Excerpted from the 2016-17
VIRGINIA STATE BAR
HARRY L. CARRICO PROFESSIONALISM COURSE
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VSB Standing Committee on Professionalism
I. INTRODUCTION

A. General

1. The public and many members of the Bar complain openly about what they perceive to be deterioration in standards of conduct by attorneys. From a lawyer’s conviction for laundering drug money to simple discourteous conduct, damage to the reputation of lawyers as hardworking, fair-minded professionals is being done all too often by members of their own profession.

2. Volumes could be filled with an analysis of the historical development of these trends and the many causes for them. A much more realistic goal is to strengthen the individual commitment of every Virginia lawyer to be part of the solution, not part of the problem.

3. There is ample guidance in the Virginia Rules of Professional Conduct concerning how lawyers should conduct themselves. The relevant rules are listed, followed by short comments designed to focus on their practical consequences. Cross references are provided to other Topics.

4. This topic concludes with a less formal listing of guidelines gained from experience, conversations and meetings with lawyers throughout Virginia. Undoubtedly, any practicing lawyer might suggest a few additions or deletions, but it is hoped that the outline will provide a framework for the new attorney to resolve his/her joint duties of diligent, competent representation of his/her client and duties to the judicial system and the public. The primary goal of the outline is to instill a firm conviction that these goals do not conflict, but rather complement each other.

B. “Principles of Professionalism,” Virginia Bar Association, August 2008

In 2008, the Supreme Court of Virginia endorsed the “Principles of Professionalism” adopted by the Virginia Bar Association.

**Principles**

In my conduct toward everyone with whom I deal, I should:

- Remember that I am part of a self-governing profession, and that my actions and demeanor reflect upon my profession.
- Act at all times with professional integrity, so that others will know that my word is my bond.
- Avoid all bigotry, discrimination, or prejudice.
- Treat everyone as I want to be treated – with respect and courtesy.
- Act as a mentor for less experienced lawyers and as a role model for future generations of lawyers.
- Contribute my skills, knowledge and influence in the service of my community.
- Encourage those I supervise to act with the same professionalism to which I aspire.

In my conduct toward my clients, I should:

- Act with diligence and dedication – tempered with, but never compromised by, my professional conduct toward others.
- Act with respect and courtesy.
- Explain to clients that my courteous conduct toward to others does not reflect a lack of zeal in advancing their interests, but rather is more likely to successfully advance their interests.

In my conduct toward courts and other institutions with which I deal, I should:

- Treat all judges and court personnel with respect and courtesy.
- Be punctual in attending all court appearances and other scheduled events.
• Avoid any conduct that offends the dignity or decorum of any courts or other institutions, such as inappropriate displays of emotion or unbecoming language directed at the courts or any other participants.
• Explain to my clients that they should also act with respect and courtesy when dealing with courts and other institutions.

In my conduct toward opposing counsel, I should:

• Treat both opposing counsel and their staff with respect and courtesy.
• Avoid ad hominem attacks, recognizing that in nearly every situation opposing lawyers are simply serving their clients as I am trying to serve my clients.
• Avoid reciprocating any unprofessional conduct by opposing counsel, explaining to my clients that such behavior harms rather than advances the client’s interests.
• Cooperate as much as possible on procedural and logistical matters, so that the clients’ and lawyers’ efforts can be directed toward the substance of disputes or disagreements.
• Cooperate in scheduling and discovery, negations, meetings, closing, hearings or other litigation or transactional events, accommodating opposing counsel’s schedules whenever possible.
• Agree whenever possible to opposing counsel’s reasonable requests for extensions of time that are consistent with my primary duties to advance my client’s interests.
• Notify opposing counsel of any schedule changes as soon as possible.
• Return telephone calls, e-mails and other communications as promptly as I can, even if we disagree about the subject matter of the communication, resolving to disagree without being disagreeable.
• Be punctual in attending all scheduled events.
• Resist being affected by any ill feelings opposing clients may have toward each other, remembering that any conflict is between the clients and not between the lawyers.

C. General Principles of Lawyer Conduct

1. High Standards of Professional Conduct - Because of a lawyer’s position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession. “Obedience to law exemplifies respect for law. To lawyers especially, respect for law should be more than a platitude.”

2. Duty to Client - Duty to represent client does not militate against obligation to treat with consideration all persons involved in legal process. Rule 3.4, Comment [7].

3. Decorum of Proceedings - While maintaining independence, lawyer should be respectful, courteous and above board in his or her relations with a judge and should avoid any other conduct calculated to gain special consideration. See Rule 3.5, Comments [3] and [4].

4. Practical Observations
   a. Courtroom is not a theatrical audition.
   b. Show respect for judge and jury at all times.
   c. No gamesmanship.
   d. No personal attacks on counsel or witness.
   e. For objections, don’t address counsel directly; speak to the court.

5. Examples:

   During a jury trial, opposing counsel asks his or her third leading question in a row and you have good reason to think he or she is doing it deliberately.

   **Right response:** “Your honor, I am mindful of the court’s prior ruling on my objection to these leading questions and I respectfully renew those objections.”

   Or ask to approach the bench and suggest that the Court reinstruct counsel outside the presence of the jury.

   **Wrong response:** “I object to this patently deliberate attempt to ignore the court’s rulings. Counsel knows better and this is an outrage.”
6. Prohibition Against Personal Reference - A lawyer should not make unfair or derogatory personal references to opposing counsel. LEO 1214, Rule 3.4, Comment [8].

