**Professionalism and Competency Under the Rules**

Written Materials 2021 VJLAP Ethics Seminar

1. Professionalism – Preamble through Rule 1.3 of the Virginia Rules of Professional Conduct (hereinafter, the “Rules”)

* Professionalism is embodied in the Preamble to the Rules:
  + The practice of law is a self-regulated profession unique in its close relationship with the processes of government and law enforcement.
  + The Lawyer performs a multitude of functions in representation of clients: advisor, advocate, negotiator, intermediary, neutral third party and evaluator
  + In all functions the lawyer should be competent prompt and diligent.
* Professionalism is embodied in the Scope of the rules:
  + The Rules presuppose a larger legal context in which the lawyer operates: rules, statutes, laws of substance and procedure
  + The larger legal context, while not a basis for civil liability, places much of the regulation of the profession in the courts
* Competence is inherent in any notion of Professionalism, and is expressed in Rule 1.1:
  + A lawyer shall provide competent representation
  + That duty includes: all legal knowledge, skill, thoroughness and preparation required to provide the competent representation
  + Inherent too in the notion of Competence is a lawyer’s mental, emotional and physical well-being [Note 7], without which a lawyer cannot provide competent representation
* Professionalism requires a clear statement of the Scope of Representation which is controlled by Rule 1.2 of the Rules:
  + A lawyer shall abide by the client’s decision in: determining whether or not to accept a settlement, to enter a plea, to ask for a jury or to permit the client to testify.
  + A lawyer can limit the scope of representation with the agreement of the client, and take any action impliedly authorized by that agreement; but
  + A lawyer shall not counsel a client to engage in, or assist a client in engaging in conduct known to be illegal or fraudulent.
* Finally, Professionalism includes Diligence per Rule 1.3:
  + A lawyer shall act with reasonable diligence and promptness in the representation.
  + She shall not intentionally fail to perform duties consistent with the agreement of representation, but may withdraw in accordance with the Rules

1. Client Communication – Expressed explicitly in Rule 1.4 and implicitly throughout the Rules:

* A lawyer shall keep client reasonably informed and comply with reasonable requests for information
  + A lawyer shall explain a matter to the extent reasonably necessary for client to make an informed decision.
  + Most of the Rules are subject to varying degrees of application depending upon the client’s consent after consultation.
  + Most fee disputes could be resolved with clear communication in advance of the representation (or shortly thereafter) Rule 1.5
* Confidentiality of Communication – Rule 1.6 – A lawyer shall not reveal:
  + Information protected by the attorney-client privilege
  + Information gained in the representation which client has requested be held inviolate (or which would be detrimental/embarrassing to the client), and
  + Except, if client agrees after consultation.
* A lawyer can reveal:
  + Information to comply with the law or a court order
  + Information to establish claim/defense in an action between the lawyer and the client, in a criminal/civil claim against the lawyer based upon a matter in which the client was involved, or
  + Information establishing that the client perpetrated a fraud on a third party
  + Information necessary to protect the client in the event of the lawyer’s death
  + Information to an outside agency for office management purposes which the lawyer reasonably expects will remain confidential
  + Information to prevent reasonably certain death or bodily harm
* A lawyer must reveal:
  + Intention expressed by client to commit a crime reasonable certain to result in death/bodily harm or injury to property after advising client of his duty to report
  + Information concerning misconduct of another attorney, only with client consent

C. Regulation of Lawyers: Update – Communication!

* *Baumann v. Virginia State Bar*, 845 S.E.2d 528 (2020); Court found violations:
  + Rule 1.2 - Lawyer did not consult with client regarding objectives of representation and the means by which they are to be pursued, and
  + Rule 1.4 – Lawyer did not keep client informed of progress (or lack thereof) so she could make informed decisions, and
  + Rule 1.5 – Lawyer’s fee was not reasonable considering the services provided, the fees charged by others in the area for similar services and fact that client was charged for services never provided (which is per se unreasonable)

D. Online Solicitation and Criticism

* Online Criticism: online reviews influence most (83%) consumers and most (73%) believe what they read online
* See Rule 1.6 above – Criticism may present a situation where lawyer can reveal confidential information to protect his online reputation, however
* Attorney-Client Privilege is sacrosanct such that lawyer may be best served refraining from breaking privilege :
  + A lawyers duty to keep client confidences has few exceptions and in an abundance of caution I do not feel at liberty to respond in a point-by-point fashion in this forum. Suffice it to say that I do not believe that the post presents a fair and accurate picture of the events.

E. Communications with Represented Government Official – Rule 4.2

* Rule 4.2 prevents a lawyer from communicating about the subject of the representation with a person the lawyer knows to be represented by counsel.
* If the “person” is a governmental entity: *Upjohn v. United States*, 449 U.S. 383 (1981): The Control Group Test applies:
  + No *ex parte* communications with anyone who, because of their status or position within the organization, has the authority to bind the entity.
  + Per LEO 1891: It is not impermissible for an attorney to directly contact and communicate with employees of an adverse party provided that the employees are not members of the corporation’s “control group” and are not able to commit the organization or corporation to specific courses of action that would lead one to believe the employee is the corporation’s alter ego

