VIRGINIA RULES SPECIFIC NOTES

INTRODUCTION

This document identifies and addresses what are or seem to be mistakes, inconsistencies, and arguably poor wording in the Virginia Rules.

Each specific Note appears on a separate page, in rule order. To make in-person or virtual collaboration and references easier, the pertinent Virginia Rule (or Comment) number appears at the top of each page. If this document contains more than one Note about the same Rule or Comment, the Notes are consecutively numbered. This allows anyone referring to a Note to identify the pertinent Virginia Rule or Comment, and which Note he or she is addressing. The goal is to allow lawyers communicating about any specific Note to easily assure that they are "on the same page."

Each Note also has a Code number. These indicate the Note's possible importance. These Code numbers are in decreasing order of possible significance:

(1) Urged improvement

(2) Recommended improvement

(3) Substantive suggestion

(4) Stylistic note

An "**ABA**" reference at the end of a Note indicates that the Virginia Rule or Comment language is the same as the ABA Model Rule or Comment language (and in approximately the same place).

A boldface reference to an ABA Model Rule or Comment means that the ABA Model Rule or Comment language is not in approximately the same place as the Virginia Rule or Comment language referred to in the Note.

VIRGINIA RULE PREAMBLE	
Note # 1	**Code # 1**
Virginia Rules Preamble's second paragraph's fifth sentence describes a lawyer's role "[a]s intermediary" (emphasis added). Virginia deleted former Virginia Rule 2.2 (which dealt with lawyers as intermediaries) in 2004. So it would be appropriate to delete this sentence.	

VIRGINIA RULE PREAMBLE	
Note # 2	**Code # 4**
Virginia Rules Preamble's fourth paragraph's third sentence contains the word "poor" in describing people who "cannot afford adequate legal assistance." This arguably pejorative word contrasts with several phrases contained in Virginia Rule 6.1: "those unable to pay" (Virginia Rule 6.1's cmt. [1]'s first sentence); "people who do not have the financial resources to compensate a lawyer" (Virginia Rule 6.1 cmt. [2]'s first sentence); "individuals in need of assistance" (Virginia Rule 6.1 cmt. [7]'s second sentence). **ABA**	

VIRGINIA RULE PREAMBLE	
Note # 3	**Code # 3**
Virginia Rules Preamble's fourth paragraph's third sentence suggests that lawyers "should therefore devote professional time and civic influence" on behalf of "the poor" (emphasis added). This is certainly true, but Virginia Rule 6.1(c) recognizes that "[d]irect financial support of programs that provided direct delivery of legal services to meet the needs described in [Virginia Rule 6.1(a)] is an alternative method of fulfilling a lawyer's responsibility under this [Virginia Rule 6.1]" (emphasis added). Thus, the Virginia Preamble sentence might be more instructive if it recognized this alternative means of serving people.	

VIRGINIA RULE PREAMBLE	
Note # 4	**Code # 3**
Virginia Rules Preamble's fifth paragraph's second sentence explains that "a lawyer can be a zealous advocate on behalf of a client" – "when an opposing party is well represented." This would seem to limit lawyers' ability to be "a zealous advocate on behalf of a client" to those circumstances, but without any guidance for lawyers when "an opposing party" is not well represented. **ABA**	

VIRGINIA RULE PREAMBLE	
Note # 5	**Code # 2**
Virginia Rules Preamble's eighth paragraph's third sentence explains that "abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice." (emphasis added). It is unclear what this means, because lawyers are dependent on the government "for the right to practice." **ABA**	

VIRGINIA RULE SCOPE	
Note # 1	**Code # 1**
Virginia Rules Scope's second paragraph begins with an explanation that the Virginia Rules follow the format of the ABA Model Rules. Presumably that is no longer necessary.	

VIRGINIA RULE SCOPE	
Note # 2	**Code # 4**
Virginia Rules Scope's first paragraph's eighth sentence contains the word "constitutive." That pretentious word is rarely used, and seems unnecessary here. **ABA**	

VIRGINIA RULE SCOPE	
Note # 3	**Code # 3**
Virginia Rules Scope's fourth paragraph explains that some ethics duties "may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established." It might be helpful to refer here to Virginia Rule 1.18, which provides specific ethics guidance in that situation. A parallel ABA Model Rule Scope paragraph refers to a parallel ABA Model Rule 1.18. **ABA**	

VIRGINIA RULE SCOPE	
Note # 4	**Code # 4**
Virginia Rules Scope's fifth paragraph's second sentence contains the term "commonwealth attorneys," without capitalization. It might be appropriate to capitalize that term.	

VIRGINIA RULE SCOPE	
Note # 5	**Code # 3**
Virginia Rules Preamble's fifth paragraph's second sentence contains the term "government law officers." That term is not defined, and contrasts with various terms contained in other Virginia Rule provisions: "Government Officers" (Virginia Rule 1.11's Title); "public office" (Virginia Rule 1.11(a)). **ABA**	

VIRGINIA RULE SCOPE	
Note # 6	**Code # 4**
Virginia Rules Scope's final paragraph's penultimate sentence contains the phrase "[t]he Preamble and this note on Scope" (emphasis added). It is unclear what the phrase "this note on Scope" means. **ABA**	

VIRGINIA RULE 1.1 cmt. [1]	
Note # 1	**Code # 4**
Virginia Rule 1.1 cmt. [1]'s first sentence explains that determining a lawyer's "competence" includes analyzing "whether a lawyer employs the requisite knowledge and skill in a particular matter" (emphasis added). That is an odd use of the "employs." Where other Virginia Rules contains that word, it denote an employment relationship. Also, the present tense "employs" seems to refer to lawyers' representational activity, not whether the lawyer possesses pre-representational ability. A word like "possesses" might be more appropriate. **ABA**	

VIRGINIA RULE 1.1 cmt. [1]	
Note # 2	**Code # 2**
Virginia Rule 1.1 cmt. [1]'s first sentence notes that "determining whether a lawyer employs the requisite knowledge and skill" includes "whether it is feasible" to: (1) "refer the matter to… a lawyer of established competence in the field in question;" (2) "associate… with… a lawyer of established competence in the field in question;" or (3) "consult with… a lawyer of established competence in the field in question. Presumably the word "refer" denotes the lawyer handing off the matter to a competent lawyer – which seems like a inapt attribute of "competence." The word "associate" is not defined, but presumably refers to a lawyer not in the same firm. That possible arrangement adds to the confusing use of the word "associate" throughout the Virginia Rules. The word "consult" presumably denotes the lawyer receiving guidance from a lawyer in another firm, but not handing off the matter or establishing a co-counsel relationship. **ABA**	

VIRGINIA RULE 1.1 cmt. [1]	
Note # 3	**Code # 4**
Virginia Rule 1.1 cmt. [1]'s first sentence explains that a lawyer lacking competence may make one of several arrangements with "a lawyer of established competence in the field in question." The word "established" seems unnecessary. **ABA**	

VIRGINIA RULE 1.1 cmt. [2]	
Note # 1	**Code # 2**
Virginia Rule 1.1 cmt. [2]'s fifth sentence describes a scenario in which "[a] lawyer can provide adequate representation" (emphasis added). Presumably the word "adequate" is intended to be synonymous with the word "competent." But the word "adequate" arguably describes a lower standard. And in any event, it would be more clear if Virginia Rule 1.1 cmt. [2] contained the same word ("competent") to denote the same level of competence. **ABA**	

VIRGINIA RULE 1.1 cmt. [2]	
Note # 2	**Code # 2**
Virginia Rule 1.1 cmt. [2]'s sixth sentence contains the same phrase "a lawyer of <u>established</u> competence" (emphasis added) as Virginia Rule 1.1 cmt. [1]. The word "established" seems unnecessary. **ABA**	

VIRGINIA RULE 1.2(a)	
Note # 1	**Code # 2**
Virginia Rule 1.2(a)'s second sentence explains that "[a] lawyer shall abide by a client's decision, after consultation with the lawyer, whether to accept an offer of settlement of a matter" (emphasis added). This is understandable guidance, but it is too narrow. The same direction would be required if a client decides to make an offer of settlement, rather than to accept an offer of settlement. Virginia Rule 1.2 cmt. [7]'s concluding sentence contains this broader description of a scenario in which a lawyer must abide by a client's decision.	

VIRGINIA RULE 1.2(e)	
Note # 1	**Code # 3**
Virginia Rule 1.2(e) begins with a description of a scenario "[w]hen a lawyer knows that a client expects" inappropriate assistance. The word "[w]hen" seems to imply an inevitability to such client expectation. The word "[i]f" might be more appropriate.	

VIRGINIA RULE 1.2 cmt. [1]	
Note # 1	**Code # 4**
Virginia Rule 1.2 cmt. [1]'s first and third sentences contain the word "objectives" in describing a representation's goals. In between those sentences, Virginia Rule 1.2 cmt. [1]'s second sentence contains a different word: "purposes." If those words were intended to be synonymous, it might be more clear if the same words were used.	

VIRGINIA RULE 1.2 cmt. [4]	
Note # 1	**Code # 4**
Virginia Rule 1.2 cmt. [4] addresses a situation "in which the client appears to be suffering mental disability" (emphasis added). The term "diminished capacity" might be more appropriate. ABA Model Rule 1.2 cmt. [4] contains that more appropriate term, as does Virginia Rule 1.14.	

VIRGINIA RULE 1.2 cmt. [6]	
Note # 1	**Code # 1**
Virginia Rule 1.2 cmt. [6]'s first sentence explains that lawyers may limit the scope of their representation "by agreement with the client or by the terms under which the lawyer's services are made available to the client" (emphasis added). The word "or" seems inapt – because such a limitation must always rest on an "agreement with the client." **ABA**	

VIRGINIA RULE 1.2 cmt. [9]	
Note # 1	**Code # 3**
Virginia Rule 1.2 cmt. [9]'s concluding sentence implicitly warns that lawyers may not "recommend [ ] the means by which a crime or fraud might be committed with impunity" (emphasis added). The phrase "with impunity" seems like an unnecessary embellishment. Lawyers may not recommend such means regardless of possible client impunity. **ABA**	

VIRGINIA RULE 1.2 cmt. [10]	
Note # 1	**Code # 2**
Virginia Rule 1.2 cmt. [10]'s second sentence refers to Virginia Rule 1.6 as an exception to a lawyer's confidentiality duty, under which the lawyer may be "permitted or required" to disclose protected client confidential information. Virginia Rule 3.3(a), (c) and (d) and Virginia Rule 4.1(b) may also require such disclosure. So it might be appropriate to refer to those other Rules here.	

VIRGINIA RULE 1.2 cmt. [12]	
Note # 2	**Code # 2**
Virginia Rule 1.2 cmt. [12]'s second sentence suggests that "a lawyer <u>should</u> not participate in a sham transaction" (emphasis added). As the ABA Model Rules General Notes discuss, some ABA Model Rule Comments contain the word "should" when the word "must" would be more appropriate, if not required. Some Virginia Rule Comments do too . Here, the word "must" would seem appropriate.	

VIRGINIA RULE 1.2 cmt. [12]	
Note # 1	**Code # 2**
Virginia Rule 1.2 cmt. [12]'s third sentence explains that lawyers may "undertake[ ] a criminal defense incident to a general retainer for legal services to a lawful enterprise" (emphasis added). Presumably this is just an example of permissible conduct. Lawyers may certainly "undertak[e]" a criminal defense "incident to" a specific retainer. **ABA**	

VIRGINIA RULE 1.3 cmt. [1]	
Note # 1	**Code # 3**
Virginia Rule 1.3 cmt. [1]'s first sentence contains the phrase "client's cause or endeavor" (emphasis added). This contrasts with Virginia Rule 1.3 cmt. [2]'s first sentence's phrase "the client's needs and interests" (emphasis added). It is unclear whether those two phrases are intended to be synonymous. If so, it might be appropriate for them to use the same words.	

VIRGINIA RULE 1.3 cmt. [1]	
Note # 2	**Code # 3**
Virginia Rule 1.3 cmt. [1]'s last sentence suggests that "[a] lawyer's workload should be controlled so that each matter can be handled adequately" (emphasis added). Rather than the word "adequately," it might be more appropriate to apply a standard that other Virginia Rules contain: "diligently" (Virginia Rule 1.3); "competently" (Virginia Rule 1.1).	

VIRGINIA RULE 1.3 cmt. [3]	
Note # 1	**Code # 3**
Virginia Rule 1.3 cmt. [3]'s third sentence warns that lawyers' "unreasonable delay" in lawyers' action on the client's behalf can (among other things) "undermine confidence in the lawyer's trustworthiness" (emphasis added). The word "trustworthiness" is appropriate conceptually here, but seems inappropriate in a Comment on the Virginia Rule addressing diligence. One would think that the word "diligence" would be more appropriate here. **ABA**	

VIRGINIA RULE 1.3 cmt. [4]	
Note # 1	**Code # 2**
Virginia Rule 1.3 cmt. [4]'s first sentence explains that "a lawyer should carry through to conclusion all matters undertaken for a client" (emphasis added). As the ABA Model Rules General Notes discuss, some ABA Model Rule Comments contain the word "should" when the word "must" would be more appropriate, if not required. Some Virginia Rules Comments do, too. This is an example of a Virginia Rule Comment where the word "must" would be more appropriate than the word "should."	

VIRGINIA RULE 1.3 cmt. [4]	
Note # 2	**Code # 2**
Virginia Rule 1.3 cmt. [4]'s concluding sentence suggests that a lawyer who "has not been specifically instructed concerning pursuit of an appeal" "should advise the client of the possibility of an appeal before relinquishing responsibility for the matter" (emphasis added). As the ABA Model Rules General Notes discuss, some ABA Model Rule Comments contain the word "should" when the word "must" would be appropriate, if not required. Some Virginia Rule Comments do too. Here, the word "must" would seem more appropriate than the word "should." Parallel ABA Model Rule 1.3 cmt. [4] contains the word "must."	

VIRGINIA RULE 1.3 cmt. [5]	
Note # 1	**Code # 4**
Virginia Rule 1.3 cmt. [5] contains a list of scenarios that lawyers should plan for: "the lawyer's death, disability, impairment, or incapacity." Virginia Rule 1.3 cmt. [5]'s concluding sentence contains a different list: "the lawyer's death, impairment, or incapacity." It would be more clear if the two consecutive sentences contained the same list of scenarios.	

VIRGINIA RULE 1.4(a)	
Note # 1	**Code # 3**
Virginia Rule 1.4(a) contains the term "a matter" – presumably denoting the matter being handled by a lawyer representing the client. Virginia Rule 1.4(b) contains a different term: "the representation." Perhaps these terms are meant to be synonymous, although the word "matter" has a more substantive aspect to it – in contrast to the word "representation" (which seems to focus on the relation between a lawyer and the client, and the logistics of that relationship). **ABA**	

VIRGINIA RULE 1.4(a)	
Note # 2	**Code # 3**
Virginia Rule 1.4(a) requires lawyers to "keep a client reasonably informed about the status of a matter" (emphasis added). This contrasts with Virginia Rule 1.4(c)'s requirement that lawyers "shall inform the client of facts pertinent to the matter" (emphasis added). It is unclear whether those are the same thing. If so, it might be more clear if the Virginia Rules contained the same words.	

VIRGINIA RULE 1.4 cmt. [5]	
Note # 1	**Code # 1**
Virginia Rule 1.4 cmt. [5]'s first sentence explains "[t]he client should have sufficient information to participate intelligently in decisions" relating to the representation – "to the extent the client is willing and able to do so." This is a strange condition. If the client is "is not willing… to do so," it is unclear what the lawyer must or can do. Lawyers cannot make materials decisions on their own, so presumably such a lawyer would be required to exercise her discretion to withdraw under Virginia Rule 1.16. If the client is not "able to do so," presumably such a lawyer would look to Virginia Rule 1.14 for guidance. **ABA**	

VIRGINIA RULE 1.4 cmt. [5]	
Note # 2	**Code # 2**
Virginia Rule 1.4 cmt. [5]'s second sentence suggests that "a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter," among other things (emphasis added). As the ABA Model General Notes discuss, some ABA Model Rule Comments contain the word "should" when the word "must" would be appropriate, if not required. Some Virginia Rule Comments do too. Here, the word "must" would be more appropriate, if not required.	

VIRGINIA RULE 1.4 cmt. [5]	
Note # 3	**Code # 2**
Virginia Rule 1.4 cmt. [5]'s third sentence suggest that a lawyer "should promptly inform the client of [a settlement offer's or a proffered plea agreement's] substance unless prior discussions with the client have left it clear that the proposal will be unacceptable" (emphasis added). This contrasts with black letter Virginia Rule 1.4(c)'s requirement that "[a] lawyer shall inform the client of . . . communications from another party that may significantly affect settlement or resolution of the matter" (emphasis added).	

VIRGINIA RULE 1.4 cmt. [5]	
Note # 4	**Code # 3**
Virginia Rule 1.4 cmt. [5]'s third sentence suggests that lawyers provide their clients facts about a settlement proposal or proffered plea agreement proposal "unless prior discussions with the client have left it clear that the proposal will be unacceptable" (emphasis added). The phrase "have left it clear" might be seen as somewhat ambiguous. ABA Model Rule 1.4 cmt. [1]'s second sentence contains a more definite standard that might be more appropriate: "unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or reject the offer."	

VIRGINIA RULE 1.4 cmt. [5]	
Note # 5	**Code # 2**
Virginia Rule 1.4 cmt. [5] sixth sentence explains that lawyers should review negotiation proposals with their clients "when there is time to explain a proposal made in a negotiation" (emphasis added). It is unclear what a lawyer must or can do when there is not time to explain such a proposal. **ABA**	

VIRGINIA RULE 1.4 cmt. [5]	
Note # 6	**Code # 2**
Virginia Rule 1.4 cmt. [5]'s sixth sentence explains that in a negotiation context, "the lawyer <u>should</u> review all important provisions with the client" (emphasis added). As the ABA Model Rules General Notes discuss, some ABA Model Rule Comments contain the word "should" when the word "must" would be more appropriate, if not required. Virginia Rules Comments do too. The word "must" would seem more appropriate than the word "should" in this Virginia Rule Comment. **ABA**	

VIRGINIA RULE 1.4 cmt. [5]	
Note # 7	**Code # 3**
Virginia Rule 1.4 cmt. [5]'s sixth sentence explains that in a negotiation context, under some circumstances "the lawyer should review all important provisions with the client before proceeding to an agreement" (emphasis added). The phrase "proceeding to an agreement" seems odd, and that sentence seems to imply that the lawyer is the one "proceeding to an agreement." It would be preferable if not required to explain that "the client" is the one "proceeding to an agreement." **ABA**	

VIRGINIA RULE 1.4 cmt. [6]	
Note # 1	**Code # 3**
Virginia Rule 1.4 cmt. [6]'s second sentence contains the term "mental disability." It might be more appropriate to use Virginia Rule 1.4's phrase "diminished capacity" or some similar term.	

VIRGINIA RULE 1.4 cmt. [7]	
Note # 1	**Code # 2**
Virginia Rule 1.4 cmt. [7]'s second sentence contains the example of a lawyer who "might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client" (emphasis added). That appropriate example seems to imply a permanent withholding – in contrast to Virginia Rule 1.4 cmt. [7]'s preceding sentence's explanation that "a lawyer may be justified in delaying transmission of information" in certain circumstances (emphasis added). It might be appropriate to use the phrase "might temporarily withhold" (emphasis added). **ABA**	

VIRGINIA RULE 1.5(a)	
Note # 1	**Code # 3**
Virginia Rule 1.5(a) addresses "[t]he factors to be considered in determining the reasonableness of a fee" (emphasis added). Although black letter Virginia Rule 1.5 and its Comments also address "expenses," Virginia Rule 1.5 apparently does not describe factors that should be "considered in determining the reasonableness" of an expense. **ABA**	

VIRGINIA RULE 1.5(a)	
Note # 2	**Code # 3**
Virginia Rule 1.5(a)(1) describes as a factor "in determining the reasonableness of a fee" "the skill requisite to perform the legal service properly" (emphasis added). The word "properly" seems inapt. The Virginia Rule words "competently" (Virginia Rule 1.1) or "diligently" (Virginia Rule 1.3) (or both) would seem more appropriate here. **ABA**	

VIRGINIA RULE 1.5(a)	
Note # 3	**Code # 2**
Virginia Rule 1.5(a)(2) describes as one of the factors "to be considered in determining the reasonableness of a fee" "the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer" (emphasis added). It is unclear why that factor can be considered in determining a fee's reasonableness only "if apparent to the client." That would seem irrelevant. **ABA**	

VIRGINIA RULE 1.5(a)	
Note # 4	**Code # 2**
Virginia Rule 1.5(a)(4) identifies as one of the "factors to be considered in determining the reasonableness of a fee" "the results obtained." That is necessarily backward-looking, and therefore seems somewhat inappropriate here. Black letter Virginia Rule 1.5(b) requires that lawyers normally communicate "the basis or rate of the fee" – "before or within a reasonable time after commencing the representation." At that time, it would seem impossible to factor in "the results obtained." The "results obtained" factor might support renegotiation of the fee. **ABA**	

VIRGINIA RULE 1.5(a)	
Note # 5	**Code # 3**
Virginia Rule 1.5(a)(6) identifies as one of the "factors to be considered in determining the reasonableness of a fee" "the nature and length of the professional relationship with the client." It is unclear whether deep and lengthy professional relationship would justify a higher fee, or result in a lower fee in the "reasonableness" analysis. A deep and lengthy professional relationship might provide the lawyer a "head start" in understanding the client, which would seem to justify a higher fee. But many if not most lawyers offer a lower fee to long-standing clients who are paying the lawyer for a high volume of work. **ABA**	

VIRGINIA RULE 1.5(e)	
Note # 2	**Code # 4**
Virginia Rule 1.5(e) contains the phrase "[a] division of a fee." That contrasts with Virginia Rule 1.5 cmt. [7]'s first sentence's phrase "[a] division of fee." **ABA**	

VIRGINIA RULE 1.5 cmt. [2]	
Note # 1	**Code # 4**
Virginia Rule 1.5 cmt. [2]'s first sentence notes that lawyers who have regularly represented a client "ordinarily will have evolved an understanding" with the client about fees and expenses (emphasis added). The word "evolved" is not linguistically incorrect, but seems odd here. The word "reached" would seem more appropriate. **ABA**	

VIRGINIA RULE 1.5 cmt. [5]	
Note # 1	**Code # 1**
Virginia Rule 1.5 cmt. [5]'s fifth sentence explains that "[a] lawyer <u>should</u> not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures." As the ABA Model Rules General Notes discuss, some ABA Model Rule Comments contain the word "should" when the word "must" would be more appropriate, if not required. Some Virginia Rules Comments do too. The word "must" would seem more appropriate here.	

VIRGINIA RULE 1.5 cmt. [6]	
Note # 1	**Code # 4**
Virginia Rule 1.5 cmt. [6](a) presumably should contain the word “or” between Virginia Rule 1.5 cmt. [6](a)(ii) and (iii).	

VIRGINIA RULE 1.5 cmt. [7]	
Note # 2	**Code # 4**
Virginia Rule 1.5 cmt. [7]'s first sentence contains the phrase "[a] division of fee." That contrasts with black letter Virginia Rule 1.5(e)'s phrase "[a] division of a fee." **ABA**	

VIRGINIA RULE 1.5 cmt. [9]	
Note # 1	**Code # 1**
Virginia Rule 1.5 cmt. [9] represents one of the most inexplicable misuses of the word "should" when the word "must" would be more appropriate, if not required. Virginia Rule 1.5 cmt. [9] describes a situation in which "[law] may prescribe a procedure for determining a lawyer's fee." Virginia Rule 1.5 cmt. [9] then suggests 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).	

VIRGINIA RULE 1.6(a)	
Note # 1	**Code # 2**
Virginia Rule 1.6(a) protects to the specified extent "other information gained in the professional relationship" (emphasis added). The term "gained in" seems to imply that the information came from the client. But as Virginia Rule 1.6 cmt. [3]'s penultimate sentence explains, Virginia Rule 1.6(a) protects the specified information "whatever its source." It therefore might be appropriate for Virginia Rule 1.6(a) to use Virginia Rule 1.9(c)(1)'s phrase "information relating to or gained in the course of the representation." Another option would be "information relating to or gained during the professional relationship" (emphasis added).	

VIRGINIA RULE 1.6(b)(3)	
Note # 1	Code # 3
Virginia Rule 1.6(b)(3) allows lawyers to disclose "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" (emphasis added). The term "clearly establishes" was used in the old Virginia Code of Professional Responsibility, and is undefined in the Virginia Rules. Some guidance would be helpful.	

VIRGINIA RULE 1.6(b)(5)	
Note # 1	**Code # 3**
Virginia Rule 1.6(b)(5) allows lawyers to disclose "such information sufficient to participate in a law office management assistance program approved by the Virginia State Bar or other similar private program" (emphasis added). It is unclear what the word "sufficient" means. Some guidance would be helpful.	

VIRGINIA RULE 1.6(c)(1)	
Note # 1	**Code # 3**
Virginia Rule 1.6(c)(1)'s first sentence requires lawyers under certain circumstances to disclose protected client confidential information relating to a client's "crime reasonably certain to result in death or substantial bodily harm" (emphasis added). The word "bodily" presumably does not include purely "mental" harm. Perhaps such "mental" harm manifests itself in some "bodily" harm. But it would be preferable to make that clear. **ABA Model Rule 1.6(b)(1)**	

VIRGINIA RULE 1.6(c)(2)	
Note # 1	**Code # 2**
Virginia Rule 1.6(c)(2)'s second sentence explains that lawyers "must obtain client consent" "[w]hen the information necessary to report [another lawyer's specified] misconduct is protected under this [Virginia Rule 1.6]" (emphasis added). It is clear that the phrase "must obtain client consent" does not actually require the lawyer to obtain client consent. Instead, that sentence means that a lawyer may not make such a disclosure without such client consent. But the sentence could be more clear.	

VIRGINIA RULE 1.6(c)(2)	
Note # 2	**Code # 2**
Virginia Rule 1.6(c)(2)'s concluding sentence explains that a lawyer's consultation with a client about disclosing another lawyer's specified misconduct "should include full disclosure of all reasonably foreseeable consequences of both disclosure and non-disclosure to the client." (emphasis added). The word "must" would be more appropriate here than the word "should." Virginia Rule 1.6 cmt. [13]'s concluding sentence specifically indicates that "the attorney must inform the client of all reasonably foreseeable consequences of both disclosure and non-disclosure" (emphasis added).	

VIRGINIA RULE 1.6 cmt. [1]	
Note # 1	**Code # 4**
Virginia Rule 1.6 cmt. [1]'s second sentence refers to "[o]ne of the lawyer's functions" (emphasis added). The word "functions" seems odd. The word "roles" might be more appropriate.	

VIRGINIA RULE 1.6 cmt. [3]	
Note # 1	**Code # 1**
Virginia Rule 1.6 cmt. [3]'s first sentence explains that "[t]he principle of confidentiality is given effect in two related bodies of law" – the confidentiality ethics rule and "the attorney-client privilege, which includes the work product doctrine" (emphasis added). This is an incorrect statement of law. The work product doctrine is a separate evidentiary protection from the attorney-client privilege, and is not included as part of the attorney-client privilege.	

VIRGINIA RULE 1.6 cmt. [3]	
Note # 2	**Code # 2**
Virginia Rule 1.6 cmt. [3] addresses several evidentiary protections. Virginia Rule 1.6 cmt. [3]'s second sentence correctly notes that both 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" (emphasis added) That is certainly true – but it represents only a tiny and rare subset of circumstances involving either the attorney-client privilege or the work product doctrine. Lawyers are only rarely the target of litigation discovery. In the overwhelming majority of situations, lawyers must assert evidentiary protections when their clients are targeted with discovery. **ABA**	

VIRGINIA RULE 1.6 cmt. [5c]	
Note # 1	**Code # 1**
Virginia Rule 1.6 cmt. [5c] explains that "[c]ompliance with [Virginia] Rule 1.6(b)(5) might require a written confidentiality agreement with the outside agency to which the lawyer discloses information" (emphasis added). This seems to be an incorrect reference. Virginia Rule 1.6(b)(6) addresses such disclosure to outside agencies.	

VIRGINIA RULE 1.6 cmt. [7c]	
Note # 1	**Code # 3**
Virginia Rule 1.6 cmt. [7c] provides guidance about Virginia Rule 1.6(c)'s mandatory disclosure. The next two Virginia Rule 1.6 Comments (Virginia Rule 1.6 cmt. [8] and [8a]) address the previous black letter Virginia Rule – Virginia Rule 1.6(b)'s discretionary disclosure provision. It might be more appropriate for the Virginia Rule 1.6 Comments to address black letter Virginia Rule 1.6 provisions in numerical order.	

VIRGINIA RULE 1.6 cmt. [7c]	
Note # 2	**Code # 1**
Virginia Rule 1.6 cmt. [7c] addresses a scenario in which "the lawyer may learn that a client intends prospective criminal conduct." Virginia Rule 1.6 cmt. [7c]'s third sentence 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" (emphasis added). This standard (the lawyer's knowledge standard) seems inconsistent with black letter Virginia Rule 1.6(c)(1) – which requires that "[a] lawyer shall promptly reveal . . . the intention of a client, as stated by the client, to commit a crime reasonably certain to result in death or substantially bodily harm to another" (among other intents). Thus, Virginia Rule 1.6(c)(1) does not on its face analyze lawyer's "knowledge" of the likelihood that the client will commit such an act. Instead, lawyer "shall promptly reveal" such "intention of a client, as stated by the client." So the only factor would seem to be the client's stated intent.	

VIRGINIA RULE 1.6 cmt. [8]	
Note # 1	**Code # 3**
Virginia Rule 1.6 cmt. [8] addresses lawyer's discretionary disclosure under Virginia Rule 1.6(b). Among other factors, Virginia Rule 1.6 cmt. [8]'s first sentence indicates that "the lawyer should weigh such factors as the nature of the lawyer's relationship with the client" (emphasis added). It is unclear why such a relationship is a factor under Virginia Rule 1.6 cmt. [8]. Some guidance would be helpful.	

VIRGINIA RULE 1.6 cmt. [8]	
Note # 2	**Code # 4**
Virginia Rule 1.6 cmt. [8]'s concluding sentence states that "a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose" (emphasis added). The singular word "interest" seems inappropriate here. Clients have more than one interest, so the plural "interests" probably would be preferable.	

VIRGINIA RULE 1.6 cmt. [9]	
Note # 1	**Code # 2**
Virginia Rule 1.6 cmt. [9] requires lawyers to withdraw "[i]f the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct" (emphasis added). The word "materially" seems odd. One might think that a lawyer must withdraw if the client will use the lawyer's services in furthering a "course of criminal or fraudulent conduct" even if use will not be "material" to the client's improper conduct.	

VIRGINIA RULE 1.6 cmt. [9]	
Note # 2	**Code # 2**
Virginia Rule 1.6 cmt. [9] requires a lawyer to withdraw "[i]f the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct" (emphasis added). The word "course" seems odd. One might think that a lawyer must withdraw if the client uses the lawyer's services to further even a single "criminal or fraudulent" act – not just a "course" of such conduit.	

VIRGINIA RULE 1.6 cmt. [11]	
Note # 1	**Code # 3**
Virginia Rule 1.6 cmt. [11]'s first sentence requires lawyers to "invoke the attorney-client privilege when it is applicable" – "if a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client." That is certainly true, but it is a tiny subset of scenarios in which lawyers must assert their client's evidentiary attorney-client privilege (among other evidentiary protections). Lawyers are rarely called as witnesses. It is far more likely that a lawyer will be obligated to assert evidentiary protections on her client's behalf when the client or a third party is "called as a witness to give testimony concerning a client."	

VIRGINIA RULE 1.6 cmt. [11]	
Note # 2	**Code # 4**
Virginia Rule 1.6 cmt. [11]'s concluding sentence requires lawyers to comply with court orders requiring the lawyer "to give information about the client" (emphasis added). The word "give" seems awkwardly colloquial. Words such as "disclose" or "reveal" might be more appropriate.	

VIRGINIA RULE 1.6 cmt. [12]	
Note # 1	**Code # 4**
Virginia Rule 1.6 cmt. [12]'s second sentence contains the same colloquially awkward phrase "give information about a client" contained in Virginia Rule 1.6 cmt. [11]'s concluding sentence. Words such as "disclose" or "reveal" might be more appropriate.	

VIRGINIA RULE 1.6 cmt. [13]	
Note # 1	**Code # 2**
Virginia Rule 1.6 cmt. [13]'s concluding sentence states that "the attorney must inform the client of all reasonably foreseeable consequences of both disclosure and non-disclosure" when requesting client consent to reveal client confidences in reporting another lawyer's misconduct. This contrasts with black letter Virginia Rule 1.6(c)(2) concluding sentence's almost certainly inappropriately discretionary suggestion that "[c]onsultation should include full disclosure of all reasonably foreseeable consequences of both disclosure and non-disclosure to the client" in that setting (emphasis added). But this understandable mandate seems contrary to Virginia Scope's first paragraph's concluding sentence – which assures that "[c]omments do not add obligations to the [Virginia] Rules but provide guidance for practicing in compliance with the [Virginia] Rules."	

