia Rule 6.1 cmt. [2] contains the trifecta of words used to describe the same person. Virginia Rule 6.1 cmt. [2]’s first sentence ends with the word “lawyer.” Virginia Rule 6.1 cmt. [2]’s second sentence contains the word “attorneys.” Virginia Rule 6.1 cmt. [2]’s third sentence contains the word “counsel.” Although presumably those three words are intended to be synonymous, it would make more sense linguistically to use the same word when referring to the same person.

**ABA Model Rule 6.1 cmt. [2]** addresses the type of services that would meet black letter ABA Model Rule 6.1(a)’s statement that lawyers should “provide a substantial majority” of their 50 hours of aspirational yearly pro bono goal to persons of “limited means” or organizations which “address the needs of persons of limited means.”

ABA Model Rule 6.1 cmt. [2] begins by explaining that black letter ABA Model Rule 6.1(b)’s “substantial majority” recommendation rests on the recognition of a “critical need for legal services that exists among persons of limited means.”

ABA Model Rule 6.1 cmt. [2] next notes that “[l]egal services under ABA Model Rule 6.1(a)(1) and (2) “consist of a full range of activities.” ABA Model Rule 6.1 cmt. [2] provides examples: (1) “individual and class representation;” (2) “the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means.”

Significantly, these acceptable types of pro bono services do not necessarily involve lawyers representing clients. The activities can also include lawyers engaging in non-representational roles. Interestingly, these type of activities likewise do not

necessarily involve “legal services rendered...to the disadvantaged.” Thus it presumably would have been better for ABA Model Rule 6.1 cmt. [2]’s first sentence to contain the phrase “to or for the benefit of the disadvantaged” (emphasis added).

ABA Model Rule 6.1 cmt. [2] concludes with the explanation that such a wide “variety of these activities” that would satisfy this pro bono responsibility “should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.”

As described below, Virginia Rule 6.1 cmt. [9] similarly describes government lawyers’ prohibitions in some circumstances from “engaging in any outside practice.” Virginia 6.1 cmt. [9] points to such a restriction as a justification for allowing those government lawyers to satisfy their pro bono responsibility through financial contributions. This contrasts with ABA Model Rule 6.1 cmt. [2]’s explanation that there are non-representational possibilities that government lawyers could undertake to satisfy their pro bono goals. In other words, ABA Model Rule 6.1 cmt. [2] indicates that government lawyers and other lawyers incapable of representing individuals can provide other services to certain specified organizations, while Virginia Rule 6.1 cmt. [9] suggest that those lawyers provide financial support to such specified organizations.

### **Virginia Rule 6.1 Comment [3]**

Virginia Rule 6.1 cmt. [3] addresses the type of services that constitute “civil rights law,” which is mentioned in Virginia Rule 6.1(a) as an acceptable type of legal service that Virginia lawyers may perform to satisfy their aspirational Virginia pro bono goal.

Virginia Rule 6.1 cmt. [3] describes those services as “free or nominal fee professional services to assert or protect rights of individuals in which society has an interest.” The description of rights or individuals “in which society has an interest” is intriguing. One would think that “society has an interest” in all individuals’ rights.

Virginia Rule 6.1 cmt. [3] then provides examples: “[p]rofessional services for victims of discrimination based on race, sex, age or handicap.” This list of discrimination victims is smaller than the commonly used current list – which now includes (among others) sexual orientation, gender identity, etc. For instance, ABA Model Rule 8.4(g) contains the following lengthier list: “race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status.”

Virginia Rule Comment 6.1 cmt. [3] concludes with a condition for considering whether those representations constitute pro bono legal services: “provided the free or nominal fee nature of any such legal work is established in advance.” Presumably this means that lawyers cannot count their hours working on such matters toward the aspirational two percent goal per year lawyers undertook such services without such advance understanding about the absence of a fee – but instead decided along the way or even toward the end of providing such services not to charge for them, or to charge a “nominal fee” for their services.

This limitation does not make much sense – as explained below in this document’s discussion of Virginia Rule 6.1 cmt. [6] and ABA Model Rule 6.1 cmt. [4].

Perhaps it is designed to prevent lawyers from “banking” hours as pro bono hours they spend on losing cases. Virginia Rule 6.1 cmt. [6] (discussed below) explicitly addresses this issue.

**ABA Model Rule 6.1** does not contain a similar detailed definition of “civil rights law,” although black letter ABA Model Rule 6.1(b)(1) mentions as a pro bono possibility lawyers providing pro bono services to “civil rights” and “civil liberties” organizations.

### **ABA Model Rule 6.1 Comment [3]**

Virginia did not adopt ABA Model Rule 6.1 cmt. [3].

ABA Model Rule 6.1 cmt. [3] addresses the meaning of the term “persons of limited means” that appears in ABA Model Rule 6.1(a)(1) and (2), and the types of services that can satisfy lawyers’ pro bono aspirational goals under ABA Model Rule 6.1(a) and (2).

ABA Model Rule 6.1 cmt. [3] begins by defining “[p]ersons eligible for legal services” under black letter ABA Rule 6.1(a)(1) and (2) (to whom ABA Model Rule 6.1(a) explains lawyers should “provide a substantial majority” of their 50 hour annual pro bono goal): (1) “those who qualify for participation in programs funded by the Legal Services Corporation,” and (2) “those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless, cannot afford counsel.” The comma seems to be in the wrong spot – it would seem to belong after the word “programs.” As discussed above, Virginia Rule 6.1 cmt. [2] describes legal services provided to such person as “poverty law” – which would satisfy Virginia lawyers’ pro bono aspirational goal.

ABA Model Rule 6.1 cmt. [3] next turns to a different topic - the type of legal services that presumably meet the definition in ABA Model Rule 6.1(a)(2). Those legal services are those included in the services lawyers can provide to satisfy their pro bono aspirational goal, as long as they are provided to the specified institutions “in matters that are designed primarily to address the needs of persons of limited means.” ABA Model Rule 6.1 cmt. [3] provides examples: (1) “homeless shelters;” (2) “battered women’s centers;” (3) “food pantries that serve those of limited means.”

ABA Model Rule 6.1 cmt. [3] concludes by explaining that the term “governmental organizations” included in black letter ABA Model Rule 6.1(a)(2)’s list of acceptable legal services clients include two types of entities: (1) “public protection programs,” (2) “sections of governmental or public sector agencies.” It is unclear what the phrase “sections of governmental or public sector agencies” means. Unfortunately, those terms add to the confusing compilation of undefined “entity” terms. For instance, ABA Model Rule 1.13 cmt. [9] contains the following undefined terms: “agency;” “branch;” “bureau;” “department.”

Virginia Rule 6.1 cmt. [4] (addressed below) mentions some of those entities as examples of the type of clients lawyers may represent in “public interest law” to satisfy their pro bono aspirational goal.

#### **Virginia Rule 6.1 Comment [4]**

Virginia Rule 6.1 cmt. [4] addresses what Virginia Rule 6.1(a) labels “public interest law” – which is included in Virginia Rule 6.1(a)’s list of acceptable pro bono services recipients of lawyers’ “[f]ree or nominal fee provision of legal services.”

Virginia Rule 6.1 cmt. [4] identifies several examples of such “public interest law:” “free or nominal fee legal services...to religious, charitable or civic groups in efforts such as setting up a shelter for the homeless, operating a hotline for battered spouses or providing public service information.”

### **Virginia Rule 6.1 Comment [5]**

Virginia Rule 6.1 cmt. [5] addresses the meaning of a term in black letter Virginia Rule 6.1(a): “volunteer activities designed to increase the availability of pro bono legal services.”

Virginia Rule 6.1 cmt. [5] provides two “examples” of such activities: (1) “[t]raining and mentoring lawyers who have volunteered to take legal aid referrals;” (2) “helping recruit lawyers for pro bono referral programs.” The word “examples” highlights the possibility that other activities would satisfy that standard.

ABA Model Rule 6.1 cmt. [2] (discussed above) similarly describes as acceptable pro bono service lawyers’ “provision of free training or mentoring to those who represent persons of limited means.”

### **ABA Model Rule 6.1 Comment [5]**

Virginia did not adopt ABA Model Rule 6.1 cmt. [5].

ABA Model Rule 6.1 cmt. [5] addresses ABA Model Rule 6.1’s two-tier pro bono aspirational goal.

As explained above, under ABA Model Rule 6.1(a) lawyers should “provide a substantial majority” of their suggested 50 hour yearly pro bono service either directly to

“persons of limited means” (ABA Model Rule 6.1(a)(i)) or to certain named institutions “in matters designed primarily to address the needs of persons of limited means” (ABA Model Rule 6.1(a)(2)).

ABA Model Rule 6.1 cmt. [5] begins by explaining that “to the extent that any hours of service remain unfulfilled” under the 50 hour recommended yearly amount after those hours spent under ABA Model Rule 6.1(a), the “remaining commitment can be met in a variety of ways” – which are listed in ABA Model Rule 6.1(b) (emphasis added).

As explained above, ABA Model Rule 6.1 uses the terms “additional” and “addition” in potentially confusing ways. First, under ABA Model Rule 1.6(a), lawyers should “provide a substantial majority” of their 50 annual pro bono hours described in ABA Model Rule 6.1(a)(1) and (2). The remaining hours should be spent as described in ABA Model Rule 6.1(b)(1)-(3). Those are not “additional services” – they instead are ways that lawyers can spend whatever of their 50 aspirational pro bono annual hours are not spent under ABA Model Rule 6.1(a)(1) - (2). Second, “[i]n addition” to those 50 hours that lawyers should aspire to spend, lawyers should contribute financially as specified in ABA Model Rule 6.1’s last sentence.

ABA Model Rule 6.1 cmt. [5] next similarly notes that some public “government and public sector lawyers and judges” may face “[c]onstitutional, statutory or regulatory restrictions” that “may prohibit or impede” them “from performing the pro bono services outlined in [ABA Model Rule 6.1] paragraphs (a)(1) and (2).” Not surprisingly, permanent government-employed lawyers generally cannot represent non–government clients.

ABA Model Rule 6.1 cmt. [5] concludes by explaining that such lawyers and judges “may” in those circumstances (“where those restrictions apply”) “fulfill their pro bono responsibility by performing services outlined in [ABA Model Rule 6.1] paragraph (b).”

Unfortunately, ABA Model Rule 6.1 cmt. [5] does not distinguish between the very different ABA Model Rule 6.1(b) paragraphs.

ABA Model Rule 6.1(b)(1) and (2) describe the delivery of legal services to individuals or institutions. That sort of activity presumably would face the same “[c]onstitutional, statutory or regulatory restrictions” on such government lawyers and judges as those in ABA Model Rule 6.1(a). So presumably such “acceptable services would exclusively involve those described in ABA Model Rule 6.1(b)(3) – non-representational “participation in activities for improving the law, the legal system or the legal profession.”

Virginia Rule 6.1 does not contain such a two-tiered pro bono system, and therefore does not address this concept.

### **Virginia Rule 6.1 Comment [6]**

Virginia Rule 6.1 cmt. [6] addresses what type of services do not satisfy Virginia’s pro bono aspirational goal because they are not from the start intended to be free or provided at below the lawyer’s normal rate.

Virginia Rule 6.1 cmt. [6] begins by explaining that any services described in Virginia Rule 6.1 but “provided on a contingent fee basis” do not constitute pro bono service – emphasizing that “the intent of the lawyer to render free or nominal fee legal services is essential.”

Virginia Rule 6.1 cmt. [6] concludes by likewise noting that “services for which fees go uncollected would not qualify” for Virginia lawyers’ aspirational two percent yearly pro bono goal. This is consistent with the condition of pre-representation “in advance” arrangement of free or nominal fee “poverty law” services described in Virginia Rule 6.1 cmt. [2] and “civil rights law” services described in Virginia Rule 6.1 cmt. [3].

This exclusion in some ways does not seem appropriate. For example, a lawyer might take on a contingent fee representation under Virginia 1.5(c) for a disadvantaged client who cannot afford to pay anything, or at least cannot afford the lawyer’s normal rate. A contingent fee arrangement would allow such a representation without the client having to pay anything unless the representation is successful. There may be very little chance of winning such a suit, so the lawyer in many ways would not be expecting to recover a fee. And perhaps even the lawyer might intend to contribute any contingent fee to some worthy Virginia Rule 6.1(c) - approved cause. One would think that such an arrangement should satisfy Virginia Rule 6.1’s aspirational pro bono goal.

Similarly, a lawyer’s client might fall on hard times during a representation. So what started as a fee-based representation might morph into a legitimate pro bono undertaking when the lawyer abandons any insistence on being paid – given the client’s change of circumstances. Thus, Virginia Rule 6.1 cmt. [6]’s per se standard seem inappropriate in some circumstances – as with other provisions, such as that in Virginia Rule 6.1 cmt. [2] and [3]’s requirements that “the free or nominal fee nature of any such legal work [must be] established in advance.”

**ABA Model Rule 6.1 cmt. [4]** addresses the requirement that lawyers' intent to provide the specified services "without fee or expectation of fee" in order for those services to satisfy ABA Model Rule 6.1(a)(1) and (2).

ABA Model Rule 6.1 cmt. [4] begins by explaining that "[b]ecause [pro bono] service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of [ABA Model Rule 6.1] (a)(1) and (2)."

ABA Model Rule 6.1 cmt.[4] next explains that "if an anticipated fee is uncollected," the lawyers' services in the matter "cannot be considered pro bono." Thus, a lawyer, who anticipates a fee for a representation but does not ultimately collect that fee cannot retroactively turn those hours into ABA Model 6.1 - approved pro bono hours.

ABA Model Rule 6.1 cmt. [4] then provides an exception for lawyers' inability to count toward their pro bono goal hours spent in a representation. ABA Model Rule 6.1 cmt. [4] explains that "the award of statutory attorneys' fees in a case originally accepted as pro bono" can be included in satisfying such lawyers' pro bono aspirational goal.

ABA Model Rule 6.1 cmt. [4] concludes with an encouragement to lawyers who receive such statutory attorneys' fees "to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means."

### **ABA Model Rule 6.1 cmt. [6]**

Virginia did not adopt ABA Model 6.1 cmt. [6].

ABA Model Rule 6.1 cmt. [6] addresses the type of pro bono services identified in ABA Model Rule 6.1(b)(1). Significantly, those services are not focused on representing “personal of limited means.”

ABA Model Rule 6.1(b)(1) identifies “certain types of legal services” lawyers can provide “to those whose incomes and financial resources place them above limited means.” ABA Model Rule 6.1 cmt. [6] also “permits” lawyers engaging in pro bono services “to accept a substantially reduced fee for services.” ABA Model Rule 6.1 cmt. [6] then provides examples: (1) “First Amendment claims;” (2) “Title VII claims; (3) “environmental protection claims.”

ABA Model Rule 6.1 cmt. [6] concludes with an explanation that the type of organizations lawyers may represent under ABA Model Rule 6.1(b)(1) to help satisfy their pro bono aspirational goal include “a wide range of organizations” – including “social service, medical research, cultural and religious groups.”

### **Virginia Rule 6.1 Comment [7]**

Virginia Rule 6.1 cmt. [7] addresses the possibility that lawyers may satisfy their aspirational pro bono goals collectively.

Virginia Rule 6.1 cmt. [7] begins by confirming that “every lawyer has an individual responsibility to provide pro bono services.”

Virginia Rule 6.1 cmt. [7] next acknowledges that “some legal matters” require more than just an individual lawyer’s “effort and resources.” Virginia Rule 6.1 cmt. [7] then explains that “a group of two or more lawyers may pool their resources” to provide

such “needed legal services” to persons “who would otherwise be unable to afford to compensate counsel.”

This collective type of pro bono service seems appropriate, but limiting this process to “individuals...who would otherwise be unable to afford to compensate counsel” seems too narrow. Under Virginia Rule 6.1(a), lawyers may satisfy their pro bono aspirational goal by providing services to the institutions identified in Virginia Rule 6.1 cmt. [4] – which might be able to afford the lawyer but to whom the lawyer provides free or “nominal fee” services. The same is true of the non-representational activities recognized in Virginia Rule 6.1 cmt. [5] as appropriate to meet Virginia lawyers’ pro bono goals. There would seem to be no reason why lawyers could not similarly engage in such activities collectively – even though those services would not be provided to “individuals...who would otherwise be unable to afford to compensate counsel.”

Virginia Rule 6.1 cmt. [7] concludes with the explanation that lawyers within a “firm or group” may be able to satisfy their Virginia aspirational pro bono goal by “designat[ing]... one or more lawyers to work on pro bono publico matters,” if the designating lawyers “support the representation” of the designated lawyers. In other words, the designated pro bono lawyers’ hours “may be attributed” to those other lawyers who do not actually perform pro bono work themselves, but who support the designated lawyers’ representation. Such designated lawyers presumably could provide the type of acceptable pro bono services described in Virginia Rule 6.1 cmt. [3], [4] and [5]. That type of pro bono service would seem to be acceptable, even if it was not provided to “individuals...who would otherwise be unable to afford to compensation counsel.”

ABA Model Rule 6.1 cmt. [9] briefly mentions a similar concept of collective action, without the attribution concept. ABA Model Rule 6.1 cmt. [9] explains that “at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm’s aggregate pro bono activities.” ABA Model Rule 6.1 cmt. [9] does not provide any further guidance.

### **ABA Model Rule 6.1 cmt. [7]**

Virginia did not adopt ABA Model Rule 6.1 cmt. [7].

ABA Model Rule 6.1 cmt. [7] addresses lawyers’ charging a “modest fee” for services provided to “persons of limited means” under ABA Model Rule 6.1(b)(2).

This type of pro bono work is acceptable if it fills up the remainder of the 50 annual hour aspirational goal that is not provided in the ways described in ABA Model Rule 6.1(a)(1) and (2).

ABA Model Rule 6.1 cmt. [7] explains that ABA Model Rule 6.1(b)(2) encourages “[p]articipation in judicare programs and acceptance of court appointments in which the fee is substantially below a lawyer’s usual rate.”

Virginia Rule 6.1 cmt. [2] and [3] describes lawyers charging a “nominal fee” for “poverty law” and “civil rights law” services, which would satisfy Virginia’s aspirational pro bono goal. In addition, Virginia Rule 6.1 cmt. [9] mentions lawyers’ provision of “nominally priced legal services to those unable to pay.”

### **ABA Model Rule 6.1 Comment [8]**

Virginia did not adopt ABA Model Rule 6.1 cmt. [8].

ABA Model Rule 6.1 cmt. [8] addresses black letter ABA Model Rule 6.1(b)(3)'s mention of "activities for improving the law, the legal system or the legal profession" as permissible pro bono work (for the hours not spent satisfying ABA Model Rule 6.1(a)'s focus on serving "persons of limited means" or organizations focusing on such persons' needs).

ABA Model Rule 6.1 cmt. [8] provides several examples of such permissible activities that would satisfy lawyers' ABA Model Rule pro bono aspirational goals (presumably if they constitute less than "a substantial majority" of the recommended 50 hour annual goal): (1) "[s]erving on bar association committees;" (2) "serving on boards of pro bono or legal services programs;" (3) "taking part in Law Day activities;" (4) "acting as a continuing legal education instructor;" (5) acting as "a mediator or an arbitrator;" (6) "engaging in legislative lobbying." These activities are acceptable as ways to satisfy lawyers' 50 annual pro bono aspirational goal - as long as they are intended to "improve the law, the legal system or the legal profession."

ABA Model Rule 6.1 cmt. [8] concludes by noting that the listed activities "are a few examples of the many activities that fall within this paragraph" – referring to lawyers' activities under black letter ABA Model Rule 6.1(b)(3).

### **Virginia Rule 6.1 Comment [9]**

Virginia Rule 6.1 cmt. [9] addresses the rationale for Virginia Rule 6.1 (c)'s statement that lawyers may satisfy their pro bono aspirational goal financially rather than through legal services.

Virginia Rule 6.1 cmt. [9] begins with a declaration that seems to describe a requirement rather than an aspiration – noting that “[t]he provision of free or nominally priced legal services to those unable to pay continues to be the obligation of each lawyer as well as the profession generally” (emphasis added). Although Virginia Rule 6.1 cmt. [9] uses the word “obligation,” it clearly does not mean that Virginia Rule 6.1 requires pro bono services. Virginia Rule 6.1’s title contains the word “[v]oluntary,” and Virginia Rule 6.1(a) explicitly uses the word “should” when describing Virginia lawyers’ pro bono services. Presumably Virginia 6.1 cmt. [9]’s word “obligation” refers to some moral rather than disciplinary-based obligation.

Virginia Rule 6.1 cmt. [9] next notes that despite individual lawyers’ and the profession’s “obligation,” “the efforts of individual lawyers are often not enough to meet the need.” It is unclear what this means – it sounds like a substitution for allowing collective action (which is allowed under Virginia Rule 6.1 cmt. [9]). But Virginia Rule 6.1 cmt. [9] then states that “these needs far exceed the capacity of the collective bar.” That recognition is undoubtedly correct, but it is unclear how that affects Virginia Rule 6.1’s discussion of pro bono services.

Virginia Rule 6.1 cmt. [9]’s then raises a completely different issue: “the nature of legal practice for many lawyers places constraints on their ability to render pro bono publico legal services.” That is also undeniably true, but really does not cast any light on individual lawyers’ or “the collective bar’s” inability to meet all pro bono legal needs. Virginia Rule 6.1 cmt. [9] provides examples: “some government lawyers” – who “are prohibited by the terms of their employment from engaging in any outside practice.”

Virginia Rule 6.1 cmt. [9] concludes by mentioning that “other lawyers lack the experience and access to resources necessary to provide competent legal assistance.”

All in all, Virginia Rule 6.1 cmt. [9] explains why Virginia lawyers individually and collectively may not be able to satisfy the required needs of persons unable to afford legal services. Standing on its own, Virginia Rule 6.1 cmt. [9] does not provide any guidance to lawyers – it instead seems to justify the alternative of lawyer’s financial contributions, which are the subject of the next Virginia Rule Comment (Virginia Rule 6.1 cmt. [10]).

Interestingly, ABA Model Rule 6.1 cmt. [5] indicates that lawyers unable to perform what could be described as traditional pro bono work can satisfy their aspirational pro bono goal in performing other described services, rather than through financial contributions. This contrasts with Virginia Rule 6.1 cmt. [9]’s suggestion that such lawyers (such as government lawyers) instead must satisfy their aspirational pro bono goal through financial contributions instead of through services.

### **Virginia Rule 6.1 Comment [10]**

Virginia Rule 6.1 cmt. [10] addresses lawyers’ financial contributions as an alternative means for fulfilling their pro bono aspirational goal.

Virginia Rule 6.1 cmt. [10] begins by noting that “the legal profession and government have established additional programs” to provide pro bono services “beyond those available through the pro bono efforts of individual lawyers.” Virginia Rule 6.1 cmt. [10] does not identify any of those programs.

The reference to legal services “beyond those available through the pro bono efforts of individual lawyers” (emphasis added) is somewhat inapt here, because Virginia

Rule 6.1(b) and Virginia Rule 6.1 cmt. [7] acknowledge and explicitly describe lawyers' acceptable collective pro bono efforts.

Virginia Rule 6.1 cmt. [10] next turns to an alternative for “[l]awyers who are unable to fulfill their pro bono publico obligation through direct, [sic] legal representation.” This is also an ill-suited identity of lawyers whom presumably the Virginia Rule Comment meant to identify as unable to fulfill their pro bono aspirational goal.

Virginia Rule 6.1 cmt. [10]'s justification for allowing lawyers to satisfy their aspirational pro bono goals financially seems odd. In essence, Virginia Rule 6.1 cmt. [10] justifies such an alternative because some lawyers could not directly represent such clients, and there are no other alternatives for them to help with pro bono efforts. That justification seems unsupported.

Virginia Rule 6.1 cmt. [10] explains that such lawyers “should support programs that provide legal services for the purposes described in [Virginia Rule 6.1](a) through financial contributions in proportion to their professional income.” Presumably those “programs” are the ones Virginia Rule 6.1 cmt. [10] mentions but does not identify.

Although not specifically quantified in Virginia Rule 6.1 cmt. [10], presumably such “financial contribution” would match the aspirational pro bono time goal described in Virginia Rule 6.1(a) – at least two percent per year of the lawyer's professional time.

Other Virginia Rule 6.1 provisions describe alternatives.

Virginia Rule 6.1(a) describes permissible non-representational activities – “designed to increase the availability of pro bono legal services.” Virginia Rule 6.1 cmt. [5] describes other non-representational activities that would satisfy lawyers' aspirational pro bono goals. So even lawyers who are “unable to fulfill their pro bono publico

obligations through direct, [sic] legal representation” have many other options – not involving financial contributions.

**ABA Model Rule 6.1 cmt. [9]** also addresses circumstances in which lawyers may satisfy their pro bono goal financially.

ABA Model Rule 6.1 cmt. [9] begins by describing pro bono representation as a “professional responsibility” that involves “the individual ethical commitment of each lawyer.”

As explained above, ABA Model Rule 6.1 does not require pro bono services as a disciplinary matter. Any “professional responsibility” would be a moral one. ABA Model Rule 6.1 cmt. [12] (discussed below) explicitly indicates that [t]he responsibility set forth in this [ABA Model Rule 6.1] is not intended to be enforced through disciplinary process.”

ABA Model Rule 6.1 cmt. [9] next acknowledges that “there may be times when it is not feasible for a lawyer to engage in pro bono services” (emphasis added). The phrase “may be times” seems inapt. It has a temporal implication that presumably is not intended – implying that lawyers may at times be able to fulfill their aspirational pro bono goal and at other times might not be able to do so. ABA Model Rule 6.1 cmt. [9]’s intended meaning does not seem time-based, but rather based on the lawyer’s type of practice. The phrase “there may be situations” or “there may be circumstances” would seem to be more appropriate.

ABA Model Rule 6.1 cmt. [9] then explains that in those situations lawyers may “discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means” (emphasis added). Interestingly, on its face this would not allow lawyers to satisfy their pro bono aspirational

goal by financially supporting organizations that provide reduced-fee rather than “free” legal services.

ABA Model Rule 6.1 cmt. [9] explains that “[s]uch financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided.” ABA Model Rule 6.1 explains that lawyers “should aspire to render at least (50) hours of pro bono publico legal services per year.” Presumably ABA Model Rule 6.1 cmt. [9]’s reference to alternative “financial support” would match the lawyer’s billable rate times the number of hours referenced in ABA Model Rule 6.1.

ABA Model Rule 6.1 cmt. [9] concludes by turning to another alternative to lawyers’ providing their own pro bono services. ABA Model Rule 6.1 cmt. [9] explains that “at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm’s aggregate pro bono activities.” This brief mention could be enormously significant, but ABA Model Rule 6.1 cmt. [9] does not provide any guidance.

Although ABA Model Rule 6.1 cmt. [9]’s concluding sentence does not explicitly explain that such collective compliance with ABA Model Rule 6.1’s aspirational goal would involve financial contributions, ABA Model Rule 6.1 cmt. [9]’s second sentence describes a scenario in which “it is not feasible for lawyers to engage in pro bono services,” and ABA Model Rule 6.1 cmt. [9]’s third and fourth sentence focuses on financial contributions. So it presumably is safe to assume that ABA Model Rule 6.1 cmt. [9]’s concluding sentence intends to describe lawyers’ collective financial contributions meant to satisfy their pro bono goals.

### **ABA Model Rule 6.1 Comment [11]**

Virginia did not adopt ABA Model Rule 6.1 cmt. [11].

ABA Model Rule 6.1 cmt. [11] states that law firms “should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this [ABA Model] Rule [6.1].”

Virginia Rule 6.1 cmt. [7] addresses lawyers’ ability to act collectively to satisfy their pro bono aspirational goal. Virginia Rule 6.1 cmt. [7] also mentions the possibility that lawyers not themselves engaged in the specified pro bono activities may nevertheless satisfy their responsibility because pro bono hours will be attributed to them that are instead served by one or more lawyers within the “firm or group” designated “to work on pro bono publico matters.”

#### **ABA Model Rule 6.1 Comment [12]**

Virginia did not adopt ABA Model Rule 6.1 cmt. [12].

ABA Model Rule 6.1 cmt. [12] assures that the lawyers’ “responsibility” to provide pro bono services described in ABA Model Rule 6.1 “is not intended to be enforced through disciplinary process.” That explanation confirms that lawyers’ pro bono “responsibility” is not mandatory in the same fashion as other ABA Model Rules – the failure of which to follow can be punished professionally.

# RULE 6.2

## Accepting Appointments

### Rule

#### Virginia Rule 6.2

Virginia Rule 6.2 addresses lawyers' acceptance of, or avoidance of, court-appointed representations.

Virginia Rule 6.2 indicates that lawyers “should not seek to avoid appointment by a tribunal to represent a person except for good cause.”

Significantly, Virginia Rule 6.2 uses the phrase “should not seek to avoid appointment.” In other words, the Virginia Rule prohibits lawyers from attempting to evade (absent “good cause”) a court appointment – presumably even if a lawyer eventually accepts the appointment. However, it seems unlikely that the Bar would punish a lawyer for resisting appointment if the lawyer eventually relents and accepts the appointment.

Virginia Rule 6.2 then offers three examples of such good cause. Virginia Rule 6.2 introduces the three examples with the phrase “such as,” thus making it clear that other examples might also justify lawyers' “seek[ing] to avoid appointment by a tribunal to represent a person.”

The three examples of “good cause” (addressed below) are a subset of a lengthier list of circumstances preventing lawyers from representing a client, requiring lawyers to

withdraw from representing a client, or allowing lawyers to withdraw from representing a client under Virginia Rule 1.16. The overlap is addressed below.

**ABA Model Rule 6.2** contains the identical language.

### **Virginia Rule 6.2(a)**

Virginia Rule 6.2(a) describes the first example of “good cause” that allows a lawyer to seek avoidance of appointment by a tribunal to represent a person: “representing the client is likely to result in” violating the ethics rules “or other law.”

This standard essentially mirrors Virginia Rule 1.16(a)(1)’s prohibition on lawyers representing a client (and its parallel requirement that lawyers withdraw from the representation of a client) if the representation “will result in violation of the Rules of Professional Conduct or other law.” Virginia Rule 6.2(a) uses the less definite introductory word “likely.” This mismatch is not surprising. Under Virginia Rule 1.16(a)(1), lawyers may not undertake a representation if it “will result” in the specified violation. Virginia Rule 6.2(a) permits lawyers to “seek to avoid” accepting the appointed representation – if the representation “is likely to” (rather than “will”) result in the specified violation.

**ABA Model Rule 6.2(a)** contains the identical language. ABA Model Rule 1.16(a)(1) contains the identical language as Virginia Rule 1.16(a)(1).

### **Virginia Rule 6.2(b)**

Virginia Rule 6.2(b) describes the second example of “good cause” that allows a lawyer to “seek avoidance of appointment by a tribunal to represent a person”: “representing the client is likely to result in an unreasonable financial burden on the lawyer.” This standard somewhat parallels Virginia Rule 1.16(b)(5), which allows (but

does not require) lawyers to withdraw from a representation if “the representation will result in an unreasonable financial burden on the lawyer.” Thus, as with the first exception, Virginia Rule 6.2(b) allows lawyers to “seek” to avoid appointment” if the unreasonable financial burden is “likely” – but not certain.

**ABA Model Rule 6.2(b)** contains the identical language. ABA Model Rule 1.16(b)(6) contains the same “will result in an unreasonable financial burden on the lawyer” standard as Virginia Rule 1.16(b)(5).

### **Virginia Rule 6.2(c)**

Virginia Rule 6.2(c) describes the third example of “good cause” that allows a lawyer to “seek avoidance of appointment by a tribunal to represent a person”: “the client or the [client’s] cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer’s ability to represent the client.”

This third example contains two concepts that appear elsewhere in the Virginia Rules.

First, the Virginia Rules deal with the “repugnant” standard in several places. Under Virginia Rule 1.2 cmt. [6], lawyers holding themselves out as available to represent a client, or after undertaking a representation, “may exclude specific objectives or means that the lawyer regards as repugnant or imprudent.” Thus, under Virginia Rule 1.2 cmt. [6], lawyers may agree to undertake a representation only if the client consents to exclude “objectives or means” that the lawyer considers “repugnant.” That focus on “objectives and means” is process-focused. But it is similar to Virginia Rule 6.2(c)’s reference to lawyers’ ability to “seek to avoid appointment” if “the client or the cause is ... repugnant.” As explained below, repugnancy is not sufficient under Virginia Rule 6.2(c)

– but it begins the assessment. ABA Model Rule 1.2 cmt. [6] contains the same concept, but focuses on action, not “objectives or means:” “may exclude actions . . . that the lawyer regards as repugnant or imprudent.”

Second, Virginia Rule 6.2(c) also implicates provisions of Virginia Rule 1.16. Virginia Rule 1.16(b)(3) allows (but does not require) lawyers’ withdrawal if the client “insists upon pursuing an objective that the lawyer considers repugnant or imprudent.”

ABA Model Rule 1.16(b)(4) contains essentially the same provision, although that ABA Model Rule provision uses the term “repugnant or with which the lawyer has a fundamental disagreement” (in contrast to the Virginia Rule 1.16(b)(3)’s phrase “repugnant or imprudent”).

Those Virginia Rules’ other “repugnant” references to representations’ “objectives” or “means” are different from (but similar to) Virginia Rule 6.2(c)’s reference to a repugnant “client” or “cause.” Virginia Rule 6.2(c) presents a threshold issue rather than focusing on representations’ objectives or actions (“means”) taken during representations. But the concept is similar. Presumably, Virginia Rule 1.2 cmt. [6] and Virginia Rule 1.16(d)(3) applies to lawyers’ acceptance of court-appointed representations and their conduct during such representations. In other words, lawyers representing court-appointed clients still look to those other rules when deciding what objectives to pursue and what actions to take during such court-appointed representations. Of course, lawyers relying on the Virginia Rule 1.16(d)(3) permissive withdrawal provision would have to convince the court that appointed her to later allow her withdrawal.

Significantly, Virginia Rule 6.2(c) does not permit lawyers to “seek to avoid appointment” merely because they find “the client or the cause . . . repugnant.” There is another requirement in Virginia Rule 6.2(c) before a lawyer may “seek to avoid appointment” if the lawyer believes that “the client or the cause is . . . repugnant.”

Under Virginia Rule 6.2(c), the lawyer must also establish that the client or the cause is “so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer’s ability to represent the client.” In other words, if the lawyer’s mere belief that her would-be court-appointed client or that client’s cause is “repugnant” would not free the lawyer to seek to avoid the court appointment. The lawyer must also believe that her feelings toward her client or the cause would affect the relationship or the representation.

This presumably parallels Virginia Rule 1.7(a)(2)’s so-called “material limitation” conflict – which recognizes a conflict of interest if “there is significant risk” that a representation “will be materially limited” by “a personal interest of the lawyer” (which presumably includes the lawyer’s belief that her client or the client’s cause is “repugnant”). To be sure, Virginia Rule 6.2(c) requires only that the lawyer seeking to avoid a court-appointed representation thinks that her feelings toward her would-be client or the client’s cause is “likely to impair” her relationship with the client or her “ability to represent the client.” This is a lesser burden of proof than the Virginia Rule 1.7(a)(2) recognition of a conflict if there is a “significant risk” that the representation “will be materially limited by . . . a personal interest of the lawyer.”

A Virginia Rule 1.7(a)(2) “material limitation” conflict may be cured by consent under Virginia Rule 1.7(b)(1) if each affected client consents after consultation and if the

lawyer “reasonably believes that [she] will be able to provide competent and diligent representation to each affected client.” But Virginia Rule 1.7 thus implicitly recognizes the possibility that an unconsentable conflict might exist if the lawyer will find that her representation of the client is “materially limited” by her “personal interest,” and does not believe that she can “provide competent and diligent to each affected client.”

**ABA Model Rule 6.2(c)** contains the identical language.

As explained above, the ABA Model Rules deal with the “repugnant” standard in at least two other places.

## Comment

### Virginia Rule 6.2 Comment [1]

Virginia Rule 6.2 cmt. [1] addresses the competing interests in the context of court-appointed representations.

Virginia Rule 6.2 cmt. [1] first explains that lawyers “ordinarily” are not obligated to accept clients “whose character or cause the lawyer regards as repugnant.” Presumably the term “character” is synonymous with the more general term “client” contained in black letter Virginia Rule 6.2(c).

Virginia Rule 6.2 cmt. [1] then notes that such “freedom to select clients” is “qualified.” The Virginia Rule Comment reminds lawyers that they all “have a responsibility to assist in providing pro bono public service” (referring to Virginia Rule 6.1’s pro bono provision), and that a lawyer “fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients.”

Virginia Rule 6.2 cmt. [1] concludes by recognizing that lawyers “might also be subject to appointment by a court” to serve such “unpopular clients or persons unable to afford legal services.”

But surprisingly, Virginia Rule 6.1 cmt. [1] does not also assure lawyers that representing unpopular clients or advancing unpopular causes does not constitute the lawyer’s endorsement of such clients or causes. Virginia Rule 1.2 cmt. [5] explains that “[l]egal representation should not be denied to people . . . whose cause is controversial or the subject of popular disapproval.” That Virginia Rule Comment then states that “a lawyer’s representation of a client, including representation by appointment, does not

constitute an endorsement of the client’s political, economic, social or moral views or activities.” One would have thought that the ethics rule dealing with court appointments would note this laudable Virginia Rule 1.2 Comment – or vice versa. And as much as lawyers rely on this principle to defend their representation of unpopular clients or advancements of unpopular causes, many in the public do not seem to agree. So lawyers telling other lawyers about this important principle has only a limited effect.

**ABA Model Rule 6.2 cmt. [1]** contains the identical language.

The ABA Model Rules also articulate the same significant concept contained in Virginia Rule 1.2 cmt. [5], discussed above. But the ABA Model Rules articulate that concept in black letter ABA Model Rule 1.2(b), not just in an ABA Model Rule Comment. ABA Model Rule 1.2(b) contains the same formulation as Virginia Rule 1.2 cmt. [5]: “[a] lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of the client’s political, economic, social or moral views or activities.” ABA Model Rule 1.2 cmt. [5] elaborates a bit on that principle – stating that “[l]egal representation should not be denied to people . . . whose cause is controversial or the subject of popular disapproval” – and that “representing a client does not constitute approval of the client’s views or activities.”

As with the similar Virginia Rule 1.2 cmt. [5], it is somewhat surprising that these ABA Model Rule provisions do not refer to the ABA Model Rule 6.2 court-appointment provision, or vice versa.

## **Virginia Rule 6.2 Comment [2]**

Virginia Rule 6.2 cmt. [2] addresses the “good cause” standard allowing lawyers to “seek to avoid” a court appointment to represent “a person who cannot afford to retain counsel or whose cause is unpopular.”

