

# VIRGINIA RULES GENERAL NOTES

## INTRODUCTION

The Virginia Rules General Notes address general rather than specific issues.

Some of the observations in this document also appears in the Virginia Rules Specific Notes (usually the most important or noticeable issues).

Many if not most of the issues addressed in the ABA Model Rules General Notes also apply to the Virginia Rules. So anyone focusing on the Virginia Rules should also review the ABA Model Rules General Notes.

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## A: Inconsistent Rule Titles

The Virginia Rules' Titles contain an inconsistent mixture of singular and plural references, and some odd word choices.

### Examples:

- Like the ABA Model Rules, Virginia Rule 1.4's title refers to "Communication" (singular), but the next Virginia Rule 1.5's title refers to "Fees" (plural).
- Like the ABA Model Rules, Virginia Rules 1.4's title and Virginia Rule 4.2's title both refer to "Communication" (singular), but Virginia Rule 7.1's title refers to "Communications" (plural).
- Like the ABA Model Rules, Virginia Rule 1.7's title and Virginia Rule 1.8's title both refer to "Conflict of Interest" (singular), but Virginia Rule 1.11's title refers to "Conflicts of Interest" (plural).
- Similar to the ABA Model Rules, Virginia Rule 1.11's title refers to "Former And Current Government Officers And Employees" (plural, with the word "And"), but the next Virginia Rule 1.12's title refers to "Judge Or Arbitrator" (singular, with the word "Or").
- Virginia Rule 1.12's title refers to "Judge Or Arbitrator" (singular), but Virginia Rule 8.2's title refers to "Judicial Officials" (plural).
- Like the ABA Model Rules, Virginia Rule 2.3's title refers to "Evaluation" (singular) for use by "Third Persons" (plural).
- Virginia Rule 2.3's title refers to "Persons" (plural), but Virginia Rule 2.10 refers to "Third Party Neutral" (singular).
- Virginia Rule 1.11's title, Virginia Rule 3.1's title, and Virginia Rule 6.5's title, contain the word "And," but Virginia Rule 1.12's title contains the word "Or."
- Virginia Rule 3.7's title refers to Virginia Rule 1.11's title, "Lawyer," but Virginia Rule 4.2's title refers to "Counsel."
- Although Virginia did not adopt ABA Model Rule 5.2, the Virginia Rules reference to that absence incorrectly describes ABA Model Rule 5.2's title as "Responsibilities Of Partners And Supervisory Lawyers", instead of ABA Model Rule 5.2's title: "Responsibilities of a Subordinate Lawyer."

- Similar to the ABA Model Rules, Virginia Rule 5.1's title refers to "Partners And Supervisory Lawyers" (plural), but Virginia Rule 5.4 refers to "Lawyer" (singular).
- Virginia Rule 5.8's title refers to "Clients" (plural) and "Lawyer" (singular).
- Similar to the ABA Model Rules, Virginia Rule 6.2's title refers to "Appointments" (plural) and Virginia Rule 6.5 refers to "Programs" (plural), but in between those two Rules Virginia Rule 6.3's title refers to "Membership" and "Organization" (singular).

### **Capitalization**

Unlike the ABA Model Rules, nearly every Virginia Rule title capitalizes even words like "a," "or," "of", etc.

But a small number of Virginia Rules do not capitalize such small words.

Virginia Rule 1.2

Virginia Rule 1.6

Virginia Rule 1.7

Virginia Rule 1.8

Virginia Rule 1.9

Virginia Rule 1.13

Virginia Rule 1.18

Virginia Rule 4.4

Virginia Rule 7.3

## B: Inconsistent Guidance: “Should” and “Must”

Like the ABA Model Rule Comments, several Virginia Rule Comments contain the word “should” where the word “must” would seem more appropriate if not required.

The following are examples:

- Virginia Rule 1.5 cmt. [5] (suggesting that “[a] lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures” (emphasis added)).
- Virginia Rule 1.5 cmt. [9] suggesting that a lawyer “should comply with the prescribed procedure [prescribed by “[l]aw . . . for determining a lawyer’s fee]” (emphasis added)).
- Virginia Rule 1.11 cmt. [4] (addressing former government-employed lawyers, and suggesting that such “[a] lawyer 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” (emphasis added)).
- Virginia Rule 1.13 cmt. [10] (suggesting that “[w]hen the organization’s interest may be or become adverse to those of one or more of its constituents, the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation” (emphasis added)).
- Virginia Rule 1.14 cmt. [2] (in contrast to black letter Virginia Rule 1.14(a)’s requirement that “a lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client” “[w]hen a client’s capacity to make adequately considered decisions in connection with a representation is diminished,” suggesting that “the lawyer should as far as possible accord the represented person [who “suffers a disability”] the status of a client, particularly in maintaining communication” (emphasis added)).
- Virginia Rule 1.15 cmt. [3] (in contrast to black letter Virginia 1.15(a)(3)(ii)’s requirement that funds in which more than one person “claim[s] an interest shall be held in the trust account until the dispute is resolved and there is an accounting and severance of their interests,” suggesting that “[t]he disputed portion of the funds should be kept in trust” (emphasis added)).

- Virginia Rule 1.16 cmt. [1] (suggesting that “[a] lawyer should not accept or continue representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion” (emphasis added)).
- Virginia Rule 2.1 cmt. [4] (suggesting that “the lawyer should make such a recommendation” “[w]here consultation with a professional in another field is itself something a competent lawyer would recommend” (emphasis added)).
- Virginia Rule 2.3 cmt. [4] (suggesting that lawyers conducting an evaluation for use by third persons “should . . . describe[] in the report” “[a]ny such limitations [on “the terms of the evaluation”] which are material to the evaluation” (emphasis added)).

In addition to these Virginia Rule Comments that parallel ABA Model Rule Comments, several Virginia Rule Comments contain unique inconsistent guidance:

- Virginia Rule 1.2 cmt. [12] (suggesting 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)). ABA Model Rule 1.2 cmt. [12] contains the word “must” rather than Virginia Rule 1.2 cmt. [12]’s word “should.”
- Virginia Rule 1.7 cmt. [10] (suggesting that “a lawyer’s need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee” (emphasis added)).

The Virginia Rules also contain a unique mismatch between a black letter Virginia Rule and a Virginia Rule Comment.

- Virginia Rule 1.6(c)(2) (addressing lawyers’ compliance with their Virginia Rule 1.6(c)(2) requirement to consult with their client about reporting another lawyer’s specified egregious misconduct; suggesting that “[c]onsultation should include full disclosure of all reasonably foreseeable consequences of both disclosure and non-disclosure to the client” (emphasis added). In contrast, Virginia Rule 1.6 cmt. [13] states that “[i]n requesting consent [as required in black letter Virginia Rule 1.6(c)(2)], the attorney must inform the client of all reasonably foreseeable consequences of both disclosure and non-disclosure” (emphasis added). The Virginia Scope’s section’s first paragraph’s concluding sentence explains that “Comments do not add obligation to the [Virginia] Rules but provide guidance for practicing in compliance with the [Virginia] Rules.”