VIRGINIA RULE 1.6 cmt. [18]	
Note # 1	**Code # 3**
Virginia Rule 1.6 cmt. [18] addresses lawyer's confidentiality duty, which "continues after the client-lawyer relationship has terminated." It might be appropriate to mention Virginia Rule 1.9(c), which specifically addresses post-termination confidentiality duties.	

VIRGINIA RULE 1.6 cmt. [21(b)]	
Note # 1	**Code # 4**
Virginia Rule 1.6 cmt. [21(b)] contains the singular possessive "employee's." It would be more appropriate to use the term "an employee's" or (perhaps even better) "employees'."	

VIRGINIA RULE 1.7 TITLE	
Note # 1	**Code # 4**
Virginia Rule 1.7's Title contains the phrase "Conflict of Interest" (in the singular). As the ABA Model Rules General Notes discuss, ABA Model Rule Titles, Rules and Comments contain a confusing mix of the words "conflict(s)" and "interest(s)" in the singular and plural. The Virginia Rules and Comments do, too. **ABA**	

VIRGINIA RULE 1.7(a)	
Note # 1	**Code # 4**
Virginia Rule 1.7(a) explains that "a lawyer shall not represent a client" under certain conditions (emphasis added). The word "client" is inconsistent with (among other provisions) Virginia Rule 1.9(a)'s prohibition on a lawyer representing another "person" under certain circumstances (emphasis added). Under either Rule, the "person" cannot be a "client" because of the specified prohibitions. **ABA**	

VIRGINIA RULE 1.7(a)	
Note #2	**Code # 3**
Virginia Rule 1.7(a) explains that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest" (emphasis added). Virginia Rule 1.7(a)'s word "involves" contrasts with Virginia Rule 6.5 cmt. [3]'s phrase "presents a conflict of interest" (emphasis added). As the ABA Model Rules General Notes discuss, the ABA Model Rules contain these and other words to describe conflicts of interests scenarios. The Virginia Rules do, too. It is unclear whether these different terms intend to be synonymous, or instead to articulate different standards. **ABA**	

VIRGINIA RULE 1.7(a)(1)	
Note # 1	**Code # 3**
Virginia Rule 1.7(a)(1) applies a "directly adverse" standard in describing a prohibited representation. As the ABA Model Rules General Notes discuss, the ABA Model Rules contain various adversity standards – using different words to describe both the type and intensity of adversity. The Virginia Rules do, too. It is unclear whether they intend to apply a different standard. **ABA**	

VIRGINIA RULE 1.7 cmt. [1]	
Note # 1	**Code # 4**
Virginia Rule 1.7 cmt. [1]'s first sentence contains a reference to "the lawyer's relationship to a client" (emphasis added). The word "with" might be preferable. **ABA**	

VIRGINIA RULE 1.7 cmt. [4]	
Note # 1	**Code # 2**
Virginia Rule 1.7 cmt. [4]'s first sentence states that "the lawyer should withdraw from the representation" "[i]f such a conflict arises after representation has been undertaken." This statement does not acknowledge the possibility that a lawyer may continue a representation with the required consents. In contrast, ABA Model Rule 1.7 cmt. [4]'s first sentence contains the following clause: "unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b)."	

VIRGINIA RULE 1.7 cmt. [4]	
Note # 1	**Code # 3**
Virginia Rule 1.7 cmt. [4]'s concluding sentence contains a reference to an unidentified Virginia Rule 1.3 Comment. Presumably the Comment is Virginia Rule 1.3 cmt. [4]. It would be helpful to identify the Comment.	

VIRGINIA RULE 1.7 cmt. [4]	
Note # 1	**Code # 3**
Virginia Rule 1.7 cmt. [4]'s concluding sentence refers to an unidentified Virginia Rule Scope paragraph. Presumably the Virginia Scope reference is to the fourth paragraph. It would be helpful to identify the paragraph.	

VIRGINIA RULE 1.7 cmt. [6]	
Note # 1	**Code # 3**
Virginia Rule 1.7 cmt. [6]'s begins by stating that "[a]s a general proposition," lawyers may not take representations directly adverse to a client "without that client's consent." That introductory clause seems too loose, and does not appear in parallel ABA Model Rule 1.7 cmt. [6].	

VIRGINIA RULE 1.7 cmt. [6]	
Note # 2	**Code # 1**
Virginia Rule 1.7 cmt. [6]'s concluding sentence states that "simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients" (emphasis added). The word "generally" is incorrect. That word focuses on the intensity of the adversity, not the type of adversity. ABA Model Rule 1.7 cmt. [6]'s concluding sentence correctly contains the word "economically" rather than "generally."	

VIRGINIA RULE 1.7 cmt. [6]	
Note # 3	**Code # 2**
Virginia Rule 1.7 cmt. [6]'s concluding sentence states that "simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients" (emphasis added). The phrase "does not require" seems too absolute. ABA Model Rule 1.7 cmt. [6]'s last sentence contains the more accurate phrase "does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients" (emphases added).	

VIRGINIA RULE 1.7 cmt. [8]	
Note # 1	**Code # 1**
Virginia Rule 1.7 cmt. [8]'s first sentence states that "[l]oyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests" (emphasis added). This seems to apply the wrong standard. Under Virginia Rule 1.7(a)(2), "[a] concurrent conflict of interest exists if . . . there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to the client, a former client or a third person or by a personal interest of the lawyer" (emphases added). Thus, such a conflict does not require that the lawyer "cannot consider" a course of action – a conflict exists if there is a "significant risk" of that impact.	

VIRGINIA RULE 1.7 cmt. [8]	
Note # 2	**Code # 3**
Virginia Rule 1.7 cmt. [8]'s concluding sentence addresses joint representations. It would seem more appropriate placed to address joint representations in a Virginia Rule 1.7 Comment dealing with such joint representations (Virginia Rule 1.7 cmt. [29] – [35]).	

VIRGINIA RULE 1.7 cmt. [10]	
Note # 1	**Code # 3**
Virginia Rule 1.7 cmt. [10]'s first sentence states that "[a] lawyer may not allow business or personal interests to affect representation of a client" (emphasis added). That seems like an odd description. Among other things, a lawyer's business interests *are* her personal interests. ABA Model Rule 1.7 cmt. [10]'s first sentence contains what might be the more appropriate generic term "own interests."	

VIRGINIA RULE 1.7 cmt. [10]	
Note # 2	**Code # 1**
Virginia Rule 1.7 cmt. [10]'s second sentence states 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). As the ABA Model Rules Generic Notes discuss, some ABA Model Rule Comments contain the word "should" where the word "must" would be more appropriate, if not required. Some Virginia Rule Comments do, too. Here, the word "should" does not seem strong enough. The word "must" or "may" would be more appropriate.	

VIRGINIA RULE 1.7 cmt. [10]	
Note # 3	**Code # 3**
Virginia Rule 1.7 cmt. [10]'s third sentence states that "a lawyer may not refer clients to an enterprise in which the lawyer has an undisclosed interest." The sentence does not contain a materiality or other qualifying standard. Presumably this general principle would not apply to a lawyer referring a client to which the lawyer owned one share of stock, etc.	

VIRGINIA RULE 1.7 cmt. [11] - [12]	
Note # 1	**Code # 4**
Virginia Rule 1.7 indicates that Virginia did not adopt ABA Model Rule 1.7 cmt. [11] - [12]. The reference erroneously contains the singular “Comment” rather than the plural “Comments.”	

VIRGINIA RULE 1.7 cmt. [14] - [18]	
Note # 1	**Code # 4**
Virginia Rule 1.7 indicates that Virginia did not adopt ABA Model Rule 1.7 cmt. [14] - [18]. The reference erroneously contains the singular “Comment” rather than the plural “Comments.”	

VIRGINIA RULE 1.7 cmt. [19]	
Note # 1	**Code # 1**
Virginia Rule 1.7 cmt. [19]'s sixth sentence contains the word "onset." The word "outset" would seem more accurate.	

VIRGINIA RULE 1.7 cmt. [21] - [22]	
Note # 1	**Code # 4**
Virginia Rule 1.7 indicates that Virginia did not adopt ABA Model Rule 1.7 cmt. [21] - [22]. The reference erroneously contains the singular “Comment” rather than the plural “Comments.”	

VIRGINIA RULE 1.7 cmt. [23a]	
Note # 1	**Code # 2**
Virginia Rule 1.7 cmt. [23a]'s first sentence begins with the word "[o]rdinarily" – then explains that "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" (emphasis added). The word "[o]rdinarily" seems unduly loose. It might be more appropriate to use a phrase such as: "[a]bsent clients' consent" or some other more restrictive phrase.	

VIRGINIA RULE 1.7 cmt. [23a]	
Note # 2	**Code # 3**
Virginia Rule 1.7 cmt. [23a]'s third sentence contains the phrase "an enterprise with diverse operations." That undefined term might be confusing. Among other things, it is unclear whether the term "diverse operations" refers to business operations of a single corporate entity, or separate members of a corporate family.	

VIRGINIA RULE 1.7 cmt. [23a]	
Note # 3	**Code # 4**
Virginia Rule 1.7 cmt. [23a]'s third sentence describes a condition under which a lawyer may undertake a representation – "if both clients consent upon consultation" (emphasis added). The word "after" might be more appropriate than "upon."	

VIRGINIA RULE 1.7 cmt. [23a]	
Note # 4	**Code # 2**
Virginia Rule 1.7 cmt. [23a]'s fourth sentence states that "government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party." It is difficult to imagine such a situation. It would have been helpful for Virginia Rule 1.7 cmt. [23a] to provide an explanation of when that would be acceptable.	

VIRGINIA RULE 1.7 cmt. [26]	
Note # 1	**Code # 3**
Virginia Rule 1.7 cmt. [26]'s second sentence describes "[r]elevant factors in determining whether there is a potential conflict" (emphasis added). The term "potential conflict" seems inapt. There is always a possibility of a "potential conflict." Lawyers must assess whether there is a "conflict" – not a "potential conflict."	

VIRGINIA RULE 1.7 cmt. [26]	
Note # 2	**Code # 4**
Virginia Rule 1.7 cmt. [26]'s second sentence describes as among the factors lawyers must consider in the specified scenario "the likelihood that actual conflict will arise." It might be more appropriate to add the word "an" between the word "that" and the word "actual."	

VIRGINIA RULE 1.7 cmt. [26]	
Note # 3	**Code # 3**
Virginia Rule 1.7 cmt. [26]'s concluding sentence addresses "material limitation" conflicts – noting that "[t]he question is often one of proximity and degree" (emphasis added). It is unclear what the words "proximity" and "degree" mean in this material limitation analysis. **ABA**	

VIRGINIA RULE 1.7 cmt. [29]	
Note # 1	**Code # 4**
Virginia Rule 1.7 cmt. [29]'s first sentence contains the term "multiple clients," rather than "common clients" or "joint clients." Presumably those terms are all intended to be synonymous, but it might be clearer if Virginia Rule 1.7 cmt. [29] and other Virginia Rule 1.7 Comments contained the same term. **ABA**	

VIRGINIA RULE 1.7 cmt. [29]	
Note # 2	**Code # 3**
Virginia Rule 1.7 cmt. [29]'s first and second sentences describe a scenario in which "the common representation fails" (emphasis added). Its third sentence similarly refers to a "failure." The words "fails" and "failure" seem inapt – as if describing some substantive failure of the representation, rather than an impermissible conflict. **ABA**	

VIRGINIA RULE 1.7 cmt. [29]	
Note # 3	**Code # 4**
Virginia Rule 1.7 cmt. [29]'s sixth sentence describes a scenario "if the relationship between the parties has already assumed antagonism" (emphases added). The word "parties" might be confusing. The word "clients" might be more appropriate. The term "assumed antagonism" seems odd. It might be more appropriate to describe the clients' interests as already antagonistic, or to use some other phrase. **ABA**	

VIRGINIA RULE 1.7 cmt. [29]	
Note # 4	**Code # 4**
Virginia Rule 1.7 cmt. [29]'s sixth sentence addresses (among other things) "the possibility that the client's interests can be adequately served by common representation" (emphasis added). The word "client's" (singular possessive) should be "clients'" (plural possessive). ABA Model Rule 1.7 cmt. [29] contains the proper plural possessive.	

VIRGINIA RULE 1.7 cmt. [29]	
Note # 5	**Code # 3**
Virginia Rule 1.7 cmt. [29]'s sixth sentence warns that "the possibility" that a lawyer may continue a joint representation "is not very good" – "if the relationship between the parties has already assumed antagonism" (emphasis added). The phrase "is not very good" seems overly optimistic. If the relationship between the joint clients "has already assumed antagonism," one would think that the possibility of continuing a joint representation is at best "very unlikely." **ABA**	

VIRGINIA RULE 1.7 cmt. [30]	
Note # 1	**Code # 3**
Virginia Rule 1.7 cmt. [30]'s second sentence describes "the prevailing rule" governing "the attorney-client privilege" between "commonly represented clients" as follows: "the privilege does not attach." The word "attach" seems inapt when addressing the attorney-client privilege. And Virginia Rule 1.7 cmt. [30] would be more clear if it explained that as to the rest of the world, the privilege still applies – allowing either of the joint clients to successfully assert privilege if a stranger to the joint representation (other than the other joint client) seeks to discover the communications among the joint clients and their joint lawyer. The privilege "does not attach" (to use Virginia Rule 1.7 cmt. [30]'s awkward phrase) if the now-adverse former joint clients seek discovery of their joint communications with their joint lawyer, or even communications one of the joint clients had on the subject of the joint representation with their joint lawyer in the absence of the other joint client. In other words, the now-adverse former joint clients generally must disclose all of the related joint-representation communications, as must their joint lawyer. But the rest of the world may not discover those. **ABA**	

VIRGINIA RULE 1.7 cmt. [31]	
Note # 1	**Code # 2**
Virginia Rule 1.7 cmt. [31]'s third sentence explains that lawyers should advise their joint clients that "the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other." This does not answer the key question – must the lawyer disclose that information to the other client before withdrawing? Virginia Rule 1.7 cmt. [31]'s third sentence seems to say "yes," but at least one legal ethics opinion (ABA LEO 450 (4/9/08)) seemed to say "no." **ABA**	

VIRGINIA RULE 1.8(b)	
Note # 1	**Code # 3**
Virginia Rule 1.8(b) prohibits lawyers from using protected client confidential information to the client's disadvantage or to the lawyer's or some third party's advantage "except as permitted or required by [Virginia] Rule 1.6 or [Virginia] Rule 3.3." This specific reference to just two Virginia Rules contrasts with ABA Model Rule 1.8 cmt. [5]'s wiser broader exception; "except as permitted or required by these [ABA Model] Rules." That incorporates any other exception allowing or requiring such use. That general approach makes more sense than Virginia Rule 1.8(b)'s reference to to just two rules. ABA Model Rule 1.8 cmt. [5] also mentions several other ABA Model Rules (in addition to ABA Model Rule 1.6 and 3.3) – which might permit or require such use: ABA Model Rule 1.2(d), 1.9(c), 4.1(b), 8.1, 8.3. It would be more clear if Virginia Rule 1.8(b) likewise referred generally to other Virginia Rules that permit or require such use, or at least referenced other specific Virginia Rules. Virginia Rule 1.8 cmt. [2] concludes with that helpful ABA Model Rule approach. But as explained in Virginia Scope's first paragraph, "[c]omments do not add obligations to the [Virginia] Rules but provide guidance for practicing in compliance with the [Virginia] Rules." So the helpful language in Virginia 1.8 cmt. [2] cannot trump black letter Virginia Rule 1.8(b)'s absence of the helpful language.	

VIRGINIA RULE 1.8(c)	
Note # 1	**Code # 3**
Virginia Rule 1.8(c)'s first sentence contains the word "himself." It might be appropriate to use the plural "lawyers" and "themselves," or in some other way avoid the masculine.	

VIRGINIA RULE 1.8(c)	
Note # 2	**Code # 3**
Virginia Rule 1.8(c)'s fourth sentence does not include "grandparent" within the defined relationship. That absence may be inadvertent – ABA Model Rule 1.8(c)'s second sentence includes "grandparent" in what otherwise is the identical list.	

VIRGINIA RULE 1.8(g)	
Note # 1	**Code # 3**
Virginia Rule 1.8(g) addresses aggregate settlements. Virginia Rule 1.8(g)'s first sentence contains the word "participate" when referring to lawyers' involvement in aggregate settlements. Virginia Rule 1.8(g)'s concluding sentence uses the word "participation" in a totally different way – denoting each person's involvement in the aggregate settlement. Replacing the word "participation" with the word "involvement" or other synonym might avoid possible confusion. **ABA**	

VIRGINIA RULE 1.8(i)	
Note # 1	**Code # 3**
Virginia Rule 1.8(i) addresses conflicts when lawyers who are related in some way represent clients who are directly adverse to one another. Virginia Rule 1.8(i) contains an exception: "except upon consent by the client after consultation regarding the relationship" (emphasis added). Because each lawyer in that scenario would require her client's consent, it might be more appropriate to use the word "clients" (plural) rather than "client" (singular).	

VIRGINIA RULE 1.8(k)	
Note # 1	**Code # 2**
Virginia Rule 1.8(k) imputes to a lawyer's "associated" law firm colleagues all Virginia Rule 1.8 prohibitions except Virginia Rule 1.8(i)'s family relations prohibition. As the ABA Model Rules General Notes discuss, the ABA Model Rules do not define the word "associated." The same is true of the Virginia Rules. It seems clear that some lawyers in a law firm are associated with their colleagues, and some are not. Thus, Virginia Rule 1.8(k) does not impute any Virginia Rule 1.8 prohibition applicable to lawyers who are not "associated" with their colleagues. And a prohibition applicable to a lawyer "associated" in the law firm is not imputed to law firm colleagues who are not "associated" with that lawyer. **ABA**	

VIRGINIA RULE 1.8 cmt. [1]	
Note # 1	**Code # 3**
Virginia Rule 1.8 cmt. [1] addresses Virginia Rule 1.8(a) and (b). Virginia Rule 1.8 cmt. [1] confusingly switches back and forth from those two black letter Virginia Rule 1.8 provisions. Virginia Rule 1.8 cmt. [1]'s first sentence addresses black letter Virginia Rule 1.8(a). Virginia Rule 1.8 cmt. [1]'s second and third sentences address black letter Virginia Rule 1.8(b). Virginia Rule 1.8 cmt. [1]'s fourth sentence goes back to a discussion of black letter Virginia Rule 1.8(a). It might be less confusing if Virginia Rule 1.8 cmt. [1] addressed black letter Virginia Rule 1.8 provisions in a consistent order.	

VIRGINIA RULE 1.8 cmt. [1]	
Note # 2	**Code # 4**
Virginia Rule 1.8 cmt. [1]'s penultimate sentence explains that restricting "standard commercial transactions" between lawyers and their clients is "impracticable." The word "impracticable" usually denotes difficulty or even impossibility. The word "impractical" might be better suited here. That word normally focuses on the wisdom of an action. **ABA**	

VIRGINIA RULE 1.8 cmt. [2]	
Note # 1	**Code # 3**
Virginia Rule 1.8 cmt. [2] parallels ABA Model Rule 1.8 cmt. [5]. It would be more clear if this Virginia Rule 1.8 Comment was numbered Virginia Rule 1.8 cmt. [5].	

VIRGINIA RULE 1.8 cmt. [6]	
Note # 1	**Code # 2**
Virginia Rule 1.8 cmt. [6]'s third sentence states that "the client [other than one of the lawyer's specific family members] should have the detached advice that another lawyer can provide" (emphasis added). The word "must" would be more appropriate here, especially because Virginia Rule 1.8 cmt. [6]'s next sentence (the concluding sentence) points to the family relationship exception. Absent that exception, under black letter Virginia Rule 1.8(c) clients must rely on another lawyer to prepare the necessary instruments.	

VIRGINIA RULE 1.8 cmt. [9]	
Note # 1	**Code # 1**
Virginia Rule 1.8 cmt. [9]'s first sentence addresses lawyers' acquisition of "literary or media rights concerning the conduct of the representation" (emphasis added). That is a much narrower range than black letter Virginia Rule 1.8(d) – which prohibits under certain circumstances lawyers' acquisition of "literary or media rights a portrayal or account based in substantial part on information relating to the representation" (emphasis added). Black letter Virginia Rule 1.8(d)'s scope presumably includes "a portrayal or account" other than one "concerning the conduct of the representation" (which seems to focus on the attorney-client relationship). **ABA**	

VIRGINIA RULE 1.8 cmt. [9]	
Note # 2	**Code # 2**
Virginia Rule 1.8 cmt. [9]'s second sentence states that "[m]easures suitable in the representation of the client may detract from the publication value of an account of the representation." That seems to express an understandable worry, but the wrong way. Presumably the concern is that lawyers hoping to maximize the publication value will take unsuitable steps in the representation. In other words, presumably the risk is that a lawyer would avoid "[m]easures suitable in the representation of the client" to enhance "the publication value of an account of the representation." **ABA**	

VIRGINIA RULE 1.8 cmt. [10]	
Note # 1	**Code # 3**
Virginia Rule 1.8 cmt. [10]'s first sentence explains that lawyers "may not subsidize lawsuits or administrative proceedings brought on behalf of their clients." This is only a subset of Virginia Rule 1.8(e)'s limitations – which apply to lawyers bringing actions on their client's behalf, or defending actions brought by others. **ABA**	

VIRGINIA RULE 1.8 cmt. [11]	
Note # 1	**Code # 4**
Virginia Rule 1.8 cmt. [11]'s concluding sentence states that a necessary "consent may be obtained on behalf of the class by court-supervised procedure." Adding the word "a" or "the" before the term "court-supervised procedure" might be appropriate.	

VIRGINIA RULE 1.8 cmt. [16]	
Note # 1	**Code # 3**
Virginia Rule 1.8 cmt. [16] is not followed by a reference to Virginia not having adopted ABA Model Rule 1.8 cmt. [17] – [20].	

VIRGINIA RULE 1.9(a)	
Note # 1	**Code # 2**
Virginia Rule 1.9(a) describes a lawyer "who has formerly represented a client in a matter" (emphasis added). The phrase "in a matter" differs linguistically from Virginia Rule 1.11(b)'s and Virginia Rule 1.12(a)'s phrase "in connection with a matter" (emphasis added). It is unclear whether representing a client "in a matter" is synonymous with representing a client "in connection with" a matter. Presumably the different formulations in successive Virginia Rules were intended to have some significance. **ABA**	

VIRGINIA RULE 1.9(a)	
Note # 2	**Code # 3**
Virginia Rule 1.9(a) prohibits lawyers from representing a "person" if that person's interests are "materially adverse to the interests of" certain former clients in specified circumstances. The word "person" is inconsistent with Virginia Rule 1.7(a)'s prohibition on a lawyer representing a "client" in specified circumstances. Under either Virginia Rule, the "person" may not be a "client" – at least in the prohibited representation. So it is odd that the core current-client Virginia Rule 1.7 and the core former-client Virginia Rule 1.9 use different formulations. **ABA**	

VIRGINIA RULE 1.9(a)	
Note # 3	**Code # 3**
Virginia Rule 1.9(a) prohibits lawyers from representing a client against a former client under specified conditions if the client's "interests are materially adverse to the interests of the former client" (emphasis added). As the ABA Model Rules General Notes discuss, the ABA Model Rules contain several variations of adversity: adversity to a client; adversity to a client's interests; "material" adversity to a client's interests; "direct" adversity to a client or to the client's interests, etc. The same is true of the Virginia Rules. It is unclear whether those deliberately chosen linguistic differences are intended to have substantively different effects. **ABA**	

VIRGINIA RULE 1.9(a)	
Note # 4	**Code # 2**
Virginia Rule 1.9(a)'s core conflicts duty owed to former clients is notable for what it does not contain. Unlike Virginia Rule 1.7(b)(4)'s requirement that a current client's consent must be "memorialized in writing," Virginia Rule 1.9(a) does not require any writing memorializing either a former client's consent or an adversarial client's consent allowing a lawyer to undertake representation in the face of a conflict.	

VIRGINIA RULE 1.9(b)	
Note # 1	**Code # 2**
Virginia Rule 1.9(b) governs lawyers' representation of clients who had been represented by a firm "with which the lawyer formerly was associated" (emphasis added). As the ABA Model Rules General Notes discuss, the ABA Model Rules do not define the word "associated." But it seems clear that some lawyers in the law firm are "associated" with their colleagues and some are not. The same is true of the Virginia Rules. Virginia Rule 1.9(b) thus on its face does not apply to lawyers formerly employed by the law firm but not associated "with" the firm. As the ABA Model Rules General Notes also discuss, the ABA Model Rules use two formulations describing lawyers' association with law firms: "in" and "with." Virginia Rules and Comments do, too. The former appears to denote lawyers who are employed by the law firm. The latter appears to denote lawyers who are not employed by the law firm (such as lawyers acting as co-counsel, lawyers assisting a lawyer from another jurisdiction, etc.). **ABA**	

VIRGINIA RULE 1.9(b)(2)	
Note # 1	**Code # 3**
Virginia Rule 1.9(b)(2) describes a lawyer who "had acquired information by [Virginia] Rules 1.6 and 1.9(c)" (emphasis added). The word "and" seems to denote the information's protection by both of those Virginia Rules. The word "or" might be more appropriate here. **ABA**	

VIRGINIA RULE 1.9(c)	
Note # 1	**Code # 2**
Virginia Rule 1.9(c)(1) addresses use of "information relating to or gained in the course of the representation." Virginia Rule 1.9(c)(2) addresses disclosure of "information relating to the representation." Virginia Rule 1.9(c) does not explain why these two successive provisions apply differently to those two explicitly different types of information. It would be helpful to have an explanation. ABA Model Rule 1.9(c) uses the same standard for its two parallel successive provisions: "information relating to the representation."	

VIRGINIA RULE 1.9(c)	
Note # 2	**Code # 2**
As noted in connection with Virginia Rule 1.8(b), that Virginia Rule provision ironically seems to provide less protection to current clients than Virginia Rule 1.9(c)(1) provides to former clients Virginia Rule 1.8(b) protects current client's "information relating to representation of a client" from the lawyer's use to the current client's disadvantage. In contrast, Virginia Rule 1.9(c)(1) protects both "information relating to … the representation" and "information … gained in the course of the representation" of former clients from the lawyer's use to the disadvantage of the former client. That difference does not make much sense.	

VIRGINIA RULE 1.9(c)(1)	
Note # 1	**Code # 3**
Virginia Rule 1.9(c)(1) prohibits a lawyer's "use" of specified information "except as [Virginia] Rule 1.6 or [Virginia] Rule 3.3 would permit or require" (among other things). Virginia Rule 1.6 addresses disclosure of protected client confidential information. Virginia Rule 1.8(b) addresses use of protected client confidential information (although it refers back to Virginia Rule 1.6). It might be more appropriate for Virginia Rule 1.9(c)(1) to refer to Virginia Rule 1.8, rather than Virginia Rule 1.6.	

VIRGINIA RULE 1.9(c)(1)	
Note # 2	**Code # 2**
Virginia Rule 1.9(c)(1) prohibits a lawyer's "use" of specified information "except as [Virginia] Rule 1.6 or [Virginia] Rule 3.3 would permit or require" (among other things). Virginia Rule 1.9(c)(1) does not mention Virginia Rule 4.1(b), which might require lawyers' disclosure of protected client confidential information.	

VIRGINIA RULE 1.9 cmt. [1]	
Note # 1	**Code # 4**
Virginia Rule 1.9 cmt. [1]'s third sentence explains that "a lawyer could not <u>properly</u> seek to rescind" a specified contract (emphasis added). The word "properly" is unnecessary. **ABA**	

VIRGINIA RULE 1.9 cmt. [1]	
Note # 2	**Code # 4**
Virginia Rule 1.9 cmt. [1]'s fourth sentence addresses a former prosecutor's representation of an accused person (the lawyer had earlier prosecuted) in "a subsequent civil action against the government concerning the same transaction" (emphasis added). It is unclear what the word "transaction" denotes. A white-collar "accused" might have been involved in an illegal "transaction," but that word seems inappropriate for a blue-collar criminal's bank robbery, etc. The word "incident" or "matter" might be more appropriate. **ABA**	

VIRGINIA RULE 1.9 cmt. [2]	
Note # 1	**Code # 2**
Virginia Rule 1.9 cmt. [2]'s second sentence explains that lawyers' "involvement" in a matter can also be a question of degree" (emphasis added). It is unclear why Virginia Rule 1.9 cmt. [2]'s second sentence focuses on a lawyer's "involvement" in a matter. Black letter Virginia Rule 1.9 applies to lawyers who represent or have represented clients in a matter – not lawyers who were somehow "involved" in a matter. Black letter Virginia Rule 1.9 does not apply to lawyers "involved" in a matter. **ABA**	

VIRGINIA RULE 1.9 cmt. [2]	
Note # 2	**Code # 3**
Virginia Rule 1.9 cmt. [2]'s second sentence states that "[t]he lawyer's involvement in a matter can also be a question of degree" (emphasis added). Even if a lawyer's "involvement" in a matter was relevant, it is unclear what the word "degree" denotes. **ABA**	

VIRGINIA RULE 1.9 cmt. [2]	
Note # 3	**Code # 3**
Virginia Rule 1.9 cmt. [2]'s fourth sentence addresses the conflict presented when a lawyer represents "another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client" (emphasis added). As the ABA Model Rules General Notes discuss, the ABA Model Rules contain several variations of adversity: adversity to a client; adversity to a client's interests; "material" adversity to a client's interests; "direct" adversity to a client or to the client's interests, etc. The same is true of the Virginia Rules. It is unclear whether those deliberately chosen linguistic differences are intended to have substantively different effects. Thus, it is unclear whether a "position" adverse to another current or former client describes the same standard as "adversity" to that client or "adversity" to that client's interests.	

VIRGINIA RULE 1.9 cmt. [3]	
Note # 1	**Code # 3**
Virginia Rule 1.9 cmt. [3]'s first sentence addresses the scenario "involving positions adverse to a former client" (emphasis added). As the ABA Model Rules General Notes discuss, the ABA Model Rules contain several variations of adversity: adversity to a client; adversity to a client's interests; "material" adversity to a client's interests; "direct" adversity to a client or to the client's interests, etc. The same is true of the Virginia Rules. It is unclear whether those deliberately chosen linguistic differences are intended to have substantively different effects. Thus, it is unclear whether "positions" adverse to a former client is the same standard as "adversity" to the former client or "adversity" to the former client's interests.	

VIRGINIA RULE 1.9 cmt. [4]	
Note # 1	**Code # 2**
Virginia Rule 1.9 cmt. [4]'s first sentence contains the phrase "associated within a firm" (emphasis added). As the ABA Model Rules General Notes discuss, ABA Model Rules and their Comments contain provisions using the word "with" and the word "in" in describing a lawyer's "association" with a firm or other persons. The same is true of the Virginia Rules. Virginia Rule 1.9 cmt. [4]'s word "within" is a strange amalgam of those two separate and presumably deliberately chosen words "with" and "in." **ABA**	

VIRGINIA RULE 1.9 cmt. [4a]	
Note # 1	**Code # 3**
Virginia Rule 1.9 cmt. [4a] contains an interesting but unnecessary historical discussion.	

VIRGINIA RULE 1.9 cmt. [4b]	
Note # 1	**Code # 3**
Virginia Rule 1.9 cmt. [4b] contains an interesting but unnecessary historical discussion.	

VIRGINIA RULE 1.9 cmt. [5]	
Note # 1	**Code # 2**
Virginia Rule 1.9 cmt. [5]'s second sentence contains the phrase "the same or a related matter" (emphasis added). That standard contrasts with black letter Virginia Rule 1.9(a)'s standard: "the same or a substantially related matter" (emphasis added). **ABA**	

VIRGINIA RULE 1.9 cmt. [6]	
Note # 1	**Code # 1**
Virginia Rule 1.9 cmt. [6]'s second sentence mentions "a situation's particular facts, aided by inferences, deductions or working presumptions" (emphasis added). That loose standard seems to conflict with Virginia Rule 1.9 cmt. [5]'s first sentence's standard: "when the lawyer involved has actual knowledge of information" (emphasis added). Perhaps Virginia Rule 1.9 cmt. [6]'s looser standard reflects the Virginia Rule Terminology statement that "[a] person's [actual] knowledge may be inferred from circumstances." But "inferred from circumstances" seems to denote a narrower range than Virginia Rule 1.9 cmt. [6]'s second sentence's phrase "aided by inferences, deductions or working presumptions." Neither Virginia Rule 1.9 cmt. [5] nor Virginia Rule 1.9 cmt. [6] mentions Virginia Rule Terminology's definition of "knows" and its reference to inferences. **ABA**	

VIRGINIA RULE 1.9 cmt. [8]	
Note # 1	**Code # 1**
Virginia Rule 1.9 cmt. [8]'s second sentence states that "the fact that a lawyer has once served a client does not preclude the lawyer from using non-confidential information about that client when later representing another client" (emphasis added). The "non-confidential" standard seems incorrect. Black letter Virginia Rule 1.9(c)(1) allows lawyers to use a former client's information (among other things) "when the information has become generally known" (emphasis added). So the term "generally known" would be more appropriate than "non-confidential," if not required. ABA Model Rule 1.9 cmt. [8]'s concluding sentence contains the term "generally known."	