Virginia Rule 6.2 cmt. [2] inexplicably describes examples that really have nothing to do with financial issues or unpopular causes: (1) “if the lawyer could not handle the matter competently” (referring to Virginia Rule 1.1); (2) “if undertaking the representation would result in an improper conflict of interest.” Those examples presumably satisfy the Virginia Rule 6.2(a) standard allowing lawyers to seek to avoid appointment if the representation “is likely to result” in an ethics violation or violation of other law.

Interestingly, Virginia Rule 6.2 cmt. [2] next provides an example of a representation that “would result in an improper conflict of interest:” “when the client or the cause is so repugnant to the lawyer as to likely to impair the client-lawyer relationship or the lawyer’s ability to represent the client.” This essentially parrots the black letter Virginia Rule 6.2(c) standard and the language in Virginia Rule 6.2 cmt. [1]. It is odd that this “repugnant standard” appears in Virginia Rule 6.2(c), Rule 6.2 cmt. [1], and again in Virginia Rule 6.2 cmt. [2].

Also, Virginia Rule 6.2 cmt. [2]’s example of what it calls “an improper conflict of interest” seems incorrect. As explained above, Virginia Rule 1.7(a)(2) recognizes an impermissible (although often consentable) conflict if “there is a significant risk” that a representation “will be materially limited” by “a personal interest of the lawyer” (among other things). Under that standard, presumably there would not be “an improper conflict

of interest” if it is only “likely” (rather than there being “a significant risk”) that the lawyer’s representation will be “impair(ed)” (rather than “materially limited”).

Virginia Rule 6.2 cmt. [2] concludes with an additional example: “if acceptance [of the appointment] would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.” The “unjust” standard seems to be a much higher standard for the lawyer seeking to avoid an appointment than black letter Virginia Rule 6.2(b)’s “unreasonable financial burden” standard. But that scenario is introduced with the phrase “for example,” so presumably a lawyer may seek to avoid an appointment even if the “unreasonable financial burden” would not be fairly considered “to be unjust.”

**ABA Model Rule 6.2 cmt. [2]** contains the identical language.

Like Virginia Rule 6.2 cmt. [2], ABA Model Rule 6.2 cmt. [2]’s example of an “improper conflict of interest” seems incorrect. Like Virginia Rule 1.7(a)(2), ABA Model Rule 1.7(a)(2) recognizes what could be described as “an improper conflict of interest” (the term used in ABA Model Rule 6.2 cmt. [2]) only if: (1) there is a “significant risk” (not merely a “likely” result); that (2) the lawyer’s representation of the client “will be materially limited” (not just “impair[ed]”).

### **Virginia Rule 6.2 Comment [3]**

Virginia Rule 6.2 cmt. [3] confirms that appointed lawyers have “the same obligations to the client as retained counsel,” including “the obligations of loyalty and confidentiality.”

Virginia Rule 6.2 cmt. [3] concludes with another reminder – that appointed lawyers are “subject to the same limitations on the client-lawyer relationship” as retained counsel,

providing as an example “the obligation to refrain from assisting the client in violation of the [Virginia] Rules.”

This unsurprising recognition that lawyers have the same obligations to court-appointed clients as to other clients presumably confirms that lawyers have the same obligation or discretion to withdraw from such representations under the Virginia Rule 1.16 standards discussed above (if the tribunal agrees with the lawyers’ assessment).

Surprisingly, Virginia Rule 6.2 cmt. [3] does not refer to Virginia Rule 1.16 cmt. [5] – which deals with court-appointed clients discharging their lawyers. Virginia Rule 1.16 cmt. [5] begins by noting that “[w]hether a client can discharge appointed counsel may depend on applicable law.” That Virginia Rule Comment next warns that “[a] client seeking to do so [“discharge appointed counsel”] should be given a full explanation of the consequences.” Virginia Rule 1.16 cmt. [5] then explains that “[t]hese consequences include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring the client to proceed pro se.” Of course, clients other than court-appointed clients presumably do not face that possibility and therefore do not deserve the same suggested explanation from their discharged lawyers.

**ABA Model Rule 6.2 cmt. [3]** contains the identical language.

ABA Model Rule 1.16 cmt. [5] contains essentially the same language as Virginia Rule 1.16 cmt. [5], except for containing the term “self-representation by the client” rather than the phrase “pro se” contained in Virginia Rule 1.16 cmt. [5].

# **RULE 6.3**

## **Membership In Legal Services Organization**

### **Rule**

#### **Virginia Rule 6.3**

Virginia Rule 6.3 addresses lawyers' participation in legal services organizations.

Virginia Rule 6.3 first explains that lawyers may serve as a legal services organization's "director, officer or member" even though the "organization serves persons having interests adverse to a client of a lawyer." The phrase "having interests" seems strange. The Virginia Rules and the ABA Model Rules normally do not use that awkward formulation.

Virginia Rule 6.3 also contains an odd phrase when describing such legal services organization – "apart from the law firm in which the lawyer practices." Perhaps that phrase is meant to distinguish between lawyers described in Virginia Rule 6.3 and lawyers who are such legal services organizations' paid employees.

Virginia Rule 6.3 then describes limits on such lawyers' actions in their role as legal services organizations' "director, officer or member." The Virginia Rule explains that such lawyers "shall not knowingly participate" in legal services organizations' "decision or action" in two specific circumstances. The phrase "a decision or action" is not defined. Because an organization's "decision" is an "action," the former term might be

unnecessary. The term "decision" presumably refers to such a legal services organization's policy decision – while the word "action" refers to such an organization's conduct that has some external effect.

**ABA Model Rule 6.3** contains the identical language.

### **Virginia Rule 6.3(a)**

Virginia Rule 6.3(a) addresses the first circumstance in which lawyers acting “as a director, officer or a member of a legal services organization” must refrain from “knowingly participat[ing] in a decision or action of the organization.”

Such lawyers shall not knowingly participate in such a "decision or action: “if participating in the decision or action would be incompatible with the lawyer’s obligations to a client under [Virginia] Rule 1.7.”

It is worth noting that Virginia Rule 6.3 uses the term “client” to mean one of two totally different sets of clients. First, a lawyer serving as “a director, officer or a member of a legal services organization” presumably has private clients in the lawyer’s other role. Second, the legal services organization obviously has clients. Virginia Rule 6.3’s first sentence describes both kinds of clients: “the organization serves persons having interests adverse to a client of the lawyer.” The “client of the lawyer” presumably are the lawyer’s private clients, while the “persons” are the organization’s clients.

Virginia Rule 6.3(a)’s reference to “a client” presumably refers to such lawyers’ private clients. As explained below, this contrasts with Virginia Rule 6.3(b)’s phrase “client of the organization.”

The term “incompatible” seems odd, but is understandable upon reflection. Virginia Rule 1.7 describes conflicts triggered by lawyers' representations of clients.

Virginia Rule 6.3(a) addresses lawyers' role in legal services organizations, but not necessarily in a representational role. In other words, a lawyer serving as a "director, officer or member of a legal services organization" is not in that role acting as its lawyer, but instead is acting in some management role. So on its face, Virginia Rule 1.7 would not govern that lawyer's conduct in such positions. To be sure, Virginia Rule 1.7 cmt. [35] deals with lawyers serving on corporate boards – but that Virginia Rule Comment addresses the conflicts implications of lawyers serving in that role while also representing a corporation.

Such lawyers might face a representational-role conflict in their representation of their private clients. But it is unlikely that such lawyers would represent their private clients in any matter "directly adverse" to the legal services organization that lawyer is serving in a non-representational role. That would not involve a Virginia Rule 1.7(a)(1) conflict, because in that situation the lawyer would not be representing "one client . . . directly adverse to another client" (because the lawyer would not be representing the organization as a client). But it might trigger a Virginia Rule 1.7(a)(2) conflict – often called a "material limitation" conflict. In that situation, there might be a "significant risk that the representation of [the lawyer's private client] will be materially limited by the lawyer's responsibilities to . . . a third person [the organization] or by a personal interest of the lawyer [her devotion to the legal service organization's purpose]." Such "material limitation" conflicts might be curable with consent, under Virginia Rule 1.7(b). But some "material limitations" conflicts are non-consentable. So presumably Virginia Rule 6.3(a) uses the term "incompatible" because technically the Virginia Rule 1.7 conflicts provision do not apply to a lawyer who is not also representing

the legal services organization. The use of a “compatibility” standard also appears in Virginia Rule 5.3, which requires lawyers serving in management or direct supervisory roles to assure that non-lawyers they manage or supervise act in a way that is “compatible” with the ethics rules. Virginia Rule 5.3(a), 5.3(b).

Although Virginia Rule 6.3(a) is somewhat vague, it presumably alerts lawyers that they must examine their work on behalf of, and confidential information gained from, the legal service organization they serve (and presumably also from those organization's clients).

**ABA Model Rule 6.3(a)** contains the identical language. The ABA Model Rules' conflicts provisions presumably would also involve the same analysis discussed above.

### **Virginia Rule 6.3(b)**

Virginia Rule 6.3(b) addresses the second circumstance in which lawyers acting "as a director, officer or member of a legal services organization" must refrain from "knowingly participat[ing] in a decision or action of the organization."

Under Virginia Rule 6.3(b), lawyers serving as such a role “may not knowingly participate in the organizations’ decision or action” “where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.”

Virginia Rule 6.3(b) uses the term “client” twice – to mean two different types of clients. Unlike Rule 6.3(a)’s possible ambiguity, Virginia Rule 6.3(b) clearly differentiates between “a client of the organization” and “a client of the lawyer.” Virginia Rule 6.3(b) is intended to protect the organization's clients. This contrasts with Virginia Rule 6.3(a)'s presumed intent – to protect the lawyer's clients.

Virginia Rule 6.3(b) again focuses on lawyers' non-representational role in a legal services organization. Such lawyers must avoid participation in any "decision or action" that might harm the organization's clients. Presumably, this forbearance avoids lawyers' temptation to favor their private clients at the expense of the organization's clients – and also avoid the appearance that they have done so.

The phrase "material adverse effect" differs from the standard conflict phrase "directly adverse" (referring to current clients) – which appears in Virginia Rule 1.7(a)(1). Presumably this is because the lawyer's participation in a legal service organization's "decision or action" would not involve her representation of a client. It may also be significant that Virginia Rule 6.3(b) does not refer to adversity to the organization's clients – but instead refers to "a material adverse effect on the representation of a client of the organization." Thus, Virginia Rule 6.3(b) focuses on "the representation of a client" rather than the client himself or herself.

**ABA Model Rule 6.3(a)** contains the identical language.

## Comment

### Virginia Rule 6.3 Comment [1]

Virginia Rule 6.3 cmt. [1] addresses the rationale for Virginia Rule 6.3 cmt. [1].

Virginia Rule 6.3 cmt. [1] begins with a laudable statement encouraging lawyers to “support and participate in legal services organizations.”

Virginia Rule 6.3 cmt. [1] then notes that lawyers’ service as “an officer or a member” of such organizations does not create an attorney-client relationship with persons “served by the organization.” That sentence does not mention lawyers’ role as a director of a legal services organization, but presumably the same would be true in that context. Perhaps it goes without saying, but such service in a legal services organization’s hierarchy likewise does not “create an attorney-client relationship” with the organization. Thus, lawyers serving in those non-representational roles may also (simultaneously or otherwise) also represent the organization as a client. Such a representational role would change the conflicts analysis, and might involve both the “material limitation”-type conflict implicated by Virginia Rule 6.3 and the more traditional “directly adverse” conflict rule contained in Virginia Rule 1.7(a)(1). And a lawyer who both represents the organization and represents one of the organization’s clients might additionally face complicated conflicts analyses frequently triggered by joint representations. Virginia Rule 1.7 cmts. [29] – [33] addresses some of those complexities.

Virginia Rule 6.3 cmt. [1] next notes the existence of a “potential conflict” between: (1) the “interests of persons” served by the legal organization; and (2) “the interests of the lawyer’s clients.”

Virginia Rule 6.3 cmt. [1] concludes by warning that lawyers' "involvement in such organizations would be severely curtailed" if those lawyers would be precluded by such potential conflicts "from serving the board of legal service organizations." Again, the absence in that sentence of references to lawyers serving as an officer or member of such a legal services organization presumably does not alter that basic principle.

**ABA Model Rule 6.3 cmt. [1]** contains the identical language.

### **Virginia Rule 6.3 Comment [2]**

Virginia Rule 6.3 cmt. [2] addresses the possibility that in "appropriate cases" it "may be necessary" to "reassure" the organization's clients that the organization's lawyers' representation of them "will not be affected by conflicting loyalties of a member of the board."

The term "reassure" presumes that those clients have already received such an assurance. Interestingly, Virginia Rule 6.3 cmt. [2] focuses on a lawyer serving as "a member of the board." That of course is a different role from the roles of "officer or a member," which also appears in Virginia Rule 6.3. Presumably the same principle applies to lawyers serving in those other roles.

Virginia Rule 6.3 cmt. [2]'s phrase "member of the board" presumably is synonymous with the word "director" that appears in black letter Virginia Rule 6.3. The phrase "member of the board" might be a bit confusing, because the word "member" also appears in black letter Virginia Rule 6.3. The Virginia Rule Comment presumably focuses on directors, because in legal services organization they essentially make the organization's decisions and therefore direct its policy.

Virginia Rule 6.3 cmt. [2] concludes by suggesting that written policies “can enhance the credibility of such assurances.” The Virginia Rule Comment thus explains the wisdom of assuring legal organizations’ clients that the organization will diligently serve them despite the involvement in the organization’s management of lawyers who represent those clients’ adversaries.

**ABA Model Rule 6.3 Comment [2]** contains the identical language.

# ABA MODEL RULE 6.4

## Law Reform Activities Affecting Client Interests

Virginia did not adopt ABA Model Rule 6.4.

### Rule

#### ABA Model Rule 6.4

ABA Model Rule 6.4 addresses lawyers' involvement in law reform organizations whose actions may beneficially affect the interests of such lawyers' clients.

ABA Model Rule 6.4 first explains that a lawyer may serve as “a director, officer or member of an organization involved in reform of the law or its administration” – even if “the reform may affect the interests of a client of the lawyer.” ABA Model Rule 6.4 next warns that “[w]hen a lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates,” the lawyer must “disclose that fact but need not identify the client.”

ABA Model Rule 6.4 does not define the term “organization involved in reform of the law or its administration.” As explained below, ABA Model Rule 6.4 cmt [1] mentions a scenario in which a lawyer is “involved in a bar association law reform program.” So it is clear that an “organization” described in ABA Model Rule 6.4 includes bar associations. But apart from that hint, it is unclear what other organizations would meet the ABA Model Rule 6.4 definition.

The term “interests of a client of the lawyer” is also not defined. Presumably such clients can have many “interests.” ABA Model Rule 6.4 apparently is not limited to the “legal interests” of the lawyer’s clients. So theoretically those clients’ “interests” could be business interests, financial interests, political interests, personal interests, etc.

ABA Model Rule 6.4’s second sentence makes it clear that the ABA Model Rule focuses on a positive effect on such lawyers’ clients – not a negative effect. Thus, ABA Model Rule 6.4 does not address lawyers’ responsibility if their clients’ interests might be materially harmed by such organizations’ decisions.

This contrasts with ABA Model Rule 6.3, which also governs lawyers playing “a director, officer or member” role – but in a “legal services organization.” ABA Model Rule 6.3 requires that such lawyers playing those roles in a legal services organization avoid “knowingly participat[ing] in the decision or action of the organization” if such participation “would be incompatible with the lawyer’s obligations to a client under [ABA Model] Rule 1.7.” And under ABA Model Rule 6.3(b), such lawyers must also refrain from participating in legal service organizations’ decisions or actions if those “could have a material adverse effect on the representation” of the organization’s clients. ABA Model Rule 6.3 therefore focuses on possible harm to the lawyers’ clients or to the legal services organizations’ clients. This contrasts with ABA Model Rule 6.4, which seems to focus primarily (if not exclusively) on lawyers’ participation in decisions or actions by law reform organizations that might benefit rather than harm the lawyers’ clients (of course, law reform organizations do not have clients).

ABA Model Rule 6.4 does not address the conflicts or other implications of lawyers (simultaneous or successively) “serv[ing] as a director, officer or member” of law reform

organizations and also representing those organizations. Such a representational role might implicate standard conflicts of interest principles – including ABA Model Rule 1.7(a)(1) “direct adversity” conflicts and Virginia Rule 1.7(a)(2)’s more subtle “material limitation” conflicts.

ABA Model Rule 6.4 concludes with a strange requirement that unfortunately is not illuminated by any Comment. A lawyer who “knows” that one of her client’s interests “may be materially benefitted by a decision in which the lawyer participates” while serving in one of the designated law reform organization’s roles “shall disclose that fact but need not identify the client.” One would think that such a lawyer should refrain from participating in such a decision. And what good would disclosure to the other decision participants do? Such a disclosure would certainly alert the other participants to that lawyer’s arguable client-driven interest in the decision. Is the thought that the other participants might oppose that lawyer’s position in the decision-making, because of the lawyer’s client’s interests? And if disclosure is intended to give information to the other participants that might affect their voting on a decision, why allow the lawyer to refrain from “identify[ing] the client” whose interests will be “materially benefitted” by the decision? After all, that unidentified client will not just be benefitted by such a decision, but instead will be “materially benefitted.” Perhaps the other decision-making participants would think differently (or participate differently) if the lawyer participating along with them in the decision-making represents a client to be materially benefitted by the decision which accounts for ninety percent of that lawyer’s income, as opposed to one percent of the lawyer’s income. Those other participating lawyers might expect the lawyer whose

client will be “materially benefitted by a decision” to refrain from voting or participating in a decision in the former situation, but not the latter situation.

## Comment

### ABA Model Rule 6.4 Comment [1]

ABA Model Rule 6.4 cmt [1] first reminds lawyers that their involvement in law reform organizations “generally does not have a client-lawyer relationship with the organization.” As explained above, if lawyers represent such an organization, all of the representation-related conflicts and other ethics rules would apply to such lawyers.

ABA Model Rule 6.4 cmt [1] next explains that “[o]therwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client.” The word “[o]therwise” seems odd. It does not seem to follow that a lawyer could not be involved in bar association law reform programs if the lawyer represented the organization. Lawyers representing law reform organizations presumably can navigate conflicts that would come from such representations – whether the organization client’s actions “indirectly affect [the lawyer’s] client,” or even directly affect such a client.

ABA Model Rule 6.4 cmt [1] then refers to ABA Model Rule 1.2(b). ABA Model Rule 1.2(b) explains that a lawyer’s representation of a client “does not constitute an endorsement of the client’s political, economic, social or moral views or activities.” That seems like an inapt citation, because it focuses on lawyers’ representations of clients – which ABA Model Rule 6.4 cmt [1] has just explained “generally” does not exist in the law-reform organization context. And if the ABA Model Rule 1.2(b) reference was intended to focus on situations where the lawyer represented the law reform organization, that ABA Model Rule’s assurance would seem to clear the way for such a representation – not prohibit it.

ABA Model Rule 6.4 cmt [1] next provides an example of a lawyer's apparent inability to participate in a law reform organization's efforts: "a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject." Although that example makes sense, it is odd that such an example would be so specific: "a lawyer specializing in antitrust litigation." Presumably the same considerations and ethics rules apply to lawyers who practice in the antitrust area – whether litigators or not. And perhaps even more pointedly, the same obligations and considerations presumably would apply to lawyers who are not "specialists" in antitrust litigation. The example also contains a strange conditional risk – that such lawyers "might be regarded as disqualified" from such participation. That worry does not make much sense. Either such lawyers would be disqualified from participating or they would not be disqualified from participating. It really does not matter if those lawyers "might be regarded as disqualified."

ABA Model Rule 6.4 cmt [1] then reminds lawyers that they "should be mindful of obligations to clients under other Rules" when "determining the nature and scope of participation in such [law reform] activities." The ABA Model Rule Comment points "particularly" to ABA Model Rule 1.7. ABA Model Rule 1.7 covers both representations adverse to current clients, and (probably more significantly in this context) to situations where "there is a significant risk" that the lawyer's representation of a client "will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer". Presumably the "clients" in ABA Model Rule 6.4 cmt [1]'s reminder are the lawyer's other clients – because such a lawyer does not represent the law reform organization. So apparently ABA Model Rule 6.4 cmt [1]

expresses the worry that the lawyer representing an antitrust litigation client (in the example discussed above) would face a “significant risk” that her representation of that antitrust litigation client would be “materially limited” by the lawyer’s “personal interest.” Such a “personal interest” is the only one of ABA Model Rule 1.7(a)(2)’s three possible “responsibilities” – if the lawyer does not represent the law reform organization.

But it seems far more likely that the lawyer’s representation of the antitrust litigation client would materially affect the lawyer’s decision-making role in the law reform organization – not vice versa. And in the situation described in ABA Model Rule 6.4’s second sentence, the lawyer’s antitrust litigation client would be “materially benefitted” by the law reform organization’s decision. It is difficult to imagine a scenario where the lawyer’s representation of an antitrust litigation client would be “materially limited” by the lawyer’s law reform organizational role that materially benefits that antitrust litigation client. What would the lawyer do differently when representing the antitrust litigation client in that context? Instead, one would think that the limitation would be in the lawyer’s other role – participating in the law reform organization’s decisions.

But ABA Model Rule 1.7(a)(2)’s “material limitation” conflict could not arise in that context, because such a “material limitation” conflict only affects lawyers acting in a representational role. And under ABA Model Rule 6.4, the lawyer participating in a law reform organization does not represent the law reform organization. Instead, such lawyers face responsibilities other than avoiding conflicts when they participate in a law reform organization’s decisions – which is discussed below.

ABA Model Rule 6.4 cmt [1] concludes with a reminder that lawyers are “professionally obligated to protect the integrity of the program by making an appropriate

disclosure within the organization when the lawyer knows a private client might be materially benefitted.”

The word “program” is used twice in ABA Model Rule 6.4 cmt [1], but is not defined. It does not seem to describe the law reform organization itself. Black letter rule ABA Model Rule 6.4 does not use the term “program.” The ABA Model Rule itself focuses on “a decision” in which the lawyer participates, not a “program” in which the lawyer participates. The term “program” does not seem to describe a continuing legal education “program” – which presumably would not involve “reform of the law or its administration.” Instead, it seems to describe a series of actions intended to reform the law or its administration – rather than just a single action. ABA Model Rule 6.4 cmt [1] also uses the word “activities,” which is more familiar and makes more sense. Perhaps the word “program” and “activities” are meant to be synonymous.

Interestingly, neither black letter ABA Model Rule 6.4 nor ABA Model Rule 6.4 cmt [1] explicitly addresses a situation in which a lawyer’s client might be adversely affected by a law reform “program,” activities or decisions in which a lawyer participates.

# **RULE 6.5**

## **Nonprofit And Court-Annexed Limited Legal Services Programs**

### **Rule**

#### **Virginia Rule 6.5(a)**

Virginia Rule 6.5(a) addresses lawyers' participation in short-term limited legal services client relationships (presumably during "no bills nights", etc.) without first checking for conflicts before providing such advice to those who need it.

These programs help society by providing limited legal advice to many persons above the income level that would entitle them to free legal services representation, but below the income level that would realistically allow them to retain a lawyer. These programs often focus on frequently occurring legal problems, such as landlord-tenant disputes, matrimonial issues, minor criminal matters such as traffic tickets, etc.

Virginia Rule 6.5(a) applies to lawyers who provide "short-term limited legal services" "under the auspices of a program sponsored by a nonprofit organization or court" – "without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter." Before turning to Virginia Rule 6.5(a)'s provisions, it is worth briefly discussing Virginia's basic conflicts rules – and the somewhat counter-intuitive impact of (and presumed intent of) Virginia Rule 6.5(a).

Virginia's core current client conflict rule is Virginia Rule 1.7. Virginia Rule 1.7(a) recognizes two types of conflicts: (1) if a lawyer's "representation of one client will be

directly adverse to another client” (commonly called a “direct adversity” or “directly adverse” conflict); and (2) if there is a “significant risk” that a lawyer’s representation of a client “will be materially limited by a lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer” (commonly called a “material limitation” conflict). Under Virginia Rule 1.7(b), some of these two types of conflicts are consentable, and some are non-consentable. Significantly, Virginia Rule 1.7 does not contain a knowledge requirement. In other words, it is a strict liability rule. Many Virginia Rules require that the lawyer have certain knowledge – defined in Virginia’s Terminology section as “actual knowledge of the fact in question,” although “knowledge may be inferred from circumstances.” But Virginia Rule 1.7’s core current client conflict standard applies whether or not the lawyer undertaking a representation “knows” that the representation violates Virginia Rule 1.7.

Virginia’s core former client conflict rule is Virginia Rule 1.9. That Virginia Rule prohibits a lawyer from representing a person in a matter that is “materially adverse to the interests” of a former client the lawyer had represented in a matter that is “the same” as or is “substantially related” to the new matter. Virginia Rule 1.9 allows such a representation if the former client and the current client consent. Like Virginia Rule 1.7, Virginia Rule 1.9’s former client conflict rule does not contain a knowledge requirement. It is a strict liability prohibition, and applies whether or not the lawyer undertaking a representation “knows” that the representation violates Virginia Rule 1.9.

Conflicts in the short-term limited legal services setting could involve several permutations. First, the lawyer’s law firm could be currently representing the short-term limited legal services client’s adversary on the same matter in which the lawyer provides

advice to that short-term limited legal services client. For example, the law firm might currently represent a landlord attempting to evict the short-term limited legal services client, tenant, who obtains legal advice about the eviction from the lawyer providing short-term limited advice to tenants. That would involve lawyers in the same firm representing adversaries in the same matter. Second, the law firm might currently represent a short-term limited legal services client's adversary in an unrelated matter. For example, the law firm might currently represent the short-term limited legal service's landlord on a tax matter, etc. Third, the law firm might currently represent another client who is adverse to the short-term limited legal services client on an unrelated matter. For example, the law firm might currently represent a credit card company seeking to collect a debt from the short-term limited legal services client.

Individual lawyers' conflicts are sometimes imputed to other lawyers with whom the individually prohibited lawyer is "associated in a firm" – under Virginia Rule 1.10. In other words, if one lawyer in a firm cannot undertake a representation, no lawyer in the firm can undertake that representation. But unlike Virginia Rule 1.7 and Virginia Rule 1.9, Virginia Rule 1.10 has a knowledge requirement. Virginia Rule 1.10(a) indicates that a lawyer in the firm may not represent a client when the lawyer "knows or reasonably should know" that any of her associated colleagues "practicing alone" could not undertake the representation.

ABA Model Rule 1.7's core current client conflict rule is essentially the same as Virginia Rule 1.7. ABA Model Rule 1.9's core former client conflict rule is essentially the same as Virginia Rule 1.9 – although the consent requirement is different. ABA Model Rule 1.9 only requires the former client's consent for a lawyer to take a matter adverse to

that former client, while Virginia Rule 1.9 requires both the former client’s consent and the present client’s consent. ABA Model Rule 1.10’s imputation rule is essentially the same as Virginia Rule 1.10, except that the ABA Model Rule does not have the “reasonably should know” standard contained in Virginia Rule 1.10(a).

So an individual lawyer violates Virginia Rule 1.7 and Virginia Rule 1.9 by representing clients in those conflict situations – without any knowledge requirement. Under Virginia Rule 1.10, a lawyer does not violate the other conflicts rules unless the lawyer “knows or reasonably should know” that his associated colleague could not undertake the same representation. Under Virginia Rule 1.10, a lawyer beginning a representation without such knowledge – but who later gains such knowledge – must withdraw from representing the client. Virginia Rule 1.16(a)(1) would require that such a lawyer “shall withdraw from the representation of a client,” because once the lawyer has such knowledge “the [continuing] representation will result in violation of the [Virginia] Rules of Professional Conduct.” But significantly, the lawyer’s associated colleague might also have to withdraw from representing the other client – because during the period before his colleague acquired knowledge of the conflict the two associated lawyers were representing clients with conflicting interests.

This type of imputed disqualification triggering withdrawal from both representations is the key to understanding Virginia Rule 6.5. As explained below, the lack of a knowledge requirement for the lawyers representing short-term clients on a “no bills night” or similar setting presumably immunizes such individual lawyers from this ethics risk. This obviously removes a deterrent that otherwise would discourage such lawyers from assisting in short-term limited legal services in those laudable

circumstances. For big firm lawyers and law firms, the more important Virginia Rule 6.5 provision is the one allowing the firm to avoid a Virginia Rule 1.10 imputation of such individual lawyers' individual disqualification absent their knowledge at the time that a short-term limited legal service presents a conflict. This provision (Virginia Rule 6.5(b)) preserves the law firm's ability to keep representing its existing clients even if one of its lawyers created an attorney-client relationship with one of her short-term limited legal services clients. Otherwise, the scenario would present a conflict because the short-term limited representation client is an adversary of the firm's existing client.

Take the example of a lawyer's meeting with a tenant on a "no bills night." The firm's lawyer might provide landlord-tenant advice to such a person. As long as that lawyer did not "know" that an associated colleague was simultaneously representing the landlord in a matter adverse to the tenant, the lawyer providing that short-term advice would not violate Virginia Rule 1.7. But that tenant is a current client of the firm in that meeting, and becomes a former client of the law firm after the meeting. The volunteer "no bills night" lawyer cannot begin to represent the landlord in a matter adverse to his former short-term client without both consenting under Virginia Rule 1.9. That seems like an unlikely scenario. But what of the lawyer's associated colleague who has been representing (or wants to represent) the landlord in the same matter (or a substantially related matter) adverse to that short-term "no bills night" legal services client? That other law firm colleague presumably does not "know" that his colleague has given short-term legal advice to the landlord's adversary tenant. But what if that law firm colleague obtains such knowledge – through some internal law firm communication or, more likely, from the lawyer who had represented the short-term tenant, or the tenant himself. In that event,

under Virginia Rule 1.16(a)(1) the lawyer and all other associated lawyers in the firm presumably would have to withdraw from representing the landlord under Virginia Rule 1.10. It seems likely that this is the scenario Virginia Rule 6.5 was intended to avoid – not the unlikely “strict liability” ethics violation by the volunteer lawyer who helps on a “no bills” night. Thus, the most important portion of Virginia Rule 6.5 might be the last portion – Virginia Rule 6.5(b). As explained below, that provision renders Virginia Rule 1.10’s imputation rule “inapplicable to a representation governed by this [Virginia] Rule [6.5]” – except in the unlikely circumstance that the volunteer lawyer “knows” that her colleague is currently representing the landlord.

**ABA Model Rule 6.5(a)** contains the identical language.

### **Virginia Rule 6.5(a)(1)**

Virginia Rule 6.5(a)(1) addresses the knowledge requirement normally absent in such programs, and its implications.

Virginia Rule 6.5(a)(1) assures such lawyers that they are not subject to Virginia Rule 1.7 and Virginia Rule 1.9(a) unless the lawyer “know[s] that the representation of the client involves a conflict of interest.” The term “involves” seems inapt. A situation might “involve” a conflict – but not actually “present” a conflict. Virginia Rule 6.5 cmt. [3] uses the better term “presents.” But Virginia Rule 1.7(a) also use the inapt word “involves.” Those parallel ABA Model Rules and Comments also use the inappropriate term “involves” and the more appropriate term “presents.”

Virginia Rule 1.7 prohibits (among other things) lawyers’ representation of one client “directly adverse to another client.” Virginia Rule 1.9(a) involves (among other things) lawyers’ representation of a client in a matter “materially adverse” to the interests

of a former client “in the same or a substantially related matter” as the lawyer’s previous representation of the now-former client.

The Virginia Rules’ fifth Terminology paragraph defines “knows” as “denot[ing] actual knowledge of the fact in question”, although “[a] person’s knowledge may be inferred from circumstances.”

As explained above, Virginia Rule 1.7 and Virginia Rule 1.9(a) are essentially strict liability provisions, thus subjecting such lawyers to ethical discipline for violating the Rules even if they do not know that they have a conflict. Virginia Rule 6.5(a)(1) protects them from that strict liability.

Under Virginia Rule 6.5(a)(1), a lawyer involved in a “no bills night” or similar program may thus provide quick short-term limited advice to someone seeking such advice – unless the lawyer personally “knows” that the short-term representation is prohibited because it is improperly adverse to the lawyer’s or one of her associated colleague’s current or former client.

This more lenient conflicts standard presumably intends to encourage lawyers’ participation in such short-term legal assistance to those who need it. If lawyers were required to run the normal conflicts check while working on a “no bills night” or similar program, the program almost certainly would not work – because the conflicts checks would take too long. Alternatively, the programs could try to ascertain who will show up at such “no bills night,” and run a conflicts checks ahead of time. But that probably would not work from a practical standpoint.

Sole practitioners or lawyers in small firms might already know the names of all of their clients or their small law firms’ clients – so the normal conflicts rules could apply to

them without hampering their participation in the programs. But lawyers at large firms do not have that luxury.

Although Virginia Rule 6.5 and its Comments do not acknowledge as much, this more forgiving conflicts rule presumably is important in relieving large firm lawyers of such conflicts checks requirements – thus encouraging their participation in such programs. Virginia Rule 6.5(a)(1)'s knowledge requirement protects them from the allegation that they violated the ethics rules.

**ABA Rule Model 6.5(a)(1)** contains the identical language.

### **Virginia Rule 6.5(a)(2)**

Virginia Rule 6.5(a)(2) addresses the imputation of an associated colleague's disqualification to a lawyers providing short-term limited services.

Under Virginia Rule 6.5(a)(2), such lawyers are subject to Virginia Rule 1.10's imputed disqualification provision "only if the lawyer [providing the "short-term limited legal services")] knows that another lawyer associated with the lawyer in a law firm" is disqualified ... with respect to the matter." Thus a lawyer assisting in a "no bills night" is not – absent actual knowledge – prohibited from assisting a client in that short-term setting by some other associated colleague's representation of the adverse party on the "matter" on which the lawyer provides advice.

The term "associated" appears throughout the Virginia Rules (and the ABA Model Rules), but unfortunately is not defined. To the extent there is any confusion about what the term means under Virginia Rule 6.5, the same is true of other rules as well. The term "associated" certainly includes partners and partner-aspiring other lawyers (usually called "associates") in the same law firm.

Unlike Virginia Rule 6.5(a)(1), Virginia Rule 6.5(a)(2) is not as dramatic. That is because unlike Virginia Rule 1.7 and Virginia Rule 1.9, Virginia Rule 1.10 contains a knowledge requirement. To be sure, Virginia Rule 1.10(a) also has a “reasonably should know” standard, so theoretically a bar disciplinary panel might conclude that the volunteer no-bills night lawyer should have run a conflicts check, and therefore “reasonably should” have known that her colleague was representing the landlord (in the example discussed above). But Virginia Rule 1.10 certainly is not a strict liability provision like Virginia Rule 1.7 and Virginia Rule 1.9.

**ABA Model Rule 6.5(a)(2)** contains identical language.

### **Virginia Rule 6.5(b)**

Virginia Rule 6.5(b) addresses the firm-wide imputation implications of a lawyer’s individual disqualification based on her provision of “short-term limited legal services to a client.”

Virginia Rule 6.5(b) begins by pointing to Virginia Rule 6.5(a)(2) – which (as explained above) applies Virginia Rule 1.10’s imputation principle only if (for example) a volunteer no-bills night lawyer “knows that another lawyer associated with” him is disqualified. That knowledge requirement presumably applies at the time that the lawyer provides such short-term limited legal services. As explained above, that knowledge requirement protects the volunteer lawyer from an ethics charge.

Virginia Rule 6.5(b) concludes with perhaps the most important provision to a law firm whose lawyers volunteer to provide short-term limited legal services. Virginia Rule 6.5(b) explains that except such a lawyer has knowledge at the time that one of her colleagues is disqualified from providing the type of short-term limited legal services that

the volunteer is about to provide, Virginia “Rule 1.10 is inapplicable to a representation governed by this Rule.”

Presumably this means that Virginia Rule 1.10’s firm-wide imputation applies to the volunteer lawyer’s individual conflict only if that individual volunteer lawyer knew about the conflict at the time that she provided the short-term limited legal services. In other words, this presumably has the effect of allowing one of her colleagues to continue an existing matter adverse to the former short-term limited legal services client, or take a representation adverse to that short-term limited legal services client. This preserves the law firm’s ability to continue and to begin representations, despite what might otherwise be conflicts impediments caused by the law firm’s lawyers’ volunteer short-term limited legal services. This institutional safeguard may be as important or more important than Virginia Rule 6.5(a)(1)’s individual lawyer safeguard applying a knowledge requirement to what normally would be a no-fault conflicts violation by the individual volunteer lawyer.

**ABA Model Rule 6.5(b)** contains the identical language.

## Comment

### Virginia Rule 6.5 Comment [1]

Virginia Rule 6.5 cmt. [1] addresses the rationale for the liberal conflicts approach in this context.

Virginia Rule 6.5 cmt. [1] first explains that “[l]egal services organizations, courts and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services.” The Virginia Rules Comment provides examples: “such as advice or the completion of legal forms – that will assist persons to address their legal problems without further representation by a lawyer.”

Virginia Rule 6.5 cmt. [1] then provides additional examples of such programs: “legal-advice hotlines, advice – only clinics or pro se counseling programs.”

Virginia Rule 6.5 cmt. [1] acknowledges that during such programs “a client-lawyer relationship is established.” The Virginia Rules use various different terms to describe such a relationship: client-lawyer, lawyer-client, attorney-client, etc. But regardless of the term, the existence of such a relationship obviously triggers all of the lawyer’s duties to the client, even a short-term client receiving only limited legal services. Among other things, those duties include the duty of competence, diligence, communication and confidentiality. For purposes of Virginia Rule 6.5, the key duty lawyers owe their clients is loyalty during the representation, and confidentiality after the representation. The former duty precludes the lawyer (and often all of her associated colleagues) from representing another client adverse to the current client. And again most importantly for Virginia Rule 6.5 purposes, the latter duty ordinarily precludes the lawyer and all of her associated colleagues from representing another client adverse to the now-former client

in the same matter on which the lawyer represented the former client or on a matter that is “substantially related” to that now-concluded matter.

Virginia Rule 6.5 cmt. [1] then gets to its key points. First, “there is no expectation that the lawyer’s representation of the client will continue beyond the limited consultation.” In other words, such short-term limited legal services clients will be “current” clients only momentarily, and then will become former clients. Second, “[s]uch programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation” – referring to Virginia Rules 1.7 (addressing adversity to current clients), Virginia Rule 1.9 (addressing adversity to former clients) and Virginia Rule 1.10 (addressing imputation to an associated law firm colleague of an individual lawyer’s disqualification).