7. A lawyer, in representing a client diligently, does not violate Rule 1.3 by acceding to reasonable requests of opposing counsel that do not prejudice the rights of his or her client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in legal process. See Comment 8 to Rule 3.4.

D. Cooperation Between Lawyers and Tribunals

In the final analysis, proper functioning of the adversary system depends upon cooperation between lawyers and tribunals in utilizing procedures which will preserve the impartiality of the tribunal and make their decisional processes prompt and just, without impinging upon the obligation of the lawyer to represent his or her client diligently within the framework of the law. Rule 3.5(d), (e), and (f).

II. ATTORNEY’S ROLE AS OFFICER OF THE COURT

A. Definition of Tribunal

“Tribunal” includes all courts and all other adjudicatory bodies (Virginia Unauthorized Practice Consideration 1-1).

B. Attorney Conduct Toward the Court

1. Contact with Officials

   a. Communications with Court

      i. General Rule - All lawyers and litigants should have access to a tribunal on an equal basis. In an adversary proceeding, a lawyer shall not communicate or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending. Such communications might have the effect or give the appearance of granting undue advantage to one party. Rule 3.5(e).

      ii. All lawyers may communicate with a tribunal:

          (a) in the course of official proceedings;

          (b) in writing if a copy is promptly (i.e., simultaneously) delivered to opposing counsel or unrepresented party;

          (c) orally upon adequate notice to opposing counsel or unrepresented adverse party; or

          (d) as otherwise authorized by law. See Rule 3.5(e).

      iii. It is permissible to contact clerk's office about the mechanics of filings, subpoenas, fees, etc.

   b. Ex Parte Proceedings

      Lawyer has broader duty to inform the court of all material facts known to lawyer. See Rule 3.3(c).

      i. Patent Applications - Beckman Instruments v. Chemtronics, 428 F.2d 555 (5th Cir. 1970) (patent applicant has duty to disclose similar prior art to Patent Office)


      iv. Federal Rules of Civil Procedure, Rule 65 - Temporary restraining order may be granted without written or oral notice to adverse party or counsel only if: (1) it is clear from specific facts in affidavit
or verified complaint that immediate, irreparable injury or loss will result before the adverse party can be heard; (2) applicant’s attorney certifies to court in writing the efforts which were made to give notice and reasons supporting claim that notice is not required.

v. Practical Observations:

(a) Appearances are important.

(b) Cordial relations with the bench in out-of-court settings are desirable, but deference and respect are still required.

*E.g.* You have concluded a lengthy bench trial. The court has taken the matter under advisement and you are waiting for the opinion. At a bar association function, you encounter the trial judge, who shakes your hand and begins a conversation. Do not, under any circumstances, bring up the pending matter or comment on the trial. Your adversary is not present and you should not discuss the case. Direct the conversation to other topics and keep it brief.

2. Gifts or Loans to Court or Individuals Associated with Court

a. General Rule - a lawyer is *never justified* in making a gift or loan to a judge, hearing officer, or an official or employee of tribunal under circumstances which *might* give appearance that gift or loan is made to influence official action. Rule 3.5(d).

b. It is not improper for employees of a law firm to give Christmas gifts of cookies valued at less than $10.00 to employees of circuit court clerk’s office. The gift was divided among several employees and does not give appearance that it was intended to influence official action. LEO 893; *See* LEOs 279, 1421, and 1698. *Note:* Committee will not set itself up to measure value of gifts made or how gifts will be viewed by recipient.

c. It is not improper for an attorney, representing a judge before whom the attorney may appear in the future, to discount his professional fees as a professional courtesy, consistent with the attorney’s practice with other professional colleagues and friends, where the judge/client is a longstanding friend and the attorney has no pending matters before that judge. LEO 1730.

C. Conflicting Duties of Preservation or Disclosure of Client Confidences and Secrets

1. Policy Considerations of Conflict

a. Duty to client:

i. The fiduciary relationship between lawyer and client and the proper functioning of the legal system require preservation of client confidences and secrets. *Preservation of confidences* facilitates full development of facts essential to proper representation of clients and encourages lay people to seek legal assistance. Rule 1.8(b); Rule 1.6, Comment [2].

ii. The ethical precept, unlike the evidentiary rule governing attorney-client privilege, exists without regard to the nature or source of information or the fact that others share knowledge Rule 1.6, Comment [3].

iii. Obligation to preserve confidences continues after termination of representation and survives the death of the client. Rule 1.9; Rule 1.6, Comment [18], LEO 1207; *See* LEOs 1643, 1367 and 1307.

*Note:* For a complete discussion relating to client confidences and secrets, *see* Topic 5, Section V, *supra*.

2. Court-Ordered Disclosure. Rule 1.6(b)(1).

A lawyer may reveal confidences or secrets when required by law or court order.

3. Disclosure that Client Intends to Commit a Crime. Rule 1.6(c)(1).

A lawyer *shall* promptly reveal the intention of his or her client to commit a crime and such information necessary to prevent the crime.

4. Fraud On the Court. Rule 1.6(c)(2).
An attorney shall reveal information when information clearly establishes that in the course of representation client has perpetrated a fraud upon a tribunal related to subject matter of the representation. Before disclosure, attorney must request that client reveal fraud to tribunal. See also Rule 3.3, Comment [11]. Information is "clearly established" when the client acknowledges to the attorney that the client has perpetrated a fraud. Rule 1.6(c)(2).