VIRGINIA RULE 1.9 cmt. [9]	
Note # 1	**Code # 3**
Virginia Rule 1.9 cmt. [9]'s third sentence contains the term "new client" to distinguish a lawyer's current client from a "former" client. The term "current client" might be preferable.	

VIRGINIA RULE 1.10(a)	
Note # 1	**Code # 2**
Virginia Rule 1.10(a) addresses the imputation to all "lawyers [who] are <u>associated</u> in a firm . . . when the lawyer knowns or reasonably should know that any one of them practicing alone would be prohibited from" a representation (emphasis added). As the ABA Model Rules General Notes discuss, the ABA Model Rules do not define the word "associated," although it seems clear that some lawyers in a law firm are "associated" with their law firm colleagues, and some lawyers are not. The same is true of the Virginia Rules and Comments. This means that Virginia Rule 1.10(a) imputes to other "associated lawyers" in the firm only the individual prohibition of another lawyer who is "associated" in the firm. Thus, on its face, Virginia Rule 1.10(a) does not impute the individual prohibition of a lawyer who is not "associated" in a law firm, and does not impute an "associated" lawyer's prohibition to lawyers who are not "associated" in the firm. Perhaps that is intentional, but it is difficult to tell that without knowing exactly what the word "associated" means, whom it applies to and whom it does not apply to. It would be helpful if Virginia Rule 1.10(a) was more clear. **ABA**	

VIRGINIA RULE 1.10(a)	
Note # 2	**Code # 3**
Virginia Rule 1.10(a) explains that when lawyers are associated with one another, "none of them shall represent a client" under specified conditions (emphasis added). The word "client" contrasts with Virginia Rule 1.10(b)'s word "person" as someone a lawyer may not represent under specified conditions. Because such a "person" may not be a "client," it might be appropriate for Virginia Rule 1.10(a) to also use the word "person" rather than the word "client." **ABA**	

VIRGINIA RULE 1.10(a)	
Note # 3	**Code # 3**
Virginia Rule 1.10(a) addresses the imputation of an individual lawyer's prohibition to all "lawyers [who] are associated in a firm . . . when the lawyer knows or reasonably should know that any one of them practicing alone would be prohibited from" a representation (emphasis added). It is unclear why Virginia Rule 1.10(a) contains the phrase "when . . . any one of them practicing alone." It would seem that the same imputation analysis would apply whether the lawyer was "practicing alone" or not. **ABA**	

VIRGINIA RULE 1.10(a)	
Note # 4	**Code # 2**
Virginia Rule 1.10(a) addresses imputation of an individual lawyer's prohibition if the lawyer "would be prohibited from [such a representation] by [Virginia] Rule 1.6, 1.7, 1.9, or 2.10(e)." Virginia Rule 1.6 does not prohibit lawyers from representing clients – it addresses lawyers' confidentiality duty. So presumably there should be no reference to Virginia Rule 1.6 in the list.	

VIRGINIA RULE 1.10(b)	
Note # 1	**Code # 2**
Virginia Rule 1.10(b) contains the phrase "association with a firm" (emphasis added). As the ABA Model Rules General Notes discuss, some ABA Model Rules refer to lawyers associated "in" a firm and some refer to lawyers associated "with" a firm. Virginia Rules and Comments do, too. Virginia Rule 1.10(b)'s word "with" contrasts Virginia Rule 1.10(a)'s phrase "associated in a firm" (emphasis added). The term "associated with" includes lawyers who are not employed by the firm – such as lawyers in other firms who are jointly representing a client, a local lawyer who "associates" with an out-of-state lawyer for Virginia Rule 5.5 purposes, and perhaps others. It is unclear whether this deliberate word choice was intended to have a different substantive meaning. **ABA**	

VIRGINIA RULE 1.10(b)	
Note # 2	**Code # 3**
Virginia Rule 1.10(b) contains the phrase "a person with interests materially adverse to those of a client" (emphasis added). As the ABA Model Rules General Notes discuss, this is one of several formulations the ABA Model Rules contain – both in their identity of the object of adversity ("interests") (rather than a client or former client), the type of adversity, and the degree of adversity ("materially"). The Virginia Rules contain the same variations. **ABA**	

VIRGINIA RULE 1.10(b)(2)	
Note # 1	**Code # 3**
Virginia Rule 1.10(b)(2) describes "information protected by [ABA Model] Rule 1.6 and 1.9(c)" (emphasis added). On its face, this phrase describes information protected by both of those ABA Model Rules, not by either (but not both of them). The word "or" presumably would be more appropriate than the word "and." **ABA**	

VIRGINIA RULE 1.10(b)(2)	
Note # 2	**Code # 2**
Virginia Rule 1.10(b)(2) focuses only on the presence of lawyers in the law firm who have "information protected by Virginia Rules 1.6 and 1.9(c) that is material to the matter." In other words, as long as all of the lawyers with protected client confidential information have left the firm, the lawyers remaining in the firm may represent clients adverse to former clients who had been represented by the lawyers who have since left the firm. This focus only on lawyers would on its face allow remaining lawyers in the firm to represent a client adverse to one of the firm's former clients (even in the same matter) – if: (1) non-lawyers with material protected client confidential information remain at the firm; and (2) even if the firm has in its possession materials containing such protected client confidential information. Even more remarkably, lawyers remaining in the firm may undertake such a representation adverse to one of the firm's former clients (even in the same matter) without screening those non-lawyers from working on the matter, and without denying anyone at the firm access to such materials remaining in the firm. Presumably other Virginia Rules (such as Virginia Rule 1.7(a)(2)'s "material limitation" provision) would apply, but one would think that Virginia Rule 1.10(b)(2) would acknowledge the impact of confidence-laden non-lawyers and material remaining at the firm. **ABA**	

VIRGINIA RULE 1.10(e)	
Note # 1	**Code # 3**
Virginia Rule 1.10(e) refers to "lawyers associated in a firm with former or current government lawyers" (emphasis added). It seems unlikely that a private law firm could have a "current government lawyer" "associated" in the firm. Perhaps Virginia Rule 1.10(e) intends to apply to part-time government lawyers, or perhaps it intends to rely on the expansive definition of the word "firm" (which the Virginia Rules Terminology describes as "including other organization[s]"). That seems unlikely, but it would be helpful if Virginia Rule 1.10(e) clarified that issue. **ABA**	

VIRGINIA RULE 1.10 cmt. [1]	
Note # 1	**Code # 2**
Virginia Rule 1.10 cmt. [1] third sentence's explanation of when two or more lawyers "constitute a firm" contains the unhelpful circular explanation – when such lawyers "conduct themselves as a firm, they should be regarded as a firm for purposes of the [Virginia] Rules." **ABA Model Rule 1.0 cmt. [2]**	

VIRGINIA RULE 1.10 cmt. [2]	
Note # 1	**Code # 2**
Virginia Rule 1.10 cmt. [2]'s fourth sentence points to "[t]he terms of any formal agreement between associated lawyers" as relevant in determining whether the lawyers constitute a "firm" (emphasis added). It would seem that even an "informal" agreement would have some effect. **ABA Model Rule 1.10 cmt. [2]**	

VIRGINIA RULE 1.10 cmt. [1b]	
Note # 1	**Code # 4**
Virginia Rule 1.10 cmt. [1b]'s first sentence addresses issues "with respect to lawyers in legal aid." The word "assisting" or some other word might be appropriate between the word "lawyers" and the word "in."	

VIRGINIA RULE 1.10 cmt. [1b]	
Note # 2	**Code # 3**
Virginia Rule 1.10 cmt. [1b]'s second sentence contains the term "unit of a legal service organization." It is unclear what the word "unit" means. It would be helpful to have an explanation.	

VIRGINIA RULE 1.10 cmt. [1b]	
Note # 3	**Code # 2**
Virginia Rule 1.10 cmt. [1b]'s third sentence states that "whether the lawyers [employed by a legal services organization] 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." As the ABA Model Rules General Notes discuss, the ABA Model Rules do not define the word "associated," which is a key standard in many ABA Model Rules and Comments. The Virginia Rules likewise do not define that important word.	

VIRGINIA RULE 1.10 cmt. [1c]	
Note # 1	**Code # 2**
Virginia Rule 1.10 cmt. [1c]'s first sentence describes a scenario "[w]here a lawyer has joined a private firm after having represented the government." Virginia Rule 1.10 cmt. [1c] points to Virginia Rule 1.11(b) and (c) for guidance. But those Virginia Rule provisions apply to lawyers who were formerly employed by the government, not just lawyers who represented the government without being employed by the government. Thus, Virginia Rule 1.10 cmt. [1c] on its face seems to erroneously apply to lawyers who have represented the government without being employed by the government.	

VIRGINIA RULE 1.11(a)	
Note # 1	**Code # 2**
Virginia Rule 1.11(a) addresses "[a] lawyer who holds public office." It is unclear whether that term is the same as Virginia Rule 1.11(b)'s term "a public officer or employee." It would be helpful to have some guidance.	

VIRGINIA RULE 1.11(a)(3)	
Note # 1	**Code # 3**
Virginia Rule 1.11(a)(3) states that "[a] lawyer who holds public office shall not . . . accept 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" (emphasis added). This "obvious" standard contrasts with several other Virginia Rules' "reasonably should know" standard. Such a "reasonably should know" standard might be easier to define and apply than the undefined "obvious" standard.	

VIRGINIA RULE 1.11(b)	
Note # 1	**Code # 3**
Virginia Rule 1.11(b)'s first sentence states that in certain circumstances "a lawyer shall not represent a private client" (emphasis added). It is unclear whether the term "private client" means: (1) a client drawn from the private sector, rather than a governmental client; or (2) a private sector or governmental client represented by a lawyer who is in private practice rather than employed by the government. It would be helpful to have an explanation.	

VIRGINIA RULE 1.11(b)	
Note # 2	**Code # 3**
Virginia Rule 1.11(b) contains the phrase "represent a private client in connection with a matter" (emphasis added). As the ABA Model Rules General Notes discuss, the ABA Model Rules contain a variety of terms to describe a lawyer's representation of a client. The same is true of the Virginia Rules. For instance, Virginia Rule 1.7(a) contains the phrase "represent a client." Virginia Rule 1.9(a) understandably contains the phrase "represented a client in a matter." Virginia Rule 1.11(b)'s phrase "represent a client in connection with a matter" presumably describes a different relationship. Otherwise, it would seem that those Virginia Rules would contain the same phrase. **ABA**	

VIRGINIA RULE 1.11(b)	
Note # 3	**Code # 4**
Virginia Rule 1.11(b)'s first sentence applies to "a lawyer (who) has participated personally and substantially as a public officer or employee" (emphasis added). It is easy to identify who is a government employee, but the term "public officer" is not defined. On its face, Virginia Rule 1.11(b) does not apply only to lawyers who have "served" in a representational role. For example, on its face Virginia Rule 1.11 applies to a lawyer who has served in a non-representational role as head of an agency or even as a mail-delivery person, etc. It would be helpful if Virginia Rule 1.11(b) defined the term "public official." **ABA**	

VIRGINIA RULE 1.11(b)(1)	
Note # 1	**Code # 3**
Virginia Rule 1.11(b)(1) allows lawyers in a firm with which a former government lawyer is associated to represent a client that such a lawyer may not represent, as long as "the disqualified lawyer is screened" as specified in that Virginia Rule. On its face, Virginia Rule 1.11(b)(1) does not 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 (emphasis added). 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. It is surprising (and perhaps inadvertent) that Virginia Rule 1.11(b)(1) does not contain a requirement of "timely" screening.	

VIRGINIA RULE 1.11(c)	
Note # 1	**Code # 3**
Virginia Rule 1.11(c)'s first sentence prohibits lawyers from representing clients in certain specified situations in which information the lawyer learned (while in the government) about a private person "could be used to the material disadvantage of that person" (emphasis added). As the ABA Model Rules General Notes discuss, the ABA Model Rules contain a variety of phrases to describe presumably different types of adversity: adverse to a person; directly adverse to a person; adverse to the interests of a person; "materially adverse" to a person, etc. The Virginia Rules contain the same variations. Virginia Rule 1.11(c)'s term "material disadvantage of that person" is one of these variations. It is unclear if the presumably deliberately articulated variations intend to define different standards. **ABA**	

VIRGINIA RULE 1.11(d)(2)	
Note # 1	**Code # 2**
Virginia Rule 1.11(d)(2) prohibits a lawyer "serving as a public officer or employee" from negotiating for "private employment with any person who is involved as a party or as an attorney for a party" in specified situations (emphasis added). The word "involved" is not defined. Eighteen words later, Virginia Rule 1.11(d)(2) contains the undefined word "participating" to describe the government-employed lawyer's role in a matter (emphasis added). Presumably the deliberately chosen word "involved" to describe private sector lawyers' and parties' role differs from the word "participating" used later in the same sentence. But neither Virginia Rule 1.11 nor any of its Comments provides any guidance. **ABA**	

VIRGINIA RULE 1.11(d)(2)	
Note # 2	**Code # 3**
Virginia Rule 1.11(d)(2) allows "a lawyer serving as a law clerk to a judge, other adjudicative officer, mediator or arbitrator" to "negotiate for private employment" under certain conditions. Although it is not clear, that description presumably denotes law clerks who are serving in one of four capacities: law clerk to a judge; law clerk to an "adjudicative officer" who is not a judge; law clerk to a "mediator"; or law clerk to an "arbitrator." The alternative reading of that phrase would apply the exception to adjudicative officers, mediators and arbitrators themselves, rather than to their clerks. That would not be consistent with the presumed principle – making it easier for law clerks to obtain employment after their clerkships. But it would be helpful if Virginia Rule 1.11 provided some guidance.	

VIRGINIA RULE 1.11(d)(2)	
Note # 3	**Code # 1**
Virginia Rule 1.11(d)(2) allows "a lawyer serving as a law clerk to a judge, other adjudicative officer, mediator or arbitrator [to]" negotiate for private employment as permitted by [Virginia] Rule 1.12(b) and subject to the conditions stated in [Virginia] Rule 1.12(b)" (emphasis added). This doubly-emphasized reference to Virginia Rule 1.12(b) is somewhat ironic. On its face, Virginia Rule 1.12(b) does not permit mediators' law clerks to negotiate for private employment. So one of the four types of law clerks specifically identified in Virginia Rule 1.11(d)(2) are not included in the Virginia Rule provision twice referred to as providing guidance. **ABA**	

VIRGINIA RULE 1.11(e)	
Note # 1	**Code # 3**
Virginia Rule 1.11(e) states that Virginia Rule 1.11(d) "does not disqualify other lawyers in the disqualified lawyer's agency" (emphasis added). It is unclear what the word "agency" means. Virginia Rule 1.13 cmt. [9] contains the term "agency," but also the terms "bureau," "department" and the "government as a whole."	

VIRGINIA RULE 1.11(e)	
Note # 2	**Code # 2**
Virginia Rule 1.11(e) states that Virginia Rule 1.11(d) "does not disqualify other lawyers in the disqualified lawyer's agency." It is somewhat surprising that the "agency" (however that term is defined) does not have to screen the individually disqualified lawyer.	

VIRGINIA RULE 1.11 cmt. [1]	
Note # 1	**Code # 2**
Virginia Rule 1.11 cmt. [1]'s second sentence states that "[a] lawyer who is 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" (emphasis added). As the ABA Model Rules General Notes discuss, some ABA Model Rule Comments contain the word "should" when the word "must" would be more appropriate, if not required. The word "must" would be more appropriate here, if not required.	

VIRGINIA RULE 1.11 cmt. [1]	
Note # 2	**Code # 3**
Virginia Rule 1.11 cmt. [1]'s second sentence states that "[a] lawyer who is 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" (emphasis added). It might be preferable to use the plural or otherwise avoid using the word "his" in this sentence.	

VIRGINIA RULE 1.11 cmt. [2]	
Note # 1	**Code # 4**
Virginia Rule 1.11 cmt. [2]'s first sentence refers to lawyers who are "employed or specially retained for the government" (emphasis added). Thus, a "specially retained" lawyer is not "employed" by the government. This status seems to contrast with Virginia Rule 1.11's title: "Special Conflicts Of Interest For Former And Current Government Officers And Employees."	

VIRGINIA RULE 1.11 cmt. [4]	
Note # 1	**Code # 4**
Virginia Rule 1.11 cmt. [4]'s first sentence refers to "power or discretion vested in public authority" (emphasis added). It is unclear what the term "public authority" means. ABA Model Rule 1.11 cmt. [4]'s second sentence contains the word "agency," which might be preferable.	

VIRGINIA RULE 1.11 cmt. [5]	
Note # 1	**Code # 2**
Virginia Rule 1.11 cmt. [5] states that "[w]hen the client is an agency of one government the agency should be treated as a private client for purposes of this [Virginia Rule 1.11]" in certain circumstances. It is unclear what it means for a lawyer who represents the government to treat the government as if it were a "private client." For instance, that term might refer to a non-governmental client, or it might refer to a governmental or a non-governmental client that a lawyer represents while in private practice. ABA Model Rule 1.11 cmt. [5]'s first sentence uses the term "another client," which would be more clear.	

VIRGINIA RULE 1.11 cmt. [5]	
Note # 2	**Code # 3**
Virginia Rule 1.11 cmt. [5] refers to a city as "an agency of . . . government." It seems incorrect to refer to a "city" as an "agency" of government.	

VIRGINIA RULE 1.11 cmt. [5]	
Note # 3	**Code # 3**
Virginia Rule 1.11 cmt. [5] describes a scenario "when a lawyer represents a city and subsequently is employed by a federal agency" (emphasis added). It is unclear whether that scenario involves a lawyer representing the federal agency, or also involves a lawyer who is employed by (but not representing) such a federal agency.	

VIRGINIA RULE 1.11 cmt. [9]	
Note # 1	**Code # 3**
Virginia Rule 1.11 cmt. [9] states that Virginia Rule 1.11(b) and (d) "do not prohibit a lawyer from jointly representing a private party and a government agency" under specified conditions. That freedom makes sense for a private sector lawyer (Virginia Rule 1.11(b)), who can represent private sector clients and also represent the government. But it is unclear whether a government-employed lawyer (Virginia Rule 1.11(d)) may jointly represent a private sector client. **ABA**	

VIRGINIA RULE 1.11 cmt. [9]	
Note # 2	**Code # 3**
Virginia Rule 1.11 cmt. [9] is not followed by an indication that Virginia did not adopt ABA Model Rule 1.11 cmt. [10].	

VIRGINIA RULE 1.12(a)	
Note # 1	**Code # 3**
Virginia Rule 1.12(a)'s first sentence prohibits lawyers who previously acted in another specified role (as a judge, etc.) from "representing anyone in connection with a matter" under certain circumstances. As the ABA Model Rules General Notes discuss, ABA Model Rules use several variations to describe a representation. The same is true of the Virginia Rules. For instance, Virginia Rule 1.7(a) contains the phrase "represent a client." Virginia Rule 1.9(a) understandably contains the phrase "represented a client in a matter." Virginia Rule 1.12(a)'s phrase "representing anyone in connection with the matter" mimics Virginia Rule 1.11(a)'s phrase "represent a client in connection with a matter." It is unclear whether these different formulations describe a different relationship between a lawyer, a client and a matter. **ABA**	

VIRGINIA RULE 1.12(a)	
Note # 1	**Code # 3**

Virginia Rule 1.12(a) addresses several lawyer roles that essentially disqualify that lawyer from a later representation. Among those roles is "arbitrator."

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) 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." Under Virginia Rule 1.12(c), 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. It would be helpful for the Virginia Rules to be more clear about these variations.

VIRGINIA RULE 1.12(a)	
Note # 2	**Code # 3**

Virginia Rule 1.12(a)'s list of specified lawyer roles that implicate later disqualification is also significant for what the list does not include.

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)). It would be helpful for the Virginia Rules to be more clear about these variations.

VIRGINIA RULE 1.12(a)	
Note # 3	**Code # 3**
Virginia Rule 1.12(a)'s first sentence prohibits a lawyer from representing anyone "in connection with a matter" in which the lawyer previously played a specified role as a judge, etc. – "unless all parties to the proceeding consent after consultation" (emphasis added). The term "proceeding" could either mean: (1) the "proceeding" in which the lawyer previously served as a judge, etc.; or (2) the "proceeding" in which the former judge, etc., wishes to represent a client. The former probably makes the most sense. Lawyers serve as judges, etc., in a "proceeding." Virginia Rule 1.12(a)'s prohibition on former judges, etc., representing "anyone in connection with a matter" seems to describe a broader range of representations – which are not limited to a "proceeding." But it would be helpful if Virginia Rule 1.12(a) was more clear. **ABA**	

VIRGINIA RULE 1.12(b)	
Note # 1	**Code # 3**
Virginia Rule 1.12(b)'s first sentence prohibits lawyers who are then serving in a specified role (judge, etc.) from "negotiat[ing] for employment" with a specified type of person (emphasis added). The word "negotiate" is not defined. Presumably it does not denote only the normal "give and take" negotiation for employment. Otherwise, a former judge, etc., could demand a certain salary from a person who is out of bounds for such employment "negotiation" – and accept such employment if the proposed employer accepts the demand without any back-and-forth negotiation about the amount. Similarly, otherwise an off-limits employer could hire a former judge, etc., by offering a "take it or leave it" employment offer, without a back-and-forth negotiation. So a broader term such as "seek" or "communicate about" might be better than the potentially ambiguous word "negotiate." **ABA**	

VIRGINIA RULE 1.12(b)	
Note # 2	**Code # 2**
Virginia Rule 1.12(b)'s first sentence prohibits lawyers who are then serving in specified roles (judge, etc.) from "negotiate[ing] for employment" with a specified type of person (emphasis added). The word "employment" is not defined, but seems somewhat inapt. Otherwise, one of the specified lawyers could negotiate with one of the off-limits persons for a consultant job. A better phrase might be "employment or retention" – a variation of Virginia Rule 5.3's broader and more generic phrase. **ABA**	

VIRGINIA RULE 1.12(b)	
Note # 3	**Code # 1**
Virginia Rule 1.12(b)'s first sentence prohibits lawyers who are then serving in specified roles (judge, etc.) from "negotiat[ing] for employment with any person who is involved as a party or as attorney for a party in a matter" in which the lawyer (judge, etc.) is "participating personally and substantially" in the specified role (judge, etc.). The phrase "involved as a party or as attorney for a party" is not defined. Perhaps it would be impossible to precisely define it, but it would have been helpful for Virginia Rule 1.12 to provide some guidance. For instance, it is difficult to imagine that a judge hearing a case would be free to negotiate for employment with a law firm whose named partner is litigating a case before the judge – by negotiating for that employment with another law firm partner who is not personally litigating the case. In other words, presumably both of those law firm partners (and all other lawyers and non-lawyers in the firm) are "involved" in the litigation before the judge. But Virginia Rule 1.12(b) does not explain that or provide any guidance. **ABA**	

VIRGINIA RULE 1.12(b)	
Note # 4	**Code # 1**
Virginia Rule 1.12(b)'s second sentence contains an exception for lawyers otherwise prohibited from seeking employment under Virginia Rule 1.12(b)'s terms. The exception covers "[a] lawyer serving as a law clerk to a judge, other adjudicative officer, or arbitrator." This list does not include mediators' law clerks. Notably, Virginia Rule 1.11(d)(2) assures that "a lawyer serving as a law clerk to a judge, other adjudicative officer, mediator or arbitrator 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)" (emphases added). But mediators' law clerks are not mentioned in Virginia Rule 1.12(b). **ABA**	

VIRGINIA RULE 1.12(c)	
Note # 1	**Code # 3**
Virginia Rule 1.12(c) imputes a specified individual lawyer's disqualification to every "lawyer in a firm with which [an individually disqualified lawyer] is associated" – subject to Virginia Rule 1.12(c)(1)'s and (2)'s exceptions (emphasis added). As the ABA Model Rules General Notes discuss, the ABA Model Rules do not define the word "associated." But it seems clear that some lawyers in the law firm are "associated" with their colleagues and some are not. The same is true of the Virginia Rules. This is one of the Virginia Rule provisions in which the imputed disqualification applies to all lawyers "in a firm" – even if those lawyers are not "associated" in or with that firm (by containing the phrase "no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter"). In other words, only a lawyer "associated" with her law firm colleagues can be the source of the imputed prohibition, but the prohibition extends to every one of her law firm colleagues – even those who are not "associated" in the firm. **ABA**	

VIRGINIA RULE 1.12 cmt. [1]	
Note # 1	**Code # 4**
Virginia Rule 1.12 cmt. [1]'s second sentence begins with the phrase "[t]he term 'personally and substantially' signifies that a judge who was a member of a multimember court" is not prohibited from certain post-judicial roles. The word "signifies" seems inapt. It would be more clear if Virginia Rule 1.12 cmt. [1] described how the term "personally and substantially" applied, rather than what it "signifies." **ABA**	

VIRGINIA RULE 1.12 cmt. [1]	
Note # 2	**Code # 3**
Virginia Rule 1.12 cmt. [1]'s fifth sentence refers to "Compliance Canons A(2), B(2) and C of the Virginia Code of Judicial Conduct." The Virginia Code of Judicial Conduct does not refer to them as "Compliance Canons." **ABA**	

VIRGINIA RULE 1.13(b)	
Note # 1	**Code # 2**
Virginia Rule 1.13(b)'s first sentence describes an organization's constituents who might engage in wrongdoing—including "other person associated with the organization" (emphasis added). As the ABA Model Rules General Notes discuss, the ABA Model Rules do not define "associated." Virginia Rule 1.13(b)'s use of the word "associated" presumably refers to non-lawyers having some role in an organization. But that role is not defined. **ABA**	

VIRGINIA RULE 1.13(d)	
Note # 1	**Code # 2**
Virginia Rule 1.13(d) requires lawyers dealing with an organizational client's listed constituents to "explain the identity of the client" (as being the organization, not the constituent) under certain circumstances. But only requiring such a lawyer to "explain the identity of the client" does not seem to go far enough in those circumstances. It might make more sense for Virginia Rule 1.13(d) to require an explanation about the implications of the lawyer's representation of the client (the organization) that the lawyer represents. This issue is discussed further below (in connection with Virginia Rule 1.13 cmt. [10]). **ABA**	

VIRGINIA RULE 1.13 cmt. [9]	
Note # 1	**Code # 3**
Virginia Rule 1.13 cmt. [9]'s seventh and eighth sentences list undefined terms describing government entities: "specific agency;" "a branch of government;" "a bureau;" "the department of which the bureau is a part." It would be helpful if Virginia Rule 1.13 provided guidance about the meaning of those terms. **ABA**	

VIRGINIA RULE 1.13 cmt. [9]	
Note # 2	**Code # 3**
Virginia Rule 1.13 cmt. [9] concludes with a reference: “See Scope.” It would help if the reference identified the pertinent Virginia Scope paragraph. **ABA**	

VIRGINIA RULE 1.13 cmt. [10]	
Note # 1	**Code # 1**
Virginia Rule 1.13 cmt. [10]'s first sentence states that "the lawyer should advise any constituent" that the lawyer "cannot represent such constituent" when adversity develops between the organizational client and that constituent (emphasis added). This contrasts with black letter Virginia Rule 1.13(d)'s requirement that such a lawyer "shall explain the identity of the client" in that circumstance (emphasis added). As the ABA Model Rules General Notes discuss, some ABA Model Rule Comments contain the word "should" when the word "must" would be appropriate, or even required. Some Virginia Rules Comments do, too. In most of those situations, it is clear from the context that the word "must" is required. In Virginia Rule 1.13 cmt. [10], the word "must" is explicitly required by black letter Virginia Rule 1.13(d) itself—not just from the overall context. **ABA**	

VIRGINIA RULE 1.13 cmt. [10]	
Note # 2	**Code # 2**

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 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. **ABA**

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. [11]	
Note # 1	**Code # 2**
Virginia Rule 1.13 cmt. [11] begins with the phrase "[whether] such a warning should be given" is a fact-intensive issue (emphasis added). The term "such a warning" is unclear, because the preceding Virginia Rule 1.13 cmt. [10] contains four warnings, two of which are repetitive. So it is unclear what the singular phrase "such a warning" refers to. **ABA**	

VIRGINIA RULE 1.14	
Note # 1	**Code # 4**
Virginia Rule 1.14's title ("Client With Impairment") is now presumably somewhat politically incorrect. Virginia might want to consider changing the title to the more politically correct ABA Model Rule title: "Client With Diminished Capacity."	

VIRGINIA RULE 1.14 cmt. [2]	
Note # 1	**Code # 1**
Virginia Rule 1.14 cmt. [2]'s third sentence explains that when dealing with "a client [who] suffers a disability," lawyers "should as far as possible accord the represented person the status of client" (emphasis added). This suggestion contrasts with black letter Virginia Rule 1.14(a), which requires that lawyers dealing with such a client "shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client" (emphasis added). **ABA**	

VIRGINIA RULE 1.14 cmt. [2]	
Note # 2	**Code # 2**
Virginia Rule 1.14 cmt. [2] addresses lawyers' representation of a client who "suffers a disability." Virginia Rule 1.14 cmt. [2]'s third sentence indicates that "[e]ven if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client" (emphasis added). That person is a client, so describing the lawyer's duty that way seems odd. Virginia Rule 1.14 cmt. [2] would be more helpful if it focused on the lawyer's required actions, not stating the common sense and obvious notion that a "client" should be accorded "the status of client." **ABA**	

VIRGINIA RULE 1.14 cmt. [3]	
Note # 1	**Code # 4**
Virginia Rule 1.14 cmt. [3] indicates that "ABA Model Rule Comments not adopted" (emphasis added). The word "Comment" should be in the singular rather than the plural.	

VIRGINIA RULE 1.14 cmt. [4]	
Note # 1	**Code # 4**
Virginia Rule 1.14 cmt. [4]'s third sentence contains the term "disabled client." It may be more appropriate to use the term "client with a diminished capacity."	

VIRGINIA RULE 1.14 cmt. [8]	
Note # 1	**Code # 4**
Virginia Rule 1.14 cmt. [8]'s first sentence contains the word "Rules," with a capital "R." In that setting, it might be more appropriate to use the word "rules" without capitalization.	

VIRGINIA RULE 1.14 cmt. [8]	
Note # 2	**Code # 3**
Virginia Rule 1.14 cmt. [8] is not followed by reference to Virginia's decision not to adopt ABA Model Rule 1.14 cmt. [9] – [10].	

VIRGINIA RULE 1.15(a)(1)	
Note # 1	**Code # 4**
Virginia Rule 1.15(a)(1) contains the term “third party.” As in other Virginia Rule contexts, the term “third person” would be more appropriate.	

VIRGINIA RULE 1.15(a)(1)	
Note # 2	**Code # 2**
Virginia Rule 1.15(a)(1) suggests that lawyers "should" place "as soon as practicable" "all other property held on behalf of a client" in "a safe deposit box or other place of safekeeping" (emphasis added). Virginia Rule 1.15(a)(1)'s word "should" seems inappropriately discretionary. One would think that lawyers either "must" or at least "ordinarily should" place such property in some "place of safekeeping" "as soon as practicable." Interestingly, the Virginia Supreme Court recently approved three revisions to Virginia Rule 1.15 [cmt. 1]'s description of lawyers' treatment of their clients' or third parties' property. In three separate sentences, the revisions replaced the discretionary word "should" with the mandatory word "must." Yet the Virginia Supreme Court did not make a similar revision in black letter Virginia Rule 1.15(a)(1). It is worth noting that the Virginia Rules' first Scope paragraph explains that "[c]omments do not add obligations to the [Virginia] Rules but provide guidance for practicing in compliance with the [Virginia] Rules."	

VIRGINIA RULE 1.15(a)(1)	
Note # 3	**Code # 3**
Virginia Rule 1.15(a)(1) does not directly address lawyers holding "property" "on behalf of…a third party" or "as a fiduciary." Virginia Rule 1.15(a)(1) only addresses "other property held on behalf of a client" (emphasis added). Despite this gap, presumably, Virginia Rule 1.15(a)(1) would require lawyers to similarly "safeguard property" held on behalf of a third person or "as a fiduciary."	

VIRGINIA RULE 1.15(a)(2)	
Note # 1	**Code # 1**
Virginia Rule 1.15(a)(2) requires lawyers located in Virginia to maintain trust accounts in a Virginia State Bar - approved financial institution – "unless otherwise expressly directed in writing by the client for whom the funds are being held" (emphasis added). It is unclear whether lawyers may similarly take direction from a "third party" whose funds a lawyer receives under Virginia Rule 1.15(a)(1). Some guidance would be appropriate, because Virginia Rule 1.15(a)(1) explicitly describes such a scenario.	

VIRGINIA RULE 1.15(b)(1)	
Note # 1	**Code # 1**
Virginia Rule 1.15(b)(1) requires that [a] lawyer shall…promptly notify a client of the receipt of the client's funds, securities, or other properties" (emphasis added). Inexplicably, Virginia Rule 1.15(b)(1) does not similarly require similar notification to "a third party" whose funds or other property the lawyer receives under Virginia Rule 1.15(a)(1).	