The word “screen” in the phrase “screen for conflicts of interest” seems inappropriate in this context. That term normally refers to a “screen” between an individually disqualified lawyer and her colleagues – intended to avoid imputation of that lawyer’s individual disqualification to her associated colleagues. Although the Virginia Rule Terminology section does not define the word “screen,” ABA Model Rule 1.0(k) contains that definition, and ABA Model Rule 1.0 cmts. [8] – [10] provide a further explanation of such a “screen.”

As explained below, Virginia Rule 6.5 cmt. [3] uses a much better word to describe the process of checking for conflicts: “check.”

**ABA Model Rule 6.5 cmt. [1]** contains the identical language.

The word “screen” is even more inappropriate in ABA Model Rule 6.5 cmt. [1] than in Virginia Rule 6.5 cmt. [1]. The word “screen” is a defined term in ABA Model Rule 1.0(k) – and has a completely different definition from its use in ABA Model Rule 6.5 cmt. [1]. The word “check” used in ABA Model 6.5 cmt. [3] or “detect and resolve” used in ABA Model Rule 1.6(b)(7) would be far more preferable.

### **Virginia Rule 6.5 Comment [2]**

Virginia Rule 6.5 cmt. [2] addresses lawyers’ disclosure obligations in the context of providing short-term limited legal services.

Virginia Rule 6.5 cmt [2] first explains that lawyers providing such “short-term limited legal services” must “secure the client’s informed consent to the limited scope of the representation.” The Virginia Rule Comment refers to Virginia Rule 1.2(b), which states that lawyers “may limit the objectives of the representation if the client consents after consultation.”

Virginia Rule 6.5 cmt. [2] next explains that such lawyers “must also advise the client of the need for further assistance of counsel” – “[i]f a short-term limited representation would not be reasonable under the circumstances.”

Virginia Rule 6.5 cmt. [2] concludes by noting that unless Virginia Rule 6.5 provides otherwise, other Virginia Rules “are applicable to the limited representation.” The Virginia Rule Comment specifically refers to Virginia Rule 1.6 (addressing lawyers’ confidentiality duties to clients) and Virginia Rule 1.9(c) (addressing lawyer’s confidentiality duties to former clients).

Virginia Rule 6.5 cmt. [3]’s reference to the possible applicability of Virginia Rule 1.9(c) would on its face seem to prevent associated colleagues of the lawyer who

has provided short-term limited legal services from later adversity to that short-term client. But as explained above, Virginia Rule 6.5(b) blocks the imputation to all of her associated colleagues of the individual lawyer's prohibition on later adversity to her short-term client.

Not surprisingly, Virginia Rule 6.5 cmt. [2] does not include in its list of applicable Virginia Rules the Virginia provision addressing "prospective clients: Virginia Rule 1.8. Virginia Rule 6.5 cmt. [1] acknowledges that lawyers participating in such programs establish a "client-lawyer relationship." Because lawyers participating in such programs establish a "client-lawyer relationship," Virginia Rule 1.8 is inapplicable.

**ABA Model Rule 6.5 cmt. [2]** contains the identical language, except for its reference to ABA Model Rule 1.2(c) – which is the ABA Model Rule equivalent of Virginia Rule 1.2(b).

### **Virginia Rule 6.5 Comment [3]**

Virginia Rule 6.5 cmt. [3] addresses Virginia Rule 6.5(a)'s imposition of a knowledge requirement in what would otherwise be a no-fault analysis of volunteer lawyers' conflict under Virginia Rule 1.7 and Virginia Rule 1.9(a).

Virginia Rule 6.5 cmt. [3] first acknowledges that a lawyer providing such short-term limited legal services "ordinarily is not able to check systematically for conflicts of interest." The phrase "check" for conflicts of interest is far better than Virginia Rule 6.5 cmt. [1]'s use of the word "screen."

Virginia Rule 6.5 cmt. [3] then explains that because of this ordinary scenario, such lawyers must comply with Virginia Rule 1.7's current client conflicts rule and Virginia Rule 1.9(a)'s former client conflicts rule "only if the lawyer knows that the representation presents a conflict of interest for the lawyer." As explained above, the term "presents" is

a much better word than the more generic possibly confusing term “involves” – which ABA Model Rule 6.5(a)(1) contains.

Similarly, such lawyers must comply with Virginia Rule 1.10’s imputed disqualification rule “only if the lawyer knows that another lawyer in the lawyer’s firm is disqualified.” This inapplicability of Virginia Rule 1.10’s imputed disqualification rule applies to the volunteer lawyer providing short-term limited legal services. Virginia Rule 6.5 thus focuses on the individual lawyer’s personal knowledge at the time, essentially relieving the lawyer from running the normal conflicts check. The more significant imputation rule – which might impute her individual disqualification to everyone else in her firm – is addressed in Virginia Rule 6.5 cmt. [4], discussed below.

**ABA Model Rule 6.5 cmt. [3]** contains the identical language.

#### **Virginia Rule 6.5 Comment [4]**

Virginia Rule 6.5 cmt. [4] addresses the Virginia Rule 1.10 imputation implications of lawyers representing short-term limited legal services clients as part of programs identified in Virginia Rule 6.5.

Virginia Rule 6.5 cmt. [4] first explains the rationale for Virginia Rule 6.5’s different imputation implications: “[b]ecause the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer’s firm.” That might be true, but a prediction about the low volume of such conflicts really does not justify by itself a different rule that applies when there is a conflict. Neither Virginia Rule 1.7, Virginia Rule 1.9 nor Virginia Rule 1.10 applies differently based on a prediction about conflicts’ likelihood.

However, Virginia Rule 6.5 cmt. [4] then gets to the point – explaining that Virginia Rule 1.10’s general imputation rule “is inapplicable to a representation governed by this [Virginia] Rule 6.5 except as provided in [Virginia Rule 6.5] (a)(2).” This means that the lawyer providing short-term limited legal services must “comply with [Virginia] Rule 1.10 when the lawyer knows that the lawyer’s firm is disqualified by [Virginia] Rules 1.7 or 1.9(a).” Of course, the “participating lawyer” “compl[ies]” with Virginia Rule 1.10 by declining to provide short-term limited legal services to the would-be client. This type of disqualification is much more likely than the participating lawyer’s direct disqualification under Virginia Rule 1.7 or Virginia Rule 1.9(a). It seems unlikely that a lawyer providing short-term limited legal services would stumble into a possible conflict based on what she herself is handling for some other current client or a matter that she herself previously handled for a now-former client. So emphasizing the knowledge requirement for application of Virginia Rule 1.10’s imputation rule is significant. But it also seems unnecessary. Unlike Virginia Rule 1.7 and Virginia Rule 1.9(a), Virginia Rule 1.10(a) already has a knowledge requirement (although Virginia Rule 1.10(a) also has a unique “reasonably should know” knowledge requirement).

Virginia Rule 6.5 cmt. [4] then turns to the most important part of Virginia Rule 6.5 – avoiding imputation to her entire firm of any individual disqualification triggered by the volunteer lawyer’s provision of short-term limited legal services. Virginia Rule 6.5 cmt. [4] states that “[b]y virtue of [Virginia Rule 6.5] paragraph (b) ... a lawyer’s participation in a short-term limited legal services program will not preclude the lawyer’s firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program’s auspices.” This critical explanation essentially

frees all of the lawyer’s associated colleagues from current or future adversity to the short-term limited legal services client. For all of those lawyers, it is almost as if their colleague’s short-term limited legal services representation never occurred.

Virginia Rule 6.5 cmt. [4] concludes with another (albeit less important) assurance: “[n]or will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.” This imputation-blocking explanation essentially frees even those lawyers (not just the non-participating associated colleagues in the firm) to currently or in the future represent adversaries of the short-term limited legal services client. The likeliest scenario for such conflicts presumably involves domestic relations matters. Both spouses might seek such short-term limited legal services without advising the other (or even with advising the other, but not knowing the conflicts consequences).

**ABA Model Rule 6.5 cmt. [4]** contains the identical language.

### **Virginia Rule 6.5 Comment [5]**

Virginia Rule 6.5 cmt. [5] addresses the conflicts implications of lawyers participating in such programs if they represent the client other than a short-term limited way.

Virginia Rule 6.5 cmt. [5] reminds lawyers that the normal conflicts and normal imputation rules in Virginia Rules 1.7, 1.9(a), and 1.10 will apply if such a lawyer “undertakes to represent the client in the matter on an ongoing basis” – “after commencing a short-term limited representation in accordance with this [Virginia] Rule.” Thus, such a lawyer’s continued representation of the client understandably triggers all of the conflicts rules that apply to other normal representations.

**ABA Model Rule 6.5 cmt. [5]** contains the identical language.

# **RULE 7.1**

## **Communications Concerning A Lawyer's Services**

The Rule 7 series addresses lawyer marketing. There have been more dramatic changes in this topic than in any other ethics topic over recent years.

Virginia Rule 7.1 combines much of the ethics guidance found in ABA Model Rule 7.1 and ABA Model Rule 7.2.

This document summarizes, analyzes and compares the following ABA Model Rule 7.2 provisions in its following Rule analyses:

ABA Model Rule 7.2(a) .....	ABA Model Rule 7.2
ABA Model Rule 7.2(b)(1)-(3) .....	Rule 7.3
ABA Model Rule 7.2(b)(4).....	ABA Model Rule 7.2
ABA Model Rule 7.2(b)(5).....	ABA Model Rule 7.3
ABA Model Rule 7.1(c) .....	Rule 7.1
ABA Model Rule 7.2(d) .....	ABA Model Rule 7.2
ABA Model Rule 7.2 cmt. [1].....	ABA Model Rule 7.2
ABA Model Rule 7.2 cmts. [2] - [6].....	Rule 7.3
ABA Model Rule 7.2 cmts. [7] - [8].....	ABA Model Rule 7.2
ABA Model Rule 7.2 cmts. [9] - [11].....	Rule 7.1
ABA Model Rule 7.2 cmt. [12].....	ABA Model Rule 7.2

## Rule

### Virginia Rule 7.1

Virginia Rule 7.1 addresses the basic prohibition on deceptive marketing.

Virginia Rule 7.1 first bluntly states that lawyers “shall not make a false or misleading communication about the lawyer or the lawyer’s services.” Virginia Rule 7.1 then defines the prohibited communications, explaining that “[a] communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make a statement considered as a whole not materially misleading.”

The most frequently used example of a lawyer’s truthful but misleading marketing statement involves a lawyer’s truthful statement that she obtained a \$1,000,000 jury verdict, which is not accompanied by an acknowledgement that an appellate court reversed that large verdict.

**ABA Model Rule 7.1** contains the identical language.

## Comment

### Virginia Rule 7.1 Comment [1]

Virginia Rule 7.1 cmt. [1] addresses the types of ways that statements can be misleading.

Virginia Rule 7.1 cmt. [1] begins with an explanation that even “[t]ruthful statements” can be misleading, and thus prohibited. Virginia Rule 7.1 cmt. [1] then unhelpfully repeats the black letter Virginia Rule 1.7 language, explaining that “[a] truthful statement is misleading if it omits a fact necessary to make the lawyer’s communication considered as a whole not materially misleading.” Virginia Rule 7.1 cmt. [1] next provides an additional explanation – that a truthful statement “is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer’s services for which there is no reasonable factual foundation.”

**ABA Model Rule 7.1 cmt. [2]** contains essentially the same language as Virginia Rule 7.1 cmt. [1].

In contrast to Virginia Rule 7.1 cmt. [1], ABA Model Rule 7.1 cmt. [1] contains another example of a truthful but misleading statements – “if [it is] presented in a way that creates a substantial likelihood that a reasonable person would believe the lawyer’s communication requires that person to take further action when, in fact, no action is required.”

### ABA Model Rule 7.1 Comment [1]

Virginia did not adopt ABA Model Rule 7.1 cmt. [1].

ABA Model Rule 7.1 cmt. [1] addresses ABA Model Rule 7.1’s reach.

ABA makes Rule 7.1 cmt. [1] makes the obvious point that ABA Model Rule 7.1 “governs all communications about a lawyer’s services, including advertising” – all of which must be truthful, “[w]hatever means are used to make known a lawyer’s services.”

### **Virginia Rule 7.1 Comment [2]**

Virginia Rule 7.1 cmt. [2] addresses lawyers’ description of their past successes.

Virginia Rule 7.1 cmt. [2] first explains that truthful communications about “a lawyer’s achievements on behalf of clients or former clients may be misleading” if they might “lead a reasonable person to form an unjustified expectation” that the lawyer will obtain the same results for that person – “without reference to the specific factual and circumstances of each client’s case.” Presumably the communicating lawyer would have to provide such additional information to avoid misleading the target of such communication.

Virginia and most other states formerly either prohibited all such statements as inherently misleading, or required elaborate disclaimers similar to those used in investment advisors’ advertisements.

Virginia Rule 7.1 cmt. [2] then addresses lawyers’ communications that compare themselves to other lawyers. As with its approach to lawyers’ description of their past successes, the Virginia Rule 7.1 cmt. [2] states that “an unsubstantiated comparison of the lawyer’s services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated.” Thus, Virginia Rule 7.1 cmt. [2]’s standard is objective (focusing on what “a reasonable person” would conclude), rather than subjective (focusing on the target’s reaction). And the phrase “presented with such specificity”

presumably means that general comparisons might pass ethics muster while specific comparisons might not.

The Virginia Rule 7.1 cmt. [2] concludes with an assurance that “[t]he inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.” It is unclear whether Virginia Rule 7.1 cmt. [2]’s “phrase likely to ... “mislead the public” intentionally defines a different standard from the preceding sentence’s phrase “lead a reasonable person.” The generic word “public” also seems to imply an objective “reasonable person” type standard.

Presumably this explanation applies both to statements about lawyers’ past successes and lawyers’ comparisons of themselves to other lawyers. Although lawyers presumably could avoid any chance of misleading would-be clients with the familiar language that “past results do not guarantee future success,” Virginia’s and other states’ elimination of such mandatory language or similar disclaimers presumably means that lawyers’ descriptions of their past successes might pass muster under Virginia Rule 7.1 cmt. [2] without any disclaimer.

**ABA Model Rule 7.1 cmt. [3]** contains essentially the identical language as Virginia Rule 7.1 cmt. [2].

In contrast to Virginia Rule 7.1 cmt. [2], ABA Model Rule 7.1 cmt. [3] adds another category of possibly but not necessarily misleading statements: “an unsubstantiated claim about a lawyer’s or law firm’s services or fees.”

### **Virginia Rule 7.1 Comment [3]**

Virginia Rule 7.1 cmt. [3] addresses the application to lawyer marketing of general prohibitions in several Virginia ethics rules on lawyers' misleading or deceptive conduct.

Virginia Rule 7.1 cmt. [3] begins with the explanation that lawyers are prohibited from engaging in dishonest conduct "[i]n communications about a lawyer's services, as in all other contexts." Virginia Rule 7.1 cmt. [3] cites Virginia Rule 8.4(c) (the general anti-deception Virginia Rule) and Virginia Rule 8.4(d) (the Virginia Rule prohibiting lawyers from implying that they can improperly influence a government agency or official).

**ABA Model Rule 7.1 cmt. [4]** contains essentially the same language, although it refers to ABA Model Rule 8.4(e) – rather than the parallel Virginia Rule 8.4(d).

### **Virginia Rule 7.1 Comment [4]**

Virginia Rule 7.1 cmt. [4] addresses lawyers' communications about their practice areas.

Virginia Rule 7.2 cmt. [4] begins by assuring lawyers that they "may communicate the fact that the lawyer does or does not practice in particular fields of law."

Virginia Rule cmt. [4] then explains that as long as the communication is not false or misleading, a "lawyer who is a specialist in a particular field of law by experience, specialized training, or education...may communicate such specialty." Virginia and most states formerly prohibited or severely curtailed lawyers' ability to describe themselves as "specializing" in a certain area.

Virginia Rule 7.1 cmt. [4] does not provide any guidance about how a lawyer would justify communicating that she is a "specialist." Presumably the lawyer would produce

evidence of her certifications, training, experience handling certain types of cases, etc. Perhaps the lawyer could also point to entities' commendations, honors, etc.

Virginia Rule 7.1 cmt. [4] concludes by assuring that a lawyer who “is certified by a named professional entity...may communicate such...certification so long as the statement is not false or misleading.” Such “certifications” presumably include Virginia Supreme Court – approved certifications, or certifications by other legitimate professional organizations. It should be obvious that lawyers may not communicate certifications from illegitimate entities, such as those created by the lawyer himself, etc.

**ABA Model Rule 7.2(c)** addresses lawyers' statements about their specialization or certification.

Black letter ABA Model Rule 7.2(c) prohibits lawyers from “stat[ing] or imply[ing] that [the] lawyer is certified as a specialist in a particular field of laws”, except under certain conditions. First, the lawyer must have been certified as a specialist “by an organization that has been approved by an appropriate authority of the state or the District of Columbia or a U.S. Territory or that has been accredited by the American Bar Association” (ABA Model Rule 7.2(c)(1)). Second, “the name of the certifying organization is clearly identified in the communication” (ABA Model Rule 7.2(c)(1)).

**ABA Model Rule 7.2 cmt. [9]** addresses lawyers' communications about their practice area.

ABA Model Rule 7.1 cmt. [9] first contains the identical language as Virginia Rule 7.1 cmt. [4] – allowing lawyers “to communicate that the lawyers does or does not practice in a particular area of law.”

ABA Model Rule 7.1 cmt. [9] then essentially follows Virginia Rule 7.1 cmt. [4]'s approach – indicating that lawyers are “generally permitted to state that the lawyer ‘concentrates in’ or is a ‘specialist,’ practices a ‘specialty,’ or ‘specializes in’ particular fields” – “based on the lawyer’s experience, specialized training or education.”

ABA Model Rule 7.1 cmt. [9] concludes with the warning that “such communications are subject to the ‘false and misleading’ standard” in ABA Model Rule 7.1.

### **Virginia Rule 7.1 Comment. [5]**

Virginia Rule 7.1 cmt. [5] addresses law firm names.

Virginia Rule cmt. 7.1 cmt. [5] first explains that law firms “may be designated by the names of all or some of its members.” Virginia Rule 7.1 cmt. [5] does not define the word “members.” That term appears elsewhere in the Virginia Rules, with no accompanying definitions. It is unclear whether the word “members” includes only partners who own the firm, as opposed to employed lawyers with no ownership interest.

Virginia Rule 7.1 cmt. [5] then explains that law firms may also be designated by “the names of deceased members” – as long as there “has been a continuing succession in the firm’s identity.”

Virginia Rule 7.1 cmt. [5] next assures that law firms may also be designated “by a trade name.” Traditionally, many if not most states prohibited law firms from using trade names. Some states continue to prohibit or limit such names. It should go without saying that lawyers may not use a trade name that itself would be misleading or otherwise violate Virginia Rule 7.1’s standards. For example, a law firm could not use the name: “Virginia’s Best Personal Injury Law Firm.” Virginia Rule 7.1 cmt. [5] provides an acceptable

example: “such as the ‘ABC Legal Clinic.’” Virginia Rule 7.1 cmt. [5] then explains that lawyers or law firms “may also be designated by a distinctive website address or comparable professional designation.”

Turning again to lawyers’ use of trade names, Virginia Rule 7.1 cmt. [5] explains that lawyers’ or law firms’ use of trade names “in law practice is acceptable so long as it is not misleading” – “[a]lthough the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice.”

Virginia Rule 7.1 cmt. [5] next addresses possibly misleading trade names. Virginia Rule 7.1 cmt. [5] explains that a private firm using a trade name “such as ‘clinic’ that also includes a geographical name such as ‘Springfield Legal Clinic’” may have to include “an express disclaimer that it is not a public legal aid agency” in order to “avoid a misleading implication.”

Virginia Rule 7.1 cmt. [5] concludes with a discussion of law firm names “including the name of a deceased partner.” After acknowledging that such a name is “strictly speaking, a trade name,” Virginia Rule 7.1 cmt. [5] explains that such “a useful means of identification” would be “misleading” if the firm uses “the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.”

**ABA Model Rule 7.1 cmt. [5]** contains essentially the same concepts and language as Virginia Rule 7.1 cmt. [5].

But ABA Model Rule 7.1 cmt. [5] differs in several ways from Virginia Rule 7.1 cmt. [5].

In contrast to Virginia Rule 7.1 cmt. [5], ABA Model Rule cmt. [5] begins with the self-evident statement that the “[f]irm names, letterhead and professional designations” are communications governed by ABA Model Rule 7.1.

ABA Model Rule 7.1 cmt. [5] then explains that a firm name may include the name of a deceased lawyer, as long as there has been “a succession in the firm’s identity” (without the word “continuing” that is contained in Virginia Rule 7.1 cmt. [5]).

In contrast to Virginia Rule 7.1 cmt. [5], ABA Model Rule 7.1 cmt. [5] warns that a law firm’s name or designation “is misleading if it implies a connection with a government agency, with a deceased lawyer who was not a former member of the firm, with a lawyer not associated with the firm or a predecessor firm, with a nonlawyer or with a public or charitable legal services organization.”

ABA Model Rule 7.1 cmt. [5] concludes with the same example contained in Virginia Rule 7.1 cmt. [5] – warning that lawyers using a “geographical name” (also providing the example of “Springfield Legal Clinic”) may require an “express statement” that the law firm “is not a public legal aid organization.”

### **ABA Model Rule 7.2 Comment [10]**

Virginia did not adopt ABA Model Rule 7.2 cmt. [10].

ABA Model Rule 7.2 cmt. [10] addresses lawyers’ practice before the United States Patent and Trademark Office.

ABA Model Rule 7.2 cmt. [10] first notes that the USPTO “has a long-established policy of designating lawyers practicing before the Office,” so lawyers’ communications about “[that] practice area[] are not prohibited by this [ABA Model Rule 7.2].” Ironically,

Virginia Rule 7.1 does not contain a similar Comment, even though the USPTO is located in Virginia.

ABA Model Rule 7.2 cmt. [10] also makes essentially the same statement about admiralty practice.

### **ABA Model Rule 7.2 Comment [11]**

Virginia did not adopt ABA Model Rule 7.2 cmt. [11].

ABA Model Rule 7.2 cmt. [11] addresses lawyers' communications about their certifications.

In contrast to Virginia Rule 7.1 cmt. [4]'s assurance that lawyers may communicate about their certifications "so long as the statement is not false or misleading," ABA Model Rule 7.2 cmt. [11] contains an elaborate discussion of certifications.

Among other things, ABA Model Rule 7.1 cmt. [11] explains that lawyers can be certified by various listed entities, and that certification "signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law." After explaining that such certifying organizations "may be expected to apply standards of experience, knowledge and proficiency to ensure that a lawyer's recognition as a specialist is meaningful and reliable," ABA Model Rule 7.2 cmt. [11] concludes by requiring that lawyers communicating about their certification must include the "name of the certifying organization."

### **Virginia Rule 7.1 Comment [6]**

Virginia Rule 7.1 cmt. [6] addresses lawyers' and law firms' use of law firm names that imply a relationship that does not exist.

Virginia Rule 7.1 cmt. [6] first affirmatively states that lawyers “may state or imply that they are practicing in a partnership or other organization only when that is the fact.” Virginia Rule 7.1 cmt. [6] then provides an example of a prohibited name – lawyers’ use of the name of “Smith and Jones” by lawyers who are “sharing office facilities, but who are not in fact associated with each other in a law firm.”

Virginia Rule 7.1 cmt. [6] articulates an interesting rationale for this prohibition: “for that title [“Smith & Jones”] suggests that they are practicing law together in a firm.” This explanation seems to equate “practicing law together in a firm” with lawyers being “associated with each other in a law firm.” As explained throughout this document, the Virginia Rules’ and the ABA Model Rules’ failure to define the critical term “associated” could create confusion about several concepts. The Virginia Rules Terminology section defines the term “law firm.” The word “[f]irm” and term “law firm” “denotes a professional entity, public or private, organized to deliver legal services, or a legal department of a corporation or other organization.”

But the Virginia Rules’ guidance is contained in a totally different place – as Comments to Virginia Rule 1.10. Virginia Rule 1.10 cmt. [1] explains that “two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm” but “if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the [Virginia] Rules.” Virginia Rule 1.10 cmt. [1] then states that “the terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Virginia Rule 1.10 cmt. [1] next explains

that “it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved.” That general statement does not provide much useful guidance. Virginia Rule 1.10 cmt. [1] concludes with an example: “[a] group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to the other.” As explained in this document’s summary, analysis and comparison of Virginia Rule 1.10, it is remarkable that Virginia Rule 1.10 cmt. [1] contains the word “should” in noting that lawyers “should not represent opposing parties in litigation.”

Virginia Rule 1.10 cmt. [1a] addresses organizations’ law departments, which are defined as firms. Virginia Rule 1.10 cmt. [1b] addresses legal aid organizations. This document addresses those and other Virginia Rule 1.10 Comments in its summary, analysis and comparison of Virginia Rule 1.10.

ABA Model Rule 1.0(c) defines the word “[f]irm” and the term “law firm” as “denoting a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employees in a legal services organization or the legal department of a corporation or other organization.” ABA Model Rule 1.0 cmts. [2] – [4] provide guidance about this ABA Model Rule definition. This contrasts with the Virginia Rules, which define the word “firm” in its Terminology section, but places the comments providing guidance in a totally different place – as Comments to Virginia Rule 1.10.

**ABA Model Rule 7.1 cmt. [7]** addresses essentially the same concept, but with less elaboration.

ABA Model Rule 7.1 cmt. [7] simply states that lawyers “may not imply or hold themselves out as practicing together in one firm when they are not a firm.” ABA Model Rule 7.1 cmt. [7] points to ABA Model Rule 1.0(c) for its definition of “firm”.

#### **ABA Model Rule 7.1 Comment [6]**

Virginia did not adopt ABA Model Rule 7.1 cmt. [6].

ABA Model Rule 7.1 cmt. [6] explains that “[a] law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction.”

#### **ABA Model Rule 7.1 Comment [8]**

Virginia did not adopt ABA Model Rule 7.1 cmt. [8].

ABA Model Rule 7.1 cmt. [8] warns that “[i]t is misleading to use the name of a lawyer holding a public office in the name of a law firm, or in communications on the law firm’s behalf.” Interestingly, this prohibition is not absolute. ABA Model Rule 7.1 cmt. [8] states that such names or communications are misleading if they are used “during any substantial period in which the lawyer is not actively and regularly practicing with the firm.” Presumably this leeway allows law firms to continue using such names or making such communications for at least a certain period of time.

# ABA MODEL RULE 7.2

## Communications Concerning A Lawyer's Services: Specific Rules

The Rule 7 series addresses lawyer marketing. There have been more dramatic changes in this topic than in any other ethics topic over recent years.

Virginia did not adopt ABA Model Rule 7.2

Virginia Rule 7.1 and Virginia Rule 7.3 address many of the issues contained in ABA Model Rule 7.2.

This document summarizes, analyzes and compares the following ABA Model Rule 7.2 provisions in its following Rule analyses:

ABA Model Rule 7.2(a) .....	ABA Model Rule 7.2
ABA Model Rule 7.2(b)(1)-(3) .....	Rule 7.3
ABA Model Rule 7.2(b)(4).....	ABA Model Rule 7.2
ABA Model Rule 7.2(b)(5).....	ABA Model Rule 7.3
ABA Model Rule 7.1(c) .....	Rule 7.1
ABA Model Rule 7.2(d) .....	ABA Model Rule 7.2
ABA Model Rule 7.2 cmt. [1].....	ABA Model Rule 7.2
ABA Model Rule 7.2 cmts. [2] - [6].....	Rule 7.3
ABA Model Rule 7.2 cmts. [7] - [8].....	ABA Model Rule 7.2
ABA Model Rule 7.2 cmts. [9] - [11].....	Rule 7.1
ABA Model Rule 7.2 cmt. [12].....	ABA Model Rule 7.2

## Rule

### ABA Model Rule 7.2(a)

Virginia did not adopt ABA Model Rule 7.2(a).

ABA Model Rule 7.2 (a) provision simply states that lawyers “may communicate information regarding the lawyer’s services through any media.”

### ABA Model Rule 7.2(b)

ABA Model Rule 7.2(b) addresses five types of lawyers’ permissible marketing-related payments.

Virginia Rule 7.3(b)(1) - (3) deals with the first three types of permissible payments. This document analyzes ABA Model Rule 7.2(b)(1) - (3) in connection with that Virginia Rule.

Virginia did not adopt ABA Model Rule 7.2(b)(4). ABA Model Rule 4.2 (b)(4) addresses referral arrangements. The ABA Model Rule explains that the general prohibition on lawyers “compensat[ing], giv[ing] or promis[ing] anything of value to a person for recommending the lawyer’s services” does not prohibit lawyers from “refer[ing] clients to another lawyer or a nonlawyer professional . . . that provides for the other person to refer clients or customers to the lawyer.” But there are conditions. First, such an arrangement is not “otherwise prohibited under these Rules.” Second, such a “reciprocal referral arrangement is not exclusive.” Third, the client must be “informed of the existence and nature of the agreement.”

ABA Model Rule 7.2(b)(5) allows lawyers to give nominal gifts to those who recommend the lawyer’s services. Virginia addresses that issue in Virginia Rule 7.3(d)(4).

This document summarizes and analyzes ABA Model Rule 7.2(b)(5) in connection with that Virginia Rule.

### **ABA Model Rule 7.2(c)**

ABA Model Rule 7.2(c) addresses lawyers' statements or implications that they are "certified as a specialist in a particular field of law."

Virginia Rule 7.1 cmt. [4] addresses that issue. This document summarizes and analyzes the ABA Model Rule 7.2(c) approach to that issue in connection with that Virginia Rule Comment.

### **ABA Model Rule 7.2(d)**

Virginia did not adopt ABA Model Rule 7.2(d).

ABA Model Rule 7.2(d) requires that all lawyer communications governed by ABA Model Rule 7.2 (which is essentially every marketing communication) "must include the name and contact information of at least one lawyer or law firm responsible for its content."

## Comment

### ABA Model Rule 7.2 Comment [1]

Virginia did not adopt ABA Model Rule 7.2 cmt. [1].

ABA Model Rule 7.2 cmt. [1] explains that ABA Model Rule 7.2 “permits public dissemination of information,” about lawyers – giving several examples: the lawyer’s basic contact information; “the kinds of services the lawyer will undertake;” information about the lawyer’s fees and prices (“including prices for specific services and payment and credit arrangements”); the lawyer’s “foreign language ability”; “names of references”; and “other information that might invite the attention of those seeking legal assistance.”

ABA Model Rule 7.2 cmt. [1] includes another significant example of information that lawyers can publicly disseminate – but with an important condition: “names of clients regularly represented,” but only “with their consent.” This consent requirement seems counterintuitive if a lawyer’s representation of a client is well known, or involves a published court decision or widely-reported transaction. But state legal ethics opinions are increasingly requiring such explicit consent.

### ABA Model Rule 7.2 Comments [2] – [6]

ABA Model Rule 7.2 cmts. [2] - [6] address lawyers paying others to recommend them.

Virginia Rule 7.3(d) and Virginia Rule 7.3 cmts. [4] - [6] address that issue. This document summarizes and analyzes those ABA Model Rule Comments in connection with that Virginia Rule and Virginia Rule Comments.

### **ABA Model Rule 7.2 Comment [7]**

Virginia did not adopt ABA Model Rule 7.2 cmt. [7].

ABA Model Rule 7.2 cmt. [7] addresses lawyers' acceptance of assignments or referrals from legal service plans and lawyer referral services. ABA Model Rule 7.2 cmt. [7] requires such lawyers to "act reasonably to assure that the activities of the plan or service are compatible with the lawyers' professional obligations." Similarly, those plans and services must conform to the ABA Model Rules when communicating with the public, and therefore may not communicate any "false or misleading" advertisements. ABA Model Rule 7.2 cmt. [7] provides an example of such a misleading communication: one that "would mislead the public to think that it was a lawyer referral service sponsored by a state agency or bar association."

### **ABA Model Rule 7.2 Comment [8]**

Virginia did not adopt ABA Model Rule 7.2 cmt. [8].

ABA Model Rule 7.2 cmt. [8] addresses "reciprocal referral arrangements" – in which lawyers refer clients to another lawyer or to a nonlawyer professional "in return for the undertaking of that person to refer clients or customers to the lawyer." ABA Model Rule 7.2 cmt. [8] explains that such arrangements must not "interfere with the lawyer's professional judgment," referring to ABA Model Rules 2.1 and 5.4(c). Similarly, lawyers may not pay "anything solely for the referral," but may agree to refer clients to the other lawyer or nonlawyer professional, "so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement." ABA Model Rule 1.7 conflict of interest rules govern such arrangements. Such "[r]eciprocal referral

arrangements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these [ABA Model] Rules.”

ABA Model Rule 7.2 cmt. [8] concludes with an assurance that ABA Model Rule 7.2 “does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.” Presumably that includes law firms, some of whose lawyers have their own professional corporations.

### **ABA Model Rule 7.2 Comments [9] – [11]**

ABA Model Rule 7.2 cmts. [9] - [11] address lawyers’ communications about their fields of practice.

The Virginia Rules address that issue in Virginia Rule 7.1. This document summarizes and analyzes those ABA Model Rule Comments in connection with that Virginia Rule and Virginia Rule Comments.

### **ABA Model Rule 7.2 Comment [12]**

Virginia did not adopt ABA Model Rule 7.2 cmt. [12].

ABA Model Rule 7.2 cmt. [12] addresses the requirement in ABA Model Rule 7.2(d) that any communication governed by the ABA Model Rule “must include the name and contact information of at least one lawyer or law firm responsible for its content.”

ABA Model Rule 7.2 cmt. [12] explains what is required: “a website address, a telephone number, an email address or a physical office location.”

# RULE 7.3

## Solicitation of Clients

The Rule 7 series addresses lawyer marketing. There have been more dramatic changes in this topic than in any other ethics topic over recent years.

Virginia Rule 7.3 addresses solicitation of clients. Some of the Virginia Rule provisions parallel provisions in ABA Model Rule 7.3. But others parallel provisions in ABA Model Rule 7.2. Virginia did not adopt a Rule 7.2.

This document summarizes, analyzes and compares the following ABA Model Rule 7.2 provisions in its following Rule analyses:

ABA Model Rule 7.2(a) .....	ABA Model Rule 7.2
ABA Model Rule 7.2(b)(1)-(3) .....	Rule 7.3
ABA Model Rule 7.2(b)(4).....	ABA Model Rule 7.2
ABA Model Rule 7.2(b)(5).....	ABA Model Rule 7.3
ABA Model Rule 7.1(c) .....	Rule 7.1
ABA Model Rule 7.2(d) .....	ABA Model Rule 7.2
ABA Model Rule 7.2 cmt. [1].....	ABA Model Rule 7.2
ABA Model Rule 7.2 cmts. [2] - [6].....	Rule 7.3
ABA Model Rule 7.2 cmts. [7] - [8].....	ABA Model Rule 7.2
ABA Model Rule 7.2 cmts. [9] - [11].....	Rule 7.1
ABA Model Rule 7.2 cmt. [12].....	ABA Model Rule 7.2

## Rule

### Virginia Rule 7.3(a)

Virginia Rule 7.3(a) addresses the term “solicitation.”

Virginia Rule 7.3(a) lists several attributes of a “solicitation” communication governed by Virginia Rule 7.3.

First, the communication must be “initiated by or on behalf of a lawyer.” Thus, the term includes lawyers’ oral, written, face-to-face, telephonic or electronic communications, as well as communications made by non-lawyers “on behalf of” a lawyer.

Second, the communications must be “directed to a specific person.” This differentiates a “solicitation” communication from more generic marketing, such as websites, newspaper advertisements, billboards, etc. The term “specific person” presumably is intended to be synonymous with the term “potential client” contained in Virginia Rule 7.3(b) and elsewhere. As explained below, ABA Model Rule 7.3 uses several terms that are also presumably intended to be synonymous, including the term “prospective client” (ABA Model Rule 7.3 cmt. [7]) – which is now a carefully defined term in ABA Model Rule 1.18(a).

Third, those “specific” persons must be “known to be in need of legal services.” Thus, the definition of “solicitation” does not include communications (even to specific persons) unless the lawyer “knows” that they need legal services. The Virginia

Terminology section defines “knows” as “denot[ing] actual knowledge of the fact in question,” although “[a] person’s knowledge may be inferred from circumstances.”

Interestingly, Virginia Rule 7.3(a) does not say who must know of the potential client’s need for legal services in a “particular matter.” Presumably it is the lawyer, but perhaps it also applies to a non-lawyer communicating “on behalf of a lawyer.”

Fourth, those legal services must be “in a particular matter.” Thus, the definition of “solicitation” does not include generic offers to provide legal services that specific persons might need at some point.

Fifth, the communication must “offer[s] to provide, or can reasonably be understood as offering to provide, legal services for that matter.”

### **ABA Model Rule 7.3(a)**

ABA Model Rule 7.3(a) is essentially the same as Virginia Rule 7.3(a), but with several key differences.

First in contrast to Virginia Rule 7.3(a)’s application to communications “initiated by or on behalf of a lawyer,” ABA Model Rule 7.3(a) covers communications “initiated by or on behalf of a lawyer or law firm.” Presumably the Virginia Rule’s reference to “on behalf of” also covers the lawyer’s colleagues.

Second, and more importantly, in contrast to Virginia Rule 7.3(a)’s requirement that the lawyer knows that the specific solicited potential client is “in need of legal services in a particular matter”, ABA Model Rule 7.3(a) uses the phrase “knows or reasonably should know.” Thus, ABA Model Rule 7.3(a) contains what amounts to a negligence standard.

### **Virginia Rule 7.3(b)**

Virginia Rule 7.3(b) addresses prohibited solicitations – which implicitly could include any type of solicitation (oral, written, electronic, face-to-face, telephonic, etc.).

Virginia Rule 7.3(b) uses the term “potential client.” That term presumably is intended to be synonymous with Virginia Rule 7.3(a)’s term “specific person.” Notably, Virginia Rule 7.3 does not use the term “prospective clients” – which appears in ABA Model Rule 7.3 cmt. [7]. The term “prospective client” is specifically defined in ABA Model Rule 1.18(a), which the ABA adopted after ABA Model Rule 7.3.

Virginia Rule 7.3(b) prohibits lawyers from soliciting “employment from a potential client” in two situations.

#### **Virginia Rule 7.3(b)(1)**

First, under Virginia Rule 7.3(b)(1), lawyers may not solicit employment if “the potential client has made it known to the lawyer a desire not to be solicited by the lawyer.”