5. Perpetration of Fraud Upon a Third Party by Client During Representation. Rule 1.6(b)(3).

A lawyer may reveal information that clearly establishes that his or her client, during course of representation, perpetrated upon a third party a fraud related to subject matter of representation.

E. Duty To Reveal Fraud Upon a Tribunal by a Person Other than Client. Rule 3.3(d)

1. Duty to Reveal - A lawyer who receives information clearly establishing that a person other than his or her client has perpetrated a fraud upon a tribunal shall promptly reveal fraud to the tribunal. Rule 3.3 (d); LEO 1490. See LEO 1663.

   a. It is improper for an attorney to participate in a divorce proceeding as counsel where opposing party has alleged 12 month separation, and attorney’s client has denied truthfulness of allegation, unless attorney raises matter of misrepresentation by the opposing party through pleadings or other disclosure. Even if attorney does not agree to represent client, he or she has duty to reveal information to tribunal. If information of fraud was given to attorney in confidence, the attorney must receive prior consent before making disclosure. LEO 543.

   b. An attorney must reveal a third party’s fraud on a tribunal even if the disclosure is detrimental to the attorney’s client. LEO 1490.

2. An attorney represented a plaintiff/passenger for injuries incurred when the automobile in which the plaintiff/passenger was riding was rear-ended. The same plaintiff/passenger was in a second accident in which the car in which he was riding was rear-ended the day after the first accident. The attorney filed a claim with the insurance companies for each of the tortfeasors and settled the first case. The attorney then went forward with the second claim, submitting exactly the same medical bills and reports from the first case to support the second case. The plaintiff also testified, with the attorney’s full knowledge, that he had not been injured in the first case. The treating physician wrote a letter indicating all injuries and treatment were related only to the first accident. The plaintiff’s attorney knowingly made false statements and presented false evidence to the court. The defense counsel, learning of this had a duty to report this conduct, if his client consents to using confidential information to do so Rule 3.3(d); Rule 8.3(a), (d); Rule 1.6 (c)(3). LEO 1608.

F. Trial Conduct. Rule 3.4

1. General Knowledge of Rules of Court

   a. Rationale - Respect for rulings is essential to proper administration of justice; however, a lawyer may in good faith and within the bounds of the law, take steps to challenge a ruling. Rule 3.4(d).

   b. Know Relevant Local Rules - some courts have them (e.g. U.S.D.C., E.D. Va. and W.D. Va.) and some do not. If you are litigating in an unfamiliar court, get the local rules.

   c. A lawyer shall not disregard or advise his or her client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he or she may take appropriate steps in good faith to test the validity of such rule or ruling (Rule 3.4 (d)).

   d. In presenting a matter to a tribunal, a lawyer shall disclose that he or she appears in a representative capacity.

2. Meritorious Claims and Contentions

   a. A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. Rule 3.1.

   b. Practical Observations

      i. Mere lack of personal conviction is not grounds to fail to make argument.
ii. Don’t be afraid to challenge in good faith.

iii. A frivolous position is like obscenity - you know it when you see it.

c. Example

Your client’s position is upheld by only a small minority of courts, and you have some trouble with the position personally. You must put aside your personal belief that the argument is a long shot so that your presentation will be forceful and will not reveal any doubt about the correctness of the minority view.

However, do not lead the court into error. See infra. If there is controlling authority against your position, the court should be made aware of it, but you have a right to test it, distinguish it or urge that it be overruled or restricted. But see discussion at Topic 6, VI-4, regarding your obligation to advise the court of contrary authority.

3. During Trial, A Lawyer Shall Not:

   a. State or allude to anything that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence. Rule 3.4(f)

   b. Assert personal knowledge of facts in issue except when testifying as a witness. Rule 3.4(f)

   c. State a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil defendant, or the guilt or innocence of an accused; but he or she may argue his or her analysis of evidence. Rule 3.4(f); LEO 1462

   d. Knowingly disobey or advise a client to disregard a standing rule or a ruling of a tribunal made in the course of a proceeding. Rule 3.4(d); LEO 1462

   e. Offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures. Rule 3.3(a)(4).

4. Practical Observations


   b. If no admissible evidence exists, don’t mention the fact.

   c. If your sole purpose is to embarrass, don’t do it. Rule 3.4 (j).

   d. It is wrong to say to jury “I am convinced,” “I believe,” “I am satisfied” or “I think.”

   e. It is okay to say “the evidence proves,” “the evidence is clear” or “the facts establish.”

   f. It is improper to object without foundation.

G. Diligent Representation Within the Bounds of the Law

1. Avoiding the Infliction of Needless Harm

   a. The duty of a lawyer to represent his or her client with diligence does not militate against his or her concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm. Rule 1.2, Rule 3.4 (j), Rule 4.4.

   b. Practical Observations: Tough litigation/negotiation does not change rules of conduct.

   c. Example

   You learn that a nonparty witness has planned a vacation including the day you had hoped to take her deposition. The witness is favorable to your opponent’s case and the litigation is high stakes and hotly contested. As a practical matter, you should resist the temptation to “play hardball,” consistent with your client’s position, and
you should consider rescheduling the deposition. It is appropriate to make sure the witness knows you have accommodated her.