VIRGINIA RULE 1.15(b)(1)	
Note # 2	**Code # 3**
Virginia Rule 1.15(b)(1) addresses the client's funds, <u>securities</u>, or other properties" (emphasis added). Presumably the word "securities" is a subset of "other properties." But it might be helpful if securities were specifically mentioned in Virginia Rule 1.15(a)(1).	

VIRGINIA RULE 1.15(b)(1)	
Note # 3	**Code # 4**
Virginia Rule 1.15(b)(1) contains the word “properties” (plural). The plural “properties” also appears in Virginia Rule 1.15(b)(2) and (3). This contrasts with Virginia Rule 1.15(a)(1)’s word “property” (singular).	

VIRGINIA RULE 1.15(b)(1)	
Note # 4	**Code # 2**
Virginia Rule 1.15(b)(1) addresses clients' funds, securities, or other properties. Those terms do not on their face include assets in which a client holds an interest, but not sole ownership. It is easy to imagine the client having less than entire ownership of such an asset. For instance, ABA Model Rule 1.15(e) describes "property in which two or more persons (one of whom may be the lawyer) claim interests."	

VIRGINIA MODEL RULE 1.15(b)(3)	
Note # 1	**Code # 2**
Virginia Rule 1.15(b)(3) states that "[a] lawyer shall…maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accountings to the client regarding them" (emphasis added). This requirement only covers one of the three scenarios described in Virginia Rule 1.15(a)(1). It does not cover funds a lawyer receives "on behalf of…a third party, or held by a lawyer as a fiduciary."	

VIRGINIA RULE 1.15(b)(4)	
Note # 1	**Code # 4**
Virginia Rule 1.15(b)(4) requires lawyers to "promptly pay or deliver to the client or another as requested by such person" certain specified assets. The word "another" seems inapt. The term "third person" might be more appropriate.	

VIRGINIA MODEL RULE 1.15(b)(5)	
Note # 1	**Code # 3**
Virginia Rule 1.15(b)(5) states that "[a] lawyer shall…not disburse funds or use property of a client or of a third party" except under specified conditions. The phrase "use property" seems odd. It is difficult to imagine a lawyer "using" property 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. Some guidance would be helpful.	

VIRGINIA MODEL RULE 1.15(b)(5)	
Note # 2	**Code # 3**
Virginia Rule 1.15(b)(5) indicates that "[a] lawyer shall not . . . disburse funds or use property of a client or of a third party with a valid lien or assignment without their consent or convert funds or property of a client or third party, except as directed by a tribunal." It is unclear whether there are two separate prohibitions: (1) on lawyers' disbursement or use of lien or assignment – holding third parties with the exception of such disbursements or use with their consent; and (2) on lawyers' conversion of such funds of property – with the exception of tribunal direction. The sentence would seem to indicate such separate actions have separate exceptions, but that is not clear. The sentence is also confusing because the prohibition on lawyers converting "funds or property of a client or a third party" does not contain the additional phrase "with a valid lien or assignment" – so it is unclear whether the prohibition on such conversion applies generally to all client or third party funds or property (which would make sense generally, but would seem out of place in this more specific provision), or whether it applies only to third parties "with a valid lien or assignment." Logically it would probably make more sense to apply all three of the prohibited actions (disbursement, use, or conversion) to all clients and all third parties "with a valid lien or assignment." More guidance would be helpful.	

VIRGINIA RULE 1.15(b)(5)	
Note # 3	**Code # 2**
Virginia Rule 1.15(b)(5) states that "[a] lawyer shall…not convert funds or property of a client or third party, except as directed by a tribunal" (emphasis added). The reference to tribunal actions 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 cmt. [2]	
Note # 1	**Code # 2**
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).	

VIRGINIA RULE 1.15 cmt. [2]	
Note # 2	**Code # 4**
Virginia Rule 1.15 cmt. [2] notes that separating client funds from the lawyer's funds "avoids even the appearance of impropriety and therefore commingling should be avoided" (emphasis added). The phrase "appearance of impropriety" seems inappropriate. That phrase was abandoned many years ago as a viable ethical standard.	

VIRGINIA RULE 1.15 cmt. [2]	
Note # 3	**Code # 2**
Virginia Rule 1.15 cmt. [2] suggests that "comingling of [a client's funds and the lawyer's funds] should be avoided" (emphasis added). Although black letter Virginia Rule 1.15(a)(3) allows some comingling of such funds, a phrase such as "ordinarily should be avoided" might be more appropriate than "should be avoided."	

VIRGINIA RULE 1.15 cmt. [2a]	
Note # 1	**Code # 2**
Virginia Rule 1.15 cmt. [2a] explains that in assessing lawyers' conduct under Virginia Rule 1.15(b)(5), "consent can then be inferred from the engagement agreement or any consequential agreement between the lawyer and the client regarding the disbursement of fees" (emphasis added). It is odd to say that consent can be "inferred" from the engagement agreement. One would think that the engagement agreement would include or not include such a consent – so it would not be necessary to "infer" consent.	

VIRGINIA RULE 1.15 cmt. [2a]	
Note # 2	**Code # 4**
Virginia Rule 1.15 cmt. [2a] explains that in assessing lawyers' conduct under Virginia Rule 1.15(b)(5), "consent can be inferred from . . . any consequential agreement between the lawyer and the client regarding the disbursement of fees" (emphasis added). Using the word "consequential" to describe an agreement seems inapt. That word normally means significant or important. Using a word like "later" might be more appropriate.	

VIRGINIA RULE 1.15 cmt. [2a]	
Note # 3	**Code # 3**
Virginia Rule 1.15 cmt. [2a] describes examples of a "consequential agreement between the lawyer and the client regarding a disbursement of fees:" "when earned fees are routinely withdrawn from the lawyer's trust account upon an accounting to the client, when costs and expenses of litigation are routinely withdrawn, or when other fees/costs or expenses are agreed upon in advance" (emphases added). The reference to lawyers "routinely withdraw[ing]" from the lawyers' trust accounts 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. Maintaining those amounts in the trust account 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 reimbursement after having advanced expenses).	

VIRGINIA RULE 1.15 cmt. [3]	
Note # 1	**Code # 4**
Virginia Rule 1.15 cmt. [3]'s first sentence begins with the plural "[l]awyers," but then later uses the singular "the lawyer's." It would be more linguistically correct for the latter reference to also use the plural possessive. **ABA**	

VIRGINIA RULE 1.15 cmt. [3]	
Note # 2	**Code # 4**
Virginia Rule 1.15 cmt. [3]'s first sentence contains the term "third parties." The term "third persons" might be preferable.	

VIRGINIA RULE 1.15 cmt. [3]	
Note # 3	**Code # 4**
Virginia Rule 1.15 cmt. [3]'s third sentence ends with the reference to "the lawyer's contention" (emphasis added). That is an odd word in this context. A word such as a "claim" or "demand" would seem more appropriate. **ABA**	

VIRGINIA RULE 1.15 cmt. [3]	
Note # 4	**Code # 2**
Virginia Rule 1.15 cmt. [3]'s fourth sentence describes a scenario in which there is a dispute about "funds" in a trust account. In that situation, "[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). Virginia Rule 1.15 cmt. [3] only addresses a dispute about "funds." It would be helpful if Virginia Rule 1.15 cmt. [3] provided guidance about disputes over property "held in trust."	

VIRGINIA RULE 1.15 cmt. [3]	
Note # 5	**Code # 2**
Virginia Rule 1.15 cmt. [3]'s penultimate sentence suggests that "[t]he disputed portion of the funds should be kept in trust" and that the lawyer "should suggest means for a prompt resolution of the dispute, such as arbitration or mediation" (emphasis added). This contrasts with black letter rule 1.15(a)(3)(iii), which requires that "funds in which two or more persons (one of whom may be the lawyer) claim an interest shall be held in the trust account until the dispute is resolved and there is an accounting and severance of their interests" (emphasis added). It would be appropriate for Virginia Rule 1.15 cmt. [3]'s penultimate sentence to contain the word "must" rather than the word "should."	

VIRGINIA RULE 1.15 cmt. [3]	
Note # 6	**Code # 4**
Virginia Rule 1.15 cmt. [3]'s concluding sentence states that disputed funds "shall be promptly distributed" (emphasis added). Most Virginia Rule Comments contain the less ambiguous word "must" when describing mandatory conduct. **ABA**	

VIRGINIA RULE 1.15 cmt. [4]	
Note # 1	**Code # 2**
Virginia Rule 1.15 cmt. [4] seems to apply only to client funds or property held by the lawyer in trust. For instance, that provision's 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] provides no guidance about "funds received…by a lawyer…on behalf of…a third party," as described in Virginia Rule 1.15(a)(1).	

VIRGINIA RULE 1.15 cmt. [6]	
Note # 1	**Code # 3**
Virginia Rule 1.15 cmt. [6]'s concluding sentence warns that lawyers serving only as escrow agents much comply with "applicable law relating to fiduciaries even though" the lawyer is not acting in a representational role (emphasis added). The phrase "even though" might be inapt. It would seem that lawyers who are not acting in a representational role would be more likely to be governed by the applicable law relating to fiduciaries. **ABA**	

VIRGINIA RULE 1.15 cmt. [7]	
Note # 1	**Code # 4**
Virginia Rule 1.15 cmt. [7]'s first sentence contains the word "Rule" twice – both capitalized. This contrasts with Virginia Rule 1.15 cmt. [7]'s second sentence, which contains the word "rule" (not capitalized). It would be better for there to be a consistent capitalization.	

VIRGINIA RULE 1.15 cmt. [7]	
Note # 1	**Code # 4**
Virginia Rule 1.15 cmt. [7]'s first sentence addresses a lawyer's use of "electronic checking for his trust account" (emphasis added). The Virginia Rules and Comments generally strive to avoid using the word "his" – by generically describing lawyers, or using the plural.	

VIRGINIA RULE 1.16	
Note # 1	**Code # 2**
Virginia Rule 1.16 contains several different words describing clients' relationship with their lawyers' services: "involving the lawyer's services" (Virginia Rule 1.16(b)(1)); "used the lawyer's services" (Virginia Model Rule 1.16(b)(2)): "regarding the lawyer's services" (Virginia Rule 1.16(b)(4)); "associated with such [client] conduct" (Virginia Rule 1.16 cmt. [7]). Some of these differing terms raise questions. For instance, is a client's "course of action involving the lawyer's services" (Virginia Rule 1.16(b)(1)) the same conduct as that in which the client "has used the lawyer's services," (Virginia Rule 1.16(b)(2)). It would be helpful to provide further guidance about any intended differences among these formulations, if any. **ABA**	

VIRGINIA RULE 1.16(c)	
Note # 1	**Code # 4**
Virginia Rule 1.16(c)'s first sentence ends with the term "Rules of Court." The capitalization would seem unnecessary here.	

VIRGINIA RULE 1.16(e)	
Note # 1	**Code # 4**
Virginia Rule 1.16(e)'s first sentence identifies documents that "shall be returned within a reasonable time to the client or the client's new counsel upon request" under certain conditions (emphasis added). The specified items can be "returned" to the client, but cannot be "returned" to "the client's new counsel." Perhaps a word such as "provided" might be more appropriate.	

VIRGINIA RULE 1.16 cmt. [1]	
Note # 1	**Code # 1**
Virginia Rule 1.16 cmt. [1]'s first sentence indicates that "[a] lawyer <u>should</u> 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). The word "must" would be more appropriate than the word "should." **ABA**	

VIRGINIA RULE 1.16 cmt. [2]	
Note # 1	**Code # 4**
Virginia Rule 1.16 cmt. [2]'s first sentence states that lawyers "ordinarily must decline or withdraw from representation" in specified circumstances. The phrase "from representation" contrasts with the phrase "the representation" contained in Virginia Rule 1.16(a)1), and Virginia Rule 1.16(b)(5) (emphases added). **ABA**	

VIRGINIA RULE 1.16 cmt. [2]	
Note # 2	**Code # 3**
Virginia Rule 1.16 cmt. [2]'s first sentence warns that lawyers "ordinarily" must decline or withdraw from representing a client "if the client demands" that the lawyer engage in specific improper conduct. Although lawyers may exercise their discretion in that situation, one would think that the lawyer's refusal to comply with the client's "demands" would allow the lawyer to initiate or continue a representation. **ABA**	

VIRGINIA RULE 1.16 cmt. [2]	
Note # 3	**Code # 4**
Virginia Rule 1.16 cmt. [2]'s first sentence describes a type of client demand that "ordinarily must" trigger a lawyer's refusal to represent a client or withdraw from a representation: "conduct that is illegal or violates . . . other law" (emphases added). The word "illegal" and the phrase "violates … other law" would seem to be synonymous. **ABA**	

VIRGINIA RULE 1.16 cmt. [2]	
Note # 4	**Code # 4**
Virginia Rule 1.16 cmt. [2]'s concluding sentence describes a scenario in which a client hopes that "a lawyer will not be constrained by a professional obligation" (emphasis added). The plural "professional obligations" might be more appropriate here. **ABA**	

VIRGINIA RULE 1.16 cmt. [2]	
Note # 5	**Code # 4**
Virginia Rule 1.16 cmt. [2]'s concluding sentence contains the phrase "professional obligation." That generic term presumably denotes lawyers' obligation to comply with "the Rules of Professional Conduct" – the term used in the preceding sentence. But the linguistic variation hints at a difference, which might cause confusion. It might be more appropriate for the concluding sentence to also refer to the "Rules of Professional Conduct." **ABA**	

VIRGINIA RULE 1.16 cmt. [3]	
Note # 1	**Code # 3**
Virginia Rule 1.16 cmt. [3]'s first sentence describes a scenario in which a tribunal has "appointed" a lawyer to represent a client. But Virginia Rule 1.16 cmt. [3]'s other sentences seem to describe lawyers' obligations whether or not they were appointed to represent a client. So the introductory sentence might erroneously lead lawyers to think that the obligations only apply to appointed counsel. **ABA**	

VIRGINIA RULE 1.16 cmt. [3]	
Note # 2	**Code # 3**
Virginia Rule 1.16 cmt. [3]'s second sentence describes "the client's demand that the lawyer engage in unprofessional conduct" (emphasis added). It is unclear whether the term "unprofessional conduct" is the same conduct that "violates the Rules of Professional Conduct" (contained in Virginia Rule 1.16 cmt. [2]). If those phrases are intended to be synonymous, it would be helpful to use the same phrase in both places. And a reference to the "Rules of Professional Conduct" would provide clearer guidance than the more generic phrase "unprofessional conduct." **ABA**	

VIRGINIA RULE 1.16 cmt. [3]	
Note # 3	**Code # 4**
Virginia Rule 1.16 cmt. [3]'s third sentence states that "[t]he court may wish an explanation for the withdrawal" of the lawyer in certain circumstances (emphasis added). The word "wish" seems inapt. The parallel ABA Model Rule 1.16 cmt. [3]'s fourth sentence uses the more appropriate word "request."	

VIRGINIA RULE 1.16 cmt. [4]	
Note # 1	**Code # 4**
Virginia Rule 1.16 cmt. [4]'s first sentence describes clients' "right to discharge" lawyers (emphasis added). Virginia Rule 1.16 cmt. [4]'s second sentence advises that lawyers may wish to "prepare a written statement reciting the circumstances" – where they anticipate a "future dispute about the withdrawal" (emphasis added). Though discharged lawyers must withdraw, it would seem more appropriate for Virginia 1.16 cmt. [4]'s concluding sentence to use the phrase "future dispute about the discharge" (emphasis added). **ABA**	

VIRGINIA RULE 1.16 cmt. [6]	
Note # 1	**Code # 3**
Virginia Rule 1.16 cmt. [6]'s first sentence contains the term "mentally incompetent." A term such as "diminished capacity" might be more appropriate.	

VIRGINIA RULE 1.16 cmt. [7]	
Note # 1	**Code # 2**
Virginia Rule 1.16 cmt. [7]'s third sentence explains that a lawyer's withdrawal "is also justified if the client persists in a course of action that a lawyer reasonably believes is illegal or unjust" (emphasis added). The term "course of action" seems inapt. One would think that a lawyer's discretionary withdrawal would be justified if the client engaged in just a single action "that the lawyer reasonably believes is illegal or unjust" - not a course of action. **ABA**	

VIRGINIA RULE 1.16 cmt. [7]	
Note # 2	**Code # 3**
Virginia Rule 1.16 cmt. [7]'s fourth sentence explains that lawyers may withdraw "if the lawyer's services were misused in the past" (emphasis added). This reference presumably is to Virginia Rule 1.16(b)(2)'s description of client misconduct in the past: "the client has used the lawyer's services to perpetuate a crime or fraud" (emphases added). The word "misused" seems broader than black letter Virginia Rule 1.16(b)(2)'s more specific phrase "to perpetuate a crime or fraud." Presumably the particular black letter description of misuse trumps the more generic Virginia Rule 1.16 cmt. [7] undefined word "misused." **ABA**	

VIRGINIA RULE 1.16 cmt. [7]	
Note # 4	**Code # 3**
Virginia Rule 1.16 cmt. [7]'s fourth sentence explains that lawyers may withdraw if their services were "misused in the past <u>even if that would materially prejudice the client</u>" (emphasis added). The phrase "even if that would materially prejudice the client" is accurate, but superfluous. Black letter Virginia Rule 1.16(b)(1) – (6) all implicitly allow withdrawal even if the withdrawal would cause some "material adverse effect." **ABA**	

VIRGINIA RULE 1.16 cmt. [7]	
Note # 3	**Code # 3**
Virginia Rule 1.16 cmt. [7]'s fourth sentence explains that lawyers may withdraw "if the lawyer's services were misused in the past even if that would materially prejudice the client" (emphasis added). That is a linguistic mismatch with black letter Virginia Rule 1.16(b)'s introductory phrase: "material adverse effect on the interests of the client" (emphasis added). Using the same terms would avoid any possible confusion about whether a lawyer's action could be materially adverse to "the interest of the client" without being materially adverse to "the client" (or vice versa). **ABA**	

VIRGINIA RULE 1.16 cmt. [8]	
Note # 1	**Code # 3**
Virginia Rule 1.16 cmt. [8] explains that a lawyer may withdraw if a client "refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation" (emphasis added). The term "court costs" seems inappropriately narrow. Presumably a lawyer would be permitted to withdraw if a client refuses to abide by the terms of an agreement regarding any expenses, not just "court costs."	

VIRGINIA RULE 1.17	
Note # 1	**Code # 2**

Virginia Rule 1.17 contains a confusing list of undefined terms. Those terms denote 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].

Second, Virginia Rule 1.17 uses 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].

Third, Virginia Rule 1.17 uses 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].

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 uses 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" in Virginia 1.7(c)(3), Virginia 1.17(c)(5), Virginia Rule 1.7(d) and in Virginia Rule cmts.: [5], [6], [12]. Virginia Rule 1.7 uses the plural term "matters" in Virginia Rule 1.17 cmts.: [2], [5], [6].

Fifth, Virginia Rule 1.17 uses 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]. Virginia Rule 1.17 uses the plural term "files" in Virginia Rule 1.17 cmt [8]. Virginia Rule 1.17 uses the plural term "files" in Virginia Rule 1.17 cmt. [8].

Virginia Rule 1.17's use of this array of undefined terms is more than linguistically unfortunate. The Virginia 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.

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.

VIRGINIA RULE 1.17(a)	
Note # 1	**Code # 4**
Virginia Rule 1.17 (a) contains the term "geographic area." This contrasts at least linguistically with Virginia Rule 1.17 cmt. [5]'s term "geographical area." Presumably those terms are intended to be synonymous. But there is already confusion about Virginia Rule 1.17's application to undefined and sometime illogical descriptions of areas, and this linguistic inconsistency potentially compounds the confusion. **ABA**	

VIRGINIA RULE 1.17(a)	
Note # 2	**Code # 3**
Virginia Rule 1.17(a) describes a lawyer "provid[ing] legal services to the poor" (emphasis added). The word "poor" seems unnecessarily derogatory. Several other Virginia Rules use more appropriate terms. For instance, Virginia Rule 6.1 cmt. [7] contains the phrase "individuals in need of such assistance" and individuals "otherwise not able to afford to compensate counsel."	

VIRGINIA RULE 1.17(a)	
Note # 3	**Code # 2**
Virginia Rule 1.17(a) states that once a lawyer has sold her practice, the lawyer may cease to engage in the private practice of law, except for several exceptions – one of which is "as in-house counsel to a business" (emphasis added). The word "business" seems unnecessarily narrow. Among other things, it would exclude from the exception a lawyer's services in-house lawyer at an educational institution, a labor union, etc.	

VIRGINIA RULE 1.17(c)(4)	
Note # 1	**Code # 4**
Virginia Rule 1.17(c)(4) describes the following information that a selling lawyer must include in a notice to specified clients: “the client’s right to retain other counsel and/or take possession of the file” (emphasis added). The word “or” by itself would seem more appropriate.	

VIRGINIA RULE 1.17(d)	
Note # 1	**Code # 2**
Virginia Rule 1.17(d) describes a scenario in which "a client involved in a pending matter cannot be given notice" (emphasis added). A limitation to a "pending" matter seems inappropriate. Clients often have dormant matters, which a lawyer presumably may be interested in selling because they might become active in the future.	

VIRGINIA RULE 1.17 cmt. [1]	
Note # 1	**Code # 4**
Virginia Rule 1.17 cmt. [1]'s first sentence haughtily states that "[t]he practice of law is a profession, not merely a business" (emphasis added). This arguably insulting statement is ironic, because Virginia Rule 1.17(a) explains that the general requirement that a lawyer selling a practice "ceases to engage in the private practice of law…except the lawyer may practice law…as in-house counsel to a business" (emphasis added). **ABA**	

VIRGINIA RULE 1.17 cmt. [2]	
Note # 1	**Code # 3**
Virginia Rule 1.17 cmt. [2]'s second sentence assures that clients' retention of other lawyers rather than acquiescence in the proposed purchasing lawyer's purchase of their matter "does not result in a violation" (emphasis added). It is unclear what the term "a violation" means. On its face, Virginia Rule 1.17 cmt. [2]'s first sentence only requires that selling lawyers take the required steps, even if their clients do not agree to retain the lawyers seeking to purchase their matters. **ABA**	

VIRGINIA RULE 1.17 cmt. [2]	
Note # 2	**Code # 3**
Virginia Rule 1.17 cmt. [2]'s second sentence assures that a lawyer's "[r]eturn to private practice as a result of an unanticipated change in circumstances [does not] result in a violation" (emphasis added). Presumably a lawyer who appropriately complies with Virginia Rule 1.17(a)'s obligation to "cease[ ] to engage in the private practice of law" could later change her mind and return to private practice. And that change of mind presumably could be deliberate, rather than triggered "as a result of an unanticipated change in circumstances." **ABA**	

VIRGINIA RULE 1.17 cmt. [3]	
Note # 1	**Code # 3**
Virginia Rule 1.17 cmt. [3] states that "[c]omment [3] to ABA Model Rule 1.17 substantially appears in paragraph (a) of this [Virginia] Rule." It is unclear why this Comment appears in the Virginia Rules. Several Virginia Rules indicate that Virginia did not adopt a similar ABA Model Rule Comment, but this type of explanatory reference seems unique and unnecessary.	

ABA MODEL RULE 1.17 cmt. [4]	
Note # 1	**Code # 4**
Virginia Rule 1.17 cmt. [4] states that Virginia Rule 1.17 "permits a sale of an entire practice attendant upon retirement from the private practice of law within the jurisdiction" (emphasis added). It might be clearer and less pretention to use a term like "occurring upon" rather than the seldom-used "attendant upon." **ABA**	

VIRGINIA RULE 1.17 cmt. [5]	
Note # 1	**Code # 1**
Virginia Rule 1.17 cmt. [5]'s second sentence contains a typo in the phrase "either as counselor co-counselor" should be "either as counsel or co-counsel or."	

VIRGINIA RULE 1.17 cmt. [5]	
Note # 2	**Code # 2**
Virginia Rule 1.17 cmt. [5]'s second sentence states that lawyers who sell a practice must "cease…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)." Virginia Rule 1.5(e) does not require that a lawyer assume "joint responsibility" for a matter "in connection with the division of a fee with another lawyer" (as required in ABA Model Rule 1.5(e)). It is unclear whether a lawyer who has ceased to practice may split a fee with another lawyer without assuming "joint responsibility" – which Virginia Rule 1.5(e) permits.	

VIRGINIA RULE 1.17 cmt. [5]	
Note # 3	**Code # 3**
Virginia Rule 1.17 cmt. [5]'s third sentence provides an example of "a lawyer with a substantial number of estate planning matters and a substantial number of probate administration cases" (emphases added). Presumably the same Virginia Rule 1.17 principles would apply if such a lawyer had just one of each kind of matter. In other words, Virginia Rule 1.17's application does not depend on the number of matters. **ABA**	

VIRGINIA RULE 1.17 cmt. [5]	
Note # 4	**Code # 3**
Virginia Rule 1.17 cmt. [5]'s concluding sentence describes a lawyer "who leaves a jurisdiction or geographical area" and who "continue[s] practice in the areas of practice that were not sold." That seems like a tiny subset of likely scenarios. **ABA**	

VIRGINIA RULE 1.17 cmt. [7]	
Note # 1	**Code # 2**
Virginia Rule 1.17 cmt. [7]'s first sentence explains that client consent is not required before lawyers disclose client confidences during "preliminary discussions concerning the possible association of any lawyer or mergers between firms." This statement seems inappropriately broad. Presumably client consent would be required if such preliminary discussions involved disclosure of protected client confidential information under Virginia Rule 1.6(a). Unlike ABA Model Rule 1.6(b)(7), Virginia Rule 1.6 does not contain an exception for such discussions with potential lateral hires or law firm merger partners.	

VIRGINIA RULE 1.17 cmt. [7]	
Note # 2	**Code # 2**
Virginia Rule 1.17 cmt. [7]'s second sentence describes "client-specific information relating to the representation and to the file" (emphasis added). That phrase seems to confirm that a "representation" differs from a "file" – although Virginia Rule 1.17 and its Comments confusingly use those terms interchangeably. **ABA**	

VIRGINIA RULE 1.17 cmt. [8]	
Note # 1	**Code # 3**
Virginia Rule 1.17 cmt. [8] addresses steps for matters involving clients who "cannot be given actual notice of the proposed purchase" (emphasis added). Both Virginia Rule 1.17 cmt. [8]'s first and second sentences use the word "purchase" in describing the event about which those clients cannot be given notice. To those clients, the key event is the "sale" of their matter – although obviously the "sale" of those clients' matters is a "purchase" from the buyer's perspective. But because Virginia Rule 1.17 cmt. [8] focuses on the clients whose matters will be "sold," the word "sale" would seem more appropriate than the word "purchase" in Virginia Rule 1.17 cmt. [8]'s first two sentences. **ABA**	

VIRGINIA RULE 1.17 cmt. [8]	
Note # 2	**Code # 4**
Virginia Rule 1.17 cmt. [8]'s third sentence contains the capitalized word "Court." Capitalization would seem inappropriate here.	

VIRGINIA RULE 1.17 cmt. [10]	
Note # 1	**Code # 2**
Virginia Rule 1.17 cmt. [10] begins by stating that "[t]he sale may not be financed by increases in fees charged the clients of the practice" (emphasis added). The word "purchase" would seem more appropriate here – the "purchase" presumably would be financed, not the "sale." **ABA**	

VIRGINIA RULE 1.17 cmt. [11]	
Note # 1	**Code # 4**
Virginia Rule 1.17 cmt. [11]'s second sentence requires lawyers selling all or part of their practice "to assume that this purchase is qualified to <u>assume the practice</u> and the purchaser's obligation to <u>undertake the representation</u> competently (emphases added). Presumably the phrase "assume the practice" and "undertake the representation" are intended to be synonymous. If so, it might be more appropriate to use the same term or write that sentence differently. **ABA**	

VIRGINIA RULE 1.17 cmt. [11]	
Note # 2	**Code # 3**
Virginia Rule 1.17 cmt. [11]'s concluding sentence requires lawyers selling all or part of their practice "to secure client consent after consultation for those conflicts which can be agreed to" (emphasis added). The phrase "conflicts which can be agreed to" seems awkward. Clients do not "agree to" a conflict – they "consent to" a representation despite a conflict. **ABA**	

VIRGINIA RULE 1.18(a)	
Note # 1	**Code # 4**
Virginia Rule 1.18(a) contains the word “discusses” in describing communications between a lawyer and a “prospective client.” ABA Model Rule 1.18(a) changed its word “discusses” to the word “consults” – which seems to more accurately describe the more common electronic form of communication. Virginia may want to make the same switch.	

VIRGINIA RULE 1.18(b)	
Note # 1	**Code # 4**
Virginia Rule 1.18(b) contains the word “discussions,” which parallels Virginia Rule 1.18(a)’s word “discusses.” It may be appropriate to change the word “discussions” to “consultations.”	

VIRGINIA RULE 1.18(c)	
Note # 1	**Code # 4**
Virginia Rule 1.18(c)'s first sentence prohibits lawyers from representing a client adverse to a "prospective client" "if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter," except under specified conditions (emphasis added). Presumably the terms "prospective client" and "that person" are intended to be synonymous. But Virginia Rule 1.18(c) might be more clear if it contained the same term to describe the same person. **ABA**	

VIRGINIA RULE 1.18(c)	
Note # 2	**Code # 2**
Virginia Rule 1.18(c)'s second sentence imputes to all lawyers in a firm an individual lawyer's Virginia Rule 1.18(c) disqualification – but only if "that lawyer is associated" with the firm. As the ABA Model Rules General Notes discuss, the ABA Model Rules' failure to define the key term "associated" could cause confusion. It is clear that under the ABA Model Rules some lawyers working in a firm are "associated" with their law firm colleagues, and some lawyers are not. An "associated" lawyer might be the source of a disqualification that might be imputed to others in her law firm. Sometimes that imputed disqualification extends to all lawyers in the firm, and sometimes only to lawyers "associated" in the firm. The Virginia Rules contain the same confusing terminology. Under Virginia Rule 1.18(c), only a lawyer "associated" with a firm might be the source of an imputed Virginia Rule 1.18(c) disqualification. If so, her individual disqualification is imputed to all of her law firm colleagues – even those that are not "associated" with her. Perhaps that is what Virginia Rule 1.18(c) intends, but that is not clear. **ABA**	

VIRGINIA RULE 1.18 cmt. [3]	
Note # 1	**Code # 4**
Virginia Rule 1.18 cmt. [3]'s concluding sentence explains that a lawyer who consults with but does later represent a "prospective client" must comply with a confidentiality duty that "exists regardless of how brief the initial conference may be" (emphasis added). The term "may be" seems inapt. The word "was" would seem more appropriate than the conditional and future-looking phrase "may be." **ABA**	

VIRGINIA RULE 1.18 cmt. [5]	
Note # 1	**Code # 4**
Virginia Rule 1.18 cmt. [5]'s first sentence contains the word "conversations" in describing a lawyer's communication with a prospective client. "Consultation" or "consultations" might be more appropriate.	

VIRGINIA RULE 1.18 cmt. [7]	
Note # 1	**Code # 1**
Virginia Rule 1.18 cmt. [7]'s concluding sentence explains that black letter 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." Black letter Virginia Rule 1.18(d)(2)(i) does not mention anything about a screened lawyer receiving compensation. So Virginia Rule 1.18 cmt. [7]'s concluding sentence's prohibition on lawyers "receiv[ing] compensation directly related to the matter in which the lawyer is disqualified" imposes a prohibition not found in black letter Virginia Rule 1.18. This is inconsistent with the Virginia Scope's first paragraph's concluding sentence, which explains that "[c]omments do not add obligations to the [Virginia] Rules but provide guidance for practicing in compliance with the [Virginia] Rules."	

VIRGINIA MODEL RULE 1.18 cmt. [7]	
Note # 2	**Code # 4**
Virginia Rule 1.18 cmt. [7]'s first sentence contains the term "the lawyer" (singular) in referring to a lawyer who obtains "significantly harmful" information from a "prospective client" (emphasis added). But Virginia Rule 1.18 cmt. [7]'s second sentence refers to "all disqualified lawyers" (plural) being screened under Virginia Rule 1.18(d)(2). Virginia Rule 1.18 cmt. [7]'s third sentence returns to the singular – explaining that Virginia Rule 1.18(d)(2)(i) does not prohibit "the screened lawyer" (singular) from receiving certain money. Virginia Rule 1.18 cmt. [7] would be more clear if it included a consistent approach. **ABA**	

VIRGINIA MODEL RULE 1.18 cmt. [9]	
Note # 1	**Code # 2**
Virginia Rule 1.18 cmt. [9]'s concluding sentence addresses "a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15" (emphasis added). Virginia Rule 1.15 does not contain the word "valuables" or the word "papers." It would make more sense to use black letter Virginia Rule 1.18 cmt. [1] first sentence's term "documents or other property" or Virginia Rule 1.15's term "property." That would avoid any confusion resulting from the inexplicably narrow and seldom - used words "valuables or papers." And it would avoid the question about what a lawyer should do if she has been entrusted with a prospective client's property that is not valuable. **ABA**	

VIRGINIA RULE 2.1 cmt. [3]	
Note # 1	**Code # 3**
Virginia Rule 2.1 cmt. [3]'s first sentence states that clients may "ask the lawyer for purely technical advice" (emphasis added). Virginia Rule 2.1 cmt. [3]'s concluding sentence states that "the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations" (emphasis added). It is unclear whether the phrase "purely technical advice" is intended to be synonymous with "strictly legal considerations." Some clarification would be helpful.	