Second, under Virginia Rule 7.3(b)(2), lawyers may not solicit employment from a potential client if “the solicitation involves harassment, undue influence, coercion, duress, compulsion, intimidation, threats or unwarranted promises of benefits.” This is an interesting list. Seven of the eight scenarios involve some overreaching based on improper conduct or on negative communications. The eighth scenario (“unwarranted promises of benefits”) involves a communication’s positive substance – rather than improper conduct or negative communications. One would have thought that the “unwarranted promises of benefits” scenario would have been covered in Virginia Rule 7.1, which focuses on the substance of advertising and marketing.

**ABA Model Rule 7.3(c)** addresses those scenarios in which solicitation of any sort is prohibited.

In contrast to Virginia Rule 7.3(b)'s use of the term "employment," ABA Model Rule 7.3(c) uses the phrase "professional employment." Presumably those terms are intended to be synonymous. Virginia Rule 7.3(a)'s definition of solicitation is limited to lawyers and others seeking legal services, which of course involves "professional employment."

ABA Model Rule 7.3(c) contains essentially the same substance as Virginia Rule 7.3(b). But there are some differences (discussed below).

First, under ABA Model Rule 7.3(c)(1), lawyers' solicitation is prohibited if "the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer". Thus, ABA Model Rule 7.3(c)(1) uses the somewhat loaded term "target" rather than Virginia Rule 7.3(b)'s use of the more neutral term "potential client."

Second, ABA Model Rule 7.3(c)(2) has a much shorter list than Virginia Rule 7.3(b)(2) of the scenarios in which lawyers may not solicit employment. The ABA Model Rule only contains three: "coercion, duress or harassment." This contrasts with eight scenarios in Virginia Rule 7.3(b)(2), six of which involve conduct and two of which involve content.

### **ABA Model Rule 7.3(b)**

Virginia did not adopt ABA Model Rule 7.3(b).

ABA Model Rule 7.3(b) addresses in-person solicitation.

ABA Model Rule 7.3(b) prohibits lawyers' "live person-to-person contact" to anyone other than three specific types of potential clients – if "a significant motive for the lawyer's [solicitation] is the lawyer's or law firm's pecuniary gain."

There might be some question about whether lawyers' or law firms' continuing legal education presentations, case update seminars, how-to transactional document drafting sessions, etc. would satisfy this standard. The lawyers and law firms undoubtedly would argue that they are simply educating the profession. On the other hand, presumably they would not offer such person-to-person encounters without at least some motivation of "pecuniary gain" that might come from work. In all situations, this analysis might depend on the exact circumstances. For instance, a would-be client who attends the program and then leaves might not have been subject to such prohibited person-to-person solicitation. But an audience member who comes up after the program to ask a specific question and receive an obvious "pitch" for work might fall within this prohibition.

ABA Model Rule 7.3(b)'s lists the three types of people from whom lawyers may freely solicit professional employment "by live person-to-person contact": (1) a "lawyer" (ABA Model Rule 7.3(b)(1)); (2) a "person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm" (ABA Model Rule 7.3(b)(2)); and (3) a "person who routinely uses for business purposes the type of legal services offered by the lawyer" (ABA Model Rule 7.3(b)(3)). Other persons presumably are off-limits to such "live person-to-person" solicitation under ABA Model Rule 7.3(b).

Virginia Rule 7.3(c) (discussed below) has essentially the same definition of those three categories of would-be clients, but for a totally different purpose. As explained below, Virginia Rule 7.3(c) relieves Virginia lawyers of having to include the words "ADVERTISING MATERIAL" in any "written, recorded or electronic solicitation" to those categories of people. The Virginia Rules do not have any specific prohibition on other more personal solicitation (live face-to-face, telephonic, etc.).

### **Virginia Rule 7.3(c)**

Virginia Rule 7.3(c) addresses a fairly mundane matter – what “written, recorded or electronic solicitation from a lawyer” must “conspicuously include the words ‘ADVERTISING MATERIAL.’”

Virginia Rule 7.3(c) explains that when required, such conspicuous wording must be “on the outside envelope, if any, and at the beginning and ending of any recorded or electronic solicitation.”

Virginia Rule 7.3(c) lists four categories of persons to whom lawyers may communicate a solicitation (defined in Virginia Rule 7.3(a), as discussed above): in “written, recorded or electronic” form without an “ADVERTISING MATERIAL” warning.

First, Virginia Rule 7.3(c)(2) allows lawyers to omit the “ADVERTISING MATERIAL” warning in “written, recorded or electronic solicitation” to lawyers. This matches ABA Model 7.3(b)(1)’s category of persons from whom lawyers may solicit professional employment “by live person-to-person contact” – “when a significant motive for the lawyer’s doing so is the lawyer’s or law firm’s pecuniary gain.”

Second, Virginia Rule 7.3(c)(2) allows lawyers to omit the “ADVERTISING MATERIAL” warning in “written, recorded or electronic solicitation” to any person who “has a familial, personal, or prior professional relationship with the lawyer.” This is similar to, but not exactly the same, as the category of persons listed in ABA Model Rule 7.3(b)(2)’s second category of persons from whom lawyers may solicit employment “by live person-to-person contact.” In contrast to Virginia Rule 7.3(c)(2)’s use of the word “personal” in describing that category, ABA Model Rule 7.3(b)(2) uses the term “close personal.” And in contrast to Virginia Rule’s 7.3(c)(2) description of persons with a “prior

professional relationship with the lawyer,” ABA Model Rule 7.3(b)(2) uses the phrase “prior business or professional relationship with the lawyer or a law firm.”

The absence of the phrase “prior business...relationship” in Virginia Rule 7.3(c)(2) (which appears in a very different ABA Model Rule 7.3(b)(2)) places outside of Virginia Rule 7.3(c)’s “ADVERTISING MATERIAL” requirement would-be clients who have not been represented by the lawyer in a “prior professional relationship,” but who had a “prior business relationship” with the lawyer. For instance, a lawyer’s car dealer, landlord, etc. have a “business relationship” with the lawyer – but not a “professional relationship” with the lawyer. Those persons might have the type of sophistication that would place them in the same category as those with a “professional relationship.” On the other hand, the lawyer’s janitor, maid or maintenance person might have a “business” relationship with the lawyer, but would not seem to be in the same category as those with a “professional relationship.” So either approach is understandable. Virginia chose to include would-be clients with a non-professional “business” relationship among those who must receive the referred “ADVERTISING MATERIAL” warning. The ABA included would-be clients with a non-professional “business relationship” with the lawyer from the list of those who are fair game for “live person-to-person solicitation.”

Third, Virginia Rule 7.3(c)(3) allows lawyers to omit the “ADVERTISING MATERIAL” warning in “written, recorded or electronic solicitation” to “one who has had prior contact with the lawyer.” This is an odd category. The term “prior contact” is not defined. Presumably, it would not be the same as the contact described in Virginia Rule 7.3(c)(2) – which implicitly includes “prior contact” as part of a “familial, personal, or prior professional relationship with the lawyer.” The term probably means persons who have

“already initiated contact with the lawyer” – described in Virginia Rule 7.3 cmt. [2]. In other words, “prior contact” initiated by the would-be client, not by the lawyer. There is no parallel category in ABA Model Rule 7.3.(b).

Fourth, Virginia Rule 7.3(c)(4) allows lawyers to omit the “ADVERTISING MATERIAL” warning in “written, recorded or electronic solicitation” to would-be clients who are “contacted pursuant to court-ordered notification.” This is a strange place for that concept. ABA Model Rule 7.3(d) (discussed below) understandably indicates that none of ABA Model Rule 7.3’s provisions “prohibit communications authorized by law or ordered by a court or other tribunal.” Virginia’s inclusion of this category of persons is on its face limited to persons from whom lawyers may solicit employment without including the “ADVERTISING MATERIAL” warning. After all, Virginia Rule 7.3(c) covers “[e]very written, recorded or electronic solicitation.” Under Virginia Rule 7.3(a) a “solicitation” is defined as a “communication” that “offers to provide, or can reasonably be understood as offering to provide, legal services for that matter.” For instance, it is debatable whether a court-ordered class action notification would constitute a “solicitation” under Virginia Rule 7.3(a). Class members are not really “in need of legal services” except in the most general sense. And a class action notification of a settlement is not really “offering to provide ... legal services. The ABA Model Rule placement of the exemption for court-ordered communications makes more sense by eliminating all of ABA Model Rule 7.3’s requirements in that court-approved and court-supervised context.

### **Virginia Rule 7.3(d)**

Virginia Rule 7.3(d) addresses lawyers providing benefits in return for recommendations.

Virginia Rule 7.3(d) warns that lawyers “shall not compensate, give or promise anything of value . . . for recommending the lawyer’s services.” The Virginia Rule exempts from that prohibition “a person who is . . . an employee or lawyer in the same law firm.” In other words, lawyers may reward their lawyer colleagues for recommending the lawyer’s services. There are fee-split implications if lawyers or their law firms “compensate, give, or promise anything of value” to non-lawyer colleagues for recommending the law firm – an issue partially addressed in Virginia Rule 7.3 cmt. [4] (discussed below), and other Virginia Rules.

Of course, black letter Virginia Rule 7.3(c) trumps any content in the accompanying Comments.

Virginia Rule 7.3(a) then describes four scenarios in which lawyers may “compensate, give, or promise anything of value” to a third person for recommendations.

First, under Virginia Rule 7.3(d)(1), lawyers may “pay the reasonable costs of advertisements or communications permitted by this Virginia Rule [7.3] and Virginia Rule 7.1, including online group advertising.”

Second, under Virginia Rule 7.3(d)(2), lawyers may “pay the usual charges of a legal service plan or a not-for-profit qualified lawyer referral service.”

Third, under Virginia Rule 7.3(d)(3), lawyers may “pay for a law practice in accordance with [Virginia] Rule 1.17.”

Fourth, under Virginia Rule 7.3(d)(4), lawyers may “give nominal gifts of gratitude that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer’s services.”

This interesting Virginia Rule 7.3(d)(4) provision on its face primarily focuses on the giver's motive. But it would seem more appropriate to primarily focus on the gift's size. It seems almost inevitable that both the giver and the recipient of such "gifts of gratitude" would have an unspoken understanding that such referrals would be encouraged in the future. In nearly every situation, such gifts are both intended to express appreciation for a past favor and to encourage additional future favors. That would not be true in non-recurring situations (such as a leaving a large restaurant tip when traveling in a distant city), but presumably would be true when a patron leaves a big tip in a neighborhood restaurant where he frequently dines. If a lawyer gives a nice bottle of wine to an accountant who frequently recommends that lawyer, presumably both of them have an "understanding" that the accountant's future recommendation may bring another bottle of wine. But there is a difference between a \$20 bottle of wine (which has a nominal value) and an \$800 bottle of wine. The nominal value of the cheaper wine means that the accountant will not be tempted to recommend a lawyer if the accountant does not think that the recommended lawyer would be best for the accountant's client. But the accountant might be tempted by the possibility of another \$800 bottle of wine to let that influence her recommendation of a lawyer who might not be the best match for her client. So it is a nominal nature of the gift that renders the gift permissible.

Unfortunately, no Virginia Rule 7.3 Comment provides any guidance.

**ABA Model Rule 7.2(b)** deals with lawyers' payments to those who recommend them (ABA Model Rule 7.3 does not this address that issue).

ABA Model Rule 7.2(b) requires that lawyers “shall not compensate, give or promise anything of value to a person for recommending the lawyer’s services” – with five exceptions.

In contrast to Virginia Rule 7.3(d), there is no exclusion from that general prohibition for an “employee or lawyer in the same law firm.”

ABA Model Rule 7.2(b) contains exceptions that are similar to the four exceptions under Virginia Rule 7.3(d).

ABA Model Rule 7.2(b)(4) does not appear in Virginia Rule 7.3 or ABA Model Rule 7.3. This document addresses ABA Model Rule 7.2(b)(4) in its summary, analysis, and comparison of ABA Model Rule 7.2.

First, under ABA Model Rule 7.2(b)(1), lawyers may “pay the reasonable costs of advertisements or communications permitted by this Rule.” In contrast to Virginia Rule 7.3(d)(1), there is no reference to ABA Model Rule 7.1, and no reference to “online group advertising.”

Second, under ABA Model Rule 7.2(b)(2) lawyers may “pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service.” This language is identical to Virginia Rule 7.3(d)(2).

Third, under ABA Model Rule 7.2(b)(3) lawyers may “pay for a law practice in accordance with [ABA Model] Rule 1.17.” This language is identical to Virginia Rule 7.3(d)(3).

Fourth, under ABA Model Rule 7.2(b)(5), lawyers may “give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer’s services.” The ABA Model Rule phrase

“expression of appreciation” presumably is synonymous with the term “gratitude” in Virginia Rule 7.3(d)(4).

Virginia Rule 7.3(d) does not contain an exception for reciprocal referral agreements, which appears in ABA Model Rule 7.2(b)(4). This document addresses that issue in its summary and analysis of ABA Model Rule 7.2.

### **ABA Model Rule 7.3(d)**

As discussed above, ABA Model Rule 7.3(d) exempts from all of ABA Model Rule 7.3’s provisions “communications authorized by law or ordered by a court or other tribunal.”

ABA Model Rule 1.0(m) defines the term “tribunal.” That term “denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity.” That ABA Model Rule 1.0(m) then explains that “[a] legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party’s interests in a particular matter.”

Interestingly, there are no ABA Model Rule 1.0 Comments providing any additional guidance on that definition.

### **ABA Model Rule 7.3(e)**

Virginia did not adopt ABA Model Rule 7.3(e).

ABA Model Rule 7.3(e) exempts from ABA Model Rule 7.3’s prohibitions on lawyers’ participation “with a prepaid or group legal service plan operated by an

organization not owned or directed by the lawyer that uses live person-to-person contact to enroll members or sell subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.”

Virginia addresses payments to such plans in Virginia Rule 7.3 cmt. [6].

## Comment

### Virginia Rule 7.3 Comment [1]

Virginia Rule 7.3 cmt. [1] addresses three categories of lawyers' communications that "typically" do "not constitute a solicitation."

Virginia Rule 7.3 cmt. [1] first mentions a communication "directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial." The second is a communication "in response to a request for information." The third is a communication "automatically generated in response to Internet searches."

**ABA Model Rule 7.3 cmt. [1]** includes essentially the same list – although it uses the phrase "electronic searches" in contrast to Virginia Rule 7.3 cmt. [1]'s phrase "Internet searches."

In contrast to Virginia Rule 7.3 cmt. [1], ABA Model Rule 7.3 cmt. [1] also repeats the general prohibition contained in ABA Model Rule 7.3(b) on lawyers soliciting employment "by live person-to-person contact."

That prohibition does not appear in Virginia Rule 7.3 cmt. [1], because the Virginia Rules do not separately address "live person-to-person contact" solicitation. Instead, Virginia Rule 7.3 applies the same rules to all solicitation communications (apart from the requirement that certain communications include the "ADVERTISING MATERIAL" warning).

## **Virginia Rule 7.3 Comment [2]**

Virginia Rule 7.3 cmt. [2] addresses the rationale for Virginia Rule 7.3(c)'s "ADVERTISING MATERIAL" warning requirement.

Virginia Rule 7.3 cmt. [2] first explains why certain categories of potential clients may be solicited by lawyers without including Virginia Rule 7.3(c)'s "ADVERTISING MATERIAL" warning "on the outside envelope, if any, and at the beginning and ending of any recording electronic solicitation." The Virginia Rule Comment explains that "[t]here is far less likelihood that a lawyer would engage in abusive practices" against such persons.

Interestingly, Virginia Rule 7.3 cmt. [2]'s list of persons who are less likely to be abused does not match black letter Virginia Rule 7.3(c)'s list. Virginia Rule 7.3 cmt. [2] mentions "a former client" – a category which presumably is only a subset of those persons with a "prior professional relationship with the lawyer" that appears in black letter Virginia Rule 7.3(c)(2). Virginia Rule 7.3 cmt. [2] uses the phrase "close personal . . . relationship," in contrast to the very different phrase "personal . . . relationship" in black letter Virginia Rule 7.3(c)(2). ABA Model Rule 7.3(b)(2) uses the phrase "close personal . . . relationship" in those categories of persons who are fair game for "live person-to-person contact." Virginia Rule 7.3 cmt. [2] describes a person "who has already initiated contact with the lawyer." That presumably refers to the category in Virginia Rule 7.3(c)(3) described as "one who has had prior contact with the lawyer."

The Virginia Rule 7.3 cmt. [2] concludes with assurance that "the requirements of [Virginia] Rule 7.3(c) are not applicable in those situations." But this exemption is not as important as the exemption for similar categories in ABA Model Rule 7.2(b). Virginia Rule 7.3(c) only exempts those categories of persons from those who must receive the

“ADVERTISING MATERIAL” warning on any lawyer’s “written, recorded or electronic solicitation.” In contrast, those categories of persons are exempted by ABA Model Rule 7.3(b) from the prohibition on lawyers soliciting employment by “live person-to-person contact.”

**ABA Model Rule 7.3 cmt. [5]** contains some of the same concepts as Virginia Rule 7.3 cmt. [2].

ABA Model Rule 7.3 cmt. [5] notes that “[t]here is far less likelihood that a lawyer would engage in overreaching against a former client, or a person with whom the lawyer has a close personal, family, business or professional relationship.” This essentially matches the categories in black letter ABA Model Rule 7.3(b)(2). The list is in a different order, and ABA Model Rule 7.3 cmt. [5] does not include black letter ABA Model Rule 7.3(b)(2)’s broadening phrase “or law firm” in describing relationships that render such solicitation permissible. Adding such relationships with other lawyers in the soliciting lawyer’s law firm dramatically affects the analysis. Although black letter ABA Model Rule 7.3(b)(2)’s standard trumps the narrower ABA Model Rule 7.3 cmt. [5]’s standard, it is unfortunate that the latter does not contain the expansive “law firm” reference.

In contrast to Virginia Rule 7.3 cmt. [2], ABA Model Rule 7.3 cmt. [5] also describes other scenarios where there is “far less likelihood” for lawyer overreaching: “situations in which the lawyer is motivated by considerations other than the lawyer’s pecuniary gain.” That exclusion does not appear in Virginia Rule 7.3 or a Virginia Rule 7.3 comment.

ABA Model Rule 7.3 cmt. [5] then explains that there is a similar lack of potential overreaching “when the person contacted is a lawyer or is known to routinely use the type of legal services involved for business purpose.” This category does not appear in the

Virginia Rules. ABA Model Rule 7.3 cmt. [5] gives several examples of the type of persons who routinely use lawyers for sophisticated issues: “entrepreneurs who regularly engage business, employment law or intellectual property lawyers; small business proprietors who routinely hire lawyers for lease or contract issues; and other people who routinely retain lawyers for business transactions or formations.”

ABA Model Rule 7.3 cmt. [5] concludes with an assurance that ABA Model Rule 7.3(b)’s general prohibition on “live person-to-person contact” is “not intended to prohibit a lawyer from participating in constitutionally protected [sic] activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries.”

Virginia Rule 7.3 cmt. [2] does not include such a discussion of protected communications. That absence makes sense, because Virginia Rule 7.3(c) does not treat in-person solicitations different from other types of solicitation. Presumably, constitutional protections would likewise override Virginia Rule 7.3(c)’s “ADVERTISING MATERIAL” mandate.

### **Virginia Rule 7.3 Comment [2a]**

Virginia Rule 7.3 cmt. [2a] addresses Virginia Rule 7.3(c)’s requirement that certain communications include an “ADVERTISING MATERIAL.”

Virginia Rule 7.3 cmt. [2] first explains that the requirement “does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors.” That presumably refers to Virginia Rule 7.3(c)(3)’s exception “one who has had prior contact with the lawyer.”

But the phrase “spokespersons or sponsors” is strange. It is difficult to imagine what “potential clients” have “spokespersons or sponsors.” Virginia Rule 7.3 cmt. [2a] does not define them, or provide any other guidance.

Virginia Rule 7.3 cmt. [2a] then warns that “prior contact from the lawyer in the form of advertising material” does not eliminate the requirement to include the “ADVERTISING MATERIAL” warning in “future contacts.”

Virginia Rule 7.3 cmt. [2a] concludes with an apparent exemption from all Virginia Rule 7.3 cmt. [2a] requirements. The Virginia Rule Comment explains that “[g]eneral announcements by lawyers, including changes in personnel or office location” do not fall within Virginia Rule 7.3(a)’s definition of “solicitation” (the Virginia Rule Comment parrots that definition). One would think that such a general exemption would be included in Virginia Rule 7.3 cmt. [1] – which provides other examples of communications that “typically” do not constitute solicitations (or perhaps even in black letter Virginia Rule 7.3(a)). Placing the general exemption in a Virginia Rule Comment otherwise focusing on the much more specific “ADVERTISING MATERIAL” warning tends to downplay or even conceal the exemption from lawyers looking for the definition of “solicitation” that meets Virginia Rule 7.3’s requirements.

### **ABA Model Rule 7.3 Comment [2]**

Virginia did not adopt ABA Model Rule 7.3 cmt. [2].

ABA Model Rule 7.3 cmt. [2] addresses ABA Model Rule 7.3(b)’s phrase “[I]ive person-to-person contact.”

As explained above, under ABA Model Rule 7.3(b) all but three categories of potential clients may not be solicited by lawyers using such intrusive communications.

That prohibition and those categories do not appear in Virginia Rule 7.3 or anywhere else in Virginia Rules. Instead, Virginia Rule 7.3 lumps that type of communication in with all other types of communication soliciting professional employment.

ABA Model Rule 7.3 cmt. [2] defines such “live person-to-person contact” as “in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications where the person is subject to direct personal encounter without time for reflection.”

Significantly, the definition “does not include chat rooms, text messages or other written communications that recipients may easily disregard.” That interesting approach thus recognizes that recipients of text messages or even real-time communications in “chat rooms” have “time for reflection,” and “may easily disregard” such communications. That probably was debatable at the beginning of the electronic age, but makes sense now.

ABA Model Rule 7.3 cmt. [2] next explains that “[a] potential for overreaching exists” in live person-to-person contact, because that scenario “subjects a person to the private importuning of the trained advocate in a direct interpersonal encounter.” ABA Model Rule 7.3 cmt. [2] notes that a would-be client “who may already feel overwhelmed by the circumstances giving rise to the need for legal services . . . may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer’s presence and insistence upon an immediate response.”

ABA Model Rule 7.3 cmt. [2] concludes with another warning that such a situation “is fraught with the possibility of undue influence, intimidation and overreaching.”

### **ABA Model Rule 7.3 Comment [3]**

ABA Model Rule 7.3 Comment [3] addresses the potential danger of “live person-to-person contact.” Virginia did not adopt a similar Comment, because Virginia does not have separate solicitation rules for live person-to-person solicitation.

ABA Model Rule 7.3 cmt. [3] first warns that “[t]he potential for overreaching inherent in live person-to-person contact justifies its prohibition” – especially “since lawyers have alternative means of conveying necessary information.” ABA Model Rule 7.3 cmt. [3] then defies some of those alternatives: “[i]n particular, communications can be mailed or transmitted by email or other electronic means that do not violate other laws.”

ABA Model Rule 7.3 cmt. [3] concludes with an explanation that those other “forms of communications make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to live person-to-person persuasion that may overwhelm a person’s judgment.”

**ABA Model Rule 7.3 Comment [4]** also addresses the dangers of person-to-person solicitation. Virginia did not adopt a similar Comment, because Virginia does not have separate solicitation rules for live person-to-person solicitation.

ABA Model Rule 7.3 cmt. [4] first notes that “[t]he contents of live person-to-person contact can be disputed and may not be subject to third-party scrutiny. The plural “contents” seems inapt. Normally the singular word “content” would be appropriate in a sentence such as this.

ABA Model Rule 7.3 cmt. [4] concludes by warning that “[c]onsequently, they [“person-to-person contact”] are much more likely to approach (and occasionally cross)

the dividing line between accurate representations and those that are false and misleading.”

This warning seems inappropriate, unsupported, and needlessly insulting to lawyers. In essence, ABA Model Rule 7.3 cmt. [4] contends that “live person-to-person contact” is “much more likely” (not just “more likely”) to contain “false and misleading” content – because its content “can be disputed and may not be subject to third-party scrutiny.” In other words, lawyers are “much more likely” to lie to potential clients because they can deny they did so, and no third party can prove otherwise. This is a remarkable condemnation of lawyers.

### **Virginia Rule 7.3 Comment [3]**

Virginia Rule 7.3 cmt. [3] addresses impermissible types of solicitation.

Virginia Rule 7.3 cmt. [3] begins with an obvious category of impermissible solicitation that does not appear in black letter Virginia Rule 7.3(b): “any solicitation that contains information that is false or misleading within the meaning of [Virginia] Rule 7.1.” Virginia Rule 7.1 states that “[a] lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services.” That Virginia Rule then explains that “[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 whole not materially misleading.”

Virginia Rule 7.3 cmt. [3]’s next category of impermissible solicitation contains an incorrect reference: solicitation “which involves coercion, duress or harassment within the meaning of Virginia Rule 7.3(a).” The reference should be to Virginia Rule 7.3(b).

Virginia Rule 7.3 cmt. [3]’s list of impermissible conduct (“coercion, duress or harassment”) matches the ABA Model Rule 7.3(c)(2) list. But it is a much shorter list than black letter Virginia Rule 7.3(b)(2)’s list: “harassment, undue influence, coercion, duress, compulsion, intimidation, threats or unwarranted promises of benefits.” Of course, black letter Virginia Rule 7.2(b)(2)’s list trumps the Virginia Rule Comment, but one would expect that the Virginia Rule Comment would match the Virginia Rule, rather than using the shorter ABA Model Rule list.

Virginia Rule 7.3 cmt. [3]’s next category of impermissible solicitation is arguably out of order, and also contains a mistaken reference: solicitation “which involves contact with a potential client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of [Virginia] Rule 7.3(a).” There is a stylistic issue with this provision. Virginia Rule 7.3 cmt. [3] first mentions solicitation containing the prohibited content, and then turns to solicitation of a potential client who does not want it. That order is the reverse of black letter Virginia Rule 7.3(b)’s order of those impermissible types of solicitation. Black letter Virginia Rule 7.3(b)(1) addresses solicitation of a “potential client” who does not want it, and black letter Virginia Rule 7.3(b)(2) addresses the content-based prohibition. One would think Virginia Rule 7.3 cmt. [3]’s discussion of these provisions would match the black letter Virginia Rule’s order of that. In addition, the reference should be to Virginia Rule 7.3(b), not Virginia Rule 7.3(a).

Virginia Rule 7.3 cmt. [3] then warns that a lawyer may violate the prohibition on harassment (again mistakenly referring to Virginia Rule 7.3(a), instead of Virginia Rule 7.3(b)) “if after sending a letter or other communication to a potential client the lawyer

receives no response, [but] continue[s] repeated efforts to communicate with the potential client.”

Virginia Rule 7.3 cmt. [3] concludes with an understandable explanation that “[r]egardless of the form of the communication [a solicitation’s] propriety will be judged by the totality of the circumstances under which it is made, including the potential client’s sophistication and physical, emotional, and mental state, the nature and characterization of the legal matter, the parties’ previous relationship, the lawyer’s conduct and the words spoken.”

**ABA Model Rule 7.3 cmt. [6]** addresses the same basic concepts as Virginia Rule 7.3 cmt. [3].

ABA Model Rule 7.3 cmt. [6] first explains that lawyers’ solicitations are prohibited if they: (1) contain “false or misleading information within the meaning of [ABA Model] Rule 7.1”; (2) involve “coercion, duress or harassment within the meaning of [ABA Model] Rule 7.3(c)(2); or (3) that involve “contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of [ABA Model] Rule 7.3(c)(1).”

In contrast to Virginia Rule 7.3 cmt. [2], ABA Model Rule 7.3 cmt. [6] concludes with a warning that “[l]ive, person-to-person contact” is “ordinarily not appropriate” with “individuals who may be especially vulnerable to coercion or duress.” ABA Model Rule 7.3 cmt. [6] provides examples: (1) “the elderly”; (2) “those whose first language is not English”; or (3) “the disabled.”

### **Virginia Rule 7.3 Comment [4]**

Virginia Rule 7.3 cmt. [4] addresses lawyers' payments to or providing benefits to others for recommending the lawyers. So lawyers might violate Virginia Rule 7.3(d) if they compensate an employee or a third person "for recommending the lawyer's services," even if the recommendation is truthful rather than false or misleading.

Virginia Rule 7.3 cmt. [4] begins by generally stating that "[l]awyers are not permitted to pay others for recommending a lawyer's services or for channeling professional work in a manner that violates [Virginia] Rule 7.1 and this [Virginia] Rule [7.3]."

The reference to Virginia Rule 7.1 is odd. Virginia Rule 7.1 prohibits lawyers from making a "false or misleading communication about the lawyer or the lawyer's services." It is possible that lawyers' payments to others might violate that prohibition on false and misleading statements, but that seems like an unnecessary and illogical reference. One would think that the person recommending the lawyer would be making such false or misleading statements about the lawyer's qualification, if anyone did. Perhaps the reference therefore focuses on lawyers paying for someone else's false statements about the lawyer. Not surprisingly, Virginia Rule 8.4(a) explains that "[i]t is professional misconduct for a lawyer to . . . knowingly assist or induce another to ["violate or attempt to violate the [Virginia] Rules of Professional Conduct"], or to do so through the acts of another."

Virginia Rule 7.3 cmt. [4] next defines the term "recommendation" – explaining that a communication meets that standard "if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities."

Virginia Rule 7.3 cmt. [4] then discusses Virginia Rule 7.3(d)(1)'s exceptions under which lawyers may make such payments.

First, lawyers may “pay for advertising and communications.” Virginia Rule 7.3 cmt. [4] provides a long list of such typical advertising, and includes more modern categories such as “domain-name registrations, sponsorship fees, banner ads, and group advertising.”

Second, lawyers may “compensate employees, agents, and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff, and website designers.” This list seems to include both lawyer employees and third party agents. But Virginia Rule 7.3 cmt. [4] also warns that such compensation is permissible only “as long as the employees, agents, and vendors do not direct or control the lawyer’s professional judgment in violation of [Virginia] Rule 5.4(c).”

Virginia Rule 5.4(c) states that “[a] lawyer shall not permit a person who recommends, employs, or pays the lawyers to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services.” Presumably Virginia Rule 7.3 cmt. [4]’s phrase “direct or control” is intended to be essentially synonymous with Virginia Rule 5.4(c)’s phrase “direct or regulate.” As discussed in this document’s analysis of Virginia Rule 5.4(c), a more generic term like “interfere” probably would have been more appropriate.

Virginia Rule 7.3 cmt. [4] also refers to Virginia Rule 5.3 as describing lawyers’ duties “with respect to the conduct of nonlawyers who prepare marketing materials for them.”

Virginia Rule 5.3 requires that lawyers employing or retaining (thus presumably employing but not directly otherwise supervising) non-lawyers must make “reasonable efforts” to ensure that such non-lawyers’ “conduct is compatible with the professional obligations of the lawyer.” Virginia Rule 5.3 also explains that in some circumstances lawyers will be “responsible” (presumably meaning punishable) for such non-lawyers’ conduct in certain specified circumstances.

Third, lawyers “may pay others for generating client leads, such as internet-based client leads.” This type of permissible payment also includes a condition: “as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with [Virginia] Rule 5.4, and the lead generator’s communications are consistent with [Virginia] Rule 7.1.”

Virginia Rule 7.3 cmt. [4] concludes by describing another condition: lawyers “must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person’s legal problems when determining which lawyer should receive their referral.” The reference to Virginia Rule 7.1 is understandable, because that Rule focuses on “false or misleading communications.” But on its face, Virginia Rule 7.1 applies to the lawyers, not to others recommending the lawyers. Presumably the reference to Virginia Rule 7.1 implicitly includes the prohibition in Virginia Rule 8.4(a) that lawyers may not violate the ethics rules “through the acts of another.”

**ABA Model Rule 7.2 cmt. [2]** contains many of the same concepts that appear in Virginia Rule 7.3 cmt. [4].

ABA Model Rule 7.2 cmt. [2] begins with the general statement that “lawyers are not permitted to pay others for recommending lawyer’s services” – except as permitted under ABA Model Rule 7.2(b)(1)-(b)(5). ABA Model Rule 7.2 cmt. [2] contains the identical definition of “recommendation” as Virginia Rule 7.3 cmt. [4].

In contrast to Virginia Rule 7.3 cmt. [4], ABA Model Rule 7.2 cmt. [2] assures that “[d]irectory listings and group advertisements that list lawyers by practice area, without more, do not constitute impermissible ‘recommendations’”.

**ABA Model Rule 7.2 cmt. [3]** also contains some concepts that appear in Virginia Rule 7.3 cmt. [4].

ABA Model Rule 7.2 cmt. [3] first explains that lawyers may pay for ethically permissible “advertising and communications,” and contains the same basic list of permissible advertisement-related payments as Virginia Rule 7.3 cmt. [4].

ABA Model Rule 7.2 cmt. [3] then explains that lawyers may pay employees and outside vendors – with a similar list of people who can be compensated as contained in Virginia Rule 7.3 cmt. [4].

In contrast to Virginia Rule 7.3 cmt. [4]’s warning that such “employees, agents, and vendors” may not “direct or control the lawyer’s professional judgment in violation of [Virginia] Rule 5.4(c),” ABA Model Rule 7.2 cmt. [3] does not contain that explicit warning.

**ABA Model Rule 7.2 cmt. [5]** addresses lead generators, which is addressed in Virginia Rule 7.2 cmt. [4]. The language is essentially the same as Virginia Rule 7.3 cmt. [4], but with a slightly different list of ABA Model Rules references.

## **ABA Model Rule 7.2 Comment [4]**

ABA Model Rule 7.2 cmt. [4] addresses lawyers' "nominal gifts" to those who recommend lawyers.

ABA Model Rule 7.2(b)(5) permits such nominal gifts, in language that is similar but not exactly the same as Virginia Rule 7.3(d)(4). There is no Virginia Rule Comment addressing such permissible gifts.

ABA Model Rule 7.2 cmt. [4] first acknowledges the general permissibility of such "nominal gifts as an expression of appreciation to a person for recommending the lawyer's services or referring a prospective client." But ABA Model Rule 7.2 cmt. [4] then warns that "the gift may not be more than a token item as might be given for holidays, or other ordinary social hospitality."

As mentioned above, ABA Model Rule 7.2 cmt. [4]'s use of the term "prospective client" implicates ABA Model Rule 1.18(a) and ABA Model Rule 1.18 cmt. [2]'s definition of the term "prospective client." Presumably that was not a defined term when the ABA adopted ABA Model Rule 7.2 cmt. [4]. At that time, the term presumably was intended to be synonymous with the term "potential client" or other similar terms that use the right title for ABA Model Rule 7.2 cmt. [4]. ABA Model Rule 7.3 cmt. [7] also contains the term "prospective clients."

Potential clients do not become "prospective clients" under ABA Model Rule 8.4(a) until certain conditions are met. So there might be some confusion triggered by ABA Model Rule 7.2 cmt. [4]'s and ABA Model Rule 7.3 cmt. [7]'s use of the now-defined term.

ABA Model Rule 7.2 cmt. [4] concludes with an explanation that such gifts are prohibited "if offered or given in consideration of any promise, agreement or

understanding that such a gift would be forthcoming or that referrals would be made or encouraged in the future.” As explained above, it would seem more appropriate to focus on such gifts’ size rather than on the giver’s motive or the recipient’s possible reaction. Such a recipient presumably would not be tempted to let an insignificant gift affect his future lawyer recommendations, but might be tempted by a large gift.

### **Virginia Rule 7.3 Comment [5]**

Virginia Rule 7.3 cmt. [5] addresses third parties’ recommendations of lawyers.

Virginia Rule 7.3 cmt. [5] begins with a general statement explaining that laypersons’ lawyer selection “should be made on an informed basis.” Virginia Rule 7.3 cmt. [5] then notes that third parties’ “[a]dvice and recommendation,” as well as “publicity and personal communications from lawyers” may “help to make this possible.” Virginia Rule 7.3 cmt. [5] contains a list of such third parties: “relatives, friends, acquaintances, business associates, or other lawyers.”

Virginia Rule 7.3 cmt. [5] concludes with another general statement that lawyers “should not compensate another person for recommending him or her, for influencing a potential client to employ him or her, or to encourage future recommendations.” Virginia Rule 7.3 cmt. [5]’s concluding sentence focuses only on the giver’s motive, not on the compensation’s magnitude. As explained above, it might have been appropriate to focus on the magnitude, as in Virginia Rule 1.8(c)’s reference to “substantial gift” in the context of lawyer’s solicitation, acceptance, or documenting of testamentary or similar gifts.

Neither ABA Model Rule 7.2’s Comments nor ABA 7.3’s Comments include such general statements in that form.

## **Virginia Rule 7.3 Comment [6]**

Virginia Rule 7.3 cmt. [6] addresses lawyer referral sources.

Virginia Rule 7.3 cmt [6] begins with an explanation that “(a) lawyer may pay the usual charges of a legal service plan of a not-for-profit lawyer referral service.”

Virginia Rule 7.3 cmt. [6] then defines both of those terms. A “legal service plan” is defined as “a prepaid or group legal service plan or a similar delivery system that assists potential clients to secure legal representation.” The term “delivery system” sounds more appropriate in describing some rocket assembly, but that term is unlikely to confuse any lawyer.

Inexplicably switching to the plural, Virginia Rule 7.3 cmt. [6] next defines “[n]ot-for-profit lawyer referral services” as “consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements.”

Virginia Rule 7.3 cmt. [6] begins its concluding sentence with the word “[c]onsequently.” It is unclear why the rest of that sentence’s limitation is a consequence of what preceded. Virginia Rule 7.3 cmt. [6]’s concluding sentence then explains that “this [Virginia] Rule (7.3) permits a lawyer to pay only the usual charges of a not-for-profit lawyer referral services.” Interestingly, this final sentence simply repeats word-for-word what is in Virginia Rule 7.3 cmt. [6]’s first sentence.

**ABA Model 7.2 cmt. [6]** also addresses referral sources.

ABA Model Rule 7.2 cmt. [6] begins by assuring that “[a] lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service.”

ABA Model Rule 7.2 cmt. [6] then defines the term “legal service plan” whose usual charges lawyers may pay: “[a] legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation.” That sentence’s phrase “prepaid or group” seems confusing, and would make little sense unless all “group legal service plans” are not prepaid. If “group legal service” plans can either be prepaid or not prepaid, that sentence’s use of the word “or” would make little sense.

ABA Model Rule 7.2 cmt. [6]’s sentence describing legal services plans also contains an expansive alternative to “a prepaid or group legal service plan” “or a similar delivery system.” It is unclear what that means.

ABA Model Rule 7.2 cmt. [6]’s definition of “[a] legal service plan” does not include the requirement that such a plan be not-for-profit.