F. Lawyer Impairment – Statistics

* **Statistics:** substance abuse and other mental health issue impact the legal profession at a higher rate than most other professions
  + The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys
  + ALM’s Mental Health and Substance Abuse Survey (2020)
    - 74% said the legal profession has had a negative effect on their mental health over time;
    - 56% of respondents said mental health problems and substance abuse are worse in the legal industry than in other industries;
    - 41% of respondents said mental health problems and substance abuse are at a crisis level in the legal industry;
    - 17.9% of respondents said they have contemplated suicide during their professional legal career;
    - 31.2% of respondents said they are depressed;
    - 64% of respondents said they have anxiety;
    - 10.1% of respondents said they have an alcohol problem; and
    - 2.8% of respondents said they have a drug problem.
  + “Stress, Drink, Leave” (2021) study (survey of almost 3,000 lawyers in California and DC)
    - Found levels of mental health problems and problematic drinking to be high among practicing lawyers generally.
    - Found women attorneys have **a higher prevalence and severity** of depression, anxiety, stress, risky and hazardous drinking, and attrition compared to their male counterparts.
    - *Overall findings*: 28% of the lawyers reported symptoms of depression; 23% maladaptive stress; 21-36% engage in hazardous drinking
    - *More on alcohol*: Over 80% of all the lawyers sampled reported being current drinkers (10% higher than general population); 30% screened positive for high-risk hazardous drinking; only 2% reported being diagnosed with an alcohol use disorder.
      * Women attorney findings: 56% engaged in risky drinking behavior; 34% were high-risk or hazardous drinking (c.f., 46% of men engaged in risking drinking; 25% were high-risk or hazardous drinkers).
      * Note: 34.6% of the women and 29.2% of the men reported that their drinking has increased during the pandemic. Women who reported an increase in drinking were seven times more likely to engage in risky drinking (men were nearly four times more likely).
      * Implications: gender disparity; under-diagnosis and treatment
    - *More on mental health*:
      * 5.2% of women had symptoms indicating moderately severe depression, compared with 4.2% of the men.
      * 8.4% of the women and 4.5% of the men had severe anxiety.
      * 37.5% of the women and 30.1% of the men reported high effort-reward imbalances.
    - *Attrition*: 25% of women contemplated leaving the profession due to mental health concerns, compared with 17% of men (note: a significantly higher proportion of male attorneys were in senior positions.
    - The study also looked beyond prevalence data; it looks at the predictors of those factors that have been shown to negatively impact the legal profession. Several occupational factors were found to significantly contribute to these problems. Women's responses demonstrated a greater level of effort needed to elicit reward at work when compared with men, significantly higher levels of over-commitment and work-family conflict, and a lower likelihood of promotion.

G. Discriminatory Statements and Actions by Lawyers

* Rule 8.4 - General Misconduct
  + No violating the Rules or assisting their violation
  + No wrongful acts (crimes) adversely affecting lawyer’s honesty, trustworthiness or fitness to practice
  + No conduct involving dishonesty, fraud, deceit of misrepresentation (which reflects adversely on fitness to practice)
  + No conduct prejudicial to administration of justice (ABA only)
  + No statements implying ability to improperly influence a government official/agency
  + No knowingly assist judge in violating rules of judicial misconduct
* New ABA Rule – Lawyer cannot engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of :
  + Race
  + Sex
  + Religion
  + National Origin
  + Ethnicity
  + Disability
  + Age
  + Sexual Orientation
  + Gender Identity
  + Marital Status, or
  + Socioeconomic Status
  + IN CONDUCT RELATING TO THE PRACTICE OF LAW.
* What is Conduct Related to the Practice of Law?
  + Representing Clients, or
  + Interacting with witnesses and court personnel, or
  + Operating a law firm, or
  + Participating in a bar association or law practice social activity?

H. Inadvertent Receipt of Confidential Information – Rule 4.4

* Lawyer who receives document (electronic or otherwise) and knows or should know that it is privileged and contains confidential information SHALL immediately stop review/use of the document, promptly notify the sender, and abide by the sender’s instructions to return or destroy same.
* LEO 1702 – Lawyer is prohibited from telling client of relevant though inadvertently disclosed information, and the lawyer is prevented from using the information even if of great significance to the client’s case.
* Possible scenarios may require lawyer recipient of inadvertently disclosed relevant information to withdraw per Rule 1.16(a)(1) – Attorney shall withdraw from the representation of a client if: the representation will result in violation of the Rules of Professional Conduct.
* Catch-22 Lawyer’s duty zealously to represent and promptly to communicate with client at direct conflict with Rule 4.4 requirement not to share inadvertently disclosed material.

H. Recent Developments & Topics

* Rule 1.2 New ABA Opinion 491- Duty to inquire about client using lawyer to commit fraud.
  + Lawyer with knowledge that creates a high probability that client is seeking lawyer’s services in a transaction in furtherance of criminal/fraudulent activity has a duty to inquire further to avoid assisting that activity
* Amendment to Rule 1.8 – Prohibited Transactions: Part One
  + (b) Lawyer shall not use information ~~relating to representation of a client~~ protected under Rule 1.6 for the advantage of the lawyer or of a third person or to the disadvantage of the client, unless the client consents after consultation, except as permitted by Rule 1.6 or Rule 3.3
* Amendment to Rule 1.8 – Prohibited Transactions: Part Two
  + (k) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship[ existed between them when the client-lawyer relationship commenced.
* Rule 3.3, Comment 11 Amendment – Reconciling Civil and Criminal Practitioners’ Duties Regarding Perjury
  + [11] ~~Except in the defense of a criminal accused, t~~[T]he rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client’s deception to the court or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also a loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperates in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2 (c). ~~Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.~~