VIRGINIA RULE 2.1 cmt. [4]	
Note # 1	**Code # 2**
Virginia Rule 2.1 cmt. [4]'s third sentence states that if "a competent lawyer" would recommend consultation with another professional, "the lawyer should make such a recommendation" (emphasis added). As the ABA Model Rules General Notes discuss, some ABA Model Rules Comments contain the word "should" where the word "must" would be appropriate, if not required. Some Virginia Rule Comments do too. Under Virginia Rule 1.1's competence requirement, it would seem that a lawyer "must" make such a recommendation if a competent lawyer would do so.	

VIRGINIA RULE 2.1 cmt. [4]	
Note # 2	**Code # 3**
Virginia Rule 2.1 cmt. [4]'s concluding sentence states that "a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts" (emphasis added). The word "often" seems like an overstatement. A word such as "sometimes" or "occasionally" may be more appropriate. **ABA**	

VIRGINIA RULE 2.3(b)(2)	
Note # 1	**Code # 4**
Virginia Rule 2.3(b)(2) explains that a lawyer "may undertake an evaluation of a matter affecting a client for the use of someone other than the client if . . . the client consents after consultation" (emphasis added). The word "consents" seems inapt. Presumably the client would direct the evaluation, not just "consent" to it.	

VIRGINIA RULE 2.3(c)	
Note # 1	**Code # 3**
Virginia Rule 2.3(c) states that "[e]xcept as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by [Virginia] Rule 1.6" (emphasis added). The word "required" seems inapt. It would not be "required" to make such disclosure – the client would direct the disclosure. The word "authorized" may be more appropriate than "required." ABA Model Rule 2.3(c) contains the word "authorized."	

VIRGINIA RULE 2.3 cmt. [1]	
Note # 1	**Code # 3**
Virginia Rule 2.3 cmt. [1] begins by explaining circumstances when "[a]n evaluation may be performed" (emphasis added). The word "performed" presumably is intended to be synonymous with black letter Virginia Rule 2.3(b)'s word "undertake," and Virginia Rule 2.3(b)(1)'s word "making." If so, it would be appropriate for Virginia Rule 2.3 and its Comments to use the same word for the same action. **ABA**	

VIRGINIA RULE 2.3 cmt. [1]	
Note # 2	**Code # 4**
Virginia Rule 2.3 cmt. [1]'s first sentence states 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" (emphasis added). The word "but" seems inapt. There is nothing inherently inconsistent with the client directing a lawyer to perform an evaluation for the primary purpose of "establishing information for the benefit of third parties."	

VIRGINIA RULE 2.3 cmt. [1a]	
Note # 1	**Code # 4**
Virginia Rule 2.3 cmt. [1a]'s second sentence states that a government lawyer making an evaluation "acts at the behest of the government as the client but for the purpose of establishing the limits of the agency's authorized activity" (emphasis added). The word "but" seems inapt. There is nothing inconsistent with a government lawyer engaged in such a process.	

VIRGINIA RULE 2.3 cmt. [2]	
Note # 1	**Code # 3**
Virginia Rule 2.3 cmt. [2]'s fourth sentence states that "[t]he question is whether the lawyer is retained by the person whose affairs are being examined." That seems inapt. The more appropriate question would seem to focus on who is the subject of the investigation – the client or a third person. **ABA**	

VIRGINIA RULE 2.3 cmt. [3]	
Note # 1	**Code # 3**
Virginia Rule 2.3 cmt. [3]'s third sentence contains the phrase "making the evaluation," while Virginia Rule 2.3 cmt. [3]'s fourth sentence contains the phrase "perform an evaluation." As explained above, if those two words were intended to be synonymous, it would have been preferable for Virginia Rule 2.3 cmt. [3] to use the same word. **ABA**	

VIRGINIA RULE 2.3 cmt. [3]	
Note # 1	**Code # 4**
Virginia Rule 2.3 cmt. [3]'s concluding sentence contains the word "findings." It is unclear what the word "findings" mean. Virginia Rule 2.3(a) contains the words "evaluator" and "reporting" – which implies that a lawyer conducts an evaluation and prepares a report. Virginia Rule 2.3(b) contains the word "evaluation." Virginia Rule 2.3(c) contains the term "report of an evaluation." Virginia Rule 2.3 cmt. [2]'s concluding sentence contains the word "results," referring to an "examination." Presumably all those terms are intended to be synonymous, but using the same words might make things more clear.	

VIRGINIA RULE 2.3 cmt. [4]	
Note # 1	**Code # 1**
Virginia Rule 2.3 cmt. [4]'s fifth sentence states that "[a]ny . . . limitations which are material to the evaluation should be described in the report" (emphasis added). The phrase "ordinarily should" or even the word "must" would seem more appropriate here. **ABA**	

VIRGINIA RULE 2.3 cmt. [4]	
Note # 2	**Code # 4**
Virginia Rule 2.3 cmt. [4] is followed by the notation that "ABA Model Rule Comments not adopted" (emphasis added) – referring to ABA Model Rule 2.3 cmt. [5]. Because the notation refers to only one ABA Model Rule Comment, this reference should contain the word "Comment" in the singular rather than the plural.	

VIRGINIA RULE 2.10	
Note # 1	**Code # 4**
Virginia Rule 2.10's title is "Third Party Neutral," without a hyphen between the word "Third" and the word "Party." ABA Model Rule 2.4 (which Virginia did not adopt) contains the term "Third-Party Neutral" – with a hyphen. The term "third-party" presumably deserves a hyphen if it is used as an adjective, as in Virginia Rule 2.10's title and elsewhere in black letter Virginia Rule 2.10 and Virginia Rule 2.10's Comments.	

VIRGINIA RULE 2.10(a)	
Note # 1	**Code # 4**
Virginia Rule 2.10(a) contains the phrase “dispute resolution proceeding.” Presumably there should be a dash between the word “dispute” and the word “resolution,” because that term is used as an adjective.	

VIRGINIA RULE 2.10(b)(1)	
Note # 1	**Code # 4**
Virginia Rule 2.10(b)(1) indicates that "[a] lawyer who serves as a third party neutral… 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 a client" (emphases added). Virginia Rule 2.10(b)(1) intends to explain how a lawyer should differentiate between those roles in the context of a lawyer's conduct as a third-party neutral. So it would be more clear if the second "the" was instead an "a" – to distinguish between what the lawyer is doing in acting as a third-party neutral and what another lawyer would do in a different, representational role.	

VIRGINIA RULE 2.10(d)(2)	
Note # 1	**Code # 4**
Virginia Rule 2.10(d)(2) contains the phrase "in light of the disclosure." Because Virginia Rule 2.10(d)(1) requires a "full disclosure of the prior or present representation," Virginia Rule 2.10(d)(2)'s phrase "in light of the disclosure" seems unnecessary.	

VIRGINIA RULE 2.10(d)(2)	
Note # 2	**Code # 4**
Virginia Rule 2.10(d)(2) contains the term “informed consent.” That is the ABA Model Rule formulation for consent, which contrasts with the standard Virginia Rule formulation “consent after consultation.” Presumably the terms are intended to be synonymous.	

VIRGINIA RULE 2.10(d)(3)	
Note # 1	**Code # 4**
Virginia Rule 2.10(d)(3) requires that a lawyer serving as a third-party neutral "reasonably believe[s] that a prior or present representation will not compromise or adversely affect the ability to act as a third party neutral" (emphasis added). The word "compromise" would seem to be synonymous with the term "adversely affect," so both of those terms presumably are not required.	

VIRGINIA RULE 2.10(e)	
Note # 1	**Code # 4**
Virginia Rule 2.10(e) states that "[a] lawyer who serves or who has served as a third party neutral may not serve as a lawyer on behalf of any party to the dispute" (emphasis added). The phrase "serve as a lawyer on behalf of any party to the dispute" seems inapt. It might be more appropriate to use the phrase such as "may not represent any party to the dispute" in specified situations.	

VIRGINIA RULE 2.10(e)	
Note # 2	**Code # 2**
Virginia Rule 2.10(e) prohibits a lawyer who has served as a third-party neutral from representing any party to the dispute "in any legal proceeding related to the subject of the dispute resolution proceeding" (emphasis added). The term "legal proceeding" seems inappropriately narrow. It would seem more appropriate for the prohibition to include representations other than those in any "legal proceeding." For instance, Virginia Rule 2.10(c) contains the more appropriate phrase: "in connection with the subject matter of the dispute resolution proceeding." Presumably that would include negotiations, transactions, etc.	

VIRGINIA RULE 2.10(h)	
Note # 1	**Code # 3**
Virginia Rule 2.10(h) states that Virginia Rule 2.10 "does not apply to joint representation, which is covered by [Virginia] Rule 1.7." That is obvious, because Virginia Rule 2.10(a) explicitly states the lawyer acting as a third-party neutral "does not represent any party."	

VIRGINIA RULE 2.11(e)	
Note # 1	**Code # 3**
Virginia Rule 2.11(e) describes lawyer-mediators' requirement "[p]rior to the mediation session" (emphasis added). It might be more clear if Virginia Rule 2.11(e)'s pre-mediation requirement discussion was included in chronological order – before Virginia Rule 2.11(c) and Virginia Rule 2.11(d).	

VIRGINIA RULE 2.11(e)(2)	
Note # 1	**Code # 4**
Virginia Rule 2.11(e)(2) contains the term “neutral evaluation.” Some Virginia Rule 2.11 provisions contain the word “neutral” in describing an evaluation, and some do not. Presumably all such evaluations are intended to be neutral.	

VIRGINIA RULE 2.11 cmt. [2]	
Note # 1	**Code # 4**
Virginia Rule 2.11 cmt. [2]'s first sentence states that excluding "an evaluative approach" in mediation "is difficult not only because practice varies widely but because no consensus exists as to what constitutes an evaluation." This seems like an oddly pessimistic view, because Virginia Rule 2.11 repeatedly uses the term "evaluation."	

VIRGINIA RULE 2.11 cmt. [2]	
Note # 2	**Code # 4**
Virginia Rule 2.11 cmt. [2]'s third sentence notes that "a question by a lawyer-mediator to a party that might be considered by some as 'reality testing' and facilitative, might be viewed by others as evaluative." Virginia Rule 2.11 cmt. [2]'s concluding sentence states that "[o]n the other hand, an evaluation by a facilitative mediator could help free the parties from the narrowing effects of the law and help empower them to resolve their dispute." This type of commentary seems too abstract to be useful in the real world.	

VIRGINIA RULE 2.11 cmt. [3]	
Note # 1	**Code # 3**
Virginia Rule 2.11 cmt. [3]'s concluding sentence describes a lawyer-mediator's conduct of a mediation as "similar to the lawyer-client consultation about the means to be used in pursuing a client's objectives in [Virginia] Rule 1.2." It seems inapt to compare a mediator's non-representational role to a lawyer's representational role. A lawyer acting in a representational role under Virginia Rule 1.2 must zealously pursue the client's chosen objectives.	

VIRGINIA RULE 2.11 cmt. [7]	
Note #	**Code #**
Virginia Rule 2.11 cmt. [7] mixes two entirely different communications lawyer-mediators may make during the mediation process: (1) legal information; and (2) evaluations. It might be more clear if these two very different topics were covered in two different Virginia Rule 2.11 Comments.	

VIRGINIA RULE 3.1 cmt. [2]	
Note # 1	**Code # 3**
Virginia Rule 3.1 cmt. [2]'s first sentence contains the word "action" twice – to mean two different things: "[t]he filing of an action or defense or similar action taken for a client . . ." (emphases added). The first "action" presumably is synonymous with "proceeding" contained in black letter ABA Model Rule 3.1's first sentence (and which itself is somewhat confusing). The second "action" presumably is a more generic description of some other litigation-related conduct. It might be more clear if the first "action" was replaced with the presumably synonymous term "proceeding" contained in black letter Virginia Rule 3.1. **ABA**	

VIRGINIA RULE 3.1 cmt. [2]	
Note # 2	**Code # 3**
Virginia Rule 3.1 cmt. [2] uses the word “action” seven times (to mean at least two different things). It might make sense to explain the different meanings.	

VIRGINIA RULE 3.1 cmt. [2]	
Note # 3	**Code # 2**
Virginia Rule 3.1 cmt. [2]'s first sentence explains that certain conduct is not "frivolous" if (among other things) "the lawyer expects to develop vital evidence only by discovery" (emphasis added). The word "vital" seems unnecessary, and presumably does not limit that principle only to scenarios involving "vital" evidence. The same presumably would be true even if the material evidence is not "vital." **ABA**	

VIRGINIA RULE 3.1 cmt. [2]	
Note # 4	**Code # 4**
Virginia Rule 3.1 cmt. [2]'s first sentence explains that certain conduct is not "frivolous" if (among other things) "the lawyer expects to develop vital evidence only by discovery" (emphasis added). The word "through" might be more appropriate than the word "by." **ABA**	

VIRGINIA RULE 3.1 cmt. [2]	
Note # 3	**Code # 3**
Virginia Rule 3.11 cmt. [2] third sentence states that an "action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person" (among other things) (emphasis added). It would seem that a client's "desire" would have no bearing on whether an action is "frivolous." Assessing whether an action is frivolous presumably depends on its merits, not on the client's motives in pursuing an action.	

VIRGINIA RULE 3.1 cmt. [2]	
Note # 4	**Code #**
Virginia Rule 3.11 cmt. [2]'s concluding sentence states that an "action is frivolous, however the client desires to the have the action taken primarily for the purpose of harassing or maliciously injuring a person" (among other things) (emphasis added). The "primarily for the purpose of harassing or maliciously injuring a person" standard contrasts with Virginia Rule 4.4(a), contains a different standard: "a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person" (emphasis added).	

VIRGINIA RULE 3.1 cmt. [2]	
Note # 5	**Code # 2**
Virginia Rule 3.1 cmt. [2]'s concluding sentence seems to be a mismatch with black letter Virginia Rule 3.1. Black letter Virginia Rule 3.1 seems to apply an objective "not frivolous" standard for lawyers advancing factual or legal positions. But Virginia Rule 3.1 also includes a more subjective "good faith argument" standard for legal assertions (but pointedly, not for factual assertions). Virginia Rule 3.1 cmt. [2]'s concluding sentence appears to apply the subjective "good faith argument" standard to both legal and factual assertions.	

VIRGINIA RULE 3.3(a)(1)	
Note # 1	**Code # 3**
Virginia Rule 3.3(a)(1) prohibits lawyers from "knowingly . . . mak[ing] a false statement of fact . . . to a tribunal." On its face, ABA Model Rule 3.3(a)(1) would prohibit lawyers from telling harmless socially-customary "white lies" such as responding favorably if a judge asks the lawyer whether the judge's secretary was polite, whether the lawyer likes the judge's new decorations in chambers, etc. **ABA**	

VIRGINIA RULE 3.3(a)(1)	
Note # 2	**Code # 3**
Significantly, Virginia Rule 3.3(a) does not on its face require a lawyer to correct a material statement of fact the lawyer made to the tribunal, which the lawyer later learns to have been false. Presumably this is a policy decision. But if so, it might be helpful to note and explain this approach in a Comment. Perhaps such a duty arises under Virginia Rule 3.3(a)(2) or Virginia Rule 4.1 (b).	

VIRGINIA RULE 3.3(a)(3)	
Note # 1	**Code # 3**
Virginia Rule 3.3(a)(3) states 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). It is unclear what the phrase "controlling legal authority" means. The Virginia formulation differs from ABA Model Rule 3.3(a)(2)'s phrase "legal authority in the controlling jurisdiction." For instance, it is unclear whether one judges' opinion is "controlling" in a case heard by another judge on the same multi-judge court. That would be "legal authority in the controlling jurisdiction," but perhaps not "controlling legal authority in the subject jurisdiction." Some guidance would be helpful.	

VIRGINIA RULE 3.3(b)	
Note # 1	**Code # 2**
Virginia Rule 3.3(b) states that "[a] lawyer may refuse to offer evidence that the lawyer reasonably believes is false." There is no exception in black letter Virginia Rule 3.3(b) for a lawyer representing a criminal defendant. But Virginia Rule 3.3 cmt. [9]'s third sentence explains that "[b]ecause of the special protections historically provided criminal defendants however, this [Virginia Rule 3.3] does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false" (emphasis added). Presumably such a prohibition on the lawyer's declining to offer such evidence does not trump black letter Virginia Rule 3.3(b). The Virginia Scope's first paragraph's last sentence states that "[c]omments do not add obligations to the [Virginia] Rules but provide guidance for practicing and compliance with the [Virginia] Rules." So changing black letter Rule 3.3(b) might be appropriate.	

VIRGINIA RULE 3.3 cmt. [2]	
Note # 1	**Code # 4**
Virginia Rule 3.3 cmt. [1]'s second sentence states that lawyers have "an obligation to present the client's case with persuasive force" (emphasis added). The word "persuasive" seems to focus more on style than content. This contrasts with Virginia Rule 3.3's focus on content. **ABA**	

VIRGINIA RULE 3.3 cmt. [3]	
Note # 1	**Code # 3**
Virginia Rule 3.3 cmt. [3]'s first sentence addresses an advocate's responsibility "for pleadings and other documents prepared for litigation" (emphasis added). Those presumably do not include pleadings, which are mentioned earlier in that sentence. But it is unclear what those "other documents" are. **ABA**	

VIRGINIA RULE 3.3 cmt. [3]	
Note # 2	**Code # 3**
Virginia Rule 3.3 cmt. [3]'s concluding substantive sentence reminds that "[t]he obligation prescribed in [Virginia] Rule 1.2(c) not to counsel a client to commit or assist the client in committing a fraud applies in litigation." Virginia Rule 3.3 cmt. [3] then contains the following: "[r]egarding compliance with [Virginia] Rule 1.2(c), see the Comment to that Rule" (emphasis added). It is unclear what specific Comment "the Comment" refers to. Virginia Rule 1.2 cmts. [9] - [10] address Virginia Rule 1.2(c). It would be helpful to know which Comment Virginia 3.3 cmt. [3] identifies as "the Comment." **ABA**	

VIRGINIA RULE 3.3 cmt. [3]	
Note # 3	**Code # 3**
Virginia Rule 3.3 cmt. [3] concludes with a vague reference to an unidentified Comment: "[s]ee also the Comment to [Virginia] Rule 8.4(b)" (emphasis added). Virginia Rule 8.4 cmt. [2] is the likely candidate. But a precise reference would be helpful. **ABA**	

VIRGINIA RULE 3.3 cmt. [3]	
Note # 4	**Code # 2**
Virginia Rule 3.3 cmt. [3] does not mention Virginia Rule 4.1(b) – which indicates that lawyers' failure to disclose a material fact might violate that Virginia Rule. Such a reference would have been appropriate to provide additional guidance about Virginia Rule 3.3 cmt. [3]'s fourth sentence: "[t]here are circumstances where failure to make a disclosure is equivalent of an affirmative misrepresentation." **ABA**	

VIRGINIA RULE 3.3 cmt. [4]	
Note # 1	**Code # 4**
Virginia Rule 3.3 cmt. [4]'s fourth sentence warns that a lawyer "must recognize the existence of pertinent legal authorities" (emphasis added). That seems like an odd requirement. Virginia Rule 3.3 focuses on what lawyers must do once they "recognize the existence of pertinent legal authorities." **ABA**	

VIRGINIA RULE 3.3 cmt. [5]	
Note # 1	**Code # 1**
Virginia Rule 3.3 cmt. [5] states that "[w]hen evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes" (emphasis added). Black letter Virginia Rule 3.3(a)(4) bluntly states that "[a] lawyer shall not knowingly… offer evidence that the lawyer knows to be false." The black letter unconditional provision presumably applies whether clients or non-clients intend to provide false evidence, so Virginia Rule 3.3 cmt. [5]'s phrase "by a person who is not the client" seems superfluous and might be confusing.	

VIRGINIA RULE 3.3 cmt. [5]	
Note # 2	**Code # 2**
Virginia Rule 3.3 cmt. [5] does not contain the ABA Model Rule 3.3 cmt. [5] concluding sentence's exception for lawyers offering knowingly false evidence: "[a] lawyer does not violate this [ABA Model Rule 3.3] if the lawyer offers the evidence for the purpose of establishing its falsity." This absence presumably is an intentional policy decision, but if so it deprives lawyers of a useful trial tactic of drawing out knowingly false evidence from an adversary in order to establish the evidence's falsity and damage the witness's credibility.	

VIRGINIA RULE 3.3 cmt. [6]	
Note # 1	**Code # 2**
Virginia Rule 3.3 cmt. [6]'s first sentence begins with the phrase "[w]hen false evidence is offered by the client" (emphasis added). The phrase "is offered by the client" seems to imply that the client has already offered the evidence. But Virginia Rule 3.3 cmt. [6] later focuses on lawyers' responsibility when their clients intend to provide false evidence, not after they have done so. So it might be more clear if Virginia Rule 3.3 cmt. [6]'s first sentence begins with the phrase "[w]hen a client intends to offer false evidence" (emphasis added).	

VIRGINIA RULE 3.3 cmt. [6]	
Note # 2	**Code # 4**
Virginia Rule 3.3 cmt. [6]'s second sentence contains the word "introduce" to describe a lawyer's introduction of false evidence – but also contains the different word "offered," presumably to describe the same thing. It would be more clear if the same word were used to describe the same conduct. **ABA**	

VIRGINIA RULE 3.3 cmt. [8]	
Note # 1	**Code # 4**
Virginia Rule 3.3 cmt. [8]'s first sentence contains the phrase "offering . . . evidence" (emphasis added). Virginia Rule 3.3 cmt. [8]'s second sentence contains the word "presentation" – referring to evidence (emphasis added). If the words "offering" and "presentation" are intended to be synonymous, it would have been more consistent to use the same word in both sentences. **ABA**	

VIRGINIA RULE 3.3 cmt. [8]	
Note # 2	**Code # 4**
Virginia Rule 3.3 cmt. [8]'s second sentence addresses presentation of evidence "to the trier of fact" (emphasis added). This contrasts with the more generic term "tribunal" contained in several black letter Virginia Rule 3.3 provisions. The word "tribunal" presumably would also be more appropriate in Virginia Rule 3.3 cmt. [8]. **ABA**	

VIRGINIA RULE 3.3 cmt. [9]	
Note # 1	**Code # 4**
Virginia Rule 3.3 cmt. [9]'s first sentence contains the words "evidence," "testimony," and "proof." The word "testimony" presumably is a subset of "evidence," but it is unclear whether the word "proof" is intended to be synonymous with the word "evidence." If so, it would be appropriate to use the same word to mean the same thing. **ABA**	

VIRGINIA RULE 3.3 cmt. [9]	
Note # 2	**Code # 4**
Virginia Rule 3.3 cmt. [9]'s third sentence describes a scenario "<u>where</u> the lawyer reasonably believes but does not know that the testimony will be false" (emphasis added). The word "when" might be more appropriate than the word "where." **ABA**	

VIRGINIA RULE 3.3 cmt. [10]	
Note # 1	**Code # 4**
Virginia Rule 3.3 cmt. [10] contains in several places the word “lawyer” and the word “advocate.” If those repeated references are intended to be synonymous, it would seem appropriate to use the same word to mean the same thing. **ABA**	

VIRGINIA RULE 3.3 cmt. [10]	
Note # 2	**Code # 4**
Virginia Rule 3.3 cmt. [10]'s third sentence contains the word "situation" (singular). But that phrase seems to refer to the previous two sentences, which describe two different situations. Virginia Rule 3.3 cmt. [10]'s fourth sentence contains with the word "situations" (plural). The plural presumably would be appropriate in the preceding sentence as well.	

VIRGINA RULE 3.3 cmt. [10]	
Note # 3	**Code # 2**
Virginia Rule 3.3 cmt. [10]'s third sentence addresses lawyers' obligation to "take reasonable remedial measures" in a scenario in which the lawyer "knows of the falsity of testimony elicited from the client during a deposition" (emphasis added). This is only a subset of black letter Virginia Rule 3.3(a)(4)'s reach. Under Virginia Rule 3.3(a)(4), lawyers presumably have the same duty if they have elicited false testimony from "a witness called by the lawyer" to be deposed.	

VIRGINIA RULE 3.3 cmt. [10]	
Note # 4	**Code # 4**
Virginia Rule 3.3 cmt. [10]'s fourth sentence contains the phrase "the false statements or evidence." The word "or" would seem to differentiate between "statements" and "evidence." But it would seem that "statements" are a subset of "evidence," so the term "other evidence" might be more appropriate there. **ABA**	

VIRGINIA RULE 3.3 cmt. [10]	
Note # 5	**Code # 2**
Virginia Rule 3.3 cmt. [10]'s sixth sentence describes lawyers' duties "[i]f withdrawal from the representation…will not undo the effect of the false evidence." It is difficult to imagine any scenario in which a lawyer's withdrawal would "undo the effect of the false evidence," and Virginia Rule 3.3 cmt. [10] does not provide any guidance on that issue. **ABA**	

VIRGINIA RULE 3.3 cmt. [11]	
Note # 1	**Code # 1**
Virginia Rule 3.3 cmt. [11] begins with the phrase “[e]xcept in the defense of a criminal accused” (emphasis added). That sentence is potentially misleading, because Virginia Rule 3.3 cmt. [11] applies in that setting and every other setting. In other words, black letter Virginia Rule 3.3(a)(4) and Virginia Rule 3.3 cmt. [11] do not contain an exception for lawyers “in the defense of a criminal accused.”	

VIRGINIA RULE 3.3 cmt. [13]	
Note # 2	**Code # 3**
Virginia Rule 3.3 cmt. [13]'s third sentence states 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" (emphasis added). It is unclear what the phrase "exercise control over the proof" means. An explanation would be helpful, especially given the high-stakes setting.	

VIRGINIA RULE 3.3 cmt. [14]	
Note # 1	**Code # 4**
Virginia Rule 3.3 cmt. [14]'s first sentence describes lawyers' "limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision" (emphasis added). That is an odd phrase. A phrase such as "presenting the client's position in a matter" might be more appropriate. **ABA**	

VIRGINIA RULE 3.4(a)	
Note # 1	**Code # 3**
Virginia Rule 3.4(a) prohibits lawyers from doing three things to "a document or other material having potential evidentiary value" "alter, destroy or conceal." That seems like an odd order, if the intent is to list the actions in order of increasingly egregious conduct. A document or other material that is "concealed" might be discovered in its original form. "Altering" such a document or other material is worse, because presumably it changes the document or other material. "Destroying" the document or other material is worse than the other two kinds of misconduct. ABA Model Rule 3.4 cmt. [2] contains a more appropriate order: "alter, conceal or destroy," although "conceal, alter, or destroy" might be somewhat better. **ABA**	

VIRGINIA RULE 3.4(e)	
Note # 1	**Code # 4**
Virginia Rule 3.4(e) prohibits lawyers from "fail[ing] to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party" (emphasis added). Linguistically, it might be preferable to use either the phrase "fail to make a reasonably diligent effort" or "fail to make reasonably diligent efforts" (emphases added). **ABA**	

VIRGINIA RULE 3.4(e)	
Note # 2	**Code # 3**
Virginia Rule 3.4(e) refers to "a <u>legally</u> proper discovery request by an opposing party" (emphasis added). It unclear what the word "legally" means here – it seems superfluous. **ABA**	

VIRGINIA RULE 3.4(e)	
Note # 3	**Code # 3**
Virginia Rule 3.4(d) refers to "a legally proper discovery request by an opposing party" (emphasis added). A third party might make a "discovery request," so the phrase "by an opposing party" would seem to improperly limit Virginia Rule 3.4(e)'s reach. **ABA**	

VIRGINIA RULE 3.4(g)	
Note # 1	**Code # 3**
Virginia Rule 3.4(g) states that "[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" (emphasis added). The word "intentionally" describes conduct that is different from "habitually." It seems odd to include the "habitually" language. One might think that the ethics rules should prohibit a lawyer from "intentionally" engaging in such a violation with such an impact – even once. And on its face, Virginia Rule 3.4(g) would prohibit a lawyer from unintentionally but "habitually" engaging in such a violation with such an impact.	

VIRGINIA RULE 3.4(g)	
Note # 2	**Code # 3**
Virginia Rule 3.4(g) states that "[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" (emphasis added). The word "established" seems unnecessary – all rules of procedure and evidence are "established."	

VIRGINIA RULE 3.4(g)	
Note # 3	**Code # 4**
Virginia Rule 3.4(g) states that "[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" (emphasis added). The word "where" has a geographic connotation that seems inappropriate. The word "when" might be more appropriate.	

VIRGINIA RULE 3.4(h)	
Note # 1	**Code # 3**
Virginia Rule 3.4(h) prohibits lawyers "from request[ing] a person other than a client to refrain from voluntarily giving relevant information to another party," except under certain limited circumstances (emphasis added). The word "relevant" seems unnecessary. It would seem that lawyers could freely request a person to refrain from voluntarily giving "irrelevant" information to another party.	

VIRGINIA RULE 3.4(h)	
Note # 2	**Code # 3**
Virginia Rule 3.4(h) prohibits lawyers "from request[ing] a person other than a client to refrain from voluntarily giving relevant information to another party" except under certain limited circumstances (emphasis added). As in other areas, the word "person" would be more appropriate than "party."	

VIRGINIA RULE 3.4(h)(2)	
Note # 1	**Code # 3**
Virginia Rule 3.4(h)(2) prohibits lawyers "from request[ing] a person other than a client to refrain from voluntarily giving relevant information to another party," under certain circumstances. The Virginia Rule 3.4(h)(2) condition "in a civil matter" seems unnecessary – because it is already included in Virginia Rule 3.4(h)(1)'s condition.	

VIRGINIA RULE 3.4(j)	
Note # 1	**Code # 4**
Virginia Rule 3.4(j) prohibits lawyers from engaging in certain behavior "when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another" (emphasis added). The word "serve" seems inappropriate. To "serve" normally is a good thing, or at least a neutral thing. It might be more appropriate to end the sentence as follows: "that such action would merely harass or maliciously injury another."	

VIRGINIA RULE 3.4 cmt. [2]	
Note # 1	**Code # 3**
Virginia Rule 3.4 cmt. [2]'s third sentence reflects a prohibition on lawyers doing specific things to "a document or other material having potential evidentiary value:" "altered, concealed or destroyed." This list seems to be a somewhat better order of increasingly egregious conduct than black letter Virginia Rule 3.4(a)'s list: "alter, destroy, or conceal." But using an ascending order of misconduct might make more sense: "concealed, altered, or destroyed." **ABA**	

VIRGINIA RULE 3.5 cmt. [2]	
Note # 2	**Code # 4**
Virginia Rule 3.4 cmt. [2]'s fourth sentence contains the phrase "an offense to destroy material for purpose of impairing its availability." Adding the word "the" between the word "for" and the word "purpose" would seem more linguistically correct. **ABA**	

VIRGINIA RULE 3.4 cmt. [2]	
Note # 3	**Code # 4**
Virginia Rule 3.4 cmt. [2]'s sixth sentence contains an archaic term: "computerized information" (emphasis added). **ABA**	

VIRGINIA RULE 3.4 cmt. [3a]	
Note # 1	**Code # 4**
Virginia Rule 3.4 cmt. [3a]'s second sentence states that "a lawyer generally is not justified in consciously violating such rules or rulings" (emphasis added). The word "consciously" contrasts with the more commonly used and more appropriate word "knowingly."	

VIRGINIA RULE 3.4 cmt. [4]	
Note # 1	**Code # 1**
Virginia Rule 3.4 cmt. [4]'s second sentence states that Virginia Rule 3.4(h) "permit[s] lawyers to advise current or former employees or other agents of a client to refrain from giving information to another party" (emphasis added). This contrasts with black letter Virginia Rule 3.4(h) – which permits lawyers to "[r]equest a person other than a client to refrain voluntarily giving relevant information to another party" in certain situations (emphasis added). Black letter Virginia Rule 3.4(h)'s word "request" differs from Virginia Rule 3.4 cmt. [4]'s word "advise." There seems to be a material difference between a corporate client's lawyers stating to an employee; (1) "I request that you not provide information," and (2) "I advise you not to provide information" (emphases added). The word "request" refers to voluntary compliance, while the word "advise" seems more mandatory. It might be preferable for Virginia Rule 3.4 cmt. [4] to use the same word as black letter Virginia Rule 3.4(h). **ABA**	

VIRGINIA RULE 3.4 cmt. [4]	
Note # 2	**Code # 3**
Virginia Rule 3.4 cmt. [4]'s concluding sentence states that Virginia Rule 3.4(h)'s "exception" is limited to civil matters because of concerns with allegations of obstruction of justice" (emphasis added). The word "allegations" seems inapt. It would seem more appropriate to say that the exception is based on "concerns with obstruction of justice" – not "allegations" of obstruction of justice.	