ABA Model Rule 7.2 cmt. [6] then turns to its definition of “a not-for-profit or qualified lawyer referral service.” ABA Model Rule 7.2 cmt. [6] begins with a definition of “[a] lawyer referral service” – before turning to the subset of those described in its opening sentence (“not-for-profit or qualified”). ABA Model Rule 7.2 cmt. [6]’s generic definition distinguishes lawyer referral services from legal service plans: “[a] lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service” (emphasis added). Thus, that broad definition focuses on what a “lawyer referral service” advertises itself as, rather than what it does.

ABA Model Rule 7.2 cmt. [6] defines the second of the two types of “qualified lawyer referral services” identified in the first sentence’s list of entities whose “usual charges” lawyers may pay (as mentioned above, lawyers “may pay the usual charges of

. . . a not-for-profit or qualified lawyer referral service”). Inexplicably switching from the singular to the plural, ABA Model Rule 7.2 cmt. [6] explains that “[q]ualified referral services are consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements.” That matches Virginia Rule 7.3 [6]’s definition of “[n]ot-for-profit lawyer referral services.”

ABA Model Rule 7.2 cmt. [6]’s next sentence begins with the word “[c]onsequently” – although it does not explain why that sentence’s limitation is a consequence of what preceded: “[c]onsequently, this [ABA Model Rule 7.2] only permits a lawyer to pay the usual charges of a not-for-profit or a qualified lawyer referral service. This sentence’s use of “or” matches ABA Model Rule 7.2 cmt. [6]’s formulation – with the same possible confusion. The preceding sentence’s definition of “[q]ualified” does not indicate whether qualified referral services can either be for-profit or not-for-profit. ABA Model Rule 7.2 cmt. [6] then compounds the possible confusion by adding another component to the definition of “qualified lawyer referral service” – despite having already defined it two sentences earlier. That earlier definition of “[q]ualified referral services” said nothing about some regulatory authority’s approval – just as it said nothing about the for-profit or not-for-profit status of such services. But ABA Model Rule 7.2 cmt. [6] now considerably narrows the definition of “qualified lawyer referral service” (inexplicably switching back from the plural to the singular: “[a] qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for the public. See, e.g., the American Bar Association’s Model Supreme Court Rules Governing Lawyer

Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act.”

ABA Model Rule 7.2 cmt. [6]’s definition of “qualified lawyer referral services” appearing two sentences earlier does not include this material limitation. And ABA Model Rule 7.2 cmt. [6]’s concluding sentence still does not solve the mysterious distinction contained in its first sentence and the previous sentence – which allow lawyers to pay the usual charges “of a not-for-profit or qualified lawyer referral service” (emphasis added). Presumably there are “not-for-profit” lawyer referral services that are not “qualified.” One would expect that lawyers could not pay the usual charges of a “not-for-profit” lawyer referral service that does not have the client-protection attributes described in ABA Model Rule 7.2 cmt. [6]’s definition of “qualified lawyer referral services.”

All in all, ABA Model Rule 7.2 cmt. [6] is confusing because (among other things) it contains two definitions of “qualified lawyer referral services” that both contain material limitations, but no definition of “not-for-profit” lawyer referral services.

### **ABA Model Rule 7.3 Comment [7]**

Virginia did not adopt ABA Model Rule 7.3 cmt. [7].

ABA Model Rule 7.3 cmt. [7] addresses group or pre-paid legal plans.

ABA Model Rule 7.3 cmt. [7] first explains that lawyers may contact “representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer’s firm is willing to offer.”

After explaining that such communications are “usually addressed to an individual acting in a fiduciary capacity” rather than to “people who are seeking legal services for themselves,” ABA Model Rule 7.3 cmt. [7] explains that such communications “are functionally similar to and serve the same purpose as advertising permitted under [ABA Model] Rule 7.2.”

### **ABA Model Rule 7.3 Comment [8]**

Virginia did not adopt ABA Model Rule 7.3 cmt. [8].

ABA Model Rule 7.3 cmt. [8] addresses communications “authorized by law or ordered by a court or tribunal.”

ABA Model Rule 7.3 cmt. [8] provides an example: “a notice to potential members of a class in class action litigation.”

As explained above, ABA Model Rule 7.3(d) implicitly excludes such communications from all of ABA Model Rule 7.3’s requirements.

As also explained above, Virginia Rule 7.3(c)(4) contains the same basic definition of excluded communications – but the exclusion is not from all Virginia Rule 7.3 requirements. Instead, such court-ordered communications are only excluded from Virginia Rule 7.3(c)’s “ADVERTISING MATERIAL” warning requirement.

### **ABA Model Rule 7.3 Comment [9]**

Virginia did not adopt ABA Model Rule 7.3 cmt. [9].

ABA Model Rule 7.3 cmt. [9] addresses lawyers’ participation in prepaid or group legal services that are operated by an organization not owned or directed by a lawyer.

ABA Model Rule 7.3 cmt. [9] first explains that lawyers' participation in such organizations may not include "personal contact . . . undertaken by any lawyer who would be a provider of legal services through the plan".

ABA Model Rule 7.3 cmt. [9] then explains the prohibition on such organizations being "owned or directed" by any lawyer or law firm "that participates in the plan."

ABA Model Rule 7.3 cmt. [9] also warns that "communication permitted by these organizations must not be directed to a person known to need legal services in a particular matter," but instead "must be designed to inform potential plan members generally of another means of affordable legal services."

ABA Model Rule 7.3 cmt. [9] concludes with a requirement that lawyers participating in such "a legal service plan" must reasonably assure that the plan sponsors are in compliance with [ABA Model] Rules 7.1, 7.2 and 7.3(c)."

The Virginia Rules do not contain a similar provision.

# ABA MODEL RULE 7.6

## Political Contributions to Obtain Legal Engagements or Appointments by Judges

Virginia did not adopt ABA Model Rule 7.6.

### Rule

#### ABA Model Rule 7.6

Virginia did not adopt ABA Model Rule 7.6, which addresses the prohibition on lawyers accepting government or judge-selected jobs if the lawyer has made a political contribution to obtain the job.

Under ABA Model Rule 7.6, lawyers and law firms are prohibited from “accept[ing] a governmental legal engagement or an appointment by a judge” – “if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.” In essence, this is a prohibition on “pay to play” political contributions.

Notably, ABA Model Rule 7.6 does not prohibit the contributions, although presumably those might violate some other ABA Model Rules. Instead, ABA Model Rule 7.6 prohibits the lawyers or law firms from accepting the resulting engagement or the appointment.

Given that limitation, it is strange that ABA Model Rule 7.6 considers improper such contributions “for the purpose of obtaining or being considered” for such an engagement or appointment” (emphasis added) a lawyer cannot obtain such an engagement or appointment without being considered for it. But ABA Model Rule 7.6’s limitation to situations where the lawyer actually has obtained the work or the appointment potentially renders irrelevant a situation where the lawyer has improperly made contributions for the impure purpose of “being considered” for the work or the appointment, but does not obtain it. It would be easy to envision an ethics rule that would prohibit even unsuccessful efforts to obtain work or an appointment, if the effort involved an improper purpose. But presumably other ethics rules might prohibit such efforts.

## **Comment**

### **ABA Model Rule 7.6 Comment [1]**

ABA Model Rule 7.6 cmt. [1] addresses the rationale for the prohibition on “pay to play.”

After acknowledging that lawyers “have a right to participate fully in the political process,” the ABA Model Rule 7.6 cmt. [1] recognizes that “the public may legitimately question” whether lawyers obtaining legal work from the government or an appointment from a judge were “selected on the basis of competence and merit” if those lawyers make a political contributions in order to obtain an engagement for legal work.”

### **ABA Model Rule 7.6 Comment [2]**

ABA Model Rule 7.6 cmt. [2] defines “political contribution.”

The definition includes the obvious direct or indirect giving “anything of value” to influence or provide financial support for election to a retention in judicial or other government office.” The definition excludes contributions “in initiative and referendum elections, and likewise does not include “uncompensated services.”

### **ABA Model Rule 7.6 Comment [3]**

ABA Model Rule 7.6 cmt. [3] defines the term “government legal engagement.” That phrase means “any engagement to provide legal services that a public official has the direct or indirect power to award.” The ABA Model Rule Comment also defines the term “appointment by a judge,” which includes “appointment to a position such as a

referee, commissioner, special master, receiver, guardian or other similar position that is made by a judge.”

ABA Model Rule 7.6 also explains that those terms do not include “substantially uncompensated services,” “engagements or appointments made on the basis of experience, expertise, professional qualifications and cost following a request for proposal or other process that is free from influence based upon political contributions.” The term also exclude “engagements or appointments made on a rotational basis from a list compiled without regard to political contributions.”

ABA Model Rule 7.6 cmt. [3]’s exclusions would essentially gut ABA Model Rule 7.6’s effectiveness if lawyers’ claims that the exclusions applied were taken at face value – rather than assessed for their bona fides.

#### **ABA Model Rule 7.6 Comment [4]**

ABA Model Rule 7.6 cmt. [4] defines “lawyer or law firm” as including “a political action committee or other entity owned or controlled by a lawyer or law firm.”

#### **ABA Model Rule 7.6 Comment [5]**

ABA Model Rule 7.6 cmt. [5] addresses the type of political contributions that disqualify lawyers or law firms from accepting engagements under ABA Model Rule 7.6.

ABA Model Rule 7.6 cmt. [5] defines such disqualifying contributions as those “the lawyer or law firm would not have made or solicited” but for “the desire to be considered for the engagements or appointments.” The purpose for such contributions “may be determined on an examination of the circumstances in which the contributions occur.” The ABA Model Rule Comment provides an example: contributions “that in the aggregate

are substantial in relation to other contributions” made by the lawyers or law firms, which are followed by the lawyer or law firm being selected – which “would support an inference” of an improper purpose.

ABA Model Rule 7.6 cmt. [5] concludes with other possible factors: lawyers’ or law firms’ desire to “further a political, social or economic interest,” or “because of an existing personal, family, or professional relationship with a candidate”. Those presumably would weigh against a finding of an improper purpose.

#### **ABA Model Rule 7.6 Comment [6]**

ABA Model Rule 7.6 cmt. [6] notes that ABA Model Rule 8.4(b) (which prohibits criminal conduct by lawyers) may be implicated if improper contributions constitute “bribery or another crime.”

# RULE 8.1

## Bar Admission And Disciplinary Matters

### Rule

#### Virginia Rule 8.1

Virginia Rule 8.1 addresses lawyers' interaction with bar authorities.

Virginia Rule 8.1 (1) identifies the lawyers to its requirements; (2) identifies the contexts in which those requirements apply; and (3) identifies communications, silence and conduct required or prohibited by those identified persons in those identified contexts.

First, Virginia Rule 8.1's requirements apply to: (1) applicant(s) "for admission to the bar," and "a lawyer already admitted to the bar."

Second, in the Rule 8.1's requirements for those identified persons apply in the following contexts: (1) "in connection with a bar admission application;" (2) in "any certification required to be filed as a condition of maintaining . . . a license to practice law;" (3) in "any certification required to be filed as a condition of . . . renewing a license to practice law;" (4) "in connection with a disciplinary matter." So Virginia Rule 8.1's requirements apply to lawyers and those seeking to be admitted as lawyers, in connection with the application or renewal process, as well as any "disciplinary matter" (which could involve lawyers at any stage of their careers). Presumably the lawyer acting "in connection with a bar admission application" includes lawyers seeking their own admission (perhaps even in another state) or in connection with someone else's application. The same presumably is true of lawyers involved in some other lawyers

disciplinary matters. This common sense approach is confirmed in Virginia Rule 8.1 cmt. [1].

Third, those identified persons in those identified contexts cannot: (1) “knowingly make a false statement of material fact” (Virginia Rule 8.1(a)); (2) “fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter (Virginia Rule 8.1(b));” (3) “fail to respond to a lawful demand for information from an admissions . . . authority (Virginia Rule 8.1(c));” (4) “fail to respond to a lawful demand for information from . . . [a] disciplinary authority” (Virginia Rule 8.1(c));” (5) “obstruct a lawful investigation by an admissions authority” (Virginia Rule 8.1(d));” (6) “obstruct a lawful investigation by . . . [a] disciplinary authority” (Virginia Rule 8.1(d)).

Thus, four of the specified types of misconduct involves communications or silence. Two of the specified types of misconduct (obstruction) could involve either communications, silence or conduct.

Interestingly, only Virginia Rule 8.1(a) and 8.1(b) contain a knowledge requirement. The Virginia Rules Terminology defines “knowingly” as “denot[ing] actual knowledge of the fact in question,” although “(a) person’s knowledge may be inferred from circumstances. Thus, Virginia Rule 8.1(c) and Virginia Rule 8.1(d) are on their face strict liability provisions that do not require lawyers’ or bar applicants’ knowing conduct. For example, a lawyer theoretically would violate Virginia Rule 8.1(c) by “fail[ing] to respond to a lawful demand for information even if the lawyer did not receive the demand. That sort of punishment seems very unlikely, but would theoretically be permissible under Virginia Rule 8.1. Similarly, a lawyer’s unknowing or even negligent “obstruct[ion]” of a lawful investigation might have the same effect.

Significantly, Virginia Rule 8.1(c) contains an exception from Virginia Rule 8.1(c)'s prohibition on "fail[ing] to respond to a lawful demand for information from an admissions or disciplinary authority": "except that this [Virginia] Rule [8.1] does not require disclosure of information otherwise protected [Virginia] Rule 1.6."

That concept makes sense, but Virginia Rule 8.1(c)'s language raises several questions. First, the term "otherwise" is unclear. Information is either "protected" by Virginia Rule 1.6 or it is not. So the word "otherwise" seems superfluous. Second, it is unclear what the phrase "protected by [Virginia] Rule 1.6" means. Virginia Rule 1.6 protects various categories of client-related information. But Virginia Rule 1.6(b) allows lawyers to disclose information "otherwise protected by [Virginia] Rule 1.6" in certain circumstances. In other words, that information is protected, but lawyers may disclose it under certain circumstances. On its face, Virginia Rule 1.8(c) allows lawyers to withhold that information from "an admissions or disciplinary authority" – even though one of the Virginia Rule 1.6(b) exceptions might permit such disclosure. More pointedly, Virginia Rule 1.6(c) might require lawyers to promptly "reveal" information that is "otherwise protected by [Virginia] Rule 1.6". Virginia Rule 8.1(c) would likewise allow lawyers to withhold that information.

Other Virginia Rules might also affect this analysis. For instance, Virginia Rule 4.1(a) indicates that "[i]n the course of representing a client a lawyer shall not knowingly ... fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client. This requirement applies regardless of any Virginia Rule 1.6 protections. And in contrast, to ABA Model Rule 4.1(b) (which contains an exception:

“unless disclosure is prohibited by [ABA Model] Rule 1.6”), Virginia Rule 4.1 does not contain an exception.

Although perhaps Virginia Rule 8.1(c) was intended to protect lawyers who are representing bar applicants or other lawyers in either the bar admission process (perhaps in another state) or in a disciplinary process from what otherwise would be a Virginia Rule 8.1(c) violation. On its face, Virginia Rule 8.1(c) could apply in many other scenarios. For instance, a lawyer might be a witness in a disciplinary process, and possesses Virginia Rule 1.6–protected information from having represented someone other than the applicant or the lawyer who face possible discipline.

Virginia Rule 8.1(b) might trump Virginia Rule 1.6’s confidentiality protections. And if any “misapprehension” would allow the client to “assist[] a criminal or fraudulent act,” Virginia Rule 4.1(b)’s disclosure obligation might trump any Virginia Rule 1.6 confidentiality protection.

### **ABA Model Rule 8.1**

ABA Model Rule 8.1 addresses the same conduct, but has a slightly narrower reach than Virginia Rule 8.1.

Like Virginia Rule 8.1, ABA Model Rule 8.1 covers: (1) “[a] applicant for admission to the bar;” (2) “in connection with a bar admission application;” and (3) “in connection with a disciplinary matter.” But there are several differences.

First, in contrast to Virginia Rule 8.1, ABA Model Rule 8.1 does not cover lawyers involved in the process of a certification “required to be filed as a condition of maintaining or renewing a license to practice law.” Of course, lawyers’ misconduct in that context might violate several other ABA Model Rule provisions.

Second, in contrast to the absence of a knowledge element in Virginia Rule 8.1(c), ABA Model Rule 8.1(b) prohibits lawyers from “knowingly fail[ing] to respond to a lawful demand for information from an admissions or disciplinary authority.”

Third, in contrast to Virginia Rule 8.1(d), ABA Model Rule 8.1 does not address lawyers’ “obstruct[ion] [of] a lawful investigation by an admissions or disciplinary authority.”

## Comment

### Virginia Rule 8.1 Comment 1

Virginia Rule 8.1 cmt. [1] addresses Virginia Rule 8.1's breadth.

Virginia Rule 8.1(c) cmt.[1] first confirms that Virginia Rule 8.1's requirements apply to persons seeking admission to the bar, as well as the licensed lawyers. Virginia Rule 8.1 cmt. [1] then provides an example: "if a person [presumably either a bar applicant or a lawyer] makes a materially false statement in connection with an application for admission or a certification necessary for license renewal, it may be the basis for discipline action once that person has been admitted to the Bar."

Virginia Rule cmt. [1] next confirms that Virginia Rule 8.1 "applies to a lawyer's own admission or discipline as well as that of others." Virginia Rule 8.1 cmt. [1] explains that "[t]hus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct.

In addition to prohibiting would-be lawyers' or lawyers' knowingly false statements, Virginia Rule 8.1 cmt. [1] concludes with an explanation that Virginia Rule 8.1 also "requires affirmative clarification of any material misstatement, of which the person involved becomes aware, that could lead to a misunderstanding on the part of the admissions or disciplinary authority." Presumably, this requirement applies both to bar applicants and lawyers involved in their own bar application process in some other state, or their involvement in a non-lawyer bar applicant's process.

**ABA Model Rule 8.1 cmt. [1]** contains essentially the same provision as Virginia Rule 8.1 cmt. [1]. But there are several differences.

First, in contrast to Virginia Rule 8.1's confirmation that Virginia Rule 8.1 applies "in connection with...a certification necessary for license renewal," ABA Model Rule 8.1 cmt. [1] does not mention that context because black letter ABA Model Rule 8.1 does not cover it.

Second, in contrast to Virginia Rule 8.1 cmt. [1], ABA Model Rule 8.1 cmt. [1] explicitly notes that a person's "material false statement in connection with an application for admission...may be relevant in a subsequent admission application."

Third, in contrast to Virginia Rule 8.1 cmt. [1], ABA Model Rule 8.1 cmt. [1] explicitly requires "correction of any prior misstatement in the matter that the applicant or lawyer may have made." That is a strange way to require correction of a "prior misstatement." One would think that the word "made" would be more appropriate than "may have made." Presumably, the correction requirement only applies if the person made a statement. That phrase might also be superfluous, because presumably a person's clarification of his own "prior misstatement in the matter that the applicant or lawyer "made" (rather than "may have made") would be required under the next portion of that ABA Model Rule 8.1 cmt. [1] concluding sentence – requiring "affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware." That would seem to include correcting such "misunderstanding on the part of the admissions or disciplinary authority" caused by the person's own "prior misstatement in the matter." That requirement matches black letter ABA Model Rule 8.1(b).

## **Virginia Rule 8.1 Comment 2**

Virginia Rule 8.1 cmt. [2] addresses possible justifications for lawyers' otherwise prohibited silence.

Virginia Rule 8.1 cmt. [1] first explains that lawyers' Virginia Rule 8.1's requirements are subject to the Fifth Amendment, "corresponding provisions of state constitutions, or other lawfully recognized matters of privilege." The term "matters of privilege" is a strange turn of phrase. The term "lawfully recognized privileges" would have seemed more apt. One might have expected a reference to the Virginia Constitution, but a more generic reference to "state constitutions" is not inappropriate – because some other state's law might apply under the Virginia choice of laws rules in Virginia Rule 8.5.

Virginia Rule 8.1 cmt. [2] concludes with an explanation that when relying on such protections, "a person" [presumably lawyers and applicants] "should openly assert the basis for nondisclosure."

**ABA Model Rule 8.1 cmt. [2]** contains the identical language.

But in contrast to Virginia Rule cmt. [2], ABA Model Rule 8.1 cmt. [2] concludes with a statement that persons relying any the specific protections "should do so openly and not use the right of nondisclosure as a justification for a failure to comply with this Rule." That last phrase does not appear in the Virginia Rule cmt. [2] and seems contrary to the first part of ABA Model Rule 8.1 cmt.[2] – which assures that persons may rely on their constitutional and other protections. That is what constitutional protections do – provide a "justification for failure to" disclose information.

### **Virginia Rule 8.1 Comment 3**

Virginia Rule 8.1 cmt. [3] addresses the duties of lawyers representing other lawyers or bar applicants.

Virginia Rule 8.1 cmt. [3] first explains that lawyers representing either a bar admission applicant or a lawyer “who is the subject of a disciplinary inquiry or proceeding” is “governed by the Rules applicable to the attorney-client relationship.” It is somewhat surprising that an ethics rule would have to remind lawyers representing clients that they are subject to the Virginia Rules “applicable to the attorney-client relationship.”

The term “attorney-client relationship” is one of several definitions found in the Virginia Rules and Virginia Rule Comments. The most frequently appearing phrase is “client-lawyer relationship.” Some Virginia Rules or Comments use the phrase: “lawyer-client relationship,” and “client-attorney relationship.” Presumably all of these terms are intended to be synonymous.

Of course, it would be unwise to assume that “the [Virginia] Rules applicable to the attorney-client relationship” would always support a lawyer’s withholding of information if the lawyer represents a bar applicant or lawyer involved in a disciplinary process. Several Virginia Rules might require or allow disclosure of protected client confidential information under certain circumstances.

**ABA Model Rule 8.1 cmt. [3]** contains essentially the same language as Virginia Rule 8.1 cmt. [3].

In contrast to Virginia Rule 8.1 cmt. [3], ABA Model Rule 8.1 cmt. [3] specifically refers to ABA Model “Rule 1.6 and in some cases, [ABA Model Rule] Rule 3.3.” The phrase “in some cases” seems odd. ABA Model Rule 3.3 governs lawyers in all cases,

under its terms. That ABA Model Rule addresses lawyers' various duties when dealing with tribunals.

#### **Virginia Rule 8.1 Comment 4**

Virginia Rule 8.1 cmt. [4] addresses Virginia Rule 8.1(d)'s "obstruction" prohibition – which does not appear in ABA Model Rule 8.1.

Virginia Rule 8.1 cmt. [4] first repeats the black letter prohibition. The Virginia Rule Comment then explains that "[o]bstruction' is used in the ordinary sense." That seems unhelpful. Virginia Rule 8.1 cmt. [4] provides examples: "among other intentional acts, purposeful delay, attempts to improperly influence others who are requested to provide information, and the falsification or destruction of relevant documentation."

**ABA Model Rule 8.1** does not include a similar comment.

# RULE 8.2

## Judicial Officials

### Rule

#### Virginia Rule 8.2

Virginia Rule 8.2 addresses lawyers' statements about judges or similar person. The prohibition seems simple enough: "[a] lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge or other judicial officer."

But this phrase raises several issues about the targets protected from such statements, the prohibited statements' topics, and standard used to judge such lawyers' knowledge.

First, defining the protected targets involves several undefined terms. The term "judge" presumably denotes sitting judges and part-time judges. The term "judicial officer" is not defined in the Virginia Rules. It obviously includes persons other than judges. It is unclear whether the term "judicial officer" is synonymous with the term "adjudicative officer," which is used in Virginia Rule 1.12(a). That Virginia Rule addresses the hiring of and post-service activities by former judges, "adjudicative officer[s]" and others. Virginia Rule 1.12 cmt. [1] defines "adjudicative officer" as "includ[ing] [thus meaning that there presumably are others] such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serves as part-time

judges.” Virginia Rule 1.12 cmt. [1] then points to several Canons in the Virginia Code of Judicial Conduct as limiting later service as a lawyer by “a part-time judge, judge pro tempore or retired judge recalled to active service.”

A key question under Virginia Rule 8.2’s reach is whether the term “judicial officer” includes “referees, special masters, hearing officers and other parajudicial officers.” Unfortunately, ABA Model Rule 8.2(a) does not help assess that issue. As explained below, that ABA Model Rule uses the terms: “judge, adjudicatory officer or public legal officer.” Ironically, the term “legal officials” does not appear in that ABA Model Rule 8.2(a) list – but does appear in ABA Model Rule 8.2’s title. Perhaps the term “public legal officer” is intended to be synonymous with “legal official.”

As also explained below, ABA Model Rule 8.2 cmt. [1] (which focuses exclusively on candidates for office rather than those sitting in office) distinguishes between “judicial office” and “public legal offices.” ABA Model Rule 8.2 cmt. [1] explains that the latter includes: “such as attorney general, prosecuting attorney and public defender.” Those clearly seem to fall outside the phrase “judicial officer.”

Despite Virginia Rule 8.2’s ambiguity about the identity of those targeted lawyer’s statement, it is clear that the Virginia Rule only applies to a current “judge or other judicial officer.” Significantly, Virginia Rule 8.2’s limitation to statements about a currently-serving judge or judicial officer presumably excludes from its prohibited statements those criticizing persons expressing an interest in or actively pursuing such judicial service. Of course, Virginia does not elect its judges – so it seems appropriate for Virginia Rule 8.2 to avoid the type of language contained in ABA Model Rule 8.2(a): “a candidate for election... to judicial or legal office.” But might have been appropriate to include in Virginia

Rule 8.2 language that also appears in ABA Model Rule 8.2(a): “a candidate for... appointment to judicial or legal office.” Virginia lawyers who are interested in serving as judges frequently announce their interest publicly, or privately – which becomes publicly known. Bar associations frequently draw up lists of such lawyers, which quickly become public. But Virginia Rule 8.2 does not cover lawyers’ statements about such lawyers who properly would be considered “candidates” for “appointment.” Those statements might not “unfairly undermine public confidence in the administration of justice” as much as statements criticizing actively-serving judges. But if such a “candidate” for “appointment” becomes a judge, the same undermining effect might be easily predicted.

Of course, lawyers’ factually false criticism of those candidates might violate other Virginia Rules. They are not likely to violate Virginia Rule 4.1, which prohibits lawyers from “knowingly...mak[ing] a false statement of fact or law” – because Virginia Rule 4.1 is limited to such statements “[i]n the course of representing a client.” But some statements about a “candidate for “appointment” might violate Virginia Rule 8.4(c), which labels it “professional misconduct for a lawyer to...engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer’s fitness to practice law.” And such critical statements might implicate other Virginia Rules.

Despite the possible reach of other Virginia Rules to factually false statements about those seeking judgeships or other judicial office, Virginia Rule 8.2 on its face seems too narrow.

Second, Virginia Rule 8.2 defines the content of such prohibited statements about that undefined group. The prohibition applies to lawyers’ statements “concerning the qualifications or integrity of a judge or other judicial officer.”

Criticizing a judge’s “qualifications” presumably goes to her intelligence, competence, diligence, etc. The word “or” seems odd – it seems to differentiate judges’ “qualifications” from their “integrity.” One would think that a judge’s “integrity” is a subset of a judge’s “qualifications.” Perhaps Virginia Rule 8.2 included the “integrity” reference because that may be the most important “qualification” a judge must possess.

Presumably the phrase “concerning the qualifications or integrity” goes beyond statements directly “concerning the qualifications or integrity” – such as “the judge cannot handle the job” or “the judge is a crook.” For instance, Virginia Rule 8.2’s prohibition covers harsh criticism of a judge’s reasoning or a judge’s overly close ties to a litigant or to a lawyer. Obviously it can be difficult to draw the line between acceptable criticism of a judge’s reasoning (“with all due respect, my client believes that the judge misapplied the collateral estoppel doctrine”) and impermissible criticism (“we think the moronic judge stupidly missed the most obvious collateral estoppel point that a first year law student would have seen”).

Third, Virginia Rule 8.2(a) defines the type of prohibited statements about those two topics. Virginia Rule 8.2’s prohibition applies to “a statement that the lawyer”: (1) “knows to be false;” or (2) makes “with reckless disregard as to its truth or falsity.” That knowledge-based standard seems inappropriate, for two reasons.

First, the prohibition goes only to the statement’s content. It would seem more appropriate if the prohibition also focused on lawyers’ statements’ word choice. If Virginia Rule 8.2 was intended to protect against statements that “unfairly undermine public confidence in the administration of justice,” one would have thought that word choice would be as important as (or perhaps more important than) content. For instance, a

lawyer's statement that a judge "seems to have misread an earlier precedent" might violate Virginia Rule 8.2 if a lawyer made the statement knowing it to be false or "with reckless disregard as to its truth or falsity." But Virginia Rule 8.2's focus purely on content rather than on word choice would presumably treat the following statement in the same way: "the idiotic judge apparently can't read, because she could not even figure out what the precedent clearly said in way that a third grader would have understood." Virginia Rule 8.2's predecessor Virginia Code of Professional Responsibility EC 8-6 warned that lawyers criticizing judges should (1) "be certain of the merits of his complaint"; and (2) "use appropriate language, and avoid petty criticisms." Virginia Rule 8.2 only contains the first of those two standards.

Second, and perhaps more importantly, Virginia Rule 8.2's prohibition on statements that the lawyer "knows to be false or with reckless disregard as to its truth or falsity" parrots the New York Times Co. v. Sullivan defamation standard – which seems completely inappropriate in this setting.

In New York Times Co. v. Sullivan, 376 U.S. 254, 279-280 (1964), the United States Supreme Court injected constitutional principles into what traditionally was a common law tort context. The Supreme Court held that public officials may not recover for a defendant's defamation unless they establish that the defendant communicated the statement with "knowledge that it was false or with reckless disregard of whether it was false or not." Unfortunately, the Supreme Court picked an inappropriate phrase to describe that knowledge triggering liability: "actual malice." Actually, that type of malice has nothing to do with the traditional type of common law "malice." Common law "malice"

goes to motive – what might be called the content of the speaker’s heart. “Actual malice” instead focuses only on content, not intent – what is in the speaker’s head.

Moreover, the United States Supreme Court has also explained that “reckless disregard” is not negligence, or even gross negligence – but instead requires that the speaker or writer had “a high degree of awareness of ... probable falsity.” St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

So if a lawyer honestly believed that a judge was corrupt, her statement to that effect would not violate Virginia Rule 8.2. Among other things, federal case law also concludes that opinion and rhetorical hyperbole cannot be proven true or false, and therefore cannot be actionable under the New York Times standard. Ironically, this means that the more extreme and offensive the remark, the less likely it is to be actionable defamation (and thus perhaps similarly immune from ethics punishment). For instance, describing a judge as “worse than Adolf Hitler” or “so bad she should be lynched” normally would amount to protected to non-actionable opinion or hyperbole.

The Virginia Supreme Court first applied the New York Times Co. v. Sullivan doctrine in 1972. Sanders v. Harris, 213 Va. 369, 372, 192 S.E.2d 754,757 (1972). In analyzing the “reckless disregard” component of the “actual malice” standard, the Virginia Supreme Court has adopted one of the United States Supreme Court’s variations on the theme: “a high degree of awareness of probable falsity.” Shenandoah Publishing House, Inc. v. Gunter, 245 Va. 320, 324, 427 S.E.2d 370, 372 (1993).

It seems inappropriate to apply this standard to statement about judges and others in the legal system (however those are defined). As mentioned above, lawyers can defend themselves from ethics discipline under that standard by simply stating that they

honestly believed what they said about the judge – and therefore did not act with knowledge of falsity or with reckless disregard. Moreover, lawyers could also either immunize themselves beforehand or defend themselves afterwards by making their critical statement as an opinion or (even worse) using rhetorical hyperbole. This is ironic, because the uglier or more outlandish the criticism, the more likely it is to avoid ethics discipline under this standard.

States that have adopted this ABA Model Rule 8.2 standard struggle with how to apply this inappropriate standard with common sense. Some states have applied it as written, and therefore have declined to ethically discipline lawyers who have said outrageous things about judges. In contrast, some states applying this standard have simply ignored the rule's language, and have instead applied an objective standard rather than a subjective standard.

In other words, those states have assessed whether a “reasonable lawyer” would have believed what she said about the judge – and punished lawyers who fall short of showing that a “reasonable lawyer” would have believed the truth of what the lawyer stated about the judge. This approach makes more sense, and tends to protect judges and similar officials – who are largely muzzled from defending themselves.

Virginia decisions disciplining lawyers for critical statements about judges have tended to rely on the courts' inherent disciplinary power rather than violation of Virginia Rule 8.2. This approach understandably tends to follow an objective standard, rather than Virginia Rule 8.2's New York Times subjective standard.

**ABA Model Rule 8.2(a)** contains the language describing the content of impermissible lawyer statements about the identified targets of those statements.

In contrast to Virginia Rule 8.2's application of the prohibition to lawyers' statements about "a judge or other judicial officer," ABA Model Rule 8.2(a) applies the prohibition to lawyers' statements about "a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office." Thus, ABA Model Rule 8.2(a) has both a broader description of the targets of such statements, and also has a broader temporal reach. ABA Model Rule 8.2's title includes the phrase "Legal Officials." And ABA Model Rule 8.2 cmt. [1] includes others in the target list.

ABA Model Rule 8.2(a)'s broader temporal reach may be more significant in some ways. In contrast to Virginia Rule 8.2(a)'s limit to statements about "a judge or other judicial officer" (obviously then currently serving in that role), ABA Model Rule 8.2(a) also applies to "a candidate for election or appointment to judicial or legal office." Thus, ABA Model Rule 8.2 (a)'s prohibition on false statements about the undefined group of public officials prohibits such statements before those public officials take office.

The term "candidate" is undefined. The term could apply only to official candidates for "election or appointment to judicial or legal office." But it might also cover persons who have publicly announced an interest in running for election or seeking appointment. So it is unclear at what stage of that process the prohibited statements would violate ABA Model Rule 8.2(a).

ABA Model Rule 8.2(a)'s application to candidates for judicial "appointment" would have made sense in Virginia Rule 8.2. But as explained above, Virginia deliberately limited the statements' prohibition to those about sitting judges and judicial officers.

### **ABA Model Rule 8.2(b)**

Virginia did not adopt Model Rule 8.2(b).

ABA Model Rule 8.2(b) requires a lawyer “who is a candidate for judicial office” to “comply with the applicable provisions of the [ABA Model] Code of Judicial Conduct.”

ABA Model Rule 8.2(b) does not specify which provisions apply to candidates, but presumably the provisions include limits on candidates’ statements about pending cases, “pledges and promises” about how they might rule, etc. Presumably such applicable provisions would not include those governing judges’ financial dealings, membership in organizations, etc. The applicable provisions obviously do not include the prohibition on practicing law. And of course lawyers who are such “candidates” must still comply with: (1) any ethics rules that apply to lawyers representing their clients before they have to terminate such representation upon taking judicial office; and (2) all of the ethics rules that govern lawyers’ non-representational conduct (such as ABA Model Rule 8.4).

## Comment

### Virginia Rule 8.2 Comment [1]

Virginia Rule 8.2 cmt. [1] addresses the rationale for Virginia Rule 8.2's prohibition.

Virginia Rule 8.2 cmt. [1] first explains that “[f]alse statements by a lawyer concerning the qualifications or integrity of a judge can unfairly undermine public confidence in the administration of justice.”

Virginia Rule 8.2 cmt. [1] concludes with an encouragement for lawyers “to continue traditional efforts to defend judges and courts unjustly criticized” – in order to “maintain the fair and independent administration of justice.” This makes sense, because judges normally are prohibited from making public statements – and thus are essentially defenseless if attacked by lawyers or others.

Virginia Rule 8.2 cmt. [1]'s first sentence appears at the end of ABA Model Rule 8.2 cmt. [1]. Virginia Rule 8.2 cmt. [1]'s second sentence appears in ABA Model Rule 8.2 cmt. [3].

**ABA Model Rule 8.2 cmt. [1]** addresses the rationale for ABA Model Rule 8.2(a)'s prohibitions.

ABA Model Rule 8.2 cmt. [1] includes (as its last sentence) essentially the identical language found in Virginia Rule 8.2 cmt. [1]: “false statements by a lawyer can unfairly undermine public confidence in the administration of justice.”

There are several differences between ABA Model Rule 8.2 cmt. [1] and Virginia Rule 8.2 cmt. [1].

In contrast, to Virginia Rule 8.2 cmt. [1], ABA Model Rule 8.2 cmt. [1] first notes that “[a]ssessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office.” ABA Model Rule 8.2 cmt. [1] also identifies others in the same situation: “persons being considered for election or appointment to . . . public legal offices, such as attorney general, prosecuting attorney and public defender.” These officials presumably fall within the definition of “public legal officer” appearing at the end of ABA Model Rule 8.2(a) – a term that does not appear in Virginia Rule 8.2.

Second, in contrast to Virginia Rule 8.2 cmt. [1], ABA Model Rule 8.2 cmt. [1] then notes that lawyers’ “honest and candid opinions on such matters contributes to improving the administration of justice.”

**ABA Model Rule 8.2 cmt. [3]** contains language identical to that in Virginia Rule 8.2 cmt. [1]’s second sentence. The language understandably encourages lawyers “to continue traditional efforts to defend judges and courts unjustly criticized.”

### **ABA Model Rule 8.2 Comment [2]**

Virginia did not adopt ABA Model Rule 8.2 cmt. [2].

ABA Model Rule 8.2 cmt. [2] explains that lawyers “should be bound by applicable limitations on political activity” when they “seek[] judicial office” (emphasis added). The word “should” seems inapt, because black letter ABA Model Rule 8.2(b) requires that such lawyers “shall comply with the applicable provisions of the [ABA Model] Code of Judicial Conduct” (emphasis added). This is another example of the ABA Model Rules and their Comments inappropriately using the word “should” rather than the word “must.”

# RULE 8.3

## Reporting Misconduct

ABA Model Rule 8.3 has a different title: Reporting Professional Misconduct.

### Rule

#### Virginia Rule 8.3(a)

Virginia Rule 8.3(a) addresses lawyers' duty to report "another lawyer[']s" ethics violation.

Virginia Rule 8.3(a) requires that "[a] lawyer having reliable information that another lawyer has committed a violation of the [Virginia] 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."

Thus, Virginia Rule 8.3(a): (1) describes the knowledge requirement triggering such lawyers' reporting duty; (2) the misconduct they must report; and (3) to whom they must report other lawyers' misconduct.

First, Virginia Rule 8.3(a) explains that lawyers having "reliable information" of the specified ethics violation must report it.

As discussed below, Virginia Rule 8.3(a)'s "reliable information standard differs dramatically from ABA Model Rule 8.3(a)'s "knows" standard.