2. Suits, Motions and Defenses Merely to Harass or Delay

   a. General Rule - In representing a client, a lawyer shall not use means that have no purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person. Rule 4.4. A lawyer shall not file a suit, initiate criminal charges, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another. Rule 3.4(j).

   b. Virginia Supreme Court Rule 1:4(a): “Counsel tendering a pleading gives his or her assurances as an officer of the court that it is filed in good faith and not for delay.” See also Va. Code § 8.01-271.1, which is the state counterpart to Fed. R. Civ. P. 11, infra.

   c. Federal Rules of Civil Procedure

      i. Rule 11 - Every pleading, motion, and other paper of a party represented by an attorney shall be signed by an attorney. The signature of the attorney or party constitutes a certificate by the signer that the signer has read the pleading, that to the best of the signer’s knowledge, it is well grounded in fact, is warranted by existing law or by good faith argument for modification of existing law, and that it is not interposed for any improper purpose, such as to cause unnecessary delay. If a pleading is signed in violation of Rule 11, the court shall impose upon the person who signed it or represented party, or both, an appropriate sanction.

      ii. Rule 26(g) - Modeled after Rule 11. Imposes strict guidelines on discovery and mandates sanctions for abuse.

      iii. Rule 56(h)-Court will impose costs on a party responsible for filing summary judgment affidavits in bad faith or for the purpose of delay.

   d. Justification for Delay - A lawyer may have legitimate reasons for delay including: (i) need for additional time to conduct investigation or locate witness; (ii) client may not be ready due to medical or emotional factors.

   e. Improper Delay - A lawyer may not seek delay to: (i) preserve some existing benefit for client-temporary injunction; (ii) allow client to continue to enjoy use and control of money that he or she ultimately will have to pay to adverse party.

3. Advancing Unwarranted Claims and Defenses: Rule 3.1.

   a. General Rule - A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. See LEO 1445.

4. Concealment or Failure to Disclose. Rule 3.3(a)(2).

   a. General Rule - A lawyer shall not conceal or fail to disclose that which he or she is required by law to reveal.

      e.g. A lawyer may not suppress or withhold evidence of a crime in his or her possession detrimental to the client if the lawyer has a duty under applicable law to produce it. (LEO 1049).

   b. Virginia Supreme Court Rule 4:1(e)(2) - The Rule requires a party to promptly amend and/or supplement discovery responses if the party learns that any response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

   c. LEOs Regarding Disclosure

      i. Where neither attorney nor client misrepresented any facts in an administrative hearing, and the court did not recite any erroneous facts in its ruling and opinion, the attorney has no duty to volunteer to court that its opinion is based on factual error. LEO 486.
ii. Attorney represents client in the sale of assets of corporation. During representation, attorney learns that client had been given two personal promissory notes to avoid taxation. Notes have been paid. The attorney is ready to file with the SCC a certificate from Virginia Department of Taxation. A statement prepared by client's accountant states no taxes are due. The attorney must advise client that conduct violates relevant federal statutes and that attorney must disclose conduct if client does not refrain from the conduct. The attorney has a duty to insure that the certificate is true and accurate. LEO 833, 1140.

iii. Defense counsel is not under affirmative obligation to reveal that court document erroneously states that client was sentenced to misdemeanor rather than a felony. LEO 1400.

There is no obligation of defense counsel to inform Commonwealth of error by Commonwealth’s Attorney, but if questioned directly, defense counsel may not affirmatively misrepresent. LEO 1622.

iv. Defense counsel is not under affirmative obligation to reveal that client has exhausted or abandoned his appellate rights. LEO 1496.

5. Use of Perjured Testimony or False Evidence. Rule 3.3.

a. General Rule - A lawyer shall not knowingly make a false statement of fact or law to a tribunal Rule 3.3(a)(1).

b. A lawyer may refuse to offer evidence that the lawyer reasonably believes is false. Rule 3.3(b).

c. A witness for lawyer's client gave three statements regarding an accident. The lawyer learned that only the first statement was accurate and that the written and deposition statements were fabrications. It is not proper for attorney to negotiate a settlement or to respond to discovery requests based on the fabricated statements. LEO 924.


a. General Rule - A lawyer shall not knowingly make a false statement of law or fact. Rule 3.3(a)(1).

b. LEOs Regarding False Statements

i. It is improper for an attorney to prepare answers to interrogatories which misrepresent the identity of an expert witness and the substance of his or her expected testimony. Rule 3.3; LEO 768.

ii. It is improper for attorney who has executed answers to interrogatories and who has represented to opposing counsel that the answers may be treated as if they were signed under oath, to include answers that are false. Rule 3.3; LEO 743.

iii. It is improper for attorney to misstate the purchase price of real property on a recorded deed. LEO 1522.

iv. It is improper for attorney to misstate in a Motion for Judgment a date of installation of an allegedly defective furnace when the attorney was aware of the actual installation date. LEO 1429.

7. Participation in the Creation or Preservation of False Evidence. Rule 3.3(b).

a. General Rule - A lawyer shall not participate in the creation or preservation of evidence when he or she knows or it is obvious that the evidence is false. LEO 1477.

b. Often a lawyer is asked by his or her client to assist in the development of evidence relevant to state of mind, motives or intent. When a lawyer is uncertain as to the client’s state of mind, the lawyer should resolve reasonable doubts in favor of client.

c. It is improper for a lawyer who represents a plaintiff in a personal injury action to request a doctor to alter existing medical records even though no pleadings are filed. Falsification or amendment of records attorney believes may be brought into evidence is improper. Rule 3.3(a)(4); LEO 948.