VIRGINIA RULE 3.4 cmt. [4]	
Note # 3	**Code # 3**
Virginia Rule 3.4 cmt. [4] concludes with a reference to Virginia Rule 4.2. It is unclear why Virginia Rule 3.4 cmt. [4] would refer to the Virginia Rule addressing ex parte communications with a represented person. A better reference would seem to be Virginia Rule 4.3, which addresses communications with an unrepresented person. Presumably the "employees of a client" are not themselves represented. Rather, it is likely that they are unrepresented, thus implicating Virginia Rule 4.3's provisions. **ABA**	

VIRGINIA RULE 3.4 cmt. [6]	
Note # 1	**Code # 4**
Virginia Rule 3.4 cmt. [6]'s fifth sentence begins with the phrase "[t]he question is" (emphasis added). It seems inappropriate to raise this as a "question."	

VIRGINIA RULE 3.4 cmt. [6]	
Note # 2	**Code # 3**
Virginia Rule 3.4 cmt. [6]'s concluding sentence states 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" (emphasis added). The "competence" standard seems inappropriate here. The same issue presumably would result in the same analysis whether the lawyer was "competent" or "incompetent."	

VIRGINIA RULE 3.4 cmt. [6]	
Note # 3	**Code # 3**
Virginia Rule 3.4 cmt. [6]'s concluding sentence states 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" (emphasis added). As the ABA Model Rules General Notes discuss, the ABA Model Rules contain both the word "action" and "course of action." The Virginia Rules do too. It is unclear whether those two terms intend to define different types of conduct. Here, it would seem that a single "action" rather than a "course of action" could amount to a violation.	

VIRGINIA RULE 3.4 cmt. [6]	
Note # 4	**Code # 3**
Virginia Rule 3.4 cmt. [6]'s concluding sentence states 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" (emphasis added). Virginia Rule 3.4 cmt. [6]'s analysis of an action's "substantial purpose" seems to contrast with black letter Virginia Rule 3.4(j)'s focus on effect rather than purpose: "such action would serve merely to harass or maliciously injure another." It might be appropriate for Virginia Rule 3.4 cmt. [6] to also focus on effect rather than purpose.	

VIRGINIA RULE 3.4 cmt. [6]	
Note # 5	**Code # 3**
Virginia Rule 3.4 cmt. [6]'s concluding sentence states 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" (emphasis added). The standard of a lawyer's action having some "substantial purpose" other than delay contrasts with black letter Virginia Rule 3.4(j) – which contains a different standard: "such action would serve merely to harass or maliciously injure another" (emphasis added). So it is much easier for a lawyer to avoid a Virginia Rule 3.4(j) violation, by contending that her conduct caused an effect other than "merely" to have the ill effects. A lawyer would have a more difficult time avoiding a Virginia Rule 3.4 cmt. [6] violation, because she would have to establish that an action had "some substantial purpose" other than the ill effects.	

VIRGINIA RULE 3.4 cmt. [7]	
Note # 1	**Code # 4**
Virginia Rule 3.4 cmt. [7]'s first sentence contains the phrase "[i]n the exercise of professional judgment on those decisions" (emphasis added). The word "in" might be more appropriate than the word "on."	

VIRGINIA RULE 3.4 cmt. [7]	
Note # 2	**Code # 4**
Virginia Rule 3.4 cmt. [7]'s third sentence mentions "the best interest of a client" (emphasis added). This singular word seems less appropriate than the arguably more appropriate plural used just 11 words earlier: lawyers "should always act in a manner consistent with the best interests of a client" (emphasis added).	

VIRGINIA RULE 3.4 cmt. [7]	
Note # 3	**Code # 4**
Virginia Rule 3.4 cmt. [7]'s third sentence begins with the phrase "[t]he duty of lawyer to represent a client." It might be appropriate to add the word "a" or "the" between the word "of" and the word "lawyer."	

VIRGINIA RULE 3.4 cmt. [7]	
Note # 4	**Code # 4**
Virginia Rule 3.4 cmt. [7]'s third sentence states that lawyers have an "obligation" to "avoid the infliction of needless harm" (emphasis added). The word "needless" does not seem necessary.	

VIRGINIA RULE 3.4 cmt. [8]	
Note # 1	**Code # 4**
Virginia Rule 3.4 cmt. [8]'s fourth sentence states that lawyers "should be courteous to opposing counsel and should accede to reasonable requests" of specified types – "which do not prejudice the rights of the client" (emphasis added). The word "interests" might be more appropriate than the word "rights."	

VIRGINIA RULE 3.5(a)(1)	
Note # 1	**Code # 3**
Virginia Rule 3.5(a)(1) permits lawyers' communications in connection with a jury trial "except as permitted by law" (emphasis added). This contrasts with Virginia Rule 3.5(a)(2)(ii), which mentions "law or court order" (emphasis added). It might be appropriate to add a reference to court order in Virginia Rule 3.5(a)(1).	

VIRGINIA RULE 3.5(a)(2)(i)	
Note # 1	**Code # 3**
Virginia Rule 3.5(a)(2)(i) prohibits lawyers from certain conduct that is "calculated merely" to have some ill effects (emphasis added). This "merely" standard contrasts with what might be a more appropriate standard "have no substantial purpose other than to" have the ill effects.	

VIRGINIA RULE 3.5(c)	
Note # 1	**Code # 4**
Virginia Rule 3.5(c) contains the word “venireman.” It might be appropriate to use the term “member of a venire,” which appears earlier in that sentence.	

VIRGINIA RULE 3.5(c)	
Note # 2	**Code # 2**
Virginia Rule 3.5(c) requires lawyers to report to the court "improper conduct . . . by another toward a venireman or a juror or a member of a juror's family" (emphasis added). It would seem appropriate to extend the same reporting duty to "improper conduct" toward the family of a member of the venire.	

VIRGINIA RULE 3.5(c)	
Note # 3	**Code # 3**
Virginia Rule 3.5(c) requires lawyers to "reveal promptly to the court" specified misconduct – "of which the lawyer has knowledge." The phrase "of which the lawyer has knowledge" seems unnecessary. Of course "lawyer can only "reveal promptly to the court" misconduct "of which the lawyer has knowledge."	

VIRGINIA RULE 3.5(e)	
Note # 1	**Code # 4**
Virginia Rule 3.5(e) starts with the phrase "[i]n an adversary proceeding" (emphasis added). This contrasts with Virginia Rule 3.7(a)'s phrase "an adversarial proceeding." These words presumably are intended to be synonymous, though it might be appropriate to use the same word.	

VIRGINIA RULE 3.5(e)(2)	
Note # 1	**Code # 2**
Virginia Rule 3.5(e)(2) requires a lawyer to "promptly deliver[] a copy of the writing to opposing counsel or to the adverse party who is not represented by a lawyer" in specified circumstances (emphases added). Presumably such a lawyer would also be obligated to deliver such a writing to counsel who is not "opposing" that lawyer, and to a non-adverse party who is not represented.	

VIRGINIA RULE 3.5 cmt. [2]	
Note # 1	**Code # 3**
Virginia Rule 3.5 cmt. [2]'s third sentence describes "a lawyer who is not connected with the case" (emphasis added). It is unclear what "not connected with the case" means. Some explanation would be helpful.	

VIRGINIA RULE 3.5 cmt. [2]	
Note # 2	**Code # 2**
Virginia Rule 3.5 cmt. [2]'s fifth sentence states that lawyers may communicate with jurors "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" (emphasis added). Virginia Rule 3.5 cmt. [2]'s "tend to" standard contrasts with black letter Virginia Rule 3.5(a)(2)(i)'s prohibition on a lawyer's questions or comments "that are calculated merely to harass or embarrass the juror or to influence the juror's actions in future jury service" (emphasis added).	

VIRGINIA RULE 3.5 cmt. [3]	
Note # 1	**Code # 3**
Virginia Rule 3.5 cmt. [3]'s second sentence states "a lawyer should not communicate with a judge relative to a matter" in certain circumstances (emphasis added). The phrase "relative to" contrasts with black letter Virginia Rule 3.5(e)'s phrase "as to the merits of the cause" (emphasis added).	

VIRGINIA RULE 3.5 cmt. [3]	
Note # 2	**Code # 2**
Virginia Rule 3.5 cmt. [3]'s second sentence prohibits lawyers from specified communications with a judge "which might have the effect or give the appearance of granting undue advantage to one party" (emphasis added). This contrasts with black letter Virginia Rule 3.5(e), which does not contain an "appearance" standard.	

VIRGINIA RULE 3.5 cmt. [3]	
Note # 3	**Code # 3**
Virginia Rule 3.5 cmt. [3]'s fourth sentence begins with the word "[o]rdinarily." That word seems inappropriate – all of the described communications must meet Virginia Rule 3.5(e)'s standard.	

VIRGINIA RULE 3.5 cmt. [3]	
Note # 4	**Code # 2**
Virginia Rule 3.5 cmt. [3]'s fifth sentence states that "[a] lawyer <u>should</u> 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" (emphasis added). As the ABA Model Rules General Notes discuss, some ABA Model Rule Comments contain the word "should" where the word "must" would be appropriate or required." Some Virginia Rule Comments do too. Here, the word "must" would seem to be required.	

VIRGINIA RULE 3.5 cmt. [4]	
Note # 1	**Code # 4**
Virginia Rule 3.5 cmt. [4]'s first sentence begins with the phrase "[t]he advocate's function" (emphasis added). The word "function" seems inapt. The word "role" might be more appropriate. **ABA**	

VIRGINIA RULE 3.5 cmt. [4]	
Note # 2	**Code # 2**
Virginia Rule 3.5 cmt. [4]'s third sentence states that "[a] lawyer must stand firm against abuse by a judge but should avoid reciprocation" (emphases added). It would seem more appropriate to swap the words "should" and "must" – suggesting that lawyers "stand firm" but prohibiting them from reciprocating.	

VIRGINIA RULE 3.5 cmt. [4]	
Note # 3	**Code # 1**
Virginia Rule 3.5 cmt. [4]'s concluding sentence states that "[Virginia] Rule 8.3(b) also requires a lawyer to report" a judge's specified conduct. That incorrectly states Virginia Rule 8.3(b)'s requirement. 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" (emphasis added). Thus, only conduct that satisfies Virginia Rule 8.3's "substantial question" standard requires reporting.	

VIRGINIA RULE 3.6(a)	
Note # 1	**Code # 2**
Virginia Rule 3.6(a) limits communications by "[a] lawyer participating in or associated with" specified criminal matters (emphasis added). Neither the term "participating in" nor the term "associated with" is defined. Presumably they are different roles, or else Virginia Rule 3.6(a) would not also contain the word "or." Some guidance would be helpful.	

VIRGINIA RULE 3.6(a)	
Note # 2	**Code # 2**
Virginia Rule 3.6(a) applies to lawyers "participating in" or "associated with specified Criminal matters" (emphasis added). As the ABA Model Rules General Notes discuss, the word "associated" is not defined in the ABA Model Rules or Comments – which generates some confusion. The same is true of the Virginia Rules. Here, for instance, it is unclear what the word "associated" means.	

VIRGINIA RULE 3.6(b)	
Note # 1	**Code # 2**
Virginia Rule 3.6(b) requires lawyers to "exercise reasonable care to prevent employees and associates" from making specified statements (emphasis added). As the ABA Model Rules General Notes discuss, the word "associated" is not defined even though it plays a key role in the ABA Model Rules. The same is true of the Virginia Rules. Here, the word "associates" is used in the ordinary way. But as the ABA Model Rules General Notes discuss, it seems clear that some lawyers in a law firm or other organization "are associated" with their colleagues and some lawyers are not. Virginia Rule 3.7(e) thus on its face does not apply to lawyers who are not "associated" with their colleagues. That would seem inappropriately narrow.	

VIRGINIA RULE 3.7(a)	
Note # 1	**Code # 4**
Virginia Rule 3.7(a) describes limits on a lawyer's conduct "in an adversarial proceeding" (emphasis added). The term "adversarial proceeding" contrasts with Virginia Rule 3.5(e)'s term "adversary proceeding" (emphasis added). Those words presumably are intended to be synonymous, so it might be appropriate to use the same word.	

VIRGINIA RULE 3.7(a)(3)	
Note # 1	**Code # 4**
Virginia Rule 3.7(a)(3) describes a scenario in which "disqualification of the lawyer would work substantial hardship on the client" (emphasis added). The word "work" seems inapt. The word "cause" might be preferable. **ABA**	

VIRGINIA RULE 3.7(c)	
Note # 1	**Code # 4**
Virginia Rule 3.7(c) contains the phrase term "as advocate." The phrase "as an advocate" might be preferable (emphasis added). **ABA**	

VIRGINIA RULE 3.7 cmt. [4]	
Note # 1	**Code # 4**
Virginia Rule 3.7 cmt. [4]'s first sentence states 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" (emphasis added). Virginia Rule 3.7(a)(3) on its face does not "recognize" any required "balancing." Presumably Virginia Rule 3.7 cmt. [4] refers to an implicit "balancing" reflected in black letter Virginia Rule 3.7(a)(3). But the word "recognizes" seems inapt – stating that Virginia Rule 3.7(a)(3) "reflects" such a balancing might be preferable. **ABA**	

VIRGINIA RULE 3.7 cmt. [4]	
Note # 2	**Code # 2**
Virginia Rule 3.7 cmt. [4]'s fourth sentence explains that "[i]t is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness" (emphases added). Such a "reasonabl[e] foreseeab[ility]" standard might affect lawyers' tactical decisions, but black letter Virginia Rule 3.7 does not seem to recognize such a "reasonabl[e] foreseeab[ility]" standard in any of its provisions. **ABA**	

VIRGINIA RULE 3.7 cmt. [4]	
Note # 3	**Code # 4**
Virginia Rule 3.7 cmt. [4]'s concluding sentence states that Virginia Rule 1.10 "has no application to this aspect of the problem" (emphasis added). The word "problem" seems inapt.	

VIRGINIA RULE 3.7 cmt. [6]	
Note # 1	**Code # 3**
Virginia Rule 3.7 cmt. [6]'s second sentence contains the phrase "the lawyer or a member of the lawyer's firm" (emphasis added). As the ABA Model Rules General Notes discuss, the ABA Model Rules contain a confusing mixture of words such as "member" when referring to law firms' lawyers. The Virginia Rules do too. It is unclear what the word "member" means. The word "member" also appears in Virginia Rule 3.7 cmt. [6]'s concluding sentence.	

VIRGINIA RULE 3.7 cmt. [6]	
Note # 2	**Code # 4**
Virginia Rule 3.7 cmt. [6]'s fourth sentence states that in certain circumstances Virginia Rule 3.7(b) "allows the lawyer to continue representation." The word "the" or "a" might be appropriate between the word "continue" and the word "representation."	

VIRGINIA RULE 3.7 cmt. [6]	
Note # 3	**Code # 3**
Virginia Rule 3.7 cmt. [6]'s concluding sentence states that in certain circumstances Virginia Rule 1.10 "disqualifies the firm also" (emphasis added). The term "the firm" seems inappropriate. Virginia Rule 1.10 disqualifies lawyers, not law firms.	

VIRGINIA RULE 3.8(d)	
Note # 1	**Code # 4**
Virginia Rule 3.8(d) states that in certain circumstances lawyers must "make timely disclosure . . . of the existence of evidence" described in Virginia Rule 3.8(d). It would seem more appropriate to require "disclosure . . . of the . . . evidence," not disclosure of "the existence of evidence."	

VIRGINIA RULE 3.8 cmt. [1]	
Note # 1	**Code # 3**
Virginia Rule 3.8 cmt. [1]'s first sentence states that "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate" (emphasis added). The word "simply" could be seen as demeaning to advocates. The word "just" might be less offensive. **ABA**	

VIRGINIA RULE 3.8 cmt. [1b]	
Note # 1	**Code # 3**
Virginia Rule 3.8 cmt. [1b]'s first sentence states that determining whether a prosecutor's action is proper under Virginia Rule 3.8(b) is "based on an objective analysis" (emphasis added). This seems to contrast with black letter Virginia Rule 3.8(b), which states that "[a] lawyer engaged in a prosecutorial function shall . . . not knowingly take advantage of an unrepresented defendant" (emphasis added). The "knowingly" standard presumably examines the prosecutor's actual knowledge, and thus does not seem to apply an "objective" analysis.	

VIRGINIA RULE 3.8 cmt. [4]	
Note # 1	**Code # 4**
Virginia Rule 3.8 cmt. [4]'s first sentence contains the phrase "lawyer/prosecutor." That obvious term does not appear anywhere else in black letter Virginia Rule 3.8 or its Comments.	

VIRGINIA RULE 4.1	
Note # 1	**Code # 3**
Virginia Rule 4.1(a) applies to lawyers' conduct "[i]n the course of representing a client." This contrasts with Virginia Rule 4.2's and Virginia Rules 4.4(a)'s application to lawyers' conduct "[i]n representing a client" and Virginia Rule 4.3's application to lawyers' conduct "[i]n dealing on behalf of a client." It is unclear whether these different standards intend to apply to a substantively different scope of lawyers' conduct. Presumably, the Virginia Rules deliberately chose these consecutive Virginia Rules' different formulations, but none of the Rules or Comments provide any guidance about the different standards' impact. **ABA**	

VIRGINIA RULE 4.1 cmt. [2]	
Note # 1	**Code # 1**
Virginia Rule 4.1 cmt. [2]'s second sentence states that "certain types of statements ["in negotiation"] ordinarily are not taken as statements of material fact" (emphasis added). The word "material" seems inappropriate here. Unlike ABA Model Rule 4.1(a), Virginia Rule 4.1(a) prohibits lawyers from "knowingly . . . mak[ing] a false statement of fact or law" – whether "material" or not.	

VIRGINIA RULE 4.1 cmt. [3]	
Note # 1	**Code # 1**
Virginia Rule 4.1 cmt. [3]'s second sentence refers to Virginia Rule 1.6 as governing Virginia Rule 4.1(b)'s "requirement of disclosure." This seems incorrect. Black letter Virginia Rule 4.1(b) states that lawyers "shall not knowingly . . . fail to disclose a fact" under the specified circumstances. Unlike ABA Model Rule 4.1(b), Virginia Rule 4.1(b) does not contain the exception – "unless disclosure is prohibited by [ABA Model] Rule 1.6." So Virginia Rule 1.6 apparently does not govern Virginia Rule 4.1(b) disclosure obligation.	

VIRGINIA RULE 4.2	
Note # 1	**Code # 3**
Virginia Rule 4.2 applies to lawyers' conduct "[i]n representing a client." This matches Virginia Rule 4.4(a)'s application to lawyers' conduct. But it contrasts with Virginia Rule 4.1's application to lawyers' conduct "[i]n dealing on behalf of a client," and also contrasts with Virginia Rule 4.3's application to lawyers' conduct "[i]n dealing on behalf of a client." It is unclear whether these different standards intend to apply to a substantively different scope of lawyers' conduct. Presumably the Virginia Rules deliberately chose these consecutive Virginia Rules' different formulations, but none of the Rules or Comments provide any guidance about the different standards' possible impact. **ABA**	

VIRGINIA RULE 4.2	
Note # 2	**Code # 2**
Virginia Rule 4.2 prohibits lawyers from communicating about the "subject of the representation with a person they know to be represented" in the matter (emphases added). Presumably the phrase "the subject of the representation" is intended to be synonymous with the term "the matter." But in this important Virginia Rule, it might have been more appropriate to use the same term to describe the same thing. For instance, using the phrase "a matter" instead of the phrase "the subject of the representation" would have used consistent language. **ABA**	

VIRGINIA RULE 4.2 cmt. [4]	
Note # 1	**Code # 3**
Virginia Rule 4.2 cmt. [4]'s second sentence contains the term "private party" (emphasis added). The term "private person" would be more appropriate, in light of Virginia Rule 4.2's explicit references to persons rather than "parties" (to avoid the implication that Virginia Rule 4.2 only applies in the litigation context). **ABA**	

VIRGINIA RULE 4.2 cmt. [4]	
Note # 2	**Code # 3**
Virginia Rule 4.2 cmt. [4]'s third sentence contains the word "[p]arties." The word "[p]ersons" would be more appropriate. **ABA**	

VIRGINIA RULE 4.2 cmt. [4]	
Note # 3	**Code # 2**
Virginia Rule 4.2 cmt. [4]'s concluding sentence assures that lawyers "having independent justification or legal authorization for communicating with a represented person is permitted to do so" (emphasis added). The term "independent justification" is not defined, and there is no guidance about what it means. **ABA**	

VIRGINIA RULE 4.2 cmt. [7]	
Note # 1	**Code # 4**
Virginia Rule 4.2 cmt. [7]'s second sentence refers to an "organization's lawyer," while the next sentence refers to an organization's constituent's "own counsel" (emphases added). These linguistic variations are unlikely to cause any confusion, but are unfortunate. **ABA**	

VIRGINIA RULE 4.2 cmt. [8]	
Note # 1	**Code # 4**
Virginia Rule 4.2 cmt. [8]'s second sentence contains the term "client-attorney relationship." This contrasts linguistically with Virginia Rule 4.2 cmt. [9]'s first sentence's term "attorney client relationship," Virginia Rule 4.4 cmt. [1]'s second sentence's term "client-lawyer relationship" and Virginia Rule 1.16(e)'s fifth sentence's term "lawyer-client relationship." Presumably all of these terms are intended to be synonymous, but a linguistic consistency might be appropriate.	

VIRGINIA RULE 4.2 cmt. [9]	
Note # 1	**Code # 4**
Virginia Rule 4.2 cmt. [9]'s second sentence contains the term "third-party" in quotation marks. It is unclear why the term appears in quotations in this instance. They seem unnecessary.	

VIRGINIA RULE 4.2 cmt. [9]	
Note # 2	**Code # 4**
Virginia Rule 4.2 cmt. [9]'s second sentence describes "concerns" when a "third-party" witness "has decided to retain counsel" (emphasis added). The phrase "decided to" seems inappropriate. It would seem that the "concern" would arise when the witness actually retains counsel, not when the witness "has decided to retain counsel."	

VIRGINIA RULE 4.3	
Note # 1	**Code # 3**
Virginia Rule applies to 4.3 lawyers' conduct "[i]n dealing on behalf of a client." This contrasts with Virginia Rule 4.1's application to lawyer's conduct "[i]n the course of representing a client" and with Virginia Rule 4.2's and Virginia Rule 4.4(a)'s application to lawyers' conduct "[i]n representing a client." It is unclear whether these different standards intend to apply to a substantively different scope of lawyers' conduct. Presumably the Virginia Rules deliberately chose these consecutive Virginia Rules' different formulations, but none of the Rules or Comments provide any guidance about the different standards' impact. **ABA**	

VIRGINIA RULE 4.3(a)	
Note # 2	**Code # 3**
Virginia Rule 4.3(a)'s first sentence describes a scenario in which lawyers must comply with Virginia Rule 4.3's prohibitions and requirements: "[i]n dealing on behalf of a client with a person who is not represented by counsel" (emphasis added). That scenario presumably describes a person who is not "represented by counsel" in the matter on which that communicating lawyer deals with that person. For example, Virginia Rule 4.3 applies to a lawyer communicating with a person about a car accident, even if that person is "represented by counsel" in a real estate matter. Perhaps that is obvious, but clarification would avoid any confusion. **ABA**.	

VIRGINIA RULE 4.3(b)	
Note # 1	**Code # 4**
Virginia Rule 4.3(b) states that a “lawyer” should not give advice “someone who is not represented by a lawyer, other than the advice to secure counsel” (emphasis added). It might make sense to use the word “lawyer” in both of those places, rather than the word “lawyer” in one place and the word “counsel” just seven words later. **ABA**	

VIRGINIA RULE 4.2(b)	
Note # 2	**Code # 4**
Virginia Rule 4.2(b) states that lawyers may not give advice ("other than the advice to secure counsel" if "the interests of such [an unrepresented] person are or have a reasonable possibility of being in conflict with the interest of the [lawyer's] client" (emphases added). It would be appropriate to either use the singular "interest" or (preferably) the plural "interests" in both places.	

VIRGINIA RULE 4.3 cmt. [1]	
Note # 1	**Code # 2**
Virginia Rule 4.3 cmt. [1] second sentence states that a lawyer "should not give advice to an unrepresented person other than the advice to obtain counsel." This contrasts with black letter Virginia Rule 4.3(b), which prohibits such other advice only in certain circumstances: "if the interests of such [unrepresented] person are or have a reasonable possibility of being in conflict with the interest of the client" (emphasis added).	

VIRGINIA RULE 4.3 cmt. [2]	
Note # 1	**Code # 4**
Virginia Rule 4.3 cmt. [2]'s second sentence allows a communicating lawyer to give "the advice to <u>obtain</u> counsel" (emphasis added). Presumably Virginia Rule 4.3 cmt. [2]'s term "obtain counsel" is intended to be synonymous with black letter Virginia Rule 4.3's term "<u>secure</u> counsel" (emphasis added). But it might be appropriate to use the same word to describe the same action. **ABA**	

VIRGINIA RULE 4.4(a)	
Note # 1	**Code # 3**
Virginia Rule 4.4(a) applies to lawyers' conduct "[i]n representing a client." That matches Virginia Rule 4.2's application to lawyers' conduct. But it contrasts with Virginia Rule 4.1's application to lawyers' conduct "[i]n the course of representing a client" and Virginia Rule 4.3's application to lawyers' conduct "[i]n dealing on behalf of a client." It is unclear whether these different standards intend to apply to a substantively different scope of lawyers' conduct. Presumably the Virginia Rules deliberately chose these consecutive Virginia Rules' different formulations, but none of the Rules or Comments provide any guidance about the different standards' impact. **ABA**	

VIRGINIA RULE 4.4(a)	
Note # 2	**Code # 2**
Virginia Rule 4.4(a) prohibits lawyers from (among other things) using "means that have no substantial purpose other than to embarrass, delay, or burden a third person". Oddly missing from the list of impermissible motives is harassment of a third person. Other Virginia Rules and Comments include harassment in similar lists: Virginia Rule 3.5(a)(2)(i) and Virginia Rule 7.3(b)(2). It is unclear why Virginia Rule 4.4(a)'s list does not include this additional type of misbehavior. **ABA**	

VIRGINIA RULE 4.4(b)	
Note # 1	**Code # 4**
Virginia Rule 4.4(b) requires a lawyer to take certain specified actions if the lawyer "knows or reasonably should know that the document or electronically stored information is privileged" (emphasis added). Technically, "information" is not "privileged" – communications *about* information can be "privileged."	

VIRGINIA RULE 4.4(b)	
Note # 2	**Code # 2**
Virginia Rule 4.4(b) on its face presumably would apply to a litigation party's "document dump" that the producing party and his lawyer has not reviewed for privilege, work product, or some other evidentiary protection, but which might contain such protected documents. Virginia Rule 4.4(b) seems to require the receiving litigation party's lawyer who is reviewing the produced documents to comply with Virginia Rule 4.4(b) requirements upon reading a document the reviewing lawyer "knows or reasonably should know" "is privileged and was inadvertently sent." Perhaps the reviewing lawyer could take a position that such a protected document was not "inadvertently" sent with the other documents in the "document dump." But the producing party's lawyer might accompany the "document dump" with a statement that any protected documents being produced were done so "inadvertently." Presumably the reviewing lawyer could seek a court order sorting out this issue. But on its face, Virginia Rule 4.4(b) does not provide the solution to such an awkward situation.	

VIRGINIA RULE 4.4(b)	
Note # 2	**Code # 2**
Virginia Rule 4.4(b) requires a lawyer to "immediately terminate . . . use" of a document or electronically stored information under specified conditions (emphasis added). But it is unclear how such a lawyer "immediately terminate[s] . . . use of such a document or electronically stored information." For instance, if the reviewing lawyer reads before reaching a mental state that requires him to stop using a document that there is an important witness that possesses relevant information, or that the adversary engaged in some conduct that would be worth exploring in further discovery. May the reviewing lawyer "use" that information to interview such a witness, or conduct discovery about such an action? Could the reviewing lawyer argue that even without having read about that witness or that action, he would have engaged in discovery that would otherwise have uncovered the witness or the action?	

VIRGINIA RULE 4.4(b)	
Note # 2	**Code # 2**
Virginia Rule 4.4(b) states that under specified conditions a lawyer must "abide by the sender's instructions to return or destroy the document or electronically stored information" (emphasis added). This contrasts with the third option – described in Virginia Rule 4.4 cmt. [3] – which does not involve the lawyer immediately "return[ing] or "destroying" the document or electronically stored information. Presumably black letter Virginia Rule 4.4(b)'s unconditional "return or destroy" provision trumps the Virginia Rule 4.4 cmt. [3] alternative. Under the Virginia Rules Scope first paragraph's concluding sentence, "[c]omments do not add obligations to the [Virginia] Rules but provide guidance for practicing in compliance with the [Virginia] Rules." So Virginia Rule 4.4 cmt. [3]'s alternative presumably would have no effect unless it was in black letter Virginia Rule 4.4(b).	

VIRGINIA RULE 4.4 cmt. [1]	
Note # 1	**Code # 4**
Virginia Rule 4.4 cmt. [1]'s concluding sentence contains the term "client-lawyer relationship." This contrasts with Virginia Rule 4.2 cmt. [8]'s second sentence's term "client-attorney relationship," Virginia Rule 4.2 cmt. [9]'s first sentence's term "attorney-client relationship," and Virginia Rule 1.16(e)'s term "lawyer-client relationship." Presumably all of these terms are intended to be synonymous, but a linguistic consistency might be appropriate.	

VIRGINIA RULE 4.4 cmt. [2]	
Note # 1	**Code # 1**
Virginia Rule 4.4 cmt. [2]'s fourth sentence states 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" – [r]egardless of whether it is obvious that the document or electronically stored information was inadvertently sent." That seems like an odd result. If "it is obvious" that the document or electronically stored information was inadvertently sent, the receiving lawyer clearly "reasonably should know" that it was inadvertently sent. It would be more clear if Virginia Rule 4.4 cmt. [2]'s fourth sentence began with a different clause: "[r]egardless of whether or not it is obvious that the document or electronically stored information was inadvertently sent," (emphasis added). That would explain that the receiving lawyer who is advised that the document or electronically stored information was inadvertently sent has the knowledge triggering her duties even if it was not already "obvious that the document or electronically stored information was inadvertently sent."	

VIRGINIA RULE 4.4 cmt. [2]	
Note # 2	**Code # 1**
Virginia Rule 4.4 cmt. [2]'s concluding sentence states 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 no duty under this rule" (emphasis added). This seems to be a misstatement of black letter Virginia Rule 4.4(b)'s obligation. Black letter Virginia Rule 4.4(b) on its face imposes on the receiving lawyer the described duties even if the receiving lawyer does "not" "know" that the document is privileged – as long as the receiving lawyer "knows or reasonably should know that the document or electronically stored information is privileged" (emphasis added).	

VIRGINIA RULE 4.4 cmt. [3]	
Note # 1	**Code # 3**
Virginia Rule 4.4 cmt. [3]'s second sentence states that lawyers under certain conditions are "prevented from using information that is of great significance to the client's case" (emphasis added). Virginia Rule 4.4(b) presumably would prevent lawyers in those specified conditions "from using information" that is not of "great significance to the client's case," but is nevertheless relevant or even significant. It would be more clear if the "great significance" factor was described as an example.	

VIRGINIA RULE 4.4 cmt. [3]	
Note # 2	**Code # 1**
Virginia Rule 4.4 cmt. [3]'s fifth sentence states that the receiving client's contesting of the sender's claim of privilege "does not constitute 'use' as prohibited by" Virginia Rule 4.4(b) – although a few words earlier at Virginia Rule 4.4 cmt. [3]'s fifth sentence describes that as "use of such a process" (emphasis added). It contorts the English language to say that such a receiving lawyer's "use" of the specified process is not a "use" of the inadvertently-received document or electronically stored information. It might be more clear if Virginia Rule 4.4 cmt. [3] acknowledged the process as involving a "use" of the documents – but included such a process as an exception (preferably in black letter Virginia Rule 4.4(b), rather than in a Comment). Black letter Virginia Rule 4.4(b)'s unconditional requirement that the receiving lawyer "abide by the sender's instructions to return or destroy the document or electronically stored information" presumably trumps Virginia Rule 4.4 cmt. [3]'s alternative "use" in the specified process. Under the Virginia Rules Scope first paragraph's concluding sentence, "[c]omments do not add obligations to the [Virginia] Rules but provide guidance for practicing in compliance with the [Virginia] Rules." So Virginia Rule 4.4 cmt. [3]'s alternative presumably would have no effect unless it was in black letter Virginia Rule 4.4(b).	

VIRGINIA RULE 4.4 cmt. [3]	
Note # 3	**Code # 1**
Virginia Rule 4.4 cmt. [3]'s fifth sentence does not explain how a receiving lawyer can in good faith "contest the sender's claim of privilege" – having reached the mental state of "know[ing] or reasonably should know[ing] that the document or electronically stored information is privileged" (emphases added). What can such a receiving lawyer point to in contesting the sender's privilege claim? Black letter Virginia Rule 4.4(b) does not require the sending lawyer's steps if the receiving lawyer "knows or reasonably should know" that the document or electronically stored information "may be" privileged – those requirements apply only if the receiving lawyer "knows or reasonably should know" that the document or electronically stored information "is privileged" (emphasis added).	