Second, the ethics violation triggering a reporting obligation must be "a violation of the Rules of Professional Conduct." Presumably Virginia Rule 8.3(a) also requires disclosure of non-Virginia lawyers' violation of the Virginia Rules that meet the Virginia

Rule 8.3(a) standard. Under Virginia Rule 8.5(a), non-Virginia lawyers must comply with the Virginia Rules under certain circumstances.

But Virginia Rule 8.3(a) does not require lawyers to report every “violation of the [Virginia] Rules of Professional Conduct.” The obligation only requires disclosure of an ethics violation that “raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness to practice law.” Third, lawyers having “reliable information” about such other lawyer’s conduct meeting that standard “shall inform the appropriate professional authority.”

**ABA Model Rule 8.3(a)** contains a similar reporting requirement.

ABA Model Rule 8.3(a) contains essentially two of the same components as Virginia Rule 8.3(a)’s reporting duty.

First, the other lawyer’s misconduct must constitute an ethics rule violation “that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer.” In contrast to the Virginia Rule 8.3(a), ABA Model Rule 8.3(a) includes the phrase “in other respects.” That does not seem to differ substantively from the Virginia Rule 8.3(a) standard.

Second, like Virginia Rule 8.3(a), ABA Model Rule 8.3(a) requires reporting to “the appropriate professional authority.”

But in stark contrast to Virginia Rule 8.3(a)’s “reliable information” knowledge standard, ABA Model Rule 8.3(a)’s reporting obligation applies only to a lawyer who “knows” of another lawyer’s specified misconduct. ABA Model Rule 1.0(f) defines “knows” as “denot[ing] actual knowledge of the fact in question”, although such “knowledge may be inferred from circumstances” – which is the same as the Virginia Terminology definition

of “knows”. Thus, the ABA Model Rule reporting requirement requires a much higher level of knowledge than Virginia Rule 8.3(a)’s “reliable information” standard.

### **Virginia Rule 8.3(b)**

Virginia Rule 8.3(b) addresses lawyers’ obligation to report judges’ misconduct.

Virginia Rule 8.3(b) requires “[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.” Interestingly, Virginia Rule 8.3(b) does not specifically refer to Virginia’s Canons of Judicial Conduct. Instead, the Virginia Rule uses a generic lower-case reference to “applicable rules of judicial conduct.” This raises the possibility that a Virginia lawyer might have a duty to report non-Virginia judge’s violation of whatever “rules of judicial conduct” apply to her conduct. That could implicate the same sort of choice of law rules discussed above.

Like Virginia Rule 8.3(a)’s duty to report other lawyers’ misconduct, Virginia Rule 8.3(b) uses a “reliable information” standard. The judicial misconduct must constitute “a violation of applicable rules of judicial conduct,” that “raises a substantial question as to the judge’s fitness for office.” Focusing on a “judge’s fitness for office” involves a subset of the standard for determining if lawyers must report another lawyer’s misconduct. As explained above, the lawyer-context reporting requirement covers such violations that raise “a substantial question” as to the misbehaving lawyer’s “fitness to practice law” (which seems to parallel a “judge’s fitness for office”). But the lawyer-context reporting standard also requires reporting if the misbehaving lawyer’s ethics violation “raises a

substantial question as to that lawyer’s honesty [or] trustworthiness.” One might think that judges’ “honesty” and “trustworthiness” would also be attributes appropriate for the judge-context reporting obligation. But the provisions’ language is deliberately different.

**ABA Model Rule 8.3(b)** contains the identical language as Virginia Rule 8.3(b), with one large exception.

Among other things, ABA Model Rule 8.3(b) has the same narrow “fitness for office” standard in the judge-reporting context, – in contrast to the broader lawyer-context reporting standard of “honesty, trustworthiness or fitness as a lawyer.”

In stark contrast to Virginia Rule 8.3(b)’s “reliable information” standard, ABA Model Rule 8.3(b) contains a “knows” standard.

### **Virginia Rule 8.3(c)**

Virginia Rule 8.3(c) addresses a certain type of lawyer’s duty to report another lawyer’s misconduct.

Virginia Rule 8.3(c) provide guidance to “a lawyer serving as a third party neutral” who “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.”

Virginia Rule 2.10 addresses such third-party neutrals. Virginia Rule 2.10 cmt. [1] implicitly defines such third-party neutrals by describing the dispute resolution proceedings that they conduct: “mediation, conciliation, early neutral evaluation, non-binding arbitration and non-judicial settlement conferences.” Thus, that definition on its face excludes arbitrators in binding arbitrations. Virginia Rule 2.11 focuses on one

specific type of third-party neutral – mediators. Thus, presumably binding arbitration arbitrators are excluded from this Virginia Rule 8.3(c) provision. That begs the question of how arbitrators in binding arbitrations might act if they receive “reliable information” about a participating lawyers’ otherwise reportable ethics violations. They seem to fall between the cracks in Virginia Rule 8.3.

Virginia Rule 8.3(c) describes the knowledge standard triggering a third-party neutral’s reporting duty as “reliable information” – the same standard that trigger lawyers’ duty to report other lawyers’ misconduct and judges’ misconduct.

In contrast to those other Virginia Rules, Virginia Rule 8.3(c) uses a different phrase that seems to narrow the reporting scope – but may instead just intend to address a specific scenario. The phrase focuses on a third-party neutral lawyer who “receives reliable information during the dispute resolution process.” That phrase thus covers third-party neutral lawyers’ knowledge of lawyers’ misconduct they receive only during that specific time. The term “dispute resolution process” is not defined, but presumably covers ancillary communications, related activities, etc. Such third-party neutral lawyers presumably must comply with the general Virginia Rule 8.3(a) requirement in all other settings. In other words, a lawyer either occasionally or repetitively acting as a “third-party neutral” must follow Virginia Rule 8.3(a)’s requirement if they acquire “reliable information” about other lawyers’ specified misconduct outside the “dispute resolution process.” But lawyers acting as third-party neutrals in that process have a confidentiality duty beyond the normal Virginia Rule 8.3(d) confidentiality duty (discussed below). Virginia Rule 8.3(c) focuses on that special circumstance.

Virginia Rule 8.3(c) applies to “a lawyer serving as a third-party neutral” who “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”. Thus, Virginia Rule 8.3(c) incorporates Virginia Rule 8.3(a)’s reporting standard, discussed above. In contrast to Virginia Rule 8.3(a)’s automatic reporting obligation (subject to Virginia Rule 8.3(d) discussed below), Virginia Rule 8.3(c) does not require the third-party neutral lawyers to report the specified misconduct. Instead, those lawyers “shall attempt to obtain the parties’ written agreement to waive confidentiality and permit disclosure of such information to the appropriate professional authority.”

The reference to such “reliable information’s” “confidential nature” obviously focuses on the mediation or other ADR confidentiality requirements. By statute, Virginia protects the mediation process with confidentiality. Virginia Code §98.61-581.22. Thus, Virginia Rule 8.3(c) provides guidance to lawyers acting as third-party neutrals who would otherwise be obligated to report other lawyers’ misconduct – but for a Virginia statutory law’s ADR confidentiality requirements. In other words, Virginia Rule 8.3(c) applies to lawyers in that special statutorily-governed status.

Virginia Rule 8.3(c) next describes what such third-party neutral lawyers must do. The Virginia Rule requires that such third-party neutrals “shall attempt to obtain the parties’ written agreement to waive confidentiality and permit disclosure of such information.” Thus, third-party neutrals with the “reliable information” that would otherwise trigger a reporting obligation cannot simply ignore it. Instead, such third-party neutral lawyers must seek the third-party neutral processes parties’ agreement to allow

disclosure of the lawyer’s misconduct. The word “parties” presumably means the clients, and does not include the misbehaving lawyer’s agreement. Otherwise, the misbehaving lawyer could veto the reporting obligation. The requirement of a “written agreement” presumably assures that there is no dispute about the parties’ consent to the disclosure.

Virginia Rule 8.3(c) contains the same provision as Virginia Rule 8.3(a) defining the entity to whom the third-party neutral must report under the specified circumstances: “the appropriate professional authority.”

**ABA Model Rule 8.3** does not have a similar provision.

### **Virginia Rule 8.3(d)**

Virginia Rule 8.3(d) addresses several exceptions to the reporting obligation.

The first section focuses on lawyers’ countervailing confidentiality duty. Virginia Rule 8.3(d) explains that lawyers do not have a duty under Virginia Rule 8.3 to disclose “information otherwise protected by [Virginia] Rule 1.6.”

Virginia Rule 1.6 is Virginia’s core rule governing confidentiality. Virginia Rule 1.6 defines three categories of protected information (in contrast to ABA Model Rule 1.6(a)’s broad protection for all “information relating to the representation of a client”). Virginia Rule 1.6(a) prohibits lawyers from revealing (absent some exception): (1) “information protected by the attorney-client privilege under applicable law;” (2) “other information gained in the professional relationship that the client has requested be held inviolate;” and (3) “other information gained in the professional relationship . . . the disclosure of which would be embarrassing or would be likely to be detrimental to the client.” Virginia Rule 1.6(b) lists circumstances when a “lawyer may reveal” protected client confidential

information. Virginia Rule 1.6(c) describes circumstances when “[a] lawyer shall promptly reveal” protected client confidential information.

Significantly, Virginia Rule 8.3(d) exempts from lawyers’ disclosure obligation “information otherwise protected by Rule 1.6” – not just information the disclosure of which would violate Virginia Rule 1.6. Thus, Virginia Rule 8.3(d) presumably does not require disclosure of information that lawyers “may reveal” under Virginia Rule 1.6(b). It is less clear on the face of Virginia Rule 8.3(d) whether the exemption from Virginia Rule 8.3’s reporting requirement applies to all protected Virginia Rule 1.6 information that lawyers “shall promptly reveal” under Virginia Rule 1.6(c).

Unlike the ABA Model Rules and most or all other states’ rules, Virginia Rule 1.6 also addresses lawyers’ obligation to report other lawyers’ misconduct. Thus, lawyers seeking guidance must check entirely separate rules – Virginia Rule 8.3 and Virginia Rule 1.6(c)(2). This disparate treatment is apparently unique, and could be confusing.

Fortunately, Virginia Rule 1.6(c)(2) helpfully refers to Virginia Rule 8.3. That will prompt lawyers to check the other pertinent Virginia Rules. But unfortunately, neither black letter Virginia Rule 8.3 nor any of its Comments refer to Virginia Rule 1.6 – except for Virginia Rule 8.3(d)’s description of “information otherwise protected by [Virginia] Rule 1.6.” That of course refers to Virginia Rule 1.6(a), which defines the protected information. But that reference does not alert lawyers that another portion of Virginia Rule 1.6 (Virginia Rule 1.6(c)(2)) requires disclosure under certain circumstances. The absence of such helpful cross-referencing could result in lawyers not properly complying with the Rules.

Under Virginia Rule 1.6(c)(2) lawyers “shall promptly reveal . . . information concerning the misconduct of another attorney to the appropriate professional authority

under [Virginia] Rule 8.3.” Virginia Rule 1.6(c)(2) explains that if such information is protected under Virginia Rule 1.6, “the attorney, after consultation, must obtain client consent.” That is awkwardly worded. The provision does not require lawyers to obtain their clients’ consent to report other lawyers’ misconduct – it instead prohibits disclosure of protected client confidential information such situations absent such client consent to the disclosure. The “consultation” mentioned in Virginia Rule 1.6(c)(2) “should include full disclosure of all reasonably foreseeable consequences of both disclosure and non-disclosure to the client.” That seems to be another example where the Virginia Rules and Comments use the wrong standard. The word “must” would be appropriate here – as in many other places.

Several Virginia Rule 1.6 Comments provide guidance.

Virginia Rule 1.6 cmt. [13] acknowledges the “awkward positions” that such lawyers find themselves in “with respect to their obligations to clients and to the profession.” The Virginia Rule Comment then notes that Virginia Rule 1.6(c)(2) addresses lawyers’ possible duty to report other lawyers’ misconduct if they “[have] information indicating that another attorney has violated the Rules of Professional Conduct.” That presumably is a shorthand for Virginia Rule 8.3(a)’s requirement that the reporting lawyer have “reliable information” of such an ethics violation. But lawyers might be confused by the mismatch between Virginia Rule 8.3(a)’s “reliable information” standard and Virginia Rule 1.6(c)(2)’s unconditional “information” standard.

Virginia Rule 1.6 cmt. [13] describes the information triggering such lawyers’ “awkward positions” as information “learned during the course of representing a client.” This contrasts with the Virginia Rule 1.6(a) formulation of protected client information as

“other information gained in the professional relationship” (emphasis added). There is a linguistic difference and perhaps a substantive difference between information “gained in the professional relationship” and information “learned during the course of representing a client.” The former seems to focus on information gained from a client or otherwise from the attorney-client relationship. It seems to focus on the source of the information. The phrase “learned during the course of representing a client” has a temporal focus. It certainly covers information learned other than from the client. This also contrasts with the broad definition in Virginia Rule 1.6 cmt. [3] – which explains that that “[t]he [Virginia Rule 1.6] confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested to be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client, whatever its source.” (emphasis added).

Virginia Rule 1.6 cmt. [3]’s phrase “whatever its source” presumably refers to information sources other than the client. The phrase “gained during” rather than “gained in” would therefore have been more accurate.

Virginia Rule 1.6 cmt. [13] next contains a logical and welcome explanation of the meaning of the odd phrase “must obtain client consent” that appears in black letter Virginia Rule 1.6(c)(2) (discussed above). Virginia Rule 1.6 cmt. [13] explains that the awkward black letter Virginia Rule 1.6(c)(2) provision means that lawyers having the required “reliable information” level of knowledge of other lawyers’ misconduct are “require[ed] . . . to request the permission of the client to disclose the information.” This makes it clear that lawyers considering whether to disclose client confidences when

reporting other lawyers' misconduct are not required to obtain that client's consent to do so. That of course would deny the clients' right to deny the request. Instead, such lawyers may not make the disclosure without their clients' consent. So Virginia Rule 1.6 cmt. [13] makes it clear that lawyers must request their client's consent – using the term “request,” which obviously means that the clients can deny the request.

Virginia Rule 1.6 cmt. [13] concludes by explaining that “the attorney must inform the client of all reasonably foreseeable consequences of both disclosure and non-disclosure” (emphasis added). This creates a troubling mismatch between black letter Virginia Rule 1.6(c)(2) and Virginia Rule 1.6 cmt. [13]. Black letter Virginia Rule 1.6(c)(2) states that such “[c]onsultation should include the full disclosure of all reasonably foreseeable consequences of both disclosure and non-disclosure to the client” (emphasis added). Virginia Rule 1.6 cmt. [13] just as plainly indicates that “[i]n requesting consent, the attorney must inform the client of all reasonably foreseeable consequences of both disclosure and non-disclosure” (emphasis added). Not only does this mismatch provide confusing and contradictory guidance, Virginia Rule 1.6 cmt. [13]'s mandatory reporting presumably is inoperative. The first Virginia Scope paragraph concludes with an assurance that “[c]omments do not add obligations to the [Virginia] Rules but provide guidance for practicing in compliance with the [Virginia] Rules.” So Virginia Rule 1.6 cmt. [13]'s mandatory reporting standard articulated cannot impose an obligation that clearly is not contained in black letter Virginia Rule 1.6(c)(2). Ironically, the binding Virginia Rule 1.6 cmt. [13]'s “must” seems more appropriate than the non-binding black letter Virginia Rule 1.6(c)(2)'s “should.”

Virginia Rule 1.6 cmt. [14] requires that lawyers must “promptly” comply with Virginia Rule 1.6(c)(2)’s and Virginia Rule 8.3(a)’s reporting obligation. But Virginia Rule 1.6 cmt. [14] then assures that “a lawyer does not violate this [Virginia Rule (1.6(c)(2))] by delaying in reporting attorney misconduct for the minimum period of time necessary to protect a client’s interests.”

Virginia Rule 1.6 cmt. [14] concludes with an example: “a lawyer might choose to postpone reporting attorney misconduct until the end of litigation when reporting during litigation might harm the client’s interests.”

Such delay not only protects the clients. Lawyers who report another lawyer’s ethics violation during the litigation might himself face an allegation that the reporting (or the threat to report) violates Virginia Rule 3.4(i). That Virginia Rule bluntly states that “[a] lawyer shall not . . . [p]resent or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.” Waiting until the end of the litigation presumably immunizes the reporting lawyer from such an allegation, because at that point there is no “civil matter” in which the reporting lawyer or his client would “obtain an advantage.”

The second Virginia Rule 8.3(d) exception to Virginia Rule 8.3(a)’s reporting obligation focuses on information lawyers gain during their laudable participation in lawyer assistance programs. Virginia Rule 8.3(d) exempts from Virginia Rule 8.3(a)’s reporting requirement “information gained by a lawyer or a judge who is a member of an approved lawyer’s assistance program.” This is the type of information that lawyers or judges would gain while assisting in a Lawyers Helping Lawyers organization or a similar entity. The word “member” is not defined. As discussed below, ABA Model Rule 8.3(c)’s term “participating” would be preferable. If judges participate in such worthwhile programs,

presumably the exception would also apply to their Virginia Rule 8.3(b)'s reporting obligation.

This exception has a condition – because it applies only “when such information is obtained for the purposes of fulfilling the recognized objectives of the program.” It is unclear exactly how this condition applies. One would think that all information gained by lawyers or judges participating in such worthwhile programs would meet this standard. Perhaps the condition was intended to strip away the exception for pure gossip or other extraneous communications. But it seems like an odd exception to the disclosure requirement exception.

The third Virginia Rule 8.3(d) exception to lawyers' Virginia Rule 8.3 reporting obligation focuses on other lawyers who assist in the same worthwhile programs. Virginia Rule 8.3(d) exempts from Virginia Rule 8.3(a)'s reporting requirement “information” gained by “a lawyer or judge . . . who is a trained intervenor or a volunteer for such a program or committee, or who is otherwise cooperating in a particular assistance effort.”

This description is also confusing. The term “trained intervenor or volunteer” is a bit vague. Does the phrase include an untrained “intervenor”? Does the word “volunteer” mean only a trained volunteer, or could it include an untrained volunteer? The phrase “program or committee” seems to imply that there is a difference between those two entities. Does a “member” of a “committee” fall inside or outside the exception?

The catch-all phrase “or who is otherwise cooperating in a particular assistance effort” might resolve some of that confusion. But presumably there are ways lawyers working in a lawyer's assistance program might acquire pertinent information without “cooperating in a particular assistance effort.” For instance, they might be supervising

another lawyer who is “cooperating in a particular assistance effort.” Or a lawyer might see reports filed by such a “cooperating” lawyer, receive such information during formal or informal conversations with a “cooperating” lawyer, receive such information second-hand, etc. ABA Model Rule 8.3(c)’s use of the phrase “participating in” seems much better.

Significantly, the exemption covers those lawyers or judges only “when such information is obtained for the purposes of fulfilling the recognized objectives of the program.” As explained above, this is a strange exception to the disclosure obligation exception.

**ABA Model Rule 8.3(c)** addresses exemptions from lawyers’ Model Rule 8.3(a) or (b) reporting obligation, in a much less elaborate way than Virginia Rule 8.3(d).

First, ABA Model Rule 8.3(c) explains that the reporting obligation “does not require disclosure of information otherwise protected by Rule 1.6.” Unlike Virginia Rule 1.6, ABA Model Rule 1.6 does not address lawyers’ reporting obligations. Thus, ABA Model Rule 8.3(c)’s reporting requirement exemption presumably covers all ABA Model Rule 1.6(a) information – without considering application of ABA Model Rule 1.6(b)’s discretionary disclosure provisions.

Second, ABA Model Rule 8.3(c) exempts from the ABA Model Rule 8.3(a) and (b) reporting obligation “information gained by a lawyer or a judge while participating in an approved lawyers assistance program.” The ABA Model Rule 8.3(c)’s phrase “participating in” presumably is broader than the word “member” in Virginia Rule 8.3(d). So the phrase presumably includes the type of lawyers and judges identified in Virginia Rule 8.3(d)’s exemption from the reporting obligation information gained by a lawyer or a

judge who is acting as a “trained intervenor or volunteer,” who is “cooperating” in an assistance effort, etc.

Significantly, ABA Model Rule 8.3(c) does not contain Virginia Rule 8.3(d)'s condition that such informations' exemption from the reporting obligations applies only “when such information is obtained for the purposes of fulfilling the recognized objectives of the program.” This ABA approach seems preferable to Virginia Rule 8.3(d)'s subject matter condition.

### **Virginia Rule 8.3(e)**

Virginia Rule 8.3(e) addresses lawyers' self-reporting obligation, in an elaborate provision not found in the ABA Model Rules.

Virginia Rule 8.3(a)'s core reporting obligation does not require self-reporting. On its face, Virginia Rule 8.3(a) only requires a lawyer to report “another lawyer” under the specified conditions. That follows the ABA Model Rule 8.3(a) approach, but differs from some other states' self-reporting obligation.

Virginia Rule 8.3(e) requires lawyers to “inform the Virginia State Bar” in three defined situations.

First, lawyers must inform the Virginia State Bar if they have “been disciplined by a state or federal disciplinary authority, agency or court in any state, U.S. territory, or the District of Columbia.” The self-reporting requirement covers such discipline based on “a violation of rules of professional conduct in that jurisdiction.” In other words, a lawyer must report to the Virginia State Bar other jurisdictions' discipline of the lawyer for violating

those other jurisdictions' ethics rules. Virginia Rule 8.5 governs Virginia's choice of laws "[i]n any exercise of a disciplinary authority of Virginia."

Second, lawyers must inform the Virginia State Bar if they have been "convicted of a felony in a state, U.S. territory, District of Columbia, or federal court."

Third, lawyers must report to the Virginia State Bar if they have 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."

In those three situations, lawyers' required reporting to the Virginia State Bar "shall be made in writing to the Clerk of the Disciplinary System of the Virginia State Bar." Virginia Rule 8.3(e) also contains a timing requirement. Lawyers must make the required written report "not later than 60 days following entry of any final order or judgment of conviction or discipline."

**ABA Model Rule 8.3** does not contain a similar self-reporting requirement.

## Comment

### Virginia Rule 8.3 Comment [1]

Virginia Rule 8.3 cmt. [1] addresses the rationale for Virginia Rule 8.3's reporting obligation.

Virginia Rule 8.3 cmt. [1] first notes that the reporting requirement comes from the legal professions' "[s]elf-regulation." The Virginia Rule Comment also notes that lawyers "have a similar obligation with respect to judicial misconduct."

Virginia Rule 8.3 cmt. [1] next warns that "[a]n apparently isolated violation [by lawyers and presumably also by judges] may indicate a pattern of misconduct that only a disciplinary investigation can uncover." Although that statement is undoubtedly accurate, it is unclear how it applies to lawyers' obligation under Virginia Rule 8.3(a) and (b) – which applies only if a lawyer ethics or judicial conduct rules violation "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness to practice law [or judges' "fitness for office]". If the "apparently isolated violation" meets that standard, lawyers must report it (subject to Virginia Rule 8.3's exemption from lawyers' reporting obligation). But lawyer obviously would not already have such "reliable information" that such an "apparently isolated violation" actually "indicates[] a pattern of misconduct" – if "only a disciplinary investigation can uncover" it.

Perhaps that sentence was meant to encourage such reporting when it is optional rather than mandatory.

Virginia Rule 8.3 cmt. [1] concludes by noting that reporting a lawyer's or judge's violation "is especially important where the victim is unlikely to discover the offense." It is unclear whether such recording "is especially important" because the victim deserves

some compensation (or more likely) because the victim is thus unlikely to report the lawyers' or judges' misconduct to enforcement or professional authorities.

**ABA Model Rule 8.3 cmt. [1]** contains the identical language.

### **Virginia Rule 8.3 Comment [2]**

Virginia Rule 8.3 cmt. [2] addresses the confidentiality interplay between Virginia Rule 8.3 and Virginia Rule 1.6.

Virginia Rule 8.3 cmt. [2] explains that reporting misconduct “is not required where it would involve a violation of [Virginia] Rule 1.6.” The Virginia Rule Comment then contains an erroneous reference to Virginia Rule 1.6(c)(3). There is no such Virginia Rule – so presumably the reference should be to Virginia Rule 1.6(c)(2).

It is unclear what Virginia Rule 8.3 cmt. [2] means. Black letter Virginia Rule 8.3(d) does not require “disclosure of information otherwise protected by [Virginia] Rule 1.6.” As explained above, Virginia Rule 1.6 protects specific client-related information, but also: (1) allows lawyers to disclose some of that protected information; and (2) requires lawyers to disclose some types of that protected information. The only way that disclosure of other lawyers' ethics violation would “involve violation of [Virginia] Rule 1.6” is if: (1) the information is protected by Virginia Rule 1.6, but did not satisfy Virginia Rule 8.3's reporting requirement, which is incorporated in Virginia Rule 1.6(c)(2); or (2) the lawyer did not obtain the necessary client consent to disclose the information, which lawyers must seek to obtain under Virginia Rule 1.6(c)(2). But it seems inappropriate for Virginia Rule 8.3 cmt. [2] to say that such reporting “is not required.” Of course it is not required

– because it does not meet the reporting requirements of either Virginia Rule 8.3 or Virginia Rule 1.6.

**ABA Model Rule 8.3 cmt. [2]** contains the identical language as Virginia Rule 8.3 cmt. [2] – explaining that “[a] report about misconduct is not required where it would “involve violation of [ABA Model] Rule 1.6.” In the ABA Model Rules, that sentence makes sense – because there is no ABA Model Rule 1.6 provision requiring such disclosure.

In contrast to Virginia Rule 1.6(c)(2)’s requirement that lawyers “must” seek their clients’ consent to make the Virginia Rule 8.3 disclosure of other lawyers’ specified misconduct, ABA Model Rule 8.3 cmt. [2] explicitly eschews a duty to request client consent to make that disclosure. Instead, ABA Model Rule 8.3 cmt. [2] suggests that lawyers “should encourage a client to consent to a disclosure where prosecution would not substantially prejudice the client’s interests.”

The word “prosecution” seems inapt. ABA Model Rule 8.3 cmt. [1] uses the phrase “disciplinary investigation.” That term “discipline” would seem more appropriate than “prosecution.”

### **Virginia Rule 8.3 Comment [3]**

Virginia Rule 8.3 cmt. [3] addresses the reason why lawyers do not have a duty to report all ethics violations by other lawyers.

Virginia Rule 8.3 cmt. [3] first explains that lawyers would face professional discipline themselves for failing to report “an ethics violation by other lawyers if they were obligated to report every ethics violation. The Virginia Rule Comment then notes that

such an absolute reporting requirement “existed in many jurisdictions but proved to be unenforceable.” Although that historical discussion is interesting, it seems irrelevant now.

Virginia Rule 8.3 cmt. [3] next explains that Virginia Rule 8.3 limits the disclosure obligation to “those offenses that a self-regulating profession must vigorously endeavor to prevent” – which requires “[a] measure of judgment” in following.

Significantly, Virginia Rule 8.3 cmt. [3] then explains that “[t]he term ‘substantial’ refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.” In other words, the obligation to report other lawyers’ ethics violations arises when lawyers have “reliable information” of the violation, and that the violation “raises a substantial question” as to the other lawyer’s “honesty, trustworthiness or fitness to practice law.” The “substantial question” goes to the seriousness of the ethics violation. The Virginia Rules Terminology section defines the term “substantial” as denot[ing] a material matter of clear and weighty importance – “when used in reference to degree or extent.” ABA Model Rule 1.0(l) contains the identical language.

Virginia Rule 8.3 cmt. [3] then explains that any required report “should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances.” That sort of generic ABA Model Rule language is understandable, but it would be more helpful if the Virginia Comment gave Virginia-specific guidance. It is unclear what “a peer review agency” is in this context. It is also uncertain whether Virginia has such a “peer review agency.”

Virginia Rule 8.3 cmt. [3] concludes by noting that lawyers considering whether they must report judicial misconduct face “[s]imilar considerations.”

**ABA Model Rule 8.3 cmt. [3]** contains identical language. As mentioned above, ABA Model Rule 1.0(l) defines “substantial” as “denoting a material matter of clear and weight importance” – “when used in reference to degree or extent.” It is surprising that ABA Model Rule 8.3 cmt. [3] would not refer to ABA Model Rule 1.0(l)’s definition of “substantial.”

### **Virginia Rule 8.3 Comment [3a]**

Virginia Rule 8.3 cmt. [3a] addresses third-party neutrals’ duty to report lawyer misconduct. ABA Model Rule 8.3 does not address that issue.

Virginia Rule 8.3 cmt. [3a] first explains that “[i]n court-related dispute resolution proceedings, a third-party neutral cannot disclose any information exchanged or observations regarding the conduct and demeanor of the parties and their counsel in the proceeding.” That statement presumably refers to confidentiality statutes and rules governing such court-related dispute resolution proceedings. It would have been helpful if the Virginia Rule Comment cited the appropriate statute.

Virginia Rule 8.3 cmt. [3a] then notes that “[m]ediation sessions are covered” by a “less restrictive” statute, which protects as confidential “any communication made in or in connection with the mediation which relates to the controversy being mediated” Virginia Code §8.01.581.22 governs that situation.

Virginia Rule 8.3 cmt. [3a] explains that because of these statutory restrictions, lawyers serving as third-party neutrals (including as mediators) “may not be able to discharge his or her obligation to report the misconduct of another lawyer if the reporting lawyer’s information is based on information protected as confidential under the statutes.”

Virginia Rule 8.3 cmt. [3a] concludes with a reminder that “both statutes permit the parties to agree in writing to waive confidentiality.” Unfortunately, Virginia 8.3 cmt. [3a] does not cite either statute.

**ABA Model Rule 8.3** does not have a similar Comment.

### **Virginia Rule 8.3 Comment [3b]**

Virginia Rule 8.3 cmt. [3b] picks up with the third-party neutral reporting discussion contained in preceding Virginia Rule 8.3 cmt. [3a].

Virginia Rule 8.3 cmt. [3b] explains that Virginia Rule 8.3 “requires a third-party neutral lawyer to attempt to obtain the parties’ written consent to waive confidentiality as to professional misconduct.” Such consent would “permit the lawyer to reveal information regarding another lawyer’s misconduct which the lawyer would otherwise be required to report.” As explained above, the term “parties” presumably includes only the clients themselves, and not their lawyers. Otherwise, a misbehaving lawyer could veto a third-party neutral lawyer’s reporting of his misconduct.

**ABA Model Rule 8.3** does not have a similar Comment.

### **Virginia Rule 8.3 Comment [4]**

Virginia Rule 8.3 cmt. [4] addresses the obligations of lawyers who represent other lawyers or who represent judges.

Virginia Rule 8.3 cmt. [4] understandably assures that Virginia Rule 8.3’s reporting duty “does not apply to a lawyer retained to represent a lawyer or judge whose professional conduct is in question.”

Virginia Rule 8.3 cmt. [4] concludes with the obvious explanation that such lawyers' conduct (presumably including a possible duty to disclose) "is governed by the rules applicable to the client-lawyer relationship." As explained throughout this document, the Virginia Rules uses various presumably synonymous terms to define the relationship between a lawyer and a client: "client-lawyer relationship;" "lawyer-client relationship;" "attorney-client relationship;" "client-attorney relationship."

**ABA Model Rule 8.3 cmt. [4]** contains the identical language.

### **Virginia Rule 8.3 Comment [5]**

Virginia Rule 8.3 cmt. [5] addresses information that lawyers receive "in the course of the lawyer's participation in or cooperation with an approved lawyers or judges assistance program." Virginia Rule 8.3(a) covers those situations.

Virginia Rule 8.3 cmt. [5] offers some guidance for applying Virginia Rule 8.3(d). That black letter Virginia Rule refers to "a lawyer or judge" who participates in "an approved lawyer's assistance program." In other words, lawyers or judges who provide the assistance, not who seek the assistance.

But Virginia Rule 8.3 cmt. [5] contains an odd mixture of those terms. Virginia Rule 8.5 cmt. [5]'s first sentence mentions both a lawyer receiving assistance, and a lawyer providing assistance. The sentence also mentions a judge – but only a judge receiving assistance, not providing assistance. Virginia Rule 8.5 cmt. [5]'s second and third sentences mention lawyers and judges receiving assistance, not providing assistance. Virginia Rule's 8.3 cmt. [5]'s fourth sentence mentions lawyers (not judges) – once to describe a lawyer providing assistance and once to describe a lawyer receiving

assistance. Virginia Rule 8.3 cmt. [5]'s sixth sentence mentions lawyers twice – once as providing assistance and once as receiving assistance. That sentence also mentions judges once – only as receiving assistance.

Virginia Rule 8.3 cmt. [5] first acknowledges that maintaining the confidentiality of such information “encourages lawyers and judges to seek treatment through such program” and that discouraging such assistance by removing the confidentiality assurance may “result in additional harm to [lawyers’ or judges’] professional careers and additional injury to the welfare of clients and the public.”

Virginia Rule 8.3 cmt. [5] then notes that these considerations underlie the exception to the disclosure duty for information obtained by “a lawyer who is participating in or cooperating with an approved lawyer assistance program.” The Virginia Rule Comment provides an example: “such as the Virginia Bar Association’s Committee on Substance Abuse.”

Virginia Rule 8.3 cmt. [5] next explains that Virginia Rule 8.3’s reporting obligation exception applies to a lawyer “who learns of the confidences and secrets of another lawyer who is the object of a particular assistance effort when such information is obtained for the purpose of fulfilling the recognized objectives of the program.” The term “confidences and secrets” seems odd. That term comes from the old ABA Model Code of Professional Responsibility (and the old Virginia Code of Professional Responsibility). The word “confidence” traditionally meant communications protected by the attorney-client privilege. And the term “secret” traditionally meant information the client has asked to be held secret, or “the disclosure of which would be embarrassing or would be likely to

be detrimental to the client.” The ABA Model Rules do not contain that old formulation. Virginia Rule 1.6(a) continues to use those definitions, but not those words.

Interestingly, Virginia Rule 1.6 cmt. [13] (discussed above) also uses the archaic “confidence or secret under [Virginia] Rule 1.6” terminology. As with Virginia Rule 8.3 cmt. [5]’s use of that phrase, presumably the use is a holdover from the old Virginia Code of Professional Responsibility. But there is a “no harm no foul” aspect – because Virginia Rule 1.6(a) essentially parrots the definition from that old formulation.

Given the meaning of that phrase “confidences and secrets of another lawyer,” it would seem that a lawyer “participating in or cooperating with” a lawyer assistance program is not likely to receive a lawyer’s or judge’s “confidences” – if that word means privileged communications – because there is no attorney-client relationship. Use of the word “secrets” makes more sense. But the absence of an attorney-client relationship between the lawyer (or judge) seeking assistance and the lawyer participating in providing such assistance makes that word inapt too.

The limitation of such lawyers’ confidentiality duty to information that “is obtained for the purpose of fulfilling the recognized objectives of the program” makes sense conceptually, but one might wonder what information would not fall within that category. For instance, a lawyer seeking assistance presumably would confess to various problems, perhaps including ethics lapses (that either meet or do not meet the reporting obligation standard). The Virginia Rule 8.3 cmt. [5] provision seems to recognize that there might be some other type of communication from the lawyer seeking assistance – which would not fall within the definition of the protected information. It is difficult to imagine what that might be.

Virginia Rule 8.3 cmt. [5] next explains that “in order to promote the purposes of the assistance program,” lawyers participating in such assistance programs must protect the “confidences and secrets” learned from the lawyer seeking the assistance “to the same extent as the confidences and secrets of a lawyer’s client.”

That is an odd concept. It seems inappropriate to apply the confidentiality duties arising from an attorney-client relationship to a relationship between a lawyer providing assistance to another lawyer and the lawyer seeking the assistance. Virginia Rule 1.6(b) allows (but does not require) lawyers who are representing clients to disclose protected client confidential information in seven specified scenarios. Virginia Rule 1.6(c) requires lawyers who are representing clients to disclose protected client confidential information in two scenarios – one of which involves reporting another lawyer (Virginia Rule 1.6(c)(2)). It is hard to imagine that the ethics rules would apply all of those discretionary and mandatory disclosure possibilities in the very different setting of a lawyer assistance program. Presumably Virginia Rule 8.3 cmt. [5] intends to apply Virginia Rule 1.6(a)’s definition of protected information, but not to incorporate Virginia Rule 1.6(b)’s discretionary disclosure provisions or (especially) Virginia Rule 1.6(c)’s mandatory disclosure provision.

Virginia Rule 8.3 cmt. [5] concludes with an explanation that lawyers “who receive[] such information [presumably “confidences and secrets” of lawyers or judges seeking assistance] would nevertheless be required to comply with the [Virginia] Rule 8.3 reporting provisions to report misconduct if the impaired lawyer or judge indicates an intent to engage in illegal activity.” The Virginia Rule Comment provides an example: “for example, the conversion of client funds to personal use.”

It seems inappropriate to limit this approach to “impaired” lawyers or judges. Lawyers or judges might just be wrongdoers, rather than “impaired.” Virginia Rule 1.14 addresses clients “with impairment.” Virginia Rule 1.14(a) implicitly defines impairment by describing a scenario “[w]hen a client’s capacity to make adequately considered decisions in connection with the representation is diminished, whether because of minority, mental impairment or some other reason.” That situation seems far different from a lawyer’s or judge’s ethics violation – which might come from such impairment, but might also come from the lawyer or judge being a bad person who violates the ethics rule.

Virginia Rule 8.3 cmt. [5]’s requirement that lawyers assisting in an lawyer assistance program must report the misconduct of a lawyer or judge seeking such assistance if the latter “indicates an intent to engage in illegal activity,” seems inconsistent with the black letter Virginia Rule 8.3(d) exception. If such information is “gained by a lawyer or judge” who is assisting in the lawyer assistance program, black letter Virginia Rule 8.3(d) would exempt it from the reporting requirement.

The last sentence of Virginia Scope’s first paragraph assures that “[c]omments do not add obligations to the [Virginia] Rules but provide guidance for practicing in compliance with the Rules.” Under that approach, this requirement to report lawyer’s or judge’s “intent to engage in illegal activity” (such as “the conversion of client funds to personal use”) would seem to be inoperative – because it purports to require an action that black letter Virginia Rule 8.3(d) does not require.

Ironically, even analogizing the relationship between a lawyer providing assistance and the lawyer receiving assistance to an attorney-client relationship, it is worth noting that lawyers do not have a duty under Virginia Rule 1.6(c)(1) to disclose “the intention of

a client, as stated by the client to commit a crime” – unless that crime is “reasonably certain to result in death or substantially bodily harm to another or substantial injury to the financial interests or property of another.” Thus, Virginia Rule 1.6(c)(1) presumably would not require disclosure of a client’s “intent to engage in . . . the conversion of client funds to personal use” – if the client only intended to convert an insubstantial amount of funds.