8. Advice or Assistance to Client in Illegal or Fraudulent Conduct. Rule 1.2(c).
A lawyer shall not counsel or assist his or her client in conduct that the lawyer knows to be criminal or fraudulent.


It is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct. See LEOs 1858, 1802, 1755, 768.

10. Practical Observations

a. If the objective is lawful, your job is to secure it. You should explain all consequences, however, and you may seek to withdraw from a representation if client insists on acting contrary to your advice and judgment. Rule 1.6(c)(1); Rule 1.16(b)(1)(2).

b. “Tough” does not mean unfair or unreasonable.

c. What goes around comes around. You will be treated professionally in the manner you treat others.

d. Needless trips to court cost money and frequently backfire. You may not assist the client in illegal conduct or in taking a frivolous legal position. Rule 3.1; see also Rule 3.4(e) and (g).

e. Your adversary and his/her client are entitled to normal courtesies.

f. If an issue affects the merits or substantive rights, the client alone has the final say. Rule 1.2.

E.g., You represent the plaintiff in a civil suit. Counsel for defendant calls 20 days following service and asks for a one-week extension, saying that the suit papers arrived while he or she was in trial. Your client urges that you move to hold the defendant in default and “show them we mean business.” You should grant defense counsel's request; it’s the right thing to do and the court will grant it anyway.

Note: A different approach might be appropriate where the request is made one month following service, counsel offers no reasonable explanation for the delay and affirmative defenses are involved. Rule 1.2 requires you to obtain your client's consent.

g. Pursue legitimate means to achieve legitimate ends.

h. Think about longer-term consequences.

i. “Good faith argument” doesn't stretch logic or defy recent precedent.

j. Don't help or permit a client to lie.

E.g.,

i. During discovery, you learn of a witness whose testimony, if believed by the jury, would prove that your client’s version of the crucial transaction is false. You have a duty to notify your client of the witness. When you do so, your client suggests that you “forget” the witness and that you not list him or her in the appropriate interrogatory answer. You must refuse to participate in or condone such an effort. You may not refuse to reveal evidence to your adversary if he or she has asked for it through proper discovery. See Rule 3.4(a), (e). You may also want to reevaluate your client’s claim generally.

ii. See Rule 1.6(c) regarding duty to reveal fraud. See Topic 6, VI-1, et seq. See also National Airlines v. Shea, 223 Va. 578 (1982), regarding candor with the court; Comment 3 to ABA Model Rule 4.1, ABA/BNA Lawyers’ Manual on Professional Conduct, § 01:156.

iii. Based upon the representations of his or her client, debtor’s attorney persuaded creditor’s attorney to vacate prior judgment on grounds of improper service. If debtor’s attorney then learns that service was proper and court was advised to the contrary, the attorney must advise the court of that fact. LEO 730.

iv. Submitting false information in answers to interrogatories can result in disciplinary consequences as well as sanctions imposed by the court. See, e.g., In the Matter of Tara Marie McCarthy, VSB Docket No. 00-042-3188 (2002) (three judge court suspended respondent’s license for 30 days for designating defense experts
in medical malpractice case who had not consented to testify and made false statements in the designations regarding the experts’ professional opinions).

v. An attorney’s duty not to practice deceit and misrepresentation is not confined to dealings with clients; it also extends to others who may be adversely affected by such conduct. *Morrissey v. Third District Committee*, 248 Va. 334, 448 S.E.2d 615 (1994) (prosecutor’s concealment of material facts from court and victim relative to plea bargain).

k. Be careful regarding what is “clearly established” vs. what you believe or think you know. See Rule 1.6 (c)(2).

H. Informing the Tribunal of Adverse Law

The complexity of law often makes it difficult for a tribunal to be fully informed unless the pertinent law is presented by the lawyers in the case. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. The adversary system contemplates that each lawyer will present and argue the existing law in the light most favorable to his or her client. Where a lawyer knows of legal authority in the controlling jurisdiction directly adverse to the position of the client the lawyer shall inform the tribunal of its existence unless opposing counsel has done so; but, having made such disclosure, the lawyer may challenge its soundness in whole or in part. Rule 3.3(a)(3).

I. Expression of Lawyer's Opinions

In order to bring about just and informed decisions, evidentiary and procedural rules have been established by tribunals to permit the inclusion of relevant evidence and argument and the exclusion of all other considerations. The expression by a lawyer of a personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant or as to the guilt or innocence of an accused is not a proper subject for argument to the trier of fact. It is improper as to factual matters because admissible evidence possessed by a lawyer should be presented only as sworn testimony. It is improper as to all other matters because, were the rules otherwise, the silence of a lawyer on a given occasion could be construed unfavorably to his or her client. However, a lawyer may argue, on his or her analysis of the evidence, for any position or conclusion with respect to any of the foregoing matters. Rule 3.4(f).

*E.g.*, In closing argument, you may not say: “It is clear to me that the plaintiff is lying.” You may say: “The evidence in this case raises serious doubt about plaintiff's credibility as a witness.”

J. Ethical Obligations During Pre-Trial Discovery

A lawyer shall not make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party. Rule 3.4 (e).