VIRGINIA RULE 4.4 cmt. [3]	
Note # 4	**Code # 1**
Virginia Rule 4.4 cmt. [3]'s fifth sentence on its face does not allow the recipient to "contest the sender's claim" that the document or electronically stored information "was inadvertently sent." That seems like an odd mismatch with the recipient's ability to "contest the sender's claim of privilege." Of course, it would have the same impediment as the recipient's contesting the sender's privilege claim – because the recipient might have a hard time pursuing that after having already reached the "knows or reasonably should know" standard conclusion that the document or electronically stored information was inadvertently sent. But the absence of such a freedom to contest the sender's inadvertence claim seems strange.	

VIRGINIA RULE 4.4 cmt. [3]	
Note # 5	**Code # 3**
Virginia Rule 4.4 cmt. [3]'s concluding sentence states that "the recipient lawyer must abide by the sender's instructions to return or destroy the document" – "[w]hen there is no such applicable law, such as in a matter that does not involve litigation." This sentence does not acknowledge the possibility that in a non-litigation setting, the receiving lawyer and her client might initiate some litigation asking a tribunal to address the issue.	

VIRGINIA RULE 5.1(c)(1)	
Note # 1	**Code # 3**
Virginia Rule 5.1(c)(1) addresses a lawyer's responsibility for another lawyer's ethics violations. Such responsibility arises if the lawyer "orders or, with knowledge of the specific conduct, ratifies the conduct involved" (emphasis added). Notably, Virginia Rule 5.1(b)(1) does not require the lawyer to know that the misbehaving lawyer's contact violates the Virginia Rules. Perhaps that is a deliberate distinction, but Virginia Rule 5.1 Comments do not address it. **ABA**	

VIRGINIA RULE 5.1(c)(1)	
Note # 2	**Code # 4**
Virginia Rule 5.1(c)(1) addresses a lawyer's responsibility for another lawyer's ethics violations. Such responsibility arises if "the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved" (emphasis added). The word "involved" seems unnecessary. **ABA**	

VIRGINIA RULE 5.1 cmt. [3]	
Note # 1	**Code # 3**
Virginia Rule 5.1 cmt. [3]'s concluding sentence explains that "the ethical atmosphere of a firm can influence the conduct of all its members." The word "members" is not defined. In common usage, the word "members" usually refers to owners of a law firm. That Virginia Rule 5.1 cmt. [3] sentence would make more sense if the word "members" referred to "all lawyers in the firm" (the phrase in Virginia Rule 5.1(a)). The ABA Model Rules General Notes discuss the inconsistent use of such terms. **ABA**	

VIRGINIA RULE 5.1 cmt. [3]	
Note # 2	**Code # 2**
Virginia Rule 5.1 cmt. [3]'s concluding sentence warns 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" (emphasis added). The "associated with the firm" phrase contrasts with Virginia Rule 5.1(a)'s very different phrase: "all lawyers in the firm." As the ABA Model Rules General Notes discuss, and as also mentioned above, the ABA Model Rules and Comments do not define the term "associated." But it is clear that some lawyers are "associated" with their law firm colleagues, and some are not. The same is true of the Virginia Rules. So Virginia Rule 5.1 cmt. [3]'s warning only refers to a subset of lawyers in the firm - which seems inappropriate. **ABA**	

VIRGINIA RULE 5.1 cmt. [6]	
Note # 1	**Code # 4**
Virginia Rule 5.1 cmt. [6] explains that a subordinate lawyer's misconduct "could reveal" a direct supervisory lawyer's ethics violation (emphasis added). The word "reveal" presumably means to "bring to light" or "uncover." Notably, this is a more common-sense definition use of the word "reveal" than Virginia Rule 1.6(a)'s use of the word "reveal" to mean "disclose." But given Virginia Rule 1.6(a)'s use of the word "reveal," Virginia Rule 5(d) cmt. [6]'s use of the same word might cause confusion. **ABA**	

VIRGINIA RULE 5.3	
Note # 1	**Code # 2**
Virginia Rule 5.3 addresses supervision of, and lawyers' possible derivative liability for misconduct by, "a nonlawyer employed or retained by or <u>associated with</u> a lawyer" (emphasis added). Presumably the word "associated" differs from an employment relationship or a retention relationship. As the ABA Model Rules General Notes discuss, the ABA Model Rules and Comments do not define the term "associated," despite its key role in many ABA Model Rules' and Comments' analyses. The same is true of the Virginia Rules. But it seems clear that some lawyers are "associated" with their law firm colleagues, and some lawyers are not. It also seems clear that lawyers can be "associated" with lawyers from other firms (as when they share fees under Virginia Rule 1.5(e) - addressed in Virginia Rule 1.5 cmt. [7]). Virginia Rule 5.3 introduces yet another expansion of the undefined term "associated" - to lawyers' relationship with nonlawyers. It would be helpful for Virginia Rule 5.3 or some other Virginia Rule or Comment to provide guidance on the implication of the word "associated" in the context of nonlawyers, and how that relationship differs from an employment or retention relationship. **ABA**	

VIRGINIA RULE 5.3(a)	
Note # 1	**Code # 4**
Virginia Rule 5.3(a) contains the term “the person’s” – presumably referring to a nonlawyer employed or retained by or associated with a lawyer. It might be more clear if Virginia Rule 5.3(a) contained the term “nonlawyer’s” rather than the generic term “the person’s” (if this presumption is correct).	

VIRGINIA RULE 5.3(a)	
Note # 2	**Code # 2**

Virginia Rule 5.3(a) requires specified lawyers to "make reasonably efforts to ensure" that classified "nonlawyers'" "conduct is compatible with the professional obligations of the lawyer" (emphasis added). The word "compatible" which also appears in ABA Model Rule 5.3(a) differs from Virginia Rule 5.1(a)'s and ABA Model Rule 5.1(a)'s word "conform" – referring to similar steps lawyers must take to assure that lawyers (rather than nonlawyers) "conform" to lawyers' ethics rules. Presumably Virginia Rules (and ABA Model Rules) deliberately chose different words.

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(a)	
Note # 2	**Code # 2**

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

VIRGINIA RULE 5.3(a)	
Note # 2	**Code # 2**
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 is only required when nonlawyers do what lawyers do when lawyers are 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. **ABA**	

VIRGINIA RULE 5.3(b)	
Note # 1	**Code # 4**
Virginia Rule 5.3(b) describes the responsibility of "a lawyer having direct supervisory authority over the nonlawyer" (emphasis added). The word "a" might be more appropriate than the word "the." Virginia Rule 5.3's introductory clause contains the better-sounding term "a nonlawyer" (emphasis added). **ABA**	

VIRGINIA RULE 5.3(c)	
Note # 1	**Code # 4**
Virginia Rule 5.3(c) addresses a lawyer's responsibility for certain specified "conduct of such a person" (emphasis added). The term "a nonlawyer" would seem more appropriate here than "such a person" (emphasis added). **ABA**	

VIRGINIA RULE 5.3(c)(1)	
Note # 1	**Code # 4**
Virginia Rule 5.3(c)(1) addresses lawyers' responsibility for nonlawyers' misconduct if "the lawyer orders or with the knowledge of a specific conduct, ratifies the conduct involved" (emphasis added). The word "the" seems unnecessary. Parallel Virginia Rule 5.1(c)(1) (addressing the identical situation involving lawyers rather than nonlawyers) does not contain the word "the." **ABA**	

VIRGINIA RULE 5.3(c)(1)	
Note # 2	**Code # 3**
Virginia Rule 5.3(c)(1) addresses lawyers' responsibility for nonlawyers' misconduct if "the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved" (emphasis added). Thus, Virginia Rule 5.3(c)(1)'s knowledge requirement only includes knowledge of the nonlawyers' "specific conduct" – not knowledge of the conduct's "violation of the [Virginia] Rules of Professional Conduct if engaged in by a lawyer." Presumably that limited "knowledge" requirement is deliberate. If so, an explanatory Comment would be helpful. **ABA**	

VIRGINIA RULE 5.3(c)(1)	
Note # 3	**Code # 4**
Virginia Rule 5.3(c)(1) addresses a lawyer's responsibility for certain nonlawyer misconduct if the lawyer "orders or, with the knowledge of a specific conduct, ratifies the conduct involved" (emphasis added). The word "involved" seems unnecessary. **ABA**	

VIRGINIA RULE 5.3(c)(2)	
Note # 1	**Code # 2**
Virginia Rule 5.3(c)(2) addresses lawyers' responsibility for certain nonlawyer misconduct if the lawyer has a specified role in "the law firm in which the person is employed, or has direct supervisory authority over" the nonlawyer (emphasis added). Virginia Rule 5.3(c)(2)'s "employed" condition describes only one of Virginia Rule 5.3's introductory sentence's three types of relationships between nonlawyers and lawyers: "employed or retained by or associated with a lawyer" (emphasis added). It is unclear why Virginia Rule 5.3(c)(2) does not similarly make partners or managerial lawyers responsible for nonlawyers' misconduct if their law firms have nonlawyers "retained by or associated with" those law firms. If that limitation was intended, it would be helpful to have a comment explaining the limitation. **ABA**	

VIRGINIA RULE 5.3 cmt. [1]	
Note # 1	**Code # 2**
Virginia Rule 5.3 cmt. [1]'s first sentence states that "[l]awyers generally employ" nonlawyers to assist in their practice (emphasis added). The word "employ" on its face refers to only one of three Virginia Rule 5.3 introductory sentence's relationships between nonlawyers and lawyers: "employed or retained by or associated with a lawyer." Virginia Rule 5.3 cmt. [1]'s second sentences confusingly refers to "[s]uch assistants, whether employees or independent contractors" (emphasis added). Presumably, "independent contractors" are not "employed" – but instead are either "retained by" or otherwise "associated with a lawyer" (as listed in Virginia Rule 5.3's introductory sentence). It would be helpful for Virginia Rule 5.3 cmt. [1] to be more clear and more complete. **ABA**	

VIRGINIA RULE 5.3 cmt. [1]	
Note # 2	**Code # 2**
Virginia Rule 5.3 cmt. [2]'s second sentence states that specified non-lawyers "act for the lawyer in rendition of the lawyer's professional services" (emphasis added). This seems incorrect. Such nonlawyers assist lawyers, they do not "act for" lawyers. **ABA**	

VIRGINIA RULE 5.3 cmt. [1]	
Note # 3	**Code # 2**
Virginia Rule 5.3 cmt. [1]'s third sentence states that lawyers "should be responsible for [employed nonlawyers'] work product" (emphasis added). It is unclear what the word "responsible" means in this context. Black letter Virginia Rule 5.3(c) contains the word "responsible" to describe lawyers' vulnerability to ethics discipline based on certain specified nonlawyer conduct. Presumably Virginia Rule 5.3 cmt. [2]'s third sentence's word "responsible" is not intended to have that meaning. Instead, presumably that word "responsible" refers to a lawyer's obligation to supervise nonlawyers' creation of work product, and perhaps such lawyers' malpractice liability for any improper work product. A phrase such as "should supervise such nonlawyers' work" might be more appropriate (emphasis added).	

VIRGINIA RULE 5.4(a)(1)	
Note # 1	**Code # 3**
Virginia Rule 5.4(a)(1) allows fee sharing with a deceased lawyer's "estate or [with] one or more specified persons" after a lawyer's death (emphasis added). That term contrasts with a different term in Virginia Rule 5.4(a)(2): "the estate or other representative of that ["deceased, disabled, or disappeared"] lawyer" (emphasis added). Perhaps the latter is intended to be a subset of the former, but that is unclear. **ABA**	

VIRGINIA RULE 5.4(a)(2)	
Note # 1	**Code # 3**
Virginia Rule 5.4(a)(2) allows fee sharing with "the estate or other representative of that ['deceased, disabled, or disappeared'] lawyer" (emphasis added). That term contrasts with Virginia Rule 5.4(a)(1)'s reference to a deceased lawyer's "estate or . . . one or more specified persons" following a lawyer's death (emphasis added). Perhaps the former is intended to be a subset of the latter, but that is not clear. **ABA**	

VIRGINIA RULE 5.4(c)	
Note # 1	**Code # 3**
Virginia Rule 5.4(c) prohibits lawyers from allowing specified persons "to direct or regulate the lawyer's professional judgment in rendering . . . legal services" (emphasis added). That phrase contrasts with the phrase "direct or control" in Virginia Rule 5.4(d)(3), and the more generic word "interfere" in Virginia Rule 5.4 cmt. [1]'s fourth sentence. The generic word "interfere" would seem more appropriate in all of those places. **ABA**	

VIRGINIA RULE 5.4(d)(3)	
Note # 1	**Code # 3**
Virginia Rule 5.4(d)(3) prohibits lawyers from allowing specified persons "to direct or control" the lawyer's professional judgment (emphasis added). That phrase contrasts with Virginia Rule 5.4(c)'s phrase "direct or regulate," and the more generic word "interfere" (in Virginia Rule 5.4 cmt. [1]'s concluding sentence). The generic word "interfere" would seem more appropriate in all of those places. **ABA**	

VIRGINIA RULE 5.4 cmt. [1]	
Note # 1	**Code # 3**
Virginia Rule 5.4 cmt. [1]'s third sentence warns that a non-client's payment of a lawyer's fee or salary (among other things) "does not modify the lawyer's obligation to the client" (emphasis added). The word "modify" seems somewhat inapt, because modification can be either an expansion or a contraction. The word "reduce" or "diminish" would seem more appropriate. **ABA**	

VIRGINIA RULE 5.5(a)	
Note # 1	**Code # 2**
Virginia Rule 5.5(a) describes the inability of a law firm or similar entity to "employ in any capacity" a lawyer engaged in "professional misconduct" resulting in her professional punishment if that lawyer "was associated" with the specified law firm or other entity at specific times. As the ABA Model Rules General Notes discuss, the ABA Model Rules do not define the word "associated," despite its key significance in imputations and other issues. That is also true of the Virginia Rules. Virginia Rule 5.5(a)'s word "associated" is essentially even more confusing, in light of Virginia Rule 5.5(b)'s explicitly different description of another relationship involved in the analysis: "any lawyer with whom a disciplined lawyer practiced" as of certain specified times (emphasis added). As the ABA Model Rules General Notes discuss, some lawyers are "associated" with their law firm colleagues, and some are not. So not all lawyers are "associated" with those lawyers with whom they "practice." It would be helpful to have some guidance about the meaning of the word "associated" in this context.	

VIRGINIA RULE 5.5(b)	
Note # 1	**Code # 4**
Virginia Rule 5.5(b) contains the word “revocation.” It is unclear whether that word is intended to be synonymous with Virginia Rule 5.5(a)(1)’s word “disbarred.” Both of those Virginia Rule provisions also contain the same word “suspension.” If the word “revocation” was intended to be synonymous with the word “disbarred,” it might be appropriate to use the same word in both of those provisions.	

VIRGINIA RULE 5.5(b)	
Note # 2	**Code # 1**
Virginia Rule 5.5(b) addresses the possible representations that can be undertaken by a lawyer, law firm, or other legal entity which hires a disciplined lawyer whose license has been suspended or revoked for professional misconduct" at specified times – if such a lawyer, law firm or entity hires such a disciplined lawyer "as a consultant, law clerk, or legal assistant." It seems odd that the limitation on representations those hiring lawyers or entities undertake depends on those job titles of a disciplined lawyer that they employ. On its face, Virginia Rule 5.5(b) would allow such hiring lawyers or legal entities to undertake the otherwise prohibited representations if they hire such a disciplined lawyer but call her something other than a "consultant, law clerk, or legal assistant." Such a form-over-substance limitation does not make much sense. But presumably Virginia Rule 5.5(b)'s specific word choice is deliberate – because just one sentence earlier Virginia Rule 5.5(a) bluntly states that in other circumstances, a lawyer or law firm entity "shall not employ in any capacity" a disciplined lawyer under specified conditions (emphasis added).	

VIRGINIA RULE 5.5(d)	
Note # 1	**Code # 3**

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. A more consistent use of defined terms might avoid possible confusion.

VIRGINIA RULE 5.5(d)(3)	
Note # 1	**Code # 2**
Virginia Rule 5.5(d)(3) requires non-Virginia lawyers to "inform the client and interested third parties in writing" that the lawyer "is not admitted to practice law in Virginia" and provide other information about the lawyer's practice and office address (emphasis added). It is unclear what the term "interested third parties" means. Perhaps it means third parties "interested" in hiring such a lawyer. The phrase "the client" seems to refer to an existing client, not a "prospective" or would-be client. So it seems unlikely that the term "interested third parties" refers to other would-be clients. Alternatively, perhaps it means others "interested" in the course or outcome of the legal matter. If it means the latter, that could be a problem if the client retaining such a lawyer did not want other third parties to know of the retention (such as in an as-yet-unannounced divorce matter, corporate takeover, etc.). It would be helpful if Virginia Rule 5.5(d)(3) identified the type of "interested third parties" to whom non-Virginia lawyers must communicate the specified information in writing.	

VIRGINIA RULE 5.5(d)(4)	
Note # 1	**Code # 3**
Virginia Rule 5.5(d)(4) allows non-Virginia lawyers who have "inform[ed] the client" as required in Virginia Rule 5.5(d)(3) to "provide legal services on a temporary and occasional basis in Virginia" that meets certain guidelines (emphasis added). Such lawyers' disclosure to "the client" is only a subset of Virginia Rule 5.5(d)(3)'s required disclosure – which includes required disclosure to "the client and interested third parties" (emphasis added). Presumably Virginia Rule 5.5(d)(4) does not intend to diminish Virginia Rule 5.5(d)(3)'s disclosure requirement, but on its face Virginia Rule 5.5(d)(4) does not match Virginia Rule 5.5(d)(3).	

VIRGINIA RULE 5.5(d)(4)(iii)	
Note # 1	**Code # 3**
Virginia Rule 5.5(d)(4)(iii) states that non-Virginia lawyers may provide legal services on a temporary and occasional basis on Virginia if those legal services are "reasonably related to a pending or potential" ADR proceeding in Virginia or elsewhere – if those services "arise out of or are reasonably related to the [non-Virginia's lawyer's] practice in a jurisdiction" in which the non-Virginia lawyer is admitted (and which do not require *pro hac* admission) (emphasis added). It is unclear what the required reasonable relationship with the non-Virginia's "practice" in the jurisdiction where she is admitted means. Notably, Virginia Rule 5.5(d)(4)(iii)'s "reasonably related" standard focusing on the non-Virginia lawyer's "practice" in the jurisdiction where she is admitted differs from Virginia Rule 5.5(d)(4)(iv)'s "reasonably related" standard that focuses on non-Virginia lawyer's "representation of a client" in a jurisdiction where she is admitted to practice (emphases added). It would seem that a "reasonably related" standard focusing on a non-Virginia lawyer's "practice" in a jurisdiction is broader than a "reasonably related" standard that focuses on a non-Virginia lawyer's "representation of a client" in a jurisdiction where she is admitted. Some further explanation would be helpful.	

VIRGINIA RULE 5.5(d)(4)(iv)	
Note # 1	**Code # 3**
Virginia Rule 5.5(d)(4)(iv)'s provision allowing non-Virginia lawyers to handle matters in Virginia "governed primarily by international law" contains a restriction on that provision's permissibility by such non-Virginia lawyers to practice law on a "temporary and occasional basis in Virginia" – "subject to the foregoing limitations." It is unclear whether the "foregoing limitations" refers 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 a reference 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 reference to those earlier Virginia Rule provisions tends to assure non-Virginia lawyers that even if they cannot comply with those two earlier provisions' limitations, they can rely on the catch-all Virginia Rule 5.5(d)(4)(iv). But the phrase allowing such non-Virginia lawyers to "temporarily and occasionally" practice law in Virginia if their legal services "are governed primarily by international law" 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 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. Thus, if Virginia Rule 5.5(d)(4)(iv) 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" restriction. It would have allowed non-Virginia lawyers to practice "temporarily and occasionally" 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. Some clarification would be helpful.

VIRGINIA RULE 5.5 cmt. [1]	
Note # 1	**Code # 3**
Virginia Rule 5.5 cmt. [1] offers the frustratingly unhelpful explanation that "[a] lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice." That is helpful generically, but does not provide non-Virginia lawyers guidance on what they may do in Virginia.	

VIRGINIA RULE 5.5 cmt. [2]	
Note # 1	**Code # 3**
Virginia Rule 5.5 cmt. [2]'s first sentence contains the unhelpful statement that "[t]he definition of the practice of law is established by law and varies from one jurisdiction to another." That is interesting, but does not provide any useful guidance. Among other things, it does not refer to Virginia's definition of the practice of law, including the Virginia Supreme Court's 2019 new definition of the practice of law.	

VIRGINIA RULE 5.5 cmt. [2]	
Note # 2	**Code # 2**
Virginia Rule 5.5 cmt. [2]'s third sentence states that Virginia Rule 5.5(c) "does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work" (emphasis added). It is unclear whether the term "responsibility" means day-to-day supervision of such nonlawyer's work creation, or whether malpractice responsibility for any errors. It would be helpful for Virginia Rule 5.5 cmt. [2] to explain the word "responsibility's" meaning.	

VIRGINIA RULE 5.5 cmt. [3]	
Note # 1	**Code # 3**
Virginia Rule 5.5 cmt. [3] states that "the definition of the practice of law does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law." That seems like a useless axiomatic statement. That is among what lawyers do.	

VIRGINIA RULE 5.5 cmt. [4]	
Note # 1	**Code # 4**
Virginia Rule 5.5 cmt. [4]'s first sentence refers to "this Rule." That capitalized word "Rule" contrasts with Virginia Rule 5.5 cmt. [5]'s concluding sentence's reference to "this rule" (without capitalization).	

VIRGINIA RULE 5.5 cmt. [4]	
Note # 2	**Code # 1**
Virginia Rule 5.5 cmt. [4]'s concluding sentence contains the phrase "systematic and continued presence in Virginia" (emphasis added). This contrasts with black letter Virginia Rule 5.5(d)(2)(i)'s term "systematic and continuous" (emphasis added). Presumably Virginia Rule 5.5 cmt. [4]'s concluding sentence's word "continued" is a typo.	

VIRGINIA RULE 5.5 cmt. [5]	
Note # 1	**Code # 3**
Virginia Rule 5.5 cmt. [5]'s concluding sentence states 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" (emphasis added). The word "generally" might cause confusion, 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 concluding sentence arguably should not be in a Virginia Rule 5.5 Comment addressing temporary practice under Virginia Rule 5.5(d)(4).	

VIRGINIA RULE 5.5 cmt. [6]	
Note # 1	**Code # 1**
Virginia Rule 5.5 cmt. [6]'s second sentence states that "[s]ervices may be 'temporary' even though the [non-Virginia lawyer] provides services in Virginia on a recurring basis" (emphases added). The phrase "even though" does not seem appropriate in Virginia Rule 5.5 cmt. [6]'s second sentence. The word "temporary" logically focuses on the duration of a non-Virginia lawyer's conduct in Virginia. The phrase "recurring basis" seems to focus on an entirely different issue – the frequency of such non-Virginia lawyer's conduct in Virginia. Virginia Rule 5.5 cmt. [6]'s concluding sentence accurately describes that distinction, but it would be more clear if Virginia Rule 5.5 cmt. [6]'s second sentence did not include the potentially confusing "even though" language. Such conduct can be "temporary" and "recurring" or "non-recurring." It would be helpful if Virginia Rule 5.5 cmt. [6]'s second sentence did not contain this confusing mismatch.	

VIRGINIA RULE 5.5 cmt. [6]	
Note # 2	**Code # 1**
Virginia Rule 5.5 cmt. [6]'s second sentence states that non-Virginia lawyer's "[s]ervices may be 'temporary' even though the [non-Virginia lawyer] provides services in Virginia on a recurring basis" (emphasis added). This description of non-Virginia lawyers' "recurring" conduct in Virginia seems to ignore black letter Virginia Rule 5.5(d)(4)'s additional condition that those non-Virginia lawyers' conduct in Virginia are "on a temporary and occasional basis in Virginia" under specified conditions (emphasis added). It would be helpful if Virginia Rule 5.5 cmt. [6]'s second sentence contained or at least referred to this other significant condition – especially because Virginia Rule 5.5(d)(4)'s limitation of non-Virginia lawyers' practice in Virginia to the "occasional" provision of legal services in Virginia differs dramatically from the ABA Model Rule 5.5(c)'s approach – which does not so limit out-of-state lawyers' temporary practice in a state. Virginia Rule 5.5 cmt. [6]'s concluding sentence mentions the "occasional" condition, but that seems inconsistent with the preceding sentence's "recurring basis" statement.	

VIRGINIA RULE 5.5 cmt. [8]	
Note # 1	**Code # 4**
Virginia Rule 5.5 cmt. [8]'s first sentence contains the phrase "a lawyer licensed to practice Virginia." The word "in" presumably belongs between the word "practice" and the word "Virginia."	

VIRGINIA RULE 5.5 cmt. [8]	
Note # 2	**Code # 3**
Virginia Rule 5.5 cmt. [8]'s first sentence points to Virginia Rule 5.5(d)(4)(i) as allowing non-Virginia lawyers to "provide legal services on a temporary and occasional basis in Virginia" as long as those non-Virginia lawyers "associate" with a "lawyer licensed to practice Virginia" – who "actively participate[s] in and share[s] responsibility for the representation of the client." This contrasts with black letter Virginia Rule 5.5(d)(4)(i), which requires that the Virginia lawyer with whom the non-Virginia lawyer associates must be "admitted to practice without limitation in Virginia" (emphasis added).	

VIRGINIA RULE 5.5 cmt. [10]	
Note # 1	**Code # 2**
Virginia Rule 5.5 cmt. [10]'s first sentence states that non-Virginia lawyers may under specified circumstances "render[] services in Virginia on a temporary basis" (emphasis added). Virginia Rule 5.5 cmt. [10]'s reference to "temporary" basis does not include black letter Virginia Rule 5.5(d)(4)'s additional condition that such legal services may be provided only "on a temporary and occasional basis in Virginia" (emphasis added).	

VIRGINIA RULE 5.5 cmt. [10]	
Note # 2	**Code # 3**
Virginia Rule 5.5 cmt. [10]'s first sentence states that a non-Virginia lawyer may provide "services in Virginia on a temporary basis" when she "engages in conduct in anticipation of a proceeding or hearing in a jurisdiction" in which the non-Virginia lawyer is "authorized to practice law or reasonably expects to be admitted pro hac vice" (emphasis added). It is unclear whether the words "proceeding or hearing" are intended to be synonymous with Virginia Rule 5.5 cmt. [10]'s third sentence's term "pending litigation." It would seem that the phrase "proceeding or hearing" would in essence be only a subset of "pending litigation."	

VIRGINIA RULE 5.5 cmt. [10]	
Note # 3	**Code # 3**
Virginia Rule 5.5 cmt. [10]'s first sentence states that a non-Virginia lawyer may "render[] services in Virginia on a temporary basis . . . when the [non-Virginia lawyer] engages in conduct in anticipation of a proceeding or 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" (emphasis added). This permissible temporary provision of legal services in Virginia does not on its face cover a junior lawyer or some other colleague who seeks to temporarily render services in Virginia, but is not authorized to practice law in the jurisdiction where the proceeding or hearing will eventually take place, and does not "expect[] to be admitted pro hac vice" (because the lawyer is playing a backroom role in the litigation). Notably, ABA Model Rule 5.5 cmt. [11] addresses the status of such lawyers – explaining that ABA Model Rule 5.5(c)(2)'s phrase "the lawyer, or a person who the lawyer is assisting" covers both the lead lawyers expecting to "appear" in the proceeding and those lawyers assisting them. It might be appropriate to either revise black letter Virginia Rule 5.5(d)(iv)(ii) or explain the status of those other lawyers in Virginia Rule 5.5 cmt. [10].	

VIRGINIA RULE 5.5 cmt. [10]	
Note # 4	**Code # 2**
Virginia Rule 5.5 cmt. [10]'s concluding sentence states that a non-Virginia lawyer "may engage in conduct temporarily in Virginia in connection with pending litigation in another jurisdiction in which the [non-Virginia lawyer] is or reasonably expects to be authorized to appear" (emphasis added). Virginia Rule 5.5 cmt. [10]'s concluding sentence does not include black letter Virginia Rule 5.5(d)(4)'s additional condition that such legal services may be provided only "on a temporary and occasional basis in Virginia" (emphasis added).	

VIRGINIA RULE 5.5 cmt. [10]	
Note # 5	**Code # 3**
Virginia Rule 5.5 cmt. [10]'s concluding sentence states that a non-Virginia lawyer "may engage in conduct temporarily in Virginia in connection with pending litigation in another jurisdiction in which the [non-Virginia lawyer] is or reasonably expects to be authorized to appear" (emphasis added). Virginia Rule 5.5 cmt. [10]'s concluding sentence's word "litigation" contrasts with Virginia Rule 5.5 cmt. [10]'s first sentence's word "proceeding." If those words are intended to be synonymous, it would be more clear if both sentences used the same word.	

VIRGINIA RULE 5.5 cmt. [10]	
Note # 6	**Code # 3**
Virginia Rule 5.5 cmt. [10]'s concluding sentence states that a non-Virginia lawyer "may engage in conduct temporarily in Virginia in connection with pending litigation in another jurisdiction in which the [non-Virginia lawyer] is or reasonably expects to be authorized to appear" (emphasis added). Virginia Rule 5.5 cmt. [10]'s concluding sentence does not account for junior lawyers or other colleagues who are assisting in litigation, but do not "expect[] to be authorized to appear" in that litigation – because they are playing a "backroom" role in the litigation. Notably, ABA Model Rule 5.5 cmt. [11] addresses the status of such lawyers – explaining that ABA Model Rule 5.5(c)(2)'s phrase "the lawyer, or a person who the lawyer is assisting" covers both the lead lawyers expecting to "appear" in the proceeding and those lawyers assisting them. It might be appropriate to either revise black letter Virginia Rule 5.5(d)(iv)(ii) or explain the status of those other lawyers in Virginia Rule 5.5 cmt. [10].	

VIRGINIA RULE 5.5 cmt. [13]	
Note # 1	**Code # 2**
Virginia Rule 5.5 cmt. [13]'s first sentence explains that black letter Virginia Rule 5.5(d)(4)(iv) "permits a [non-Virginia lawyer] to provide certain legal services on a temporary basis in Virginia that arise out of or are reasonably related to that lawyer's practice in the jurisdiction in which the [non-Virginia lawyer] is admitted" but are not within black letter Virginia Rule 5.5(d)(4)(ii) or black letter Virginia Rule 5.5(d)(4)(iii) (emphasis added). Virginia Rule 5.5 cmt. [13]'s first sentence does not include black letter Virginia Rule 5.5(d)(4)'s additional condition that such legal services may be provided only "on a temporary and occasional basis in Virginia" (emphasis added).	

VIRGINIA RULE 5.5 cmt. [13]	
Note # 2	**Code # 2**
Virginia Rule 5.5 cmt. [13]'s first sentence explains that black letter Virginia Rule 5.5(d)(4)(iv) "permits a [non-Virginia lawyer] to provide certain legal services on a temporary basis in Virginia that arise out of or are reasonably related to that lawyer's practice in a jurisdiction in which the [non-Virginia lawyer] is admitted but are not within" black letter Virginia Rule 5.5(d)(4)(ii) or black letter Virginia Rule 5.5(d)(4)(iii) (emphasis added). This contrasts with black letter Virginia Rule 5.5(d)(4)(iv) – which does not require that the non-Virginia lawyer's "temporary and occasional" provision of legal service in Virginia relate to that lawyer's "practice in [another] jurisdiction," but rather requires that such "temporary and occasional" provision of legal service in Virginia "arise out of or are reasonably related to the representation of a client by the [non-Virginia lawyer] in a jurisdiction in which the [non-Virginia lawyer] is admitted to practice." That presumably is a different standard, because it is articulated differently.	

VIRGINIA RULE 5.5 cmt. [14]	
Note # 1	**Code # 2**
Virginia Rule 5.5 cmt. [14]'s first sentence seems to incorrectly describe black letter Virginia Rule 5.5(d)(4)(iv)'s requirement. Virginia Rule 5.5 cmt. [14]'s first sentence states that "[black letter Virginia Rule 5.5(d)(4)(iv) require[s] that the services arise out of or be reasonably related to the [non-Virginia lawyer's] practice in a jurisdiction in which the [non-Virginia lawyer] is admitted to practice" (emphasis added). But black letter Virginia Rule 5.5(d)(4)(iv) requires that the services "arise out of or are reasonably related to the representation of a client by the [non-Virginia lawyer] in a jurisdiction in which the [non-Virginia lawyer] is admitted to practice" (emphasis added). Services in Virginia could "arise out of or be reasonably related to" a non-Virginia lawyer's "practice" in another jurisdiction, but not to that lawyer's "representation of a client."	