Because the lawyer seeking assistance is not the assisting lawyer’s client, presumably none of the Virginia Rule 1.6 discretionary or mandatory disclosure provisions apply to information that assisting lawyers receive. Lawyers generally need not disclose non-clients’ misconduct. Virginia Rule 3.3 imposes such duties in some tribunal settings. Perhaps there are other examples. If Virginia 8.3 cmt. [5] intends to impose Virginia Rule 8.3 disclosure obligations on lawyers who do not represent other lawyers but who instead assist other lawyers, one would think that the Virginia Rules would do so bluntly. In fact, because the Virginia Scope paragraph explains that “[c]omments do not add obligations to the Rules,” such an imposition presumably cannot be contained in a Virginia Rule Comment. And as explained above, a Virginia Rule Comment certainly cannot contradict some black letter Rule’s confidentiality requirement.

Thus, Virginia Rule 8.3 cmt. [5]’s apparent imposition of an obligation to report assistance-seeking lawyers’ “intent to engage in illegal activity, for example, the conversion of client funds to personal use” seems improper and inoperative.

**ABA Model Rule 8.3 cmt. [5]** contains language identical to Virginia Rule 8.3 cmt. [5]’s explanation of the disclosure exception’s purpose. ABA Model Rule 8.3 cmt. [5] is less extensive than the Virginia Rule Comment. For instance, it does not include Virginia

Rule 8.3 cmt. [5]’s odd discussion of an “impaired” lawyer or judge who “indicates an intent to engage in illegal activity.”

In contrast to Virginia Rule 8.3 cmt. [5], ABA Model Rule 8.3 cmt. [5] concludes with an acknowledgment that “[t]hese [ABA Model] Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program.” That statement seems incorrect. ABA Model Rule 8.3(c) on its face, does not require disclosure of information “gained by a lawyer or judge while participating in an approved lawyers assistance program.” That would seem to settle the matter.

ABA Model Rule 8.3 cmt. [5] then warns that “such an obligation, however, may be imposed by the rules of the program or other law.” That seems like a strange provision.

It is unclear what “obligation” ABA Model Rule 8.3 cmt. [5] refers to – whether an “obligation” to protect information or to disclose information. It would seem likely that “the rules of [a lawyers assistance] program or other law would require confidentiality rather than disclosure.

### **Virginia Rule 8.3 Comment [6]**

Virginia Rule 8.3 cmt. [6] addresses Virginia’s self-reporting obligation – which does not appear in ABA Model Rule 8.3.

Virginia Rule 8.3 cmt. [6] explains that Virginia Rule 8.3(e)’s “duty of a lawyer to self-report a criminal conviction or professional discipline” is “triggered only after the conviction or decision has become final.” Virginia Rule 8.3 cmt. [6] then notes that the punishing jurisdiction’s law governs “[w]hether an offense is a felony.”

Virginia Rule 8.3 cmt. [6] concludes with an explanation that “it is possible that an offense in another jurisdiction may be a misdemeanor crime from which there is no duty to self-report, even though under Virginia law the offense is a felony.”

**ABA Model Rule 8.5** does not contain a similar Comment, because it does not contain a similar self-reporting obligation.

# RULE 8.4

## Misconduct

### Rule

#### Virginia Rule 8.4

Virginia Rule 8.4 contains the introductory phrase: “[it] is professional misconduct for a lawyer to... .”

This contrasts with the introductory phrases for other ethics rules that apply only to lawyers when they are representing their clients. For instance, Virginia Rule 4.1 starts with the phrase: “[in] the course of representing a client a lawyer shall not . . .” Similarly Virginia Rule 4.2 starts with the phrase: “[in] representing a client . . . , a lawyer shall not . . .” Virginia Rule 4.3(a) starts with the phrase: “[in] dealing on behalf of a client . . .” Virginia Rule 4.4(a) starts with the phrase “[i]n representing a client . . .” Those and other ethics rules apply only when lawyers are representing their clients.

In stark contrast, Virginia Rule 8.4 applies to lawyers whenever and wherever they act. In other words, Virginia Rule 8.4’s prohibitions apply to lawyers every day, in every phase of their professional and personal lives.

Some of Virginia Rule 8.4(a)’s prohibitions have a knowledge standard, and some do not. That distinction is discussed below.

**ABA Model Rule 8.4** contains the identical language.

### **Virginia Rule 8.4(a)**

Virginia Rule 8.4(a) addresses lawyers' own unethical conduct, and their involvement in others' conduct that would violate the lawyers' ethics rules.

Virginia Rule 8.4(a) explains that it is "professional misconduct" for a lawyer to violate or otherwise be involved in the violation of any Virginia Rule of Professional Conduct. This all-inclusive prohibition explains that lawyers cannot engage in the following activities related to any of the Virginia Rules: (1) "violate;" (2) "attempt to violate;" (3) "knowingly assist... another" to violate; (4) "knowingly... induce another" to violate; (5) violate "through the acts of another."

These extensive prohibitions sometimes create tension with the ethics rules that apply when lawyers are representing their clients. Those other rules apply only to the lawyers, and therefore do not prohibit clients from taking some actions that their lawyers cannot themselves take. This tension frequently arises in connection with Virginia Rule 4.2, which prohibits a lawyer from communicating ex parte with a person the lawyer "knows to be represented by another lawyer in the matter," without that other lawyer's consent. As mentioned above, Virginia Rule 4.2 starts with the phrase "[i]n representing a client..." So Virginia Rule 4.2(a)'s prohibition does not apply to those lawyers' clients communicating directly with a person that the client and the lawyer know to be represented by another lawyer in that matter.

Virginia Rule 4.2 cmt. [4] explicitly states that "parties to a matter may communicate directly with each other." Legal ethics opinions, case law and commentators have trouble reconciling: (1) clients' freedom in that setting to communicate directly ex parte with a represented person; and (2) lawyers' violation of Virginia Rule 8.4(a) by

coordinating with the client to “assist,” “induce,” or otherwise violate the lawyer’s prohibition on such ex parte communications “through the acts of another” (her client).

This document explains that tension in its summary and analysis of Virginia Rule 4.2.

Of course, the same tension may arise in connection with many other ethics rules.

**ABA Model Rule 8.4(a)** contains the identical language.

### **Virginia Rule 8.4(b)**

Virginia Rule 8.4(b) addresses lawyers’ intentional criminal or wrongful acts.

Virginia Rule 8.4(b) declares it “professional misconduct for lawyers to “commit a criminal or deliberately wrongful act” – but only under certain circumstances (discussed below). Virginia Rule 8.4(b) does not define or provide any guidance on the phrase “deliberately wrongful act.” “Deliberately wrongful acts” are not necessarily criminal – or else Virginia Rule 8.4(b) would not have used the word “or.” As explained below, Virginia Rule 8.4 cmt [2] seems limited to explaining illegal conduct that falls within this Virginia Rule 8.4(b) definition.

Significantly, Virginia Rule 8.4(b) only prohibits such an act “that reflects adversely on the lawyer’s honesty, trustworthiness or fitness to practice law.” Thus, Virginia Rule 8.4(b) does not impose a per se prohibition on all “criminal or deliberately wrongful act[s].” For instance, a lawyer engaged in civil disobedience would not violate this Rule, if it was generally recognized that the lawyer’s “deliberately wrongful” or even “criminal” act did not meet the “reflects adversely” standard.

**ABA Model Rule 8.4(b)** is similar to Virginia Rule 8.4(b).

ABA Model Rule 8.4(b) differs from Virginia Rule 8.4(b) in two ways.

First, in contrast to Virginia Rule 8.4(b)'s description of "a criminal or deliberately wrongful act," ABA Model Rule 8.4(b) limits the prohibition to "a criminal act" – without the "or deliberately wrongful act" phrase. This therefore makes ABA Model Rule 8.4(b) easier to apply, because it incorporates extrinsic criminal law. This contrasts with Virginia Rule 8.4(b)'s undefined and presumably broader phrase "deliberately wrongful act."

Second, in contrast to Virginia Rule 8.4(b)'s standard of lawyers' "honesty, trustworthiness or fitness to practice law," ABA Model Rule 8.4(b) ends with the phrase "honesty, trustworthiness or fitness in other respects." Thus, ABA Model Rule 8.4(b) seems to prohibit a broader range of lawyers' misconduct. A lawyer's criminal act might "reflect[] adversely on the lawyer's . . . fitness as a lawyer in other respects," but not meet the narrower Virginia Rule 8.4(b)'s "fitness to practice law" standard.

### **Virginia Rule 8.4(c)**

Virginia Rule 8.4(c) addresses a specific type of lawyer misconduct – dishonesty.

Virginia Rule 8.4(c) declares it "professional misconduct" for lawyers to engage in "conduct involving dishonesty, fraud, deceit or misrepresentation." But like Virginia Rule 8.4(b), not all such acts violate Virginia Rule 8.4(c). The prohibition is limited to such an act "which reflects adversely on the lawyer's fitness to practice law."

This limitation makes sense. A flat prohibition on lawyers' "dishonesty" would on its face prohibit social niceties and dispute – avoidance techniques (such as falsely expressing admiration for a spouse's ugly clothing or distasteful dinner, etc.).

But interestingly, Virginia Rule 8.4(c) prohibits such deceitful conduct only if it "reflects adversely on the lawyer's fitness to practice law." This is obviously a narrower

standard than Virginia Rule 8.4(b)'s prohibition on lawyers' criminal or wrongful acts "that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law." Presumably that limitation is based on the justifiable assumption that lawyers' "dishonesty, fraud, deceit or misrepresentation" would always "reflect[] adversely on the lawyer's honesty [or] trustworthiness."

**ABA Model Rule 8.4(c)** addresses the same conduct. But the ABA Model Rule contains an unrealistic complete prohibition on lawyers' "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation."

Thus, in stark contrast to Virginia Rule 8.4(c), ABA Model Rule 8.4(c) on its face prohibits every sort of socially acceptable "white lies" in which everyone engages and no one condemns. Of course, lawyers are not punished for telling a party host she really enjoyed the party when she didn't, etc. It is unfortunate that ABA Model Rule 8.4(c) simply cannot be enforced as it is written. Some examples of lawyer conduct that flatly violates black letter ABA Model Rule 8.4(c) might be humorous – such as a lawyer's deliberately dishonest response to a spouse's question "does this outfit make me look fat?"

But ABA Model Rule 8.4(c)'s unrealistic and unenforceable per se prohibition on any "conduct involving dishonesty...deceit or misrepresentation" would also on its face prohibit lawyers' participation in deliberately deceptive but undeniably necessary steps to uncover invidious housing discrimination (which presumably requires deceptive conduct), government lawyers' involvement in criminal sting operations or spying on foreign agents, etc. Those sort of socially worthwhile deceptive acts presumably would not trigger professional discipline unless they went too far. Between the humorous and the deadly serious examples, lawyers might also participate in a socially worthwhile but commercial

(and judicially acceptable) deceptive conduct to catch trademark infringement, copyright violations, etc. Interestingly, the ABA might be inhibited from ever changing this flat prohibition by the inevitable bad publicity that such a change would inevitably generate.

### **ABA Model Rule 8.4(d)**

Virginia did not adopt ABA Model Rule 8.4(d).

ABA Model Rule 8.4(d) declares it “professional misconduct” for lawyers to “engage in conduct that is prejudicial to the administration of justice.”

Although Virginia Rule 8.4 does not contain such a provision, presumably lawyers engaged in conduct “prejudicial to the administration of justice” would engage in communications or conduct that would violate some other Virginia Rule 8.4 provision or some other Virginia Rule.

### **Virginia Rule 8.4(d)**

Virginia Rule 8.4(d) addresses lawyers’ gaming the judicial or political system.

Virginia Rule 8.4(d) declares it “professional misconduct” for lawyers to “state or imply an ability to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official.” Virginia Rule 8.4(d) thus prohibits the communications about the ability to commit the improper acts. Presumably lawyers actually improperly influencing them would also violate some other Virginia Rule – such as Virginia Rule 8.4(b)’s prohibition on criminal acts, among others.

**ABA Model Rule 8.4(e)** contains essentially the same concept as Virginia Rule 8.4(d). But ABA Model Rule 8.4(e) differs from that Virginia Rule in several ways.

First, in contrast to Virginia Rule 8.4(d)'s list of entities or people lawyers may not claim the ability to improperly influence ("any tribunal, legislative body, or public official"), ABA Model Rule 8.4(e) contains a shorter list: "a government agency or official."

Second, in contrast to Virginia Rule 8.4(d)'s limitation of the prohibition to lawyers' statements that they can "influence improperly or upon irrelevant grounds" the listed entities and people, ABA Model Rule also prohibits lawyers' statements that they can "achieve results" through such influence.

Third, in contrast to Virginia Rule 8.4(d)'s prohibition on lawyers' statements that they can "influence improperly or upon irrelevant grounds" the listed entities and people, ABA Model Rule 8.4(d) limits the prohibition to claiming the ability to engage in improper influence "by means that violate the [ABA Model] Rules of Professional Conduct or other law." This ABA Model Rule articulation sounds more limited than Virginia Rule 8.4(d), but presumably such communications would always violate the Virginia Rules or other law.

### **Virginia Rule 8.4(e)**

Virginia Rule 8.4(e) addresses lawyer's improper interaction with judges.

Virginia Rule 8.4(e) declares it "professional misconduct" for lawyers to "knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law."

Interestingly, Virginia Rule 8.4 contains a "knowingly" standard only for two of its five examples of "professional misconduct:" (1) Virginia Rule 8.4(a)'s prohibition on lawyers "knowingly assist[ing] or induce[ing] another" to violate the Virginia Rules; and (2) Virginia Rule 8.4(e)'s prohibition on lawyer "knowingly assisting a judge or judicial

officer” in the specified misconduct. Perhaps the knowledge requirement is built into the other descriptions of “professional misconduct” included in Virginia Rule 8.4(b), (c) or (d). ABA Model Rule 8.4 contains the same pattern. As explained below, ABA Model Rule 8.4(g) also contains a “knows or reasonably should know” standard.

**ABA Model Rule 8.4(f)** contains the identical language.

### **ABA Model Rule 8.4(g)**

Virginia did not adopt ABA Model Rule 8.4(g), which addresses harassment and discrimination.

Virginia likewise had not adopted the former ABA Model Rule provision dealing with similar misconduct (and discussed below).

ABA Model Rule 8.4(g) declares it “professional misconduct” for lawyers to “engage in conduct that the lawyer knows or reasonably should know” constitutes a laundry list of condemned behavior: “harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status.” The prohibition applies to a broad range of lawyer activities: “conduct related to the practice of law.”

ABA Model Rule 8.4(g) also contains two exceptions.

First, the Rule “does not limit the ability of a lawyer to accept, decline or withdraw from a representation,” citing ABA Model Rule 1.16. The word “ability” seems odd. That word normally goes to someone’s competence to take action, not their discretion or freedom to take such action. Although ABA Model Rule 8.4(g) does not cite any specific ABA Model Rule 1.16 provision, presumably the most likely relevant provision is ABA

Model Rule 1.16(b)(4). That provision allows lawyers to "withdraw from representing a client" (subject to another provision – ABA Model Rule 1.16(c)) if "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement." But even that provision focuses on client's conduct, not the client's characteristics.

Second, the ABA Model Rule "does not preclude legitimate advice or advocacy consistent with these [ABA Model] Rules."

The ABA approved ABA Model Rule 8.4(g) and the accompanying Comments in 2016.

Before this change, the ABA Model Rules dealt with specified misconduct in an ABA Model Rule 8.4 Comment.

A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

Former ABA Model Rule 8.4 cmt. [3] (emphasis added).

This former ABA Model Rule Comment was fairly limited. First, it applied only to a lawyers' conduct "in the course of representing a client." Other ABA Model Rule prohibitions begin with the same or similar phrase, such as the prohibition on false statements of material fact (ABA Model Rule 4.1), or the prohibition on ex parte communications with represented persons (ABA Model Rule 4.2). This limiting language contrasts with the introductory phrase of ABA Model Rule 8.4: "[i]t is professional

misconduct for a lawyer to . . . ." Those prohibitions apply whenever the lawyer acts in any context, professionally or personally. Second, the former ABA Model Rule Comment prohibited only "knowing" misconduct. Third, the former ABA Model Rule Comment did not prohibit discrimination. It prohibited "bias or prejudice," if such conduct was "based upon" the stated attributes. The ABA Model Rules did not define those two terms, but presumably, they describe improper (and perhaps even unlawful) conduct that is a subset of discrimination. If the terms were meant to describe the more generic conduct of "discrimination," the ABA could have used that one word rather than the two words. Fourth, the former ABA Model Rule Comment prohibited the misconduct only when it was "prejudicial to the administration of justice." That vague standard paralleled the black letter ABA Model Rule 8.4(d)'s prohibition on any "conduct that is prejudicial to the administration of justice." In fact, the general language of ABA Model Rule 8.4(d) thus already prohibited the specific conduct described in former ABA Model Rule 8.4 cmt. [3].

## Comment

### ABA Model Rule 8.4 Comment [1]

Virginia did not adopt ABA Model Rule 8.4 cmt. [1].

ABA Model Rule 8.4 cmt. [1] addresses the prohibition on lawyers themselves (or acting with or through another) violating any ABA Model Rule.

ABA Model Rule 8.4 cmt. [1] first essentially repeats ABA Model Rule 8.4(a), but adds an example: “as when [lawyers] request or instruct an agent to do so on the lawyer’s behalf.”

ABA Model Rule 8.4 cmt [1] concludes with an assurance that ABA Model Rule 8.4(a) “does not prohibit a lawyer from advising a client concerning action a client is legally entitled to take.” This statement presumably focuses on the tension described above – which (for example) can arise in connection with ABA Model Rule 4.2’s prohibition on lawyers’ ex parte communications with a person the lawyer knows to be represented in the matter – but acknowledgment in ABA Model Rule 4.2 cmt [4] that “parties to a matter may communicate directly with each other”).

### Virginia Rule 8.4 Comment [2]

Virginia Rule 8.4 cmt. [2] addresses the type of wrongful acts for which lawyers can be held professionally responsible.

Virginia Rule 8.4 cmt. [2] first notes that “[many] kinds of illegal conduct reflect adversely on fitness to practice law.” The Virginia Rule Comment provides two examples: (1) “offenses involving fraud”; and (2) “the offense of willful failure to file an income tax return.”

Virginia Rule 8.4 cmt [2] then acknowledges that “some kinds of offenses carry no such implication.”

Virginia Rule 8.4 cmt [2] next explains that the distinction between the former and latter type of offenses “[t]raditionally“...was drawn in terms of offenses involving ‘moral turpitude’.” The Virginia Rule Comment then contains a somewhat confusing sentence: “[t]hat concept [presumably the “distinction” referred to in the previous sentence] can be construed to include offenses concerning some matters of personal morality.” The sentence provides examples: “such as adultery and comparable offenses.” Those type of offenses “have no specific connection to fitness for the practice of law.” It is unclear whether the “concept [that] can be construed to include” the listed offenses place “adultery and comparable offenses” inside or outside such “moral turpitude” offenses. Presumably they would fall outside that category, because they “have no specific connection to fitness for the practice of law.” So one would think that the sentence would say that the “moral turpitude” concept could be construed to “exclude” rather than “include” such misconduct. After all, Virginia Rule 8.4 cmt [2] intends to describe what Virginia Rule 8.4 prohibits.

Virginia Rule 8.4 cmt [2] next turns to another concept – explaining that “[a]lthough a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice.” Virginia Rule 8.4 cmt [2] provides examples: “[o]ffenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice” (emphasis added). Virginia Rule 8.4 cmt [2]’s reference to “serious interference with the administration of justice” contrasts with ABA Model Rule 8.4(d)’s flat and unconditional statement that “[i]t is professional misconduct for a lawyer to . . . engage in

conduct that is prejudicial to the administration of justice.” In other words, Virginia Rule 8.4 cmt [2] apparently only considers it “professional misconduct” for a lawyer to engage in “serious interference with the administration of justice” – in contrast to ABA Model Rule 8.4(d)’s condemnation of any “conduct that is prejudicial to the administration of justice.”

Strangely, as discussed below, ABA Model Rule 8.4 cmt [2] also uses the phrase “serious interference with the administration of justice.” Perhaps such interference has to be “serious” to violate ABA Model Rule 8.4(d)’s condemnation as “professional conduct” lawyers’ engaging in “conduct that is prejudicial to the administration of justice.” One would think that any interference – even “unserious” interference – would meet the “prejudicial to the administration of justice” standard.

Virginia Rule 8.4 cmt [2] concludes with the warning that “[a] pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.” While undoubtedly correct, Virginia Rule 8.4 cmt. [2]’s warning seems disconnected to black letter Rule 8.4 and its Comments. Nothing in black letter Rule 8.4 or its Comments describe the implications of lawyers’ “indifference to legal obligation.” In other words, that standard does not appear anywhere in Virginia Rule 8.4 or its Comments, and thus seems beside the point.

**ABA Model Rule 8.4 cmt. [2]** contains the identical language.

Thus, ABA Model Rule 8.4 cmt. [2] has the same strange use of the word “include” rather than the word “exclude” in discussing the characteristics of “adultery and comparable offenses.” Similarly, ABA Model Rule 8.4 cmt. [2] uses the seemingly irrelevant “indifference to legal obligation” standard contained in Virginia Rule 8.4 cmt. [2]’s last sentence.

Interestingly, ABA Model Rule 8.4 cmt [2]’s reference to “serious interference with the administration of justice” differs from the broader black letter ABA Model Rule 8.4(d) phrase “prejudicial to the administration of justice.” As explained above, perhaps ABA Model Rule 8.4 does not consider it “prejudicial to the administration of justice” for a lawyer to engage in conduct constituting “interference with the administration of justice” if that interference is not “serious.” That seems unlikely, but would be the only way to explain the mismatch between ABA Model Rule 8.4(d)’s flat condemnation of “conduct that is prejudicial to the administration of justice” and ABA Model Rule 8.4 cmt [2]’s condemnation of lawyers’ “serious interference with the administration of justice” (deliberately adding the adjective “serious”).

#### **Virginia Rule 8.4 Comment [4]**

Virginia Rule 8.4 cmt. [4] focuses on lawyers’ intentional but justifiable violations of law.

Virginia Rule 8.4 cmt. [4] first notes that lawyers “may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists.” The Virginia Rule Comment points to Virginia Rule 1.2(c) – referring to “provisions of [Virginia] Rule 1.2(c) concerning a good faith challenge to the validity, scope, meaning or application of the law.” Virginia Rule 8.4 cmt [4] states that those Virginia Rule 1.2(c) provisions “apply to challenges of legal regulation of the practice of law.”

The phrase “challenges of legal regulation of the practice of law” seems inapt (emphasis added). Earlier in that sentence, Virginia Rule 8.4 cmt. [4] uses the apparently more appropriate “challenge to” phrase – rather than “challenge of.”

Virginia Rule 8.4 cmt. [4]’s reference to Virginia Rule 1.2(c) also seems like a mismatch. Virginia Rule 1.2(c) describes lawyers “counsel[ing] or assist[ing]” a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.” Presumably, that is the provision that Virginia Rule 8.4 cmt. [4] describes as “concerning a good faith challenge” to a law – even though Virginia Rule 1.2(c) uses the phrase “to make a good faith effort to determine” the law’s meaning rather than “a good faith challenge.” Presumably “a good faith challenge” to a law is one way that lawyers and their clients can make “a good faith effort to determine the validity . . . of the law.”

Perhaps more importantly, Virginia Rule 8.4 cmt. [4]’s reference to lawyers’ “challenges of legal regulation of the practice of law” represents only a subset of Virginia Rule 1.2(c)’s much broader application to lawyers’ challenges” of the law. It is not clear why Virginia Rule 8.4 cmt. [4] limits such challenges to “legal regulation” of law practice, rather than applies generally to challenges to any laws.

Virginia Rule 8.4 cmt. [4] concludes with references to Virginia Rule 3.1 and Virginia Rule 3.4(d). Virginia Rule 3.1 states that lawyers “shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law”. Virginia Rule 3.4(d) states that lawyers “shall not... [k]nowingly disobey or advise a client to disregard a standing rule or a ruling of a tribunal made in the course of a proceeding” – but acknowledges that “the lawyer may take steps, in good faith, to test the validity of such rule or ruling.” These references presumably remind lawyers that these and perhaps other Virginia Rules limit the sort of “good faith challenge”

described in Virginia Rule 1.2(c) and therefore permissible under Virginia Rule 8.4 cmt [2].

**ABA Model Rule 8.4 cmt. [6]** contains the identical language as Virginia Rule 8.4 cmt. [4], although it refers to ABA Model Rule 1.2(d) – because that is the parallel of Virginia Rule 1.2(c).

ABA Model Rule 8.4 cmt. [6] thus contains the odd “challenges of” instead of the seemingly more appropriate phrase “challenges to.” ABA Model Rule 8.4 cmt. [6] also strangely limits its reach to lawyers’ “challenges of legal regulation of the practice of law” – in contrast to black letter ABA Model Rule 1.2(d)’s much broader reference to lawyers’ challenges to the law generally (not just the law governing the legal profession).

In contrast to Virginia Rule 8.4 cmt. [4], ABA Model Rule 8.4 cmt. [6] does not contain the references to ABA Model Rule 3.3 or ABA Model Rule 3.6.

### **Virginia Rule 8.4 Comment [5]**

Virginia Rule 8.4 cmt. [5] addresses lawyers holding special positions of trust.

Virginia Rule 8.4 cmt. [5] first notes that “[l]awyers holding public office assume legal responsibilities going beyond those of other citizens,” so such lawyers’ “abuse of public office can suggest an inability to fulfill the professional role of attorney.”

The phrase “inability to fulfill the professional role of attorney” is awkward – but presumably is intended to be synonymous with the phrase “lawyer’s . . . fitness to practice law”, which appears in Virginia Rule 8.4(b) and (c). Virginia Rule 8.4 cmt [5] then states that other “the same is true” of lawyers’ “abuse of positions of private trust.” Virginia Rule 8.4 cmt. [5] provides examples: “trustee, executor, administrator, guardian, agent and

officer, director or manager of a corporation or other organization.” In contrast to lawyers “holding public office,” lawyers acting in one of those listed private roles presumably have fiduciary duties to those served in those roles. Virginia Rule 8.4 cmt [5] thus presumably would reach the same conclusion about those private lawyers’ “abuse of positions of private trust” as lawyers who abuse “public office” then – “an inability to fulfill the professional role of attorney.” And as explained above, presumably that “inability” would trigger the “reflects adversely on the lawyer’s fitness to practice law” mentioned in Virginia Rule 8.4(b) and Virginia Rule 8.4(c).

**ABA Model Rule 8.4 cmt. [7]** contains the identical language.

### **ABA Model Rule 8.4 Comment [3]**

Virginia did not adopt ABA Model Rule 8.4 cmt. [3].

ABA Model Rule 8.4 cmt [3] addresses ABA Model Rule 8.4 (g)’s prohibition on specified “harassment or discrimination.”

ABA Model Rule 8.4 cmt [3] first states that the specified misbehavior “undermine[s] confidence in the legal profession and the legal system.” ABA Model Rule 8.4 cmt [3] then explains that the term “discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others.” The term “[h]arassment includes sexual harassment and derogatory or demeaning verbal or physical conduct.” The term “[s]exual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct or a sexual nature.”

ABA Model Rule 8.4 cmt [3] concludes by noting that application of ABA Model Rule 8.4(g) may be “guide[d]” by “substantive law of antidiscrimination and

anti-harassment statutes and case law.” Thus, ABA Model Rule 8.4(g) does not explicitly incorporate that outside substantive law, but instead notes that the outside law can “guide application” of ABA Model Rule 8.4(g).

#### **ABA Model Rule 8.4 Comment [4]**

Virginia did not adopt ABA Model Rule 8.4 cmt. [4].

ABA Model Rule 8.4 cmt. [4] addresses the conduct covered by ABA Model Rule 8.4(g)’s declaration as “professional misconduct” lawyers’ harassment or discrimination.

ABA Model Rule 8.4 cmt [4] first explains the interactions and the practices that constitute “[c]onduct related to the practice of law.” Those include: (1) “representing clients;” (2) “interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law;” (3) “operating or managing a law firm or law practice;” and (4) “participating in bar association, business or social activities in connection with the practice of law.”

ABA Model Rule 8.4 cmt [4] then assures that “[l]awyers may engage in conduct undertaken to promote diversity and inclusion without violating this [ABA Model] Rule.”

ABA Model Rule 8.4 cmt [4] concludes with an example of “conduct undertaken to promote diversity and inclusion:” “for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.”

Such ABA Model Rule 8.4 cmt. [4] – approved conduct presumably could not violate black letter ABA Model Rule 8.4(g)’s unconditional prohibition on “discrimination” on the basis of the listed attributes in ABA Model Rule 8.4(g). It goes without saying that

an ABA Model Rule Comment cannot trump a black letter ABA Model Rule prohibition. And the word “diversity” is not defined in ABA Model Rule 8.4 cmt. [4], so such diversity presumably may not include the attributes listed in ABA Model Rule 8.4(g). Thus, on its face ABA Model Rule 8.4(g) presumably would flatly prohibit any “discrimination” on the basis of race, sex, etc. while implementing the “initiatives” described in ABA Model Rule 8.4 cmt. [4]. For example, on its face, ABA Model Rule 8.4(g) presumably would prohibit: a minority-only recruiting fair; a program “advancing diverse employees” based on their race or sex; “sponsoring diverse law student organizations” that themselves discriminate by admitting only those of a certain race, sex, sexual orientation, etc.

#### **ABA Model Rule 8.4 Comment [5]**

Virginia did not adopt ABA Model Rule 8.4 cmt. [5].

ABA Model Rule 8.4 cmt. [5] addresses several other arguable exceptions to ABA Model Rule 8.4(g)’s per se prohibition on harassment or discrimination based on the listed characteristics.

ABA Model Rule 8.4 cmt. [5] first explains that “[a] trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation” of the ABA Model Rule 8.4(g) prohibition.

ABA Model Rule 8.4 cmt [5] then notes that lawyers do not violate ABA Model Rule 8.4(g) “by limiting the scope or subject matter of the lawyer’s practice or by limiting the lawyer’s practice to members of underserved populations in accordance with these Rules and other law.” Presumably this Comment limitation language would likewise not allow

lawyers to discriminate on the basis of the listed attributes in black letter ABA Model Rule 8.4(g).

ABA Model Rule 8.4 cmt [5] next contains a strange assurance that lawyers “may charge and collect reasonable fees and expenses for a representation,” citing ABA Model Rule 1.5(a). It is unclear how this obvious discretion has anything to do with “harassment or discrimination.”

ABA Model Rule 8.4 cmt [5] then reminds lawyers that they “also should be mindful of their professional obligations under [ABA Model] Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under [ABA Model] Rule 6.2 not to avoid appointments from a tribunal except for good cause.” The ABA Model Rule Comment also points to ABA Model Rule 6.2(a), (b) and (c). Those references seem superfluous, because the preceding sentence mentions ABA Model Rule 6.2 – which obviously includes those three subparts.

ABA Model Rule 8.4 cmt [5] concludes with an acknowledgement that lawyers’ “representation of a client does not constitute an endorsement by the lawyer of the client’s views or activities,” citing ABA Model Rule 1.2(b). ABA Model Rule 1.2(b) contains essentially the same language although ABA Model Rule 8.4 cmt. [5] mentions the “client’s views or activities,” while ABA Model Rule 1.2(b) contains a broader list: “the client’s political, economic, social or moral views or activities.” Similar language appears in Virginia Rule 1.2 cmt. [5], rather than in black letter Virginia Rule 1.2.

# **RULE 8.5**

## **Disciplinary Authority; Choice Of Law**

### **Rule**

#### **Virginia Rule 8.5(a)**

Virginia Rule 8.5(a) addresses Virginia’s power to discipline Virginia lawyers and non-Virginia lawyers.

Virginia Rule 8.5(a) first states that Virginia can exercise disciplinary authority over “[a] lawyer admitted to practice in this jurisdiction.”

The word “admitted” presumably means licensed to practice law in Virginia. Throughout the Virginia Rules, there is a sometimes confusing mix of the terms “licensed,” “admitted,” and “authorized.” Virginia Rule 5.5 (dealing with multi-jurisdictional practice) uses all three of those terms. This document addresses the possible meaning and Virginia Rules’ confusing use of those three terms in its analysis of Virginia Rule 5.5.

The meaning of the term “licensed” seems self-evident. A “licensed” Virginia lawyer is officially authorized by the Virginia Supreme Court to practice law in Virginia, presumably without any limitation and for all purposes.

The term “admitted” presumably describes a broader ability to practice law in Virginia, but also by virtue of some governmental entity’s official action. Lawyers who are “licensed” in Virginia clearly are “admitted” to practice in Virginia. But non-Virginia and even non-U.S. lawyers might be “admitted” to practice law in some limited way. Such

admissions might include pro hac admission to a Virginia federal or state court. Virginia Supreme Court rules and regulations also allow certain non-Virginia to be admitted for limited purposes – such as the spouses of members of the military, foreign legal consultants, etc.

The term “authorized” presumably means lawyers either licensed/admitted to practice law in Virginia or otherwise free to practice law in Virginia even though they are not licensed/admitted in Virginia. Such “authorization” presumably does not always require a government entity’s official action. For instance, under the U.S. Constitution’s Supremacy Clause, lawyers are allowed to practice purely federal law anywhere in the United States – even if they are not licensed in, admitted in, or even officially authorized by, the state where they are engaging in such purely federal law. Of course, it might be difficult to draw the line between purely federal law and other law that would require some approval by that state – this document discusses that issue in its analysis of Virginia Rule 5.5 (the multijurisdictional practice rule). But lawyers licensed somewhere in the United States should be permitted to practice purely federal law in any other state, because that is “authorized” by the United States Constitution. And another obvious example of such “authorized” lawyers are those temporarily practicing in Virginia under Virginia Rule 5.5 (the multi-jurisdictional practice rule). Those non-Virginia (and even non-U.S.) lawyers are “authorized” by Virginia Rule 5.5 to “temporarily and occasionally” practice in Virginia – without any official Virginia government action. Another example is an in-house lawyer who has satisfied the Virginia Corporate Counsel regulations (although she might also be considered “admitted” in Virginia for such limited purposes).

Virginia Rule 8.5(a)'s reference to lawyer admitted "in this jurisdiction" seems odd. That is the generic one-size-fits-all phrase found in the ABA Model Rules. One would have thought that the Virginia Rules would use the word "Virginia" rather than "this jurisdiction." But of course the meaning is clear. Oddly, Virginia Rule 8.5(a) uses the word "Virginia" elsewhere in the Rule. In fact, the word "Virginia" appears later in that very sentence. One might wonder why Virginia Rule 8.5(a)'s introductory sentence did not use the word "Virginia" in both places – especially on the first occasion when it would be appropriate.

Virginia Rule 8.5(a) next reminds such Virginia-"admitted" lawyers that they are "subject to the disciplinary authority of Virginia, regardless of where the lawyer's conduct occurs." Thus, a Virginia-admitted lawyer who commits some misconduct in another jurisdiction may be punished by Virginia. That process sometimes involves Virginia following up on that other jurisdiction's discipline, by imposing reciprocal discipline. But theoretically, a Virginia-admitted lawyer might be punished only by Virginia and not by that other jurisdiction for misconduct in that other jurisdiction. Of course, the Virginia Bar might apply Virginia Rule 8.5(b)'s choice of laws provision (discussed below) to apply that other jurisdiction's (or perhaps some third jurisdiction's) ethics rules.

Virginia Rule 8.5(a) next explains that lawyers can also be subject to "the disciplinary authority of Virginia" even if they are "not admitted in Virginia." Such a lawyer can face Virginia discipline if the lawyer: (1) "provides . . . legal services in Virginia;" (2) "holds himself out as providing . . . legal services in Virginia;" or (3) "offers to provide legal services in Virginia."

To make all of this more complicated, lawyers can provide legal services, hold themselves out as providing, or offer to provide legal services “in” Virginia – while either physically present in Virginia or not. In other words, lawyers can engage in all of that conduct virtually “in” Virginia but physically somewhere else.

The first “provides . . . legal services in Virginia” category of lawyers includes non-Virginia lawyers who either otherwise properly practice law in Virginia, or permissibly practice law in Virginia under Virginia Rule 5.5 – which addresses non-Virginia and non-U.S. lawyers’ temporary or permanent practice in Virginia. And obviously that first “provides . . . legal services in Virginia” category of lawyers might include non-Virginia or non-U.S. lawyers properly (perhaps even illegally) providing legal services in Virginia.

The second “holds himself out as providing “legal services in Virginia” category of lawyers presumably overlaps with the first category. But theoretically a non-Virginia lawyer who “holds himself out” as providing legal services in Virginia could be disciplined by Virginia even if he or she never actually provides those legal services. The “holding out” presumably could involve advertising or other marketing, use of website or business cards showing a connection with Virginia, or failing to avoid the misleading impression that the lawyer can provide services in Virginia. The latter scenario presumably could include a non-Virginia lawyer using a website, business card, office business lobby listing, etc. that does not have a disclaimer to dispel the implicit representation that the lawyer can practice in Virginia.

The third “offers to provide legal services . . . in Virginia” category probably overlaps with the second category, but presumably also includes non-Virginia lawyers

who offer their services to Virginia residents without explicitly holding themselves out as Virginia lawyers.

Virginia Rule 8.5(a) then turns to logistics. The Virginia Rule explains that any of the lawyers in those three categories automatically “consents to the appointment of the Clerk of the Supreme Court of Virginia as his or her agent for purposes of notices of any disciplinary action by the Virginia State Bar.” Of course, this makes it easier for the Virginia State Bar to send any required notices, such as a notice that the Virginia Bar is taking disciplinary action against such non-Virginia lawyers who might otherwise be difficult to track down.

Virginia Rule 8.5(a) concludes with a reminder that lawyers “may be subject for the same conduct to the disciplinary authority of Virginia and any other jurisdiction where the lawyer is admitted.” This essentially parallels the first sentence’s warning – that lawyers may be punished by multiple jurisdictions for the same misconduct in any of those jurisdictions or some other jurisdiction.

**ABA Model Rule 8.5(a)** is similar to Virginia Rule 8.5(a). But there are three differences.

First, in contrast to Virginia Rule 8.5(a), ABA Model Rule 8.5(a) uses the phrase “this jurisdiction” throughout the Rule. Virginia Rule 8.5(a) sometimes uses that phrase, and sometimes uses the more appropriate word “Virginia.”

Second, in contrast to Virginia Rule 8.5(a), ABA Model Rule 8.5(a) does not on its face subject to the jurisdiction’s discipline a lawyer who “holds himself out as providing” legal services in the jurisdiction. Instead, ABA Model Rule 8.5(a) applies the jurisdiction’s

disciplinary authority to a lawyer who “provides or offers to provide any legal services in this jurisdiction.”