III. RELATIONSHIPS WITH MEMBERS OF THE BAR

A. Misconduct. Rule 8.4

1. A lawyer shall not:

   a. Violate the Rules of Professional Conduct or knowingly assist or induce another to do so, or do so through the acts of another (Rule 8.4(a));

   b. Commit a criminal or deliberately wrongful act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer (Rule 8.4(b));

   c. Engage in professional conduct involving dishonesty, fraud, deceit or misrepresentation (Rule 8.4(c));

   d. State or imply an ability to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official (Rule 8.4 (d)); or

   e. Knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law (Rule 8.4 (e)).

2. Practical Observations
a. You are how you act.

b. You represent the legal profession, even after working hours.

c. Fitness to practice law = scrupulously honest.

d. Violation of law tarnishes public perception.

3. Example
Because of a busy schedule, you miss a deadline for filing a brief. Your client calls to ask you about it and suggests that you backdate the certificate of service and "blame it on the mail." No. Notify the court and opposing counsel quickly and candidly and request an extension of time.

B. Professional Conduct

1. A lawyer should maintain high standards of professional conduct and should encourage fellow lawyers to do likewise. He or she should be temperate and dignified, and should refrain from all illegal and ethically reprehensible conduct which reflects adversely on his or her fitness to practice law. Because of his or her position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession. Obedience to law exemplifies respect for law. To lawyers especially, respect for the law should be more than a platitude. (See Topic 6, p. IV-5, et seq.)

2. Practical Observations

a. Hot tempers are unprofessional and counterproductive.

b. The public is watching.

c. Lawyers are held to a higher standard.

d. If lawyers don't respect law, who will?

3. A lawyer must reveal to the proper officials all unprivileged knowledge of conduct of lawyers which he or she believes clearly to be a violation of the Rules of Professional Conduct. Rule 8.3(a).

a. There is a two-prong test for determining when an attorney's duty to report another attorney's misconduct arises: first, a lawyer must have information that another lawyer has committed a violation of the Rules; second, the lawyer must assess whether the violation "raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness to practice law in other respects.” Rule 8.3(a). LEO 1528.

b. A lawyer who is a member of the VBA Committee on Substance Abuse and/or who is a trained intervener for the Committee does not violate the Virginia Rules of Professional Conduct [Rule 8.3(a)] for failing or refusing to disclose any information gained in performance of such duties relative to the “Lawyers Helping Lawyers” Program. Rule 8.3(d).

c. In deciding whether to report another attorney, relevant factors include, but are not limited to: the recentness of the conduct; the seriousness of the conduct; the likelihood that the behavior will be repeated; the likelihood that it will affect the attorney’s competence; and any mitigating or aggravating circumstances. LEO 1540.

d. The reporting attorney must possess information based on a substantial degree of certainty and not on rumors or suspicion. See LEOs 1338, 1528, 1545, 1562, 1567, 1582.

e. This requirement is subject to an attorney's ethical responsibility to preserve a client’s confidences and secrets. LEO 1468, Rule 1.6(c)(3), Rule 8.3(d).

f. A lawyer must report a violation even if he or she knows another lawyer intends to file a similar report. LEO 838.

C. Maintaining the Integrity of the Profession

Every lawyer owes a solemn duty to uphold the integrity and honor of his or her profession; to encourage respect for the law and for the courts and the judges thereof; to observe the Rules of Professional Conduct; to act as a member of a learned
profession, one dedicated to public service; to cooperate with his or her fellow lawyers in supporting the organized bar through the devoting of his or her time, efforts, and financial support as his or her professional standing and ability reasonably permit; to conduct himself or herself so as to reflect credit on the legal profession; and to inspire the confidence, respect, and trust of his or her clients and of the public.

D. Courtesy

1. A lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities and similar matters which do not prejudice the rights of his or her client. He or she should follow local customs of courtesy or practice, unless he or she gives timely notice to opposing counsel of his or her intention not to do so. A lawyer should be punctual in fulfilling all professional commitments. Rule 3.4, Comment [8].

2. Practical Observations
   a. Incurring needless costs in order to prove a point is not in client’s best interests. E.g., if court will grant it, save the trip. Be sure, however, to adequately preserve your objections.
   b. Scare tactics simply don’t work.
   c. Lawyers reflect their clients.
   d. What would you do if the tables were turned?
   e. One aspect of professionalism is the judicious use of whatever power the lawyer holds.

E. Conduct Toward Opposing Lawyers

1. In adversary proceedings, clients are litigants and though ill feeling may exist between clients, such ill feeling should not influence a lawyer in his or her conduct, attitude and demeanor toward opposing lawyers. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system. Rule 3.4, Comment [8].

2. Practical Observations
   a. Remain objective and above the fray.
   b. Do not use inflammatory language like “absurd,” “preposterous,” “cheat,” “lie,” “ridiculous,” he or she “knows better” or “is stupid.”
   c. Approach the bench to air serious concerns about opposing counsel. Do not do it in front of jury.
   d. The public's perception of lawyers, judges and courtrooms is in your hands.

F. Threatening Criminal Prosecution

1. A lawyer shall not present or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter. Rule 3.4(i). It is not a violation of Rule 3.4 (i) for an attorney to simply advise a client of all legal recourse for a problem, including the possibility of reporting matters to the appropriate law enforcement officials. See Rule 3.4, Comment [5].