VIRGINIA RULE 5.5 cmt. [14]	
Note # 2	**Code # 3**
Virginia Rule 5.5 cmt. [14]'s first sentence states that black letter Virginia Rule 5.5(a)(4)(iii) requires that the lawyer's services be related to the lawyer's practice "in a jurisdiction in which the [non-Virginia] lawyer is admitted" (emphasis added). Lawyers can be admitted in a jurisdiction for all purposes, or for limited purposes (such as admitted *pro hac* or under some other regulation). Presumably Virginia Rule 5.5 cmt. [14]'s word "admitted" means that the lawyer is "admitted" for all purposes. But that could be made more clear. **ABA**	

VIRGINIA RULE 5.5 cmt. [14]	
Note # 3	**Code # 3**
Virginia Rule 5.5 cmt. [14]'s fifth sentence identifies as one sufficient relationship to a lawyer's home state "significant aspects of the [non-Virginia] lawyer's work might be conducted in that jurisdiction" (meaning the lawyer's home state). That seems like a strange sufficient relationship, because lawyers often (if not usually) conduct "significant aspects" of their work in their office. Transactional lawyers and litigators presumably work primarily in their office, and travel to other jurisdictions from time to time. So if that established sufficient relationship with their home state, it would seem that nearly every lawyer could easily satisfy the "reasonably related" standard. If that was intended, Virginia Rule 5.5 cmt. [14] could be more explicit. **ABA**	

VIRGINIA RULE 5.5 cmt. [14]	
Note # 4	**Code # 3**
Virginia Rule 5.5 cmt. [14]'s sixth sentence states that the "necessary relationship" between a non-Virginia lawyer's practice and her home state "might arise when the client's activities or the legal issues involve multiple jurisdictions." That it would seem irrelevant when analyzing whether a lawyer's services are "reasonably related" to the lawyer's practice in her home state. Theoretically that situation could be relevant if the lawyer was admitted in one of those "multiple jurisdictions coming," but Virginia Rule 5.5 cmt. [14] does not on its face require that. **ABA**	

VIRGINIA RULE 5.5 cmt. [14]	
Note # 5	**Code # 3**
Virginia Rule 5.5 cmt. [14]'s sixth sentence states that the "necessary relationship" with the lawyer's home state "might arise" when "the officers of a multinational corporation" retain a lawyer to assess the merits of business sites in "multiple jurisdictions" (emphasis added). The fact that "officers" of such a multinational corporation retain a lawyer seems irrelevant. Corporate constituents other than "officers" can retain lawyers. **ABA**	

VIRGINIA RULE 5.5 cmt. [14]	
Note # 6	**Code # 3**
Virginia Rule 5.5 cmt. [14]'s sixth sentence explains that the "necessary relationship" with the lawyer's home state "might arise" when the officers of a multinational corporation" retain a lawyer to assess the merits of business sites in "multiple jurisdictions" (emphasis added). The fact that the corporation client is "multinational" would seem irrelevant in analyzing the "reasonable relationship" between a lawyer and her home jurisdiction. **ABA**	

VIRGINIA RULE 5.5 cmt. [14]	
Note # 7	**Code # 2**
Virginia Rule 5.5 cmt. [14]'s concluding sentence identifies as establishing the required "necessary relationship" with a non-Virginia lawyer's home jurisdiction the following: "the [non-Virginia lawyer's] services may draw on the lawyer's 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" (emphasis added). Whether the lawyer's expertise is "recognized" would seem irrelevant when assessing a relationship between the lawyer's services and her practice in her home jurisdiction. **ABA**	

VIRGINIA RULE 5.5 cmt. [14]	
Note # 8	**Code # 3**
Virginia Rule 5.5 cmt. [14]'s concluding sentence identifies as establishing the required "necessary relationship" with a lawyer's home jurisdiction the following: "the [non-Virginia lawyer's] services may draw on the lawyer's 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" (emphasis added). Whether the lawyer's recognized expertise is developed through the "regular" practice of law would seem irrelevant. A new lawyer or former professor might meet the required standard without having developed it through the "regular" practice of law. **ABA**	

VIRGINIA RULE 5.5 cmt. [14]	
Note # 9	**Code # 2**
Virginia Rule 5.5 cmt. [14]'s concluding sentence identifies as establishing the required "necessary relationship" with a lawyer's home jurisdiction the following: "the [non-Virginia lawyer's] services may draw on the lawyer's 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" (emphasis added). This possible scenario meeting the "necessary relationship" with a lawyer's home jurisdiction presumably does not need to have anything to do with the lawyer's home jurisdiction. In other words, a lawyer's expertise in those areas of law need not be "related to the lawyer's practice [or representations of clients in] the jurisdiction in which the lawyer is admitted to practice" – other than perhaps that the lawyer acquired that expertise while physically in such a jurisdiction. So Virginia Rule 5.5 cmt. [14] essentially creates an exception that is not supported by black letter Virginia Rule 5.5(d)(4). **ABA**	

VIRGINIA RULE 5.5 cmt. [14]	
Note # 10	**Code # 3**
Virginia Rule 5.5 cmt. [14]'s concluding sentence identifies as establishing the required "necessary relationship" with a lawyer's home jurisdiction the following: "the [non-Virginia lawyer's] services may draw on the lawyer's 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" (emphasis added). The term "particular body" seems inapt. Lawyers by definition always deal with "a particular body" of law. **ABA**	

VIRGINIA RULE 5.5 cmt. [21]	
Note # 1	**Code # 1**
Virginia Rule 5.5 cmt. [21]'s first and concluding sentences contain the term "prospective clients." That term is inapt if not generally erroneous in most situations Virginia Rule 1.18(a) defines a "prospective client" as "[a] person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter." Virginia Rule 5.5 cmt. [21]'s communications "advertising legal services" are not likely to involve communications to such "prospective clients." Terms such as "would-be" clients or "possible" clients might be more appropriate.	

VIRGINIA RULE 5.6 cmt. [2]	
Note # 1	**Code # 2**
Virginia Rule 5.6 cmt. [2]'s concluding sentence states that a "lawyer must fully disclose the extent of any restriction ["on their right to practice"] to any future client and refer the client to another lawyer if requested to do so." Black letter Virginia Rule 5.6 does not contain such a requirement. The Virginia Rules Scope's first paragraph's concluding sentence assures that "[c]omments do not add obligations to the [Virginia] Rules but provide guidance for practicing in compliance with the [Virginia] Rules."	

VIRGINIA RULE 5.8(a)(1)	
Note # 1	**Code # 4**
Virginia Rule 5.8(a)(1) contains the word “leaving” when referring to a lawyer who is leaving a firm. Virginia Rule 5.8(b)(1) also contains the word “leaving.” This contrasts linguistically with Virginia Rule 5.8(a)(1)’s word “departure” and Virginia Rule 5.8(d)’s word “departing.” It might be more clear if Virginia Rule 5.8 consistently used a form of the word “leave” or a form of the word “depart.”	

VIRGINIA RULE 5.8(a)(1)	
Note # 2	**Code # 3**
Virginia Rule 5.8(a)(1) contains the term "clients of the law firm." Virginia Rule 5.8(a)(2) also contains that term. Virginia Rule 5.8(b)(1) contains a similar term: "a client of the law firm." Virginia Rule 5.8(d) also contains that term. But Virginia Rule 5.8(d) also contains the term "a client of a departing lawyer." Similarly, Virginia Rule 5.8 cmt. [2]'s first sentence contains the term "the departing lawyer's clients." It might be more clear if Virginia Rule 5.8 consistently referred to clients either of a law firm or of a lawyer (before those clients decide on the lawyer they wish to represent them in the future).	

VIRGINIA RULE 5.8 cmt. [1]	
Note # 1	**Code # 4**
Virginia Rule 5.8 cmt. [1]'s second sentence and fourth sentence contain the term "this rule" (without caps). This contrasts with Virginia Rule 6.5 cmt. [2]'s, [3]'s, [4]'s, and [5]'s use of the term "this Rule" (with an initial cap). A consistent capitalization would be preferable.	

VIRGINIA RULE 5.8 cmt. [3]	
Note # 1	**Code # 2**
Virginia Rule 5.8 cmt. [3] defines the word "client" as denoting "clients whose active matters the departing lawyer has primary responsibility" (emphasis added). Virginia Rule 5.8 cmt. [3] does not provide similar guidance for clients' inactive matters, but whose attorney-client relationship with the law firm has not ended on its terms or by the passage of time. Virginia Rule 5.8 therefore does not provide any guidance about how to handle such clients or their files.	

VIRGINIA RULE 5.8 cmt. [3]	
Note # 2	**Code # 2**
Virginia Rule 5.8 cmt. [3] defines the word "client" as denoting "clients whose active matters the departing lawyer has primary responsibility" (emphasis added). Virginia Rule 5.8 cmt. [3] seems to unrealistically consider that every law firm client has only one lawyer with "primary responsibility" for a client. In many (if not most) law firms, several lawyers may have "primary responsibility" for certain legal issues the firm is handling for a client. One lawyer might have "primary responsibility" for litigation, while another lawyer has "primary responsibility" for transactions. Virginia Rule 5.8 cmt. [3]'s approval represents 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. Virginia Rule 1.17 envisions the same client's separate matters being separately addressed in purchase and sale transactions. Virginia Rule 1.17 thus seems to take a more realistic view of lawyer's practice than Virginia Rule 5.8.	

VIRGINIA RULE 5.8 cmt. [4]	
Note # 1	**Code # 3**
Virginia Rule 5.8 cmt. [4]'s concluding sentence addresses situations "when the lawyer is appointed by a court to represent a client." It might be helpful for Virginia Rule 5.8 cmt. [4] to mention to Virginia Rule 1.16 cmt. [3]'s and cmt. [5]'s guidance on such appointed lawyers' withdrawal or discharge.	

VIRGINIA RULE 6.1 cmt. [1]	
Note # 1	**Code # 4**
Virginia Rule 6.1 cmt. [1]'s second sentence states that "[t]he Council for the Virginia State Bar urges "Virginia lawyers to contribute pro bono services. That reference seems odd, and unnecessary. Virginia Rule 6.1 cmt. [1] could itself encourage lawyers' pro bono activity rather than citing the Virginia State Bar Council. On a more linguistic level, the term "Council <u>of</u> the Virginia State Bar" (emphasis added) would seem more appropriate than "Council <u>for</u> the Virginia State Bar" (emphasis added).	

VIRGINIA RULE 6.1 cmt. [2]	
Note # 1	**Code # 4**
Virginia Rule 6.1 cmt. [2] contains the trifecta of terms: "lawyer" (Virginia Rule 6.1 cmt. [2]'s first sentence); "attorneys" (Virginia Rule 6.1 cmt. [2]'s second sentence); "counsel" (Virginia Rule 6.1 cmt. [2]'s concluding sentence). Although those different terms are not likely to cause any confusion, it might be more appropriate to use the same word to describe the same professional.	

VIRGINIA RULE 6.1 cmt. [3]	
Note # 1	**Code # 3**
Virginia Rule 6.1 cmt. [3]'s second sentence describes "discrimination based on race, sex, age or handicap." The ABA Model Rules contain more extensive and inclusive lists. 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." It might be appropriate to use a lengthier list here.	

VIRGINIA RULE 6.1 cmt. [6]	
Note # 1	**Code # 3**
Virginia Rule 6.1 cmt. [6]'s first sentence states that services are "not pro bono publico if provided on a contingent fee basis." This exclusion in some ways does not seem appropriate. For example, a lawyer might take on a contingent fee representation under Virginia Rule 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 any fees unless the representation is successful. There may be very little chance of winning such a suit, so the lawyer would not be expecting to recover a fee. Perhaps 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.	

VIRGINIA RULE 6.1 cmt. [7]	
Note # 1	**Code # 3**
Virginia Rule 6.1 cmt. [7]'s second sentence states that "a group of two or more lawyers may pool their resources to ensure that individuals in need of [pro bono] assistance, who would otherwise be unable to afford to compensate counsel, receive needed legal services" (emphasis added). Limiting such collective pro bono services to such individuals 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. These would seem to be no reason why lawyers cannot 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. [9]	
Note # 1	**Code # 4**
Virginia Rule 6.1 cmt. [9]'s first sentence requires a period at the end.	

VIRGINIA RULE 6.1 cmt. [10]	
Note # 1	**Code # 4**
Virginia Rule 6.1 cmt. [10]'s concluding sentence does not appear to require a comma between the word "direct" and the word "legal."	

VIRGINIA RULE 6.2 cmt. [2]	
Note # 1	**Code # 3**
Virginia Rule 6.2 cmt. [2]'s second sentence describes a scenario that presumably would result in an improper conflict of interest: "when 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" (emphasis added). If Virginia Rule 6.2 cmt. [2]'s standard intends to incorporate Virginia Rule 1.7(a)(2)'s so-called "material limitation" conflict, it misses the mark. Virginia Rule 1.7(a)(2) considers is it a conflict "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 (emphasis added). **ABA**	

VIRGINIA RULE 6.2 cmt. [2]	
Note # 2	**Code # 3**
Virginia Rule 6.2 cmt. [2]'s concluding sentence explains that lawyers may decline an appointment "when it would impose a financial sacrifice so great as to be unjust" (emphasis added). The word "unjust" seems inapt. That word normally refers to something other than money. It might be more appropriate for Virginia Rule 6.2 cmt. [2] to use the Virginia Rule 1.16(b)(5) discretionary withdrawal standard: "the representation will result in an unreasonable financial burden on the lawyer" (emphasis added). **ABA**	

VIRGINIA RULE 6.3 cmt. [2]	
Note # 1	**Code # 4**
Virginia Rule 6.3 cmt. [2]'s concluding sentence begins with the phrase "[e]stablished, written policies." It is unclear whether that phrase requires a comma. **ABA**	

VIRGINIA RULE 6.5(a)(1)	
Note # 1	**Code # 3**
Virginia Rule 6.5(a)(1) describes a scenario in which "the representation of the client involves a conflict of interest" (emphasis added). The word "involves" (which is also used in Virginia Rule 1.7(a)) contrasts with the word "presents" – which appears in Virginia Rule 6.5 cmt. [3]. As the ABA Model Rules General Notes discuss, the ABA Model Rules use different words to describe the existence of a conflict. The Virginia Rules do too. Presumably those words are intended to be synonymous, but if not the Virginia Rules should explain any intended differences. **ABA**	

VIRGINIA RULE 6.5 cmt. [1]	
Note # 1	**Code # 4**
Virginia Rule 6.5 cmt. [1]'s concluding sentence describes a situation "in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation" (emphasis added). Although the Virginia Rules do not define the word "screen" (as do the ABA Model Rules), the common usage of the word "screen" involves lawyers being separated in some way from other lawyers. The word "check" might be more appropriate here. **ABA**	

VIRGINIA RULE 7.1 cmt. [2]	
Note # 1	**Code # 3**
Virginia Rule 7.1 cmt. [2]'s second sentence describes a standard for determining if a lawyer's communication about her services "may be misleading:" "if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated" (emphasis added). Virginia Rule 7.1 cmt. [2]'s concluding sentence articulates a different standard in addressing "[t]he inclusion of an appropriate disclaimer or qualifying language," - which "may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public" (emphasis added). It is unclear whether Virginia Rule 7.1 cmt. [2] second sentence's "would lead a reasonable person to conclude" standard is intended to be the same as or different from Virginia Rule 7.1 cmt. [2]'s concluding sentence's standard: "likely to create unjustified expectations or otherwise mislead the public." If so, Virginia Rule 7.1 cmt. [2] should explain the difference. **ABA**	

VIRGINIA RULE 7.1 cmt. [5]	
Note # 1	**Code # 3**
Virginia Rule 7.1 cmt. [5]'s first sentence contains the word "members" (twice), in describing lawyers in a firm. The Virginia Rule Terminology section does not define that term. But the Virginia Terminology section defines "partner" as "denot[ing] 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" (emphases added). It seems that a "shareholder" would not be considered a "member." If so, Virginia Rule 7.1 cmt. [5]'s first sentence apparently would not allow a law firm to use the name of a "shareholder" in its name.	

VIRGINIA RULE 7.1 cmt. [5]	
Note # 2	**Code # 3**
Virginia Rule 7.1 cmt. [5]'s seventh sentence prohibits a law firm from using in its name the name of "a lawyer not associated with the firm or a predecessor of the firm" (emphasis added). As the ABA Model Rule General Notes discuss, the ABA Model Rules do not define the word "associated," although that relationship plays a key role in many ABA Model Rules' application and analysis. The same is true of the Virginia Rules. However, it seems clear that some lawyers are "associated" with their law firm colleagues and some are not. Virginia Rule 7.1 cmt. [5] does not allow a law firm to use in its name a lawyer who is not "associated" with the law firm. That may be an intentional exclusion, but the Virginia Rules' ambiguous and inconsistent use of the word "associated" does not provide assurance that the exclusion is intentional. **ABA**	

VIRGINIA RULE 7.3(b)(2)	
Note # 1	**Code # 3**
Virginia Rule 7.3(b)(2) prohibits a lawyer's solicitation if it "involves . . . unwarranted promises of benefits." It might be appropriate to instead include that content-based restriction in Virginia Rule 7.1 – which focuses on content rather than conduct.	

VIRGINIA RULE 7.3(c)(2)	
Note # 1	**Code # 3**
Virginia Rule 7.3(c)(2) states that [e]very written, recorded or electronic solicitation from a lawyer" requires specified writing unless the solicitation's recipient "has a familial, personal, or prior professional relationship with the lawyer" (emphasis added). The exception's limitation to those with a "prior professional relationship" seems too narrow. For instance, the exception would not include would-be clients engaged in sophisticated non-legal business relationships with lawyers. ABA Model Rule 7.3(b)(2)'s exception to its more sweeping prohibition includes "a prior business or professional relationship with the lawyer or law firm" (emphasis added).	

VIRGINIA RULE 7.3 (c)(2)	
Note # 2	**Code # 2**
Virginia Rule 7.3 (c)(2) requires certain writing on a solicitation, unless (among other things), "the recipient of the solicitation…has a familial, personal, or prior professional relationship with the lawyer" (emphasis added). Focusing just on one "lawyer" seems inappropriate. ABA Model Rule 7.3(c) solicitation prohibition (which admittedly is much more restrictive than Virginia Rule 7.3(c)(2)'s writing requirement) contains a more logical exception: "unless the contact is with a…person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm" (emphasis added). Virginia Rule 7.3(c)(2) on its face would require the specified writing on any solicitation sent by an individual lawyer to a client who has not worked with that lawyer, but who has for decades relied on that lawyer's law firm. It might be appropriate to add the phrase "or law firm" to "the lawyer" reference.	

VIRGINIA RULE 7.3(c)(3)	
Note # 2	**Code # 4**
Virginia Rule 7.3(c)(3)'s final word "lawyer" does not need a period after it.	

VIRGINIA RULE 7.3(d)(4)	
Note # 1	**Code # 4**
Virginia Rule 7.3(d)(4) 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." As long as such a gift is "nominal," and of "gratitude," it would seem that the rest of the conditions would not be required.	

VIRGINIA RULE 7.3 cmt. [2a]	
Note # 1	**Code # 3**
Virginia Rule 7.3 cmt. [2a]'s first sentence refers to "requests of potential clients or their spokespersons or sponsors" (emphasis added). It is unclear what the words "spokespersons" and "sponsors" mean.	

VIRGINIA RULE 7.3 cmt. [2a]	
Note # 2	**Code # 3**
Virginia Rule 7.3 cmt. [2a]'s concluding sentence states that certain communications are not considered "communications soliciting professional employment:" "[g]eneral announcements by lawyers, including changes in personnel or office location." It might be appropriate to instead include that content-based restriction in Virginia Rule 7.1 – which focuses on content, rather than conduct.	

VIRGINIA RULE 7.3 cmt. [3]	
Note # 1	**Code # 1**
Virginia Rule 7.3 cmt. [3]'s first sentence refers twice to Virginia Rule 7.3(a). This seems to be an erroneous reference. Virginia Rule 7.3(b) would seem more appropriate.	

VIRGINIA RULE 7.3 cmt. [3]	
Note # 2	**Code # 2**
Virginia Rule 7.3 cmt. [3]'s first sentence prohibits "any solicitation that "involves coercion, duress or harassment." This contrasts with Virginia Rule 7.3(b)(2)'s longer list: "solicitation involve[ing] harassment, undue influence, coercion, duress, compulsion, intimidation, threats or unwarranted promises of benefits." It might be more appropriate to include the complete list, or simply refer to Virginia Rule 7.3(b)(2).	

VIRGINIA RULE 7.3 cmt. [6]	
Note # 1	**Code # 4**
Virginia Rule 7.3 cmt. [6]'s second sentence defines "[a] legal service plan" (singular) (emphasis added). Virginia Rule 7.3 cmt. [6]'s second sentence refers to "[n]ot-for-profit lawyer referral services" (plural) (emphasis added). It might be appropriate for Virginia Rule 7.3 cmt. [6] to consistently use either the singular or the plural.	

VIRGINIA RULE 8.1(c)	
Note # 1	**Code # 3**
Virginia Rule 8.1(c) does not contain a knowledge requirement, in contrast to Virginia Rule 8.1(a)'s and (b)'s explicit knowledge requirement, and Virginia Rule 8.1(d)'s implicit knowledge requirement. It might be appropriate for Virginia Rule 8.1(c) to state that a lawyer in the defined category "shall not . . . knowingly fail to respond" as described in Virginia Rule 8.1(c).	

VIRGINIA RULE 8.1(c)	
Note # 2	**Code # 2**
Virginia Rule 8.1(c) states that certain specified lawyers "shall not…fail to" provide certain information – "except that this [Virginia Rule 8.1(c)] does not require disclosure of information otherwise protected by [Virginia] Rule 1.6." Thus, on its face, Virginia Rule 8.1(c) does not require lawyers to disclose information even if Virginia Rule 1.6 would allow such disclosure. That category of information is "protected" by Virginia Rule 1.6, but its disclosure would not violate Virginia Rule 1.6.	

VIRGINIA RULE 8.1 cmt. [1]	
Note # 1	**Code # 4**
Virginia Rule 8.1 cmt. [1]'s concluding sentence requires applicants and other specified persons to make "affirmative clarification of any material misstatement <u>of which the person involved becomes aware</u>, that could lead to a misunderstanding on the part of the admissions or disciplinary authority" (emphasis added). The phrase "of which the person involved becomes aware" probably is superfluous. A person can only clarify "material misstatement of which she becomes aware."	

VIRGINIA RULE 8.1 cmt. [2]	
Note # 1	**Code # 3**
Virginia Rule 8.1 cmt. [2]'s first sentence states that Virginia Rule 8.1 is subject to "other lawfully recognized matters of privilege" (emphasis added). It is unclear what the term "matters of privilege" means. Perhaps the word "privileges" would be preferable to the term "matters of privilege."	

VIRGINIA RULE 8.2	
Note # 1	**Code # 4**
Virginia Rule 8.2 contains the phrase "the qualifications or integrity of a judge" or other judicial officer" (emphasis added). The word "integrity" seems unnecessary – presumably "integrity" is an important part of such persons' "qualifications." **ABA**	

VIRGINIA RULE 8.3(d)	
Note # 1	**Code # 2**
Virginia Rule 8.3(d) exempts from lawyers' and judges' normal reporting requirement "information [which] is obtained for the purposes of fulfilling the recognized objectives of" approved lawyer's assistance programs (emphasis added). It is unclear what this content limitation means. One would think that all "such information" obtained in those settings would be "for the purposes of fulfilling the recognized objectives of the program." An uncertain content limitation would seem contrary to the general provision encouraging lawyers to assist in such programs.	

VIRGINIA RULE 8.3(e)(2)	
Note # 1	**Code # 4**
Virginia Rule 8.3(e)(2) contains the following words: "state;" "territory." Virginia Rule 8.39(e)(2) does too. These words contrast with Virginia Rule 5.5(d)(1)'s capitalized words "State" and "Territory."	

VIRGINIA RULE 8.3 cmt. [2]	
Note # 1	**Code # 1**
Virginia Rule 8.3 cmt. [2] explains that reporting another lawyer's misconduct "is not required where it would involve violation of [Virginia] Rule 1.6" – citing "[Virginia] Rule 1.6(c)(3)." There is no Virginia Rule 1.6(c)(3). Presumably the reference should be to Virginia Rule 1.6(c)(2).	

VIRGINIA RULE 8.3 cmt. [3]	
Note # 1	**Code # 3**
Virginia Rule 8.3 cmt. [3]'s penultimate sentence contains the term "peer review agency." It is unclear what that term means. Some clarification would be helpful.	

VIRGINIA RULE 8.3 cmt. [3a]	
Note # 1	**Code # 3**
Virginia Rule 8.3 cmt. [3a]'s second, third and fourth sentences refer to statutes. It would be helpful for Virginia Rule 8.3 cmt. [3a] to provide the statutes' citations.	

VIRGINIA RULE 8.3 cmt. [5]	
Note # 1	**Code # 3**
Virginia Rule 8.3 cmt. [5]'s fourth sentence contains the terms "confidences and secrets." Those are archaic terms that are no longer defined in the Virginia Rules. It might be more appropriate to refer to all information such lawyers and judges receive in the specified assistance program context.	

VIRGINIA RULE 8.3 cmt. [5]	
Note # 2	**Code # 3**
Virginia Rule 8.3 cmt. [5]'s concluding sentence states that "a lawyer who receives such information 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, for example, the conversion of client funds to personal use" (emphasis added). The term "impaired" seems unnecessary – Virginia Rule 8.3 presumably applies to information from an impaired or unimpaired lawyer or judge.	

VIRGINIA RULE 8.3 cmt. [5]	
Note # 3	**Code # 2**
Virginia Rule 8.3 cmt. [5]'s concluding sentence states that "a lawyer who receives such information 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, for example, the conversion of client funds to personal use." It is unclear why black letter Virginia Rule 8.3(d) and Virginia Rule 8.3 cmt. [5] do not relieve such lawyers from an obligation to disclose such information. Black letter Virginia Rule 8.3(d) relieves lawyers and judges of such a reporting obligation if the "information [is] otherwise protected by [Virginia] Rule 1.6 or information" gained by lawyers or judges in approved lawyer's assistance programs (emphasis added). Perhaps the reporting requirement rests on the limitation of that non-disclosure provision to information "obtained for the purposes of fulfilling the recognized objectives of the program" – because such a stated intent to engage in illegal activities does not fulfill those purposes. But it would be helpful to have clarification.	

VIRGINIA RULE 8.4 cmt. [2]	
Note # 1	**Code # 2**
Virginia Rule 8.4 cmt. [2]'s third sentence states that the "concept [presumably of offenses involving "moral turpitude"] can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law" (emphasis added). The word "include" seems incorrect. The listed offenses "concerning matters of personal morality" would seem to be defined outside those "involving moral turpitude." So the word "exclude" would seem more appropriate than the word "include." In addition, the word "include" might appear to "include" "matters of personal morality" as the "kinds of illegal conduct [that] reflect adversely on fitness to practice law." Presumably such "matters of personal morality" are excluded from the type of such illegal conduct that "reflect[s] adversely on fitness to practice law." **ABA**	

VIRGINIA RULE 8.4 cmt. [2]	
Note # 2	**Code # 2**
Virginia Rule 8.4 cmt. [2]'s sixth sentence contains a list of offenses for which lawyers should be professionally answerable – including "serious interference with the administration of justice" (emphasis added). The word "serious" seems inappropriate here. One might think that lawyers should be professionally answerable for any "interference with the administration of justice," however "serious." **ABA**	

VIRGINIA RULE 8.4 cmt. [2]	
Note # 3	**Code # 3**
Virginia Rule 8.4 cmt. [2]'s concluding sentence states that "[a] pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation" (emphasis added). That presumably means that at some point "repeated offenses, even ones of minor significance" will trigger a lawyer's reporting obligation. But there is no guidance on how many of those must occur to trigger such an obligation. **ABA**	

VIRGINIA RULE 8.4 cmt. [2]	
Note # 4	**Code # 3**
Virginia Rule 8.4 cmt. [2]'s concluding sentence states that "a pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation" (emphasis added). It is unclear how that undeniably accurate axiom affects Virginia Rule 8.4's application. Virginia Rule 8.4 does not define as "professional misconduct" a lawyer's "indifference to legal obligation." **ABA**	

VIRGINIA RULE 8.4 cmt. [4]	
Note # 1	**Code # 3**
Virginia Rule 8.4 cmt. [4]'s second sentence states that Virginia Rule 1.2(c)'s provisions "apply to challenges <u>of</u> legal regulation of the practice of law" (emphasis added). The word "to" would seem more appropriate than the word "of" here.	

VIRGINIA RULE 8.4 cmt. [4]	
Note # 2	**Code # 3**
Virginia Rule 8.4 cmt. [4]'s second sentence explains that Virginia Rule 1.2(c)'s provisions "apply to challenges of legal regulation of the practice of law." It seems like an inappropriately narrow subset of challenges lawyers may undertake.	

VIRGINIA RULE 8.4 cmt. [7]	
Note # 1	**Code # 3**
Virginia Rule 8.4 cmt. [5]'s second sentence explains that "[a] lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers" (emphasis added). It is unclear what that standard means. Perhaps it is intended to by synonymous with Virginia Rule 8.4(b)'s phrase "fitness to practice law," but that is not clear. **ABA**	

VIRGINIA RULE 8.5(a)	
Note # 1	**Code # 4**
Virginia Rule 8.5(a)'s first sentence begins with the odd statement with that "[a] lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of Virginia, regardless of where the lawyer's conduct occurs" (emphasis added). It would make more sense to use the word "Virginia" in both places – replacing the term "this jurisdiction."	

VIRGINIA RULE 8.5(b)(1)	
Note # 1	**Code # 3**
Virginia Rule 8.5(b)(1) states that "the rules of the jurisdiction" in which a tribunal sits (unless the tribunal's rules provide otherwise) apply to "conduct in connection with a proceeding in a court, agency, or other tribunal before which a lawyer appears" (emphasis added). The word "appears" presumably means that only "conduct in connection with" a pending proceeding will be governed by the specified rules. This is because a lawyer can only "appear" in a pending proceeding. It might be more clear if Virginia Rule 8.5(b) explicitly stated as much. For instance, ABA Model Rule 8.5(b)(1) explicitly states that "for conduct in connection with a matter pending before a tribunal the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise" (emphasis added). It might be appropriate to make the "pending" standard explicit rather than implicit.	

VIRGINIA RULE 8.5(b)(1)	
Note # 2	**Code # 1**
Virginia Rule 8.5(b)(1) states that the "rules of the jurisdiction" in which a tribunal sits (unless the tribunal's rules provide otherwise) apply to "conduct in connection with a proceeding in a court, agency, or other tribunal before which a lawyer appears" (emphasis added). Virginia Rule 8.5(b)(1)'s limitation of the specified choice of laws principle to lawyer who "appears" before a tribunal seems to create a mismatch between conduct by lawyers who "appears" in a proceeding and lawyers who represent the client in connection with that proceeding but do not "appear" in the proceeding. For instance, a lawyer might work on a 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) – although their colleagues who "appear" in the proceeding would be covered. That means that some lawyers might be governed by one jurisdiction's ethics rules while their colleagues working on the same case might be governed by another jurisdiction's ethics rules. That does not make much sense.	

VIRGINIA RULE 8.5(b)(3)	
Note # 1	**Code # 1**

Virginia Rule 8.5(b)(3) contains an odd provision that on its face does not make sense – for two reasons. Under Virginia Rule 8.5(b)(3), the Virginia ethics rules apply to "conduct in the course of providing, holding out as providing, or offering to provide legal services in Virginia" (emphases added). Virginia Rule 8.5(b)(3) explicitly trumps Virginia Rule 8.5(b)(1) and (2). The choice of law analysis becomes odd and impractical if a lawyer provides legal services in Virginia "in connection with a proceeding" pending 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" Virginia Rule 8.5(b)(1), such lawyers' conduct in Virginia would be governed by the Virginia Rules. So under Virginia Rule 8.5(b)(3), that lawyer would be governed by one set of rules when acting outside Virginia and a different set of rules when acting inside Virginia. That does not make much sense.

VIRGINIA RULE 8.5(b)(3)	
Note # 2	**Code # 1**
Virginia Rule 8.5(b)(3) contains an odd provision that on its face does not make sense for two reasons. Under Virginia Rule 8.5(b)(3), the Virginia Rules apply to "conduct in the course of…holding out as providing, or offering to provide legal services in Virginia" (emphasis added). Virginia Rule 8.5(b)'s inclusion of the phrase "holding out as providing, or offering to provide legal services in Virginia" could trigger even more 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)(3), her "conduct in the course of . . . holding out as providing, or offering to provide legal service in Virginia" would be governed by the Virginia Rules – even if she engaged in conduct in another jurisdiction. That does not make much sense.	

VIRGINIA RULE 8.5 cmt. [9]	
Note # 1	**Code # 2**
Virginia Rule 8.5 cmt. [9]'s first sentence states that Virginia Rule 8.5(b)(1) "applies the law of the jurisdiction in which the court, agency, or other tribunal sits" to conduct by a lawyer who "appears before a court, agency, or other tribunal in another jurisdiction." This misstates black letter Virginia Rule 8.5(b)(1)'s standard – which contains an explicit exception to that general rule: "unless the rules of the court, agency, or other tribunal provide otherwise." The remainder of Virginia Rule 8.5 cmt. [9] provides a clarifying example, but it would avoid confusion if Virginia Rule 8.5 cmt. [9]'s first sentence mentioned the exception.	

VIRGINIA RULE 8.5 cmt. [9]	
Note # 2	**Code # 1**
Virginia Rule 8.5 cmt. [9]'s concluding sentence states 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." This 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) and (b)(2)." Thus, under strange Virginia Rule 8.5(b)(3)'s provision, the Virginia Rules apparently would apply to a lawyer who assists in some USPTO proceeding but who does not "appear" before the USPTO.	