Third, in contrast to Virginia Rule 8.5(a), ABA Model Rule 8.5(a) does not have a parallel to the logistical provision under which lawyers subject to the Virginia Bar’s discipline automatically consent to the Virginia Supreme Court Clerk’s appointment for purposes of receiving notices of disciplinary action.

### **Virginia Rule 8.5(b)**

Virginia Rule 8.5(b) addresses the Virginia Rules’ choice of law analysis.

Virginia Rule 8.5(b) begins with the phrase: “[i]n any exercise of the disciplinary authority of Virginia . . . .” Thus, on its face, Virginia Rule 8.5(b)’s choice of laws analysis applies only to lawyers who face discipline by the Virginia Bar.

Although the choice of law provision on its face is limited to Virginia’s “exercise of . . . disciplinary authority,” lawyers presumably also look to the choice of law provision in their day-to-day ethics analysis and compliance. In other words, lawyers who are subject to Virginia discipline assess the choice of laws rules outside the disciplinary process and also look to see what jurisdiction’s ethics rules apply to their everyday actions.

**ABA Model Rule 8.5(b)’s** introductory phrase contains the identical language (other than using the generic phrase “of this jurisdiction” rather than the word “Virginia”).

### **Virginia Rule 8.5(b)(1)**

Virginia Rule 8.5(b)(1) addresses the disciplinary authority choice of law for lawyers’ tribunal-related conduct.

Virginia Rule 8.5(b)(1) explains what jurisdiction’s ethics rules will apply “[i]n any exercise of the disciplinary authority of Virginia” for those lawyers. As explained above, Virginia might exercise such disciplinary authority over Virginia or non-Virginia lawyers.

Virginia Rule 8.5(b)(1) governs the choice of law “for conduct in connection with a proceeding in a court, agency, or other tribunal before which a lawyer appears.”

The term “in connection with” is not defined, but presumably includes conduct before the listed entity, or in some other way related to the proceeding in such an entity. For instance, litigators’ interviews of witnesses who might testify in a court proceeding presumably would be considered to have taken place “in connection with” that proceeding, even though they occurred out-of-court or even out-of-state.

The “in connection with” standard also has a temporal element. ABA Model Rule 8.5(b)(1) avoids the uncertain and possibly ambiguous temporal analysis by using the phrase “pending before a tribunal,” as discussed below. A “proceeding” is either “pending” or it is not “pending.”

But Virginia Rule 8.5(b)(1)’s phrase “in connection with” is not defined, and is potentially much broader. It is unclear whether Virginia Rule 8.5(b)(1)’s phrase “in connection with a proceeding” includes only “pending” proceedings, or if it also includes impending, anticipated, concluded or other non-pending proceedings. Virginia Rule 8.5(b)(1)’s phrase “a proceeding in” seems to imply that the proceeding is ongoing, thus “pending.” But Virginia deliberately left out the word “pending” when adopting its Virginia Rule 8.5. One must assume that the deliberate decision to leave that term out was intentional, and designed to have an effect. The phrase “in connection with a proceeding” might include conduct that occurred before the proceeding was “pending.”

Of course, by definition a proceeding” is at some point “pending.” But once a proceeding is pending, it might be possible to look back before the proceeding was “pending” and consider such pre-pending (or perhaps even post-pending) conduct to fit within the definition of the phrase “in connection with a proceeding.”

This possible interpretation of the “in connection with a proceeding” term as applying before and perhaps even after a “pending” proceeding is partially mooted by a phrase appearing later in that sentence – which describes a “proceeding...before which a lawyer appears.” Presumably lawyers can only “appear” in a “pending proceeding.” But there might still be conduct “in connection with” a proceeding before the lawyer “appears” or perhaps even after the lawyer “appears” and the proceeding ends. This possible interpretation of the “in connection with a proceeding” term as applying before and perhaps even after a “pending” proceeding is partially mooted by a phrase appearing later in that sentence – which describes a “proceeding...before which a lawyer appears.” Presumably lawyers can only “appear” in a “pending proceeding. But there might still be conduct “in connection with” a proceeding before the lawyer “appears” or perhaps even after the lawyer “appears” and the proceeding ends.

Virginia Rule 8.5(b)(1) likewise does not include the definition of “proceeding.” A filed case presumably meets that standard. But the word “proceeding” might also include some emergency other hearing conducted in Virginia but related to a filed case in another jurisdiction. As discussed below, ABA Model Rule 8.5(b)(1) avoids any possible confusion about the word “proceeding” by using the phrase “a matter pending before a tribunal.”

The term “tribunal” is not defined in the Virginia Terminology section (in contrast to the ABA Model Rules, which define “tribunal” in ABA Model Rule 1.0(m)). That ABA Model Rule explains that the word “tribunal” “denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity.” ABA Model Rule 1.0(m) then explains that “[a] legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party’s interests in a particular matter.”

The phrase “a lawyer appears” presumably means some formal role before those listed entities. Litigators routinely “appear” as counsel of record in courts. In determining whether a lawyer “appears” in other settings might not be as clear. For instance, an associate might work on a court case behind the scenes, never “appearing” either as counsel of record or in some other way in a proceeding. Presumably such lawyers are not covered by Virginia Rule 8.5(b)(1). Such lawyers clearly can be disciplined by the Virginia Bar if they practice law in Virginia (or hold themselves out as practicing law in Virginia, or offer to practice law in Virginia) – but are not covered by the terms of Virginia Rule 8.5(b)(1). Presumably they can be covered by Virginia Rule 8.5(b)(2) or Virginia Rule 8.5(b)(3), which are discussed below. Virginia Rule 8.5(b)(1)’s odd limitation of its reach to lawyers who “appear” in a tribunal might mean that the lead lawyer in a case (who appears as counsel of record in a tribunal) might be governed by one set of ethics rules while another lawyer practicing in the office next to her working on the same case (but not “appearing” as counsel of record) might be governed by a different jurisdiction’s ethics rules.

ABA Model Rule 8.5(b)(1) does not use the word “appears,” so it avoids any confusion about that term.

For lawyers who “appear” before the listed entities in such “a proceeding,” Virginia Rule 8.5(b)(1) explains that “the rules to be applied shall be the rules of the jurisdiction in which the court, agency, or other tribunal sits.” In other words, the rules to be applied are those of the entity’s host jurisdiction – where it is physically located.

But there is an exception to that general approach: “unless the rules of the court, agency, or other tribunal provide otherwise.” For example, the United States Patent and Trademark Office sits in Virginia, but has adopted its own ethics rules. So lawyers who “appear” before the USPTO would find that their conduct “in connection with” a USPTO proceeding will be governed by the USPTO ethics rules rather than its host jurisdiction’s (Virginia) ethics rules.

Most state courts presumably apply their host jurisdiction’s ethics rules. Most federal courts also apply their host jurisdiction’s ethics rules – adopted by the host-jurisdiction’s highest court. But there are exceptions that might complicate any choice of laws rules. For instance, the District of Delaware’s local rules (amended effective August 1, 2016) apply the ABA Model Rules as the applicable ethics rules for lawyers appearing before that court. Local Rule 83.5(d). And not surprisingly, federal courts frequently have adopted their own local rules that are not based on another jurisdiction’s ethics rules (or the ABA Model Rules), but which apply their own home-grown ethics rules on certain tribunal-related issues.

**ABA Model Rule 8.5(b)(1)** also addresses tribunal-related conduct.

ABA Model Rule 8.5(b)(1) differs from Virginia Rule 8.5(b)(1) in several ways.

First, in contrast to Virginia Rule 8.5(b)(1)'s application of that Virginia provision's choice of law to lawyers who "appear" before the listed entities, ABA Model Rule 8.5(b)(1) explicitly applies its choice of laws rule to any lawyer for his or her "conduct in connection with" that matter. In other words, even lawyers who clearly do not "appear" before a listed entity will be governed by ABA Model Rule 8.5(b)(1)'s choice of law rule. This means that the same choice of laws rules applicable to lawyers who officially "appear" before a tribunal in a proceeding will also apply to all of the other lawyers working on a matter conducting research, interviewing witnesses, preparing pleadings, etc.

Second, in contrast to Virginia Rule 8.5(b)(1)'s description of "conduct in connection with a proceeding" in a Virginia Rule 8.5(b)(1) listed entity, ABA Model Rule 8.5(b)(1) uses the phrase "conduct in connection with a matter pending before a tribunal". As explained above, Virginia Rule 8.5(b)(1) does not contain the word "pending." Thus, the ABA Model Rule approach seems to have a more limited temporal scope than the Virginia Rule approach. The phrase "in connection with" adds some uncertainty – because that phrase could theoretically cover conduct occurring before or even after a proceeding was "pending."

Third, in contrast to Virginia Rule 8.5(b)(1)'s listing of "a court, agency, or other tribunal," ABA Model Rule 8.5(b)(1) simply uses the word "tribunal." But as explained above, ABA Model Rule 1.0(m) actually defines "tribunal" as including entities that are not in the Virginia Rule list. For instance, it would be difficult to conclude that Virginia Rule 8.5(b)(1) would apply to lawyers' conduct before "an arbitrator in a binding arbitration proceeding" or "a legislative body." Those situations are clearly within the broad ABA Model Rule 1.0(m) definition of "tribunal." If this is correct, those lawyers' conduct

presumably would be covered by the other Virginia choice of law option – Virginia Rule 8.5(b)(2) (discussed below).

### **Virginia Rule 8.5(b)(2)**

Virginia Rule 8.5(b)(2) addresses the disciplinary choice of law for “any other conduct” of lawyers that is different from the tribunal-related conduct governed by Virginia Rule 8.5(b)(2).

Virginia Rule 8.5(b)(2) explains that for such “other conduct, the rules of the jurisdiction in which the lawyer’s conduct occurred” shall apply the governing ethics rules when Virginia exercises its disciplinary authority. This may sound simple, but it could be very difficult to determine in which jurisdiction a lawyer’s conduct “occurred.” If a lawyer sitting in one state improperly threatens criminal charges against a lawyer in a second state to gain an advantage in a civil matter pending in a third state, where has that conduct “occurred”? Is it where the lawyer was sitting when she threatened that, where the recipient heard the threat, or where the matter was pending? This type of analysis implicates traditional choice of laws principles. Presumably those might help in the application of a simple statement like this.

**ABA Model Rule 8.5(b)(2)** contains the identical introductory phrase as Virginia Rule 8.5(b)(2).

But ABA Model Rule 8.5(b)(2) also contains significant additional phrases that might lead to another jurisdiction’s ethics rules applying to such lawyers’ conduct.

ABA Model Rule 8.5(b)(2)’s next phrase explains that “if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct.” That complicates the choice of laws issue even more, because it acknowledges

that a lawyer’s conduct might occur in one jurisdiction, but have its predominant effect in another jurisdiction. Both of those concepts can be difficult to assess and apply, but acknowledging a difference between them compounds the difficulty.

ABA Model Rule 8.5(b)(2) concludes with a reassuring concept not found in Virginia Rule 8.5. ABA Model Rule 8.5(b)(2)’s last sentence assures that “[a] lawyer shall not be subject to discipline if the lawyer’s conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer’s conduct will occur.”

ABA Model Rule 8.5(b)(2)’s forbearance of discipline in that setting is oddly one-sided. As explained above, ABA Model Rule 8.5(b)(2) provides two alternatives for non-tribunal related conduct: (1) “the rules of the jurisdiction in which the lawyer’s conduct occurred;” or (2) “the rules of the jurisdiction [where] the predominant effect of the conduct” occurred – if that “is in a different jurisdiction.” It might be difficult to conclusively determine where either one of those occurred. So it is conceivable (and perhaps even probable) that a lawyer will have to analyze where her conduct “occurred” as well as where “the predominant effect” of her conduct occurred. But under ABA Model Rule 8.5(b)(2), lawyers will be immunized from discipline only if she conforms to the rules of a jurisdiction in which [she] reasonably believes the predominant effect of [her] conduct will occur. In other words, that lawyer is not given the same benefit of the doubt when analyzing the other possible and equally ambiguous issue – where her “conduct occurred.”

This is a somewhat strange mismatch – because there can be confusion about where conduct “occurred,” as well as where the predominant effect of that conduct

“occurred.” Under ABA Model Rule 8.5(b)(2), lawyers are safe from discipline only if they follow the ethics rules of the jurisdiction in which they reasonably believe the “predominant effect” of their conduct occurred.

Virginia did not adopt any provision like this. It follows from the other phrase that Virginia did not adopt – acknowledging that a lawyer might engage in conduct in one jurisdiction, but the predominant effect of that conduct could be in a different jurisdiction.

### **Virginia Rule 8.5(b)(3)**

Virginia Rule 8.5(b)(3) is a strange potentially significantly material conflict of law provision.

On its face, Virginia Rule 8.5(b)(3) applies the Virginia Rules in a way that seems to ignore Virginia Rule 8.5(b)(1) and (2). Under Virginia Rule 8.5(b)(3), lawyers will be governed by the Virginia Rules “for conduct in the course of providing, holding out as providing, or offering to provide legal services in Virginia” – “notwithstanding subparagraphs (b)(1) and (b)(2).”

None of that makes sense. Under Virginia Rule 8.5(b)(2), a lawyer whose conduct occurred in Virginia will be governed by the Virginia Rules – both under that provision and under Virginia Rule 8.5(b)(3). So in that situation, the latter rule is superfluous. But apart from that, Virginia Rule 8.5(b)(3) only adds to the choice of law confusion. The clearest example of such confusion would involve a lawyer who provides legal services in Virginia “in connection with” a proceeding in another jurisdiction. Of course, that happens all the time. Even a Virginia-based lawyer who appears as counsel of record in another jurisdiction’s federal or state court inevitably provides legal services “in connection with” such proceedings while back home in Virginia. Such a lawyer might conduct legal

research in Virginia, interview clients based in Virginia, place calls or send emails from Virginia, report to a Virginia-based client about the proceeding, etc. Under Virginia Rule 8.5(b)(1), such lawyers would have to follow the ethics rules of that tribunal's host jurisdiction (the other state), unless the tribunal provides otherwise. But under Virginia Rule 8.5(b)(3), "notwithstanding subparagraph [(b)(1)]," such lawyers' conduct in Virginia would be governed by the Virginia Rules. But if such a lawyer traveled to the other jurisdiction to argue in that jurisdiction's court, that other jurisdiction's ethics rules presumably would apply under Virginia Rule 8.5(b)(1).

In fact, one of the prime examples of the other tribunal-specific rules scenario in Virginia Rule 8.5(b)(1) involves the Virginia-based USPTO. Under Virginia Rule 8.5(b)(1), Virginia-based lawyers engaged in "conduct in connection with a proceeding" before the USPTO would be governed by the USPTO's ethics rules under the explicit terms of that Virginia Rule provision. But under Virginia Rule 8.5(b)(3), "notwithstanding" that provision in Virginia Rule 8.5(b)(1), Virginia-based lawyers would be governed by the Virginia Rules, despite the directly contrary provision in Virginia Rule 8.5(b)(1) – which eschews Virginia's Rules in favor of the USPTO's rules.

Virginia Rule 8.5(b)(3)'s inclusion of the phrase "holding out as providing, or offering to provide legal services in Virginia" could trigger even further confusion. A lawyer in another jurisdiction who "hold[s]" herself out as providing, or who "offer[s] to provide legal services in Virginia" might engage in conduct in that other jurisdiction. Under Virginia Rule 8.5(b)(2) "the rules of the jurisdiction in which the lawyer's conduct occurred" (that other jurisdiction) would apply. But under Virginia Rule 8.5(b)(3) "notwithstanding"

Virginia Rule 8.5(b)(1), her “conduct in the course of ... holding out as providing, or offering to provide, legal services in Virginia” would be governed by the Virginia Rules.

It is difficult, if not impossible, to believe Virginia Rule 8.5(b)(3) intends such a result. But the interplay of Virginia Rule 8.5(b)’s three provisions would seem to require this analysis and bizarre conclusion.

## Comment

### Virginia Rule 8.5 Comment [1]

Virginia Rule 8.5 cmt. [1]’s first paragraph addresses Virginia’s power to discipline lawyers not admitted in Virginia.

Virginia Rule 8.5 cmt. [1] begins by noting that “[i]n the past,” jurisdictions’ discipline of lawyers depended on whether the lawyer was admitted in that jurisdiction. That sentence is interesting, but only in an academic sense.

Virginia Rule 8.5 cmt. [1] then notes that Virginia Rule 8.5(a) subjects lawyers “not admitted in Virginia” to Virginia professional discipline “for conduct occurring in the course of providing, holding himself out as providing, or offering to provide legal services in Virginia.” In other words, Virginia can also discipline non-Virginia lawyers who advertise that they can practice in, or who offer to practice in, Virginia. Virginia Rule 8.5 cmt. [1]’s first paragraph concludes by noting that Virginia has adopted the approach recommended by a 1996 ABA suggestion. But of course Virginia Rule 8.5 extends Virginia’s disciplinary authority to lawyers who commit misconduct in other jurisdictions as well.

Virginia Rule 8.5 cmt. [1]’s second paragraph notes the long-standing approach that Virginia-admitted lawyers may be punished by Virginia (presumably including for misconduct elsewhere). The Virginia Rule Comment then explains that extending Virginia’s discipline to non-Virginia lawyers “is for the protection of (Virginia) citizens (although again using the generic phrase “this jurisdiction.”) Virginia Rule 8.5 cmt. [1] next explains that this purpose will also be advanced by “[r]eciprocal enforcement of a jurisdiction’s disciplinary findings and sanctions.” This presumably refers to Virginia’s

discipline of Virginia and non-Virginia lawyers who have been previously disciplined by another state, and vice versa.

Virginia Rule 8.5 cmt. [1] concludes by noting Virginia Rule 8.5(a)'s provision under which lawyers subject to Virginia discipline are deemed to have appointed the Virginia Supreme Court Clerk "to receive service of process" in Virginia (again using the generic term "this jurisdiction," rather than the word "Virginia").

**ABA Model Rule 8.5 cmt. [1]** does not contain a provision similar to Virginia Rule 8.5 cmt. [1]'s first paragraph.

ABA Model Rule 8.5 cmt. [1] second paragraph contains essentially the same language as Virginia Rule 8.5 cmt. [1]'s second paragraph.

But there are two differences between ABA Model Rule 8.5 cmt. [1] and Virginia Rule 8.5 cmt. [1].

First, in contrast to Virginia Rule 8.5 cmt. [1], ABA Model Rule 8.5 cmt. [1] refers to the ABA Model Rules for Lawyer Disciplinary Enforcement.

Second, in contrast to Virginia Rule 8.5 cmt. [1], ABA Model Rule 8.5 cmt. [1] also explains that "[t]he fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters." That sentence does not appear in Virginia Rule 8.5 cmt. [1]. It presumably focuses on long-arm jurisdiction over lawyers who are sued in Virginia.

#### **ABA Model Rule 8.5 Comment [5]**

Virginia did not adopt ABA Model Rule 8.5 cmt. [5].

ABA Model Rule 8.5 cmt. [5] first recognizes that "it may not be clear whether the predominant effect of the lawyer's conduct will occur" in a jurisdiction different from the

jurisdiction where the lawyer engages in the conduct. As explained above, Virginia Rule 8.5(b) does not recognize the “predominant effect” factor in Virginia’s choice of law analysis.

ABA Model Rule 8.5 cmt. [5] next assures lawyers that they “shall not be subject to discipline under this Rule” if the lawyers’ conduct “conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur.” In other words, lawyers will not face Virginia ethical discipline if they follow the ethics rules of the jurisdiction where they “reasonably believe[]” their conduct’s “predominant effect will occur.” ABA Model Rule 8.5 cmt. [5] thus provides a “safe harbor” from ethical discipline if lawyers comply with the ethics rules of their own jurisdiction or another jurisdiction in which they believe their conduct’s predominant effect will occur. Significantly, lawyers apparently do not have a similar safe harbor based on their “reasonable belief” that their conduct has occurred in a certain jurisdiction – they only receive the benefit of that doubt when they “reasonably believe” that the predominant effect of their conduct will be in a certain jurisdiction. This different approach might make sense if it was easier to determine where conduct occurred than to determine where the predominant effect of that conduct will occur. It might be somewhat easier, but not dramatically easier – at least not enough to justify a totally different choice of law analysis.

ABA Model Rule 8.5 cmt. [5] concludes with a controversial concept, acknowledging that lawyers and their clients may be able to affect the choice the laws analysis. But such power is specific and limited. Under ABA Model Rule 8.5 cmt. [5], “[w]ith respect to conflicts of interest, in determining a lawyer’s reasonable belief under [ABA Model Rule 8.5(b)(2) of the identity of the “jurisdiction in which the lawyer reasonably

believes the predominant effect of the lawyer’s conduct will occur”], a written agreement between the lawyer and the client that reasonably specifies a particular jurisdiction as within the scope of that [ABA Model Rule 8.5(b)(2)] paragraph may be considered if the agreement was obtained with the client’s informed consent confirmed in the agreement.”

This unique concept raises several issues. First, the lawyers’ and clients’ power to affect the analysis covers only one type of ethics question: “[w]ith respect to conflicts of interest.” Presumably the term “[w]ith respect to conflicts of interest” refers to lawyers’ conduct, not conflicts of law analysis that determines which jurisdiction’s ethics rules apply to all lawyer conduct. Thus, lawyers’ and clients’ power to affect the choice of laws analysis apparently does not apply to all of the other ethics decisions that lawyers must make.

Second, lawyers’ and clients’ power apparently does not apply to tribunal-related conduct’s conflicts of interest. Instead, it applies only to ABA Model Rule 8.5(b)(2) scenarios, in which the ABA Model Rules assess whether lawyers are governed by the jurisdiction where their conduct occurred, or another jurisdiction “if the predominant effect of the conduct” will occur in that jurisdiction.

Third, ABA Model Rule 8.5 cmt. [5] explains that lawyer-client written agreements “that reasonably specif[y] a particular jurisdiction as within the scope of [ABA Model Rule 8.5(b)(2)] may be considered if the agreement was obtained with the client’s informed consent confirmed in the agreement.” This elaborate provision essentially would allow lawyers to seek application of a specific jurisdiction’s conflicts rules, as long as clients consent to that application. And such written agreements are not binding – but merely “may be considered” in determining the reasonableness of lawyers’ belief about

which jurisdiction’s conflicts of interest rules will apply. Under ABA Model Rule 8.5(b)(2), there are only two possible jurisdictions that would apply to conflicts of interest issues: (1) the jurisdiction “in which the lawyer’s conduct occurred;” or (2) another jurisdiction “if the predominant effect” of the lawyer’s conduct will be in that other jurisdiction. So clients’ and lawyers’ written agreement would have a limited effect – because presumably it could only choose one of those two jurisdiction’s rules. But it could be a significant difference. Some jurisdictions might allow lawyers’ conduct, while others might not.

### **ABA Model Rule 8.5 Comment [6]**

Virginia did not adopt ABA Model Rule 8.5 cmt. [6].

ABA Model Rule 8.5 cmt. [6] addresses the possibility that lawyers might essentially be “whipsawed” between jurisdictions that apply different rules. ABA Model Rule 8.5 cmt. [6] first describes a scenario where “two admitting jurisdictions” “proceed against a lawyer for the same conduct.” The term “admitting jurisdictions” seems too narrow. Lawyers not admitted in a jurisdiction can nevertheless be disciplined by that jurisdiction, and/or governed by that jurisdiction’s ethics rules. So jurisdictions other than those in which a lawyer is “admitted” might “proceed against a lawyer for the same conduct.”

Perhaps ABA Model Rule 8.5 cmt. [6] intentionally limited this favorable approach only to choosing between the ethics rules of jurisdictions where a lawyer is “admitted” (not jurisdictions where lawyers might not be “admitted” but which might otherwise supply the governing ethics rule). But such a restrictive approach would seem contrary to the apparent purpose of this forgiving provision. One would have thought that lawyers would

be protected from “whipsawing” by any two (or even more) jurisdictions whose ethics rules might provide different and potentially inconsistent ethics guidance.

ABA Model Rule 8.5 cmt. [6] next notes that in that scenario the “two admitting jurisdictions “should ... identify the same governing ethics rules.” In other words, the jurisdictions should not subject one lawyer to two different sets of rules, but instead (apparently) cooperate or otherwise settle on one set of ethics rules.

ABA Model Rule 8.5 cmt. [6] concludes with a more detailed suggestion – that the “two admitting jurisdictions” “should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against the lawyer on the basis of two inconsistent rules.” Thus, lawyers should not be “whipsawed” by being punished by one “admitting jurisdiction” for conduct that the other “admitting jurisdiction” allows or even requires. This approach makes great sense, because some neighboring states take completely different approaches. For instance, some states require lawyers to disclose certain intended client actions, while their neighboring state prohibits such disclosure.

### **ABA Model Rule 8.5 Comment [7]**

Virginia did not adopt ABA Model Rule 8.5 cmt. [7].

ABA Model Rule 8.5 cmt. [7] notes that ABA Model Rule 8.5’s “choice of law provision” “applies to transnational practice lawyers – “unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.” Thus, other external law, treaties or regulatory provisions might trump ABA Model Rule 8.5’s choice of law provisions.

## **Virginia Rule 8.5 Comment [8]**

Virginia Rule 8.5 cmt. [8] addresses conflicts of laws analysis “that may arise when a lawyer is subject to the rules of more than one jurisdiction.”

Virginia Rule 8.5 cmt. [8] provides a number of examples: (1) one jurisdiction’s rules “may prohibit the questioned conduct while the rules of another jurisdiction may permit it;” (2) lawyers “admitted in only one jurisdiction” may “also be subject to the rules of another jurisdiction in which he is not admitted to practice” – for “conduct occurring in the course of providing, holding himself out as providing, or offering to provide services in the non-admitting jurisdiction”; (3) “a lawyer admitted in one jurisdiction may be subject to the rules of another jurisdiction if he appears before a court, agency, or other tribunal in that jurisdiction.” Unfortunately, Virginia Rule 8.5 cmt. [8] does not offer any guidance about the applicable ethics rules in those scenarios – it just lists the possible scenarios.

**ABA Model Rule 8.5 cmt. [2]** presents similar scenarios as Virginia Rule 8.5 cmt. [8], also without providing any answers or other guidance.

After acknowledging that lawyers may be subject to more than one set of ethics rules, ABA Model Rule 8.5 cmt. [2] provides a slightly different set of possible scenarios: (1) lawyers “may be licensed to practice in more than one jurisdiction with different rules”; (2) lawyers “may be admitted to practice” before a court with rules that differ from the court’s host jurisdiction or jurisdictions “in which the lawyer is licensed to practice”; (3) lawyers’ “conduct may involve significant contacts with more than one jurisdiction.”

This list of possible scenarios confirms that lawyers can be “admitted” in a jurisdiction where they are not “licensed.” And as explained above, lawyers can be “authorized” to practice in jurisdictions where they are not “licensed” or “admitted.”

**ABA Model Rule 8.5 cmt. [3]** addresses some of the same issues as Virginia Rule 8.5 cmt. [8].

ABA Model Rule 8.5 cmt. [3] begins by explaining that ABA Model Rule 8.5(b) “seeks to resolve such potential conflicts” of law. The ABA Model Rule Comment then explains that ABA Model Rule 8.5(b)’s “premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interests of both clients and the profession (as well as the bodies having authority to regulate the profession).” ABA Model Rule 8.5 cmt. [3] thus tends to confirm the day-to-day applicability (rather than the applicability just in a disciplinary process) of ABA Model Rule 8.5, and state parallels such as Virginia Rule 8.5.

ABA Model Rule 8.5 cmt. [3] next describes ABA Model Rule 8.5(b) as having two basic themes: (1) “providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct;” (2) “making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions”; and (3) “providing protection from discipline for lawyers who act reasonably in the face of uncertainty.”

### **Virginia Rule 8.5 Comment [9]**

Virginia Rule 8.5 cmt. [9] addresses choice of laws issues facing tribunal-related conduct.

Virginia Rule 8.5 cmt. [9] applies to a lawyer who “appears before a court, agency, or other tribunal in another jurisdiction.” Thus, Virginia Rule 8.5 cmt. [9] apparently does not apply to lawyers working on a tribunal-related matter but who do not “appear” in court. To the extent that this Virginia Rule Comment would apply different ethics rules to lawyers

who “appear” in a proceeding and lawyers who assist those lawyers but do not themselves “appear” in the proceeding, that would seem like an odd and inappropriate approach.

Virginia Rule 8.5 cmt. [9] next points to Virginia Rule 8.5(b)(1), which the Virginia Rule Comment indicates “applies the law of the jurisdiction in which the court, agency, or other tribunal sits.” Of course, black letter Virginia Rule 8.5(b)(1) contains an important exception: “[u]nless the rules of the court, agency, or other tribunal provide otherwise.” One would think that Virginia Rule 8.5 cmt. [9]’s first sentence would itself acknowledge that possibility – perhaps by using a word such as “normally” or “generally.”

Virginia Rule 8. cmt. [9] then acknowledges that “[i]n some instances,” such tribunals have their own “lawyer conduct rules and disciplinary authority.” The Virginia Rule Comment does not explicitly explain that in those circumstances the tribunal’s rules apply, although the black letter Virginia Rule 8.5(b)(1) indicates that. Virginia Rule 8.5 cmt. [9] provides an obvious Virginia example – the Virginia-based United States Patent and Trademark Office. Virginia Rule 8.5 cmt. [9] explains that the USPTO (identified by the then “PTO”) “through the Office of Enrollment and Discipline, enforces its own rules of conduct and disciplines practitioners under its own procedures.”

Virginia Rule 8.5 cmt. [9] concludes with a warning that a lawyer “admitted in Virginia who engages in misconduct in connection with practice before the PTO is subject to the PTO’s rules” – and will be governed by those rules “in the event of a conflict between the rules of Virginia and the PTO rules.”

That seems to be an incorrect statement of Virginia Rule 8.5(b)(1)’s application – for two reasons. First, because the USPTO has adopted its own rules, under Virginia

Rule 8.5(b)(1) the USPTO’s ethics rules always govern Virginia lawyers’ “conduct in connection with a proceeding in [the USPTO] before which a lawyer appears.” Thus, even if there is no conflict between the Virginia Rules and the USPTO’s rules, the latter govern such lawyers’ conduct.

Second, even if a lawyer engaged in “conduct in connection with a proceeding” before the USPTO in which the lawyer has not appeared, under odd Virginia Rule 8.5(b)(3), the Virginia Rules presumably would apply to USPTO-related “conduct in the course of providing, holding out as providing, or offering to provide legal services in Virginia” – “notwithstanding” Virginia Rule 8.5(b)(1) or (2). Thus, under that strange Virginia provision, the Virginia Rules apparently would apply to a lawyer who assists in some USPTO proceeding but who does not “appear” before the USPTO.

**ABA Model Rule 8.5 cmt. [4]** addresses lawyers’ tribunal-related conduct, similar to Virginia Rule 8.5 cmt. [9].

ABA Model Rule 8.5 cmt. [4] differs in several ways from Virginia Rule 8.5 cmt. [9], which provides Virginia’s guidance on tribunal-related conduct.

First, in contrast to Virginia Rule 8.5(b)(1), application of Virginia Rules to “conduct in connection with a proceeding,” ABA Model Rule 8.5 cmt. [4] covers “lawyer’s conduct relating to a proceeding.” Those two phrases probably mean the same thing.

Second, in contrast to Virginia Rule 8.5 cmt. [9], ABA Model Rule 8.5 cmt. [4] is on its face limited to proceedings “pending before a tribunal.” Virginia Rule 8.5(b)(1) and Virginia Rule 8.5 cmt. [9] are not explicitly limited to “pending” proceedings. But those provisions presumably may only apply to “pending” proceedings – because that Virginia Rule and that Comment apply only to a lawyer who “appears” before the specified

tribunals. Presumably a lawyer can “appear” only before a proceeding that is “pending” before a tribunal.

Third, ABA Model Rule 8.5 cmt. [4] contains an important phrase not found in Virginia Rule 8.5 or its Comments: “[t]he lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits” (subject to a proviso described below). Thus, lawyers will be subject only to one set of rules. This contrasts starkly with Virginia Rule 8.5(b)(1) and (b)(3). Virginia Rule 8.5(b)(1) indicates that lawyers appearing before a tribunal shall be governed by the ethics rules of the host jurisdiction (subject to essentially the same proviso below). But then Virginia Rule 8.5(b)(3) inexplicably states that “notwithstanding” Virginia Rule 8.5(b)(1), the Virginia Rules will apply to such lawyers’ “conduct in the course of providing ... legal services in Virginia.” Thus, the interplay of those two Virginia Rules on their face seems to apply the tribunal’s host jurisdiction’s ethics rules “in connection with” the proceeding (subject to the proviso), while applying Virginia’s Rules to a Virginia or non-Virginia lawyer who provides legal services in Virginia in connection with the proceeding. It is easy to imagine lawyers appearing before a non-Virginia tribunal providing related legal services in Virginia – client meetings, witness interviews, document reviews, etc. ABA Model Rule 8.5 cmt. [4] seems to avoid this problem by indicating that lawyers’ conduct “relating to a proceeding” “shall be subject only” to one set of rules.

Fourth, ABA Model Rule 8.5 cmt. [4] contains a proviso similar to that in Virginia Rule 8.5(b)(1) and described in Virginia Rule 8.5 cmt. [9]. That proviso explains that a tribunal’s host jurisdiction’s ethics rules will apply “unless the rules of the tribunal, including its choice of law rule, provide otherwise.” Virginia Rule 8.5(b)(1) and Virginia

Rule 8.5 cmt. [9] do not include the possibility that a tribunal’s “choice of law rule” might result in some other ethics rules governing such lawyer’s conduct. Interestingly, ABA Model Rule 8.5 cmt. [4] describes the tribunal’s “choice of law rule,” not its host jurisdiction’s “choice of law rule.”

Fifth, ABA Model Rule 8.5 cmt. [4] then turns to “all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal.” The same approach presumably applies to lawyers who have not yet “appeared” in a tribunal, which is the approach taken by Virginia Rule 8.5(b)(1) and Virginia Rule 8.5 cmt. [9]. In other words, if the lawyer has not “appeared” before the tribunal, but eventually appears, the proceeding must not have been pending earlier. Of course, this does not account for lawyers working on a pending or anticipated proceeding who never “appear” before the tribunal. That mismatch is discussed above.

Under ABA Model Rule 8.4 cmt. [4], lawyers’ conduct “in connection with” a proceeding which is “not yet pending” could be subject to one of two sets of ethics rules: (1) the rules of the jurisdiction in which the lawyer’s conduct occurred; or (2) the rules of the jurisdiction in which “the predominant effect of the conduct” will occur. Under Virginia Rule 8.5(b)(2), lawyers who have not appeared before a tribunal (and presumably lawyers working on tribunal-related matters who never appear before the tribunal) are governed by only one set of rules: “[t]he rules of the jurisdiction in which the lawyer’s conduct occurred.” In other words, Virginia Rule 8.5(b)(2) never applies the rules of a jurisdiction where a lawyer’s conduct predominant effect will occur (unless some other provision could otherwise apply those rules). Only the ethics rules of the jurisdiction where the lawyer’s conduct occurred will govern that conduct. As explained above, there is an

exception under odd Virginia Rule 8.5(b)(3) – which seems to apply the Virginia Rules “for conduct in the course of providing, holding out as providing, or offering to provide legal services in Virginia.”

Sixth, ABA Model Rule 8.5 cmt. [4] concludes with an acknowledgment that for “conduct in anticipation of a proceeding that is likely to be before a tribunal,” ABA Model Rule 8.5(b)(2) could apply three possible sets of ethics rules where “the predominant effect of such conduct” occurred: (1) “where the conduct occurred;” (2) “where the tribunal sits;” or (3) “another jurisdiction.” The absence in Virginia Rule 8.5 of a “predominant effect” analysis means that such choices will not apply in Virginia disciplinary proceedings.

Seventh, ABA Model Rule 8.5 cmt. [4] does not contain a provision similar to strange Virginia Rule 8.5(b)(3), described above.

### **Virginia Rule 8.5 Comment [10]**

Virginia Rule 8.5 cmt. [10] addresses conduct other than tribunal-related conduct addressed in Virginia Rule 8.5 cmt. [9].

Virginia Rule 8.5 cmt. [10] first explains that for that non-tribunal-related conduct, Virginia Rule 8.5(b)(2) “resolves the conflict [among jurisdictions] by choosing the rules of the jurisdiction where the conduct occurred.” This confirms Virginia Rule 8.5’s deliberate absence of a “predominant effect” possibility for choosing the applicable ethics rules.

Virginia Rule 8.5 cmt. [10] next notes that a lawyer’s “physical presence . . . is not dispositive in determining where the questioned conduct occurred.” That certainly complicates the analysis, although it still does not adopt a “predominant purpose”

standard. Virginia Rule 8.5 cmt. [10]’s recognition that a lawyer’s “physical presence” does not automatically determine where her conduct occurred highlights the odd ABA Model Rule 8.5(b) mismatch between immunizing lawyers who comply with the ethics rules of a jurisdiction “in which the lawyer reasonably believes that predominant effect of the lawyer’s conduct will occur” – but not offering parallel immunity if the lawyer complies with the ethics rules of a jurisdiction “in which the lawyer reasonably believes” the lawyer’s conduct occurred or will occur.”

Virginia Rule 8.5 cmt. [10] concludes with another warning that “[d]etermining where the lawyer’s conduct occurred in the context of transactional work may require the appropriate disciplinary tribunal to consider other factors.” The Virginia Rule describes the factors as “including the residence and place of business of any client, third person, or public institution such as a court, tribunal, public body, or administrative agency, the interests of which are materially affected by the lawyer’s actions.” It is strange that a sentence devoted to determining where lawyers’ “transactional work” occurred includes courts and tribunals which may be “materially affected by the lawyer’s actions.” And that Virginia Rule 8.5 cmt. [10] sentence does not give any guidance about how the listed factors affect the analysis of determining where the lawyer’s “conduct occurred.” In fact, looking at the location of clients, third persons and entities whose interest might be “materially affected by the lawyer’s actions” sounds like a “predominant effect” standard. Virginia Rule 8.5 cmt. [10] likewise does not provide any insights into a possible relationship between the Virginia standard and the ABA Model Rule 8.5(b)(2) “predominant effect” standard.

Finally, Virginia Rule 8.5 cmt. [10] does not offer any guidance about Virginia Rule 8.5(b)(3)'s strange "notwithstanding" provision that seems to apply Virginia Rules situations where one normally would presume Virginia Rules 8.5(d)(1) and (2) would determine the appropriate rule's selection.