2. The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the protection of society as a whole. Threatening to use, or using, the criminal process to coerce adjustment of private claims or controversies is a subversion of that process; further, the person against whom the criminal process is so misused may be deterred from asserting his or her legal rights and thus the usefulness of the civil process in settling private disputes is impaired. As in all cases of abuse of judicial process, the improper use of criminal process tends to diminish public confidence in our legal system. Rule 3.4(i).

3. Practical Observations
   a. Resist temptation to issue warning or “shot over the bow.”
b. Danger of perceived extortion.

c. Be careful regarding meaning of “solely.”

d. Convey your position without making threat.

4. Examples

a. Your client asks you to collect on a bad check. In a letter requesting payment, you may not state your intent to seek criminal prosecution and penalties under Va. Code § 18.2-181 if payment is not made. LEO 776; Accord: LEOs 715, 716.

b. Threat to file Federal Rule 11 motion for sanctions in a legitimate attempt to induce settlement is not improper per se, but proceed very cautiously in this area. LEO 760.

c. In a letter requesting payment on a bad check, attorney states his or her intention to prosecute under Va. Code § 18.2-181 if payment is not forwarded. The lawyer states that “this law carries criminal sanctions.” The language is improper under Rule 3.4(i). LEO 776. See also LEO 716.

d. Attorney attempted to advance client’s interest in a civil matter regarding debtor/creditor and spousal support issues. Attorney should not state in a letter that criminal prosecution is possible. LEOs 715, 716, 1555, 1569.

e. Attorney may send letter to person harassing and defaming client and threaten possible arrest and civil action. No suit had been filed and purpose was to end harassment, not obtain advantage in civil action. LEO 1063.

f. An attorney did not violate Rule 3.4(i) when he or she advised opposing counsel that a Federal Rule of Civil Procedure Rule 11 motion would be filed against opposing counsel personally in the event there was an adverse verdict. Rule 11 sanctions are not “disciplinary charges” as prohibited in Rule 3.4(i). LEOs 760, 1603.

g. See also LEO 1036 - questionable propriety of threatening to hold adverse attorney “personally liable” for damage to client’s business reputation. Rule 3.4(i).

h. Stating that one intends to request a Legal Ethics Opinion does not violate Rule 3.4(i). LEO 1309.

i. Attorney’s demand letter stating civil and criminal penalties for failure to settle a breach of contract claim violates Rule 3.4(i). LEO 1434.

j. Rule 3.4(i) of the Virginia Rules of Professional Conduct applies only to attorney disciplinary proceedings; therefore, it would not be improper for a lawyer to threaten the obligor of delinquent child support payments with suspension proceedings under Code § 63.1-263.1 or other relevant Code sections. LEO 1621.

k. In the Matter of Sa’ad El-Amin, VSB No. 93-032-0694 (VSB Disc. Bd. 1994) the Respondent, on behalf of his clients, wrote to another attorney, David L. Murray, Sr., advising that a financial settlement of his clients’ claims against Murray would forestall the filing of a lawsuit and a complaint with the Bar. By agreed disposition, the board imposed an admonition, finding a violation of Rule 3.4(i).

l. In a breach of contract action, plaintiff’s attorney, in a letter to defense counsel, states that plaintiff’s attorney intends to advise client to seek criminal action against defendant, whether or not debt is paid. This statement does not violate Rule 3.4 (i) since no advantage was sought and letter merely advises that criminal action will be sought regardless of any action taken by defendant to settle breach of contract claim. LEO1753.

m. Attorney’s statement to opposing counsel that he will advise judge or Commonwealth’s Attorney of possible inappropriate contact by or on behalf of opposing counsel with attorney’s client does not violate Rule 3.4 (i). Statement seen as attempt to stop improper contact and not gain advantage in civil matter. LEO 1755.

G. Deposition Conduct

All rules of courtroom courtesy apply in this forum. A few specific illustrations:

1. Alert counsel of your intent to bring a non-party (expert) to a deposition. Don’t just appear and risk an argument or postponement.
2. Provide counsel copies of documents you show to the deponent. This avoids everyone looking over the witness’s shoulder or straining to see the document.

3. Do not reschedule unilaterally; consult all counsel and the deponent.

IV. CONTACT WITH OTHER PARTIES, WITNESSES AND JURORS

A. Communicating With One of Adverse Interest - During the course of his or her representation of a client a lawyer shall not:

1. Communicate or cause another to communicate on the subject of the representation with a party he or she knows to be represented by a lawyer in that matter unless he or she has the prior consent of the lawyer representing such other party or is authorized by law to do so. Rule 4.2. The Rule applies even though the represented person initiates or consents to the communication. Rule 4.2, Comment [3]. Zaug v. Va. State Bar ex rel. Fifth Dist.-Section III Comm. 285 Va. 457, 737 S.E.2d 914 (2013):

VSB must prove three separate facts to establish a violation of the Rule: (1) that the attorney knew that he or she was communicating with a person represented by another lawyer; (2) that the communication was about the subject of the representation; and (3) that the attorney (a) did not have the consent of the lawyer representing the person and (b) was not otherwise authorized by law to engage in the communication. Rule 4.2 requires an attorney to disengage from such communications when they are initiated by a person the lawyer knows is represented. But the Rule does not require attorneys to be discourteous or impolite when they do so.

2. Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his or her client. Rule 4.3(b).

3. In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. Rule 4.3(a).

See LEO 1795.

4. The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel. For this reason a lawyer should not communicate on the subject matter of the representation of his or her client with a person he or she knows to be represented in the matter by a lawyer, unless pursuant to law or rule of court or unless he or she has the consent of the lawyer for that person. If one is not represented by counsel, a lawyer representing another may have to deal directly with the unrepresented person; in such an instance, a lawyer should not undertake to give advice to the person who is attempting to represent himself or herself, except that he or she may advise him or her to obtain a lawyer. Comment 1 to Rule 4.3.

5. Practical Observations

a. Inability to reach lawyer no excuse for direct contact.

b. Client may talk directly to represented opponent. Cmt.[4], Rule 4.2

c. “If I were you” advice is improper.

d. Must suppress desire to be an advocate; explain the facts and the reasons for your call objectively. No fibbing about who you are and what you want.

e. Memorialize any contact with adverse party with a prompt letter, setting forth exactly what was said; otherwise you risk being misquoted.

6. Examples

a. Unethical to communicate indirectly with adverse party through your client by telling him or her what to say to that party. LEO 233. See Rule 8.4 (a).
b. Improper to communicate with any witness or employee of a party corporation represented by counsel who are within the “control group” as discussed in *Upjohn Co. v. U.S.*, 101 S. Ct. 667 (1981); LEOs 459, 530, 801, 905, 1527, 1589; See *Stahl, Ex Parte* Interviews with Enterprise Employees, Washington & Lee Law Review, Vol. 44; Fall, 1987. It is permissible under the Virginia Rules of Professional Conduct for attorney to communicate with employees at a corporation adverse to interest of attorney’s client so long as: (1) attorney discloses adversarial role and (2) employee does not occupy a position in corporation that would lead one to believe employee is corporation's alter ego. Rule 4.3(a), Rule 4.2, Comment 4 to Rule 4.2. LEO 530. See also LEOs 347, 459, 530, 795, 905. However, be aware that some judges in state court and the federal courts may consider ex parte contacts with a represented defendant’s employees improper, regardless of their position with the defendant employer, if their statements could be used as an admission or a predicate for vicarious liability on the part of the represented employer. *Dupont v. Winchester Medical Center, Inc.*, 34 Va. Cir. 105 (Winchester 1994); *Armsey v. Medshares Mgt. Servs., Inc.*, 184 F.R.D. 569 (W.D. Va. 1998) (decided under former DR 7-103); *Queensberry v. Norfolk & W. Ry.*, 157 F.R.D. 21 (E.D. Va. 1993) (decided under former DR 7-103).

c. Fact that adverse party’s attorney is wrongfully withholding information from that party is not an exception to the rule. LEOs 521 and 1752.

d. It is permissible for an attorney to communicate directly with former officers, directors and employees of adversary party unless attorney knows that they have counsel. Rule 4.3(a), Comment 4 to Rule 4.2. LEOs 533, 1527, 1589, 1670. An attorney may contact an unrepresented former employee of a corporate adversary who was interviewed by corporate counsel, prior to employee’s termination, regarding the pending litigation, with certain restrictions: the attorney may inquire as to factual matters but may not ask former employee to reveal content of discussions with corporate counsel. LEO 1749, Rules 1.6, 1.13, 4.2, 4.4.

e. Do not contact an opposing party during the appeal period following trial if opposing party was represented by counsel at trial. This applies even if a notice of appeal is not yet filed. LEO 963. See LEO 1389.

f. A lawyer may not directly contact an opposing party even when opposing counsel does not return telephone calls. LEO 1525.

g. You represent the plaintiff in a collection case in General District Court. The defendant does not have a lawyer and he or she calls you for advice in preparing his or her answer and grounds of defense. You should explain that the rules of the legal profession prohibit you from giving that advice even though you might be inclined to do so. You should stress the importance of the pleading and urge the defendant to see a lawyer. Then send him or her a letter memorializing the conversation.

B. Contact with Witnesses

1. Contact and Communication with Witnesses and Opposing Party - A lawyer shall not suppress any evidence that the lawyer or the lawyer’s client has obligation to reveal or produce. A lawyer shall not advise or cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein. Rule 3.4(b). See LEO 1795

A lawyer shall not communicate on the subject of representation with a person he or she knows is represented by counsel except with prior consent of person’s lawyer. Rule 4.2.

2. Compensation to Witnesses and Prohibition Against Contingent Fees - A lawyer shall not pay, offer to pay, or agree to payment of compensation to a witness contingent upon the content of his or her testimony or outcome of case. A lawyer may advance, guarantee or acquiesce in payment of: (a) expenses reasonably incurred by witness in attending and testifying; (b) reasonable compensation to a witness for lost earnings as a result of attending or testifying; (c) a reasonable fee for the professional services of an expert witness. Rule 3.4(c); LEO 587.

4. LEOs Regarding Communication with and Payment to Witnesses

a. Attorney may contact adverse party's treating physician only with consent. LEO 1639; § 8.01-399(D) Va. Code.

b. It is improper for a law firm to enter into a compensation agreement with a private investigator in which investigator will be paid out of proceeds of settlement or award in two personal injury cases when it cannot be ruled out that investigator may be a rebuttal witness. Rule 3.4(c). LEO 615.
c. It is not improper for a lawyer to enter into a contract with his or her client and medical consultant whereby the medical expert furnishes technical assistance on a contingent fee basis. This is proper when lawyer’s involvement in contract between expert and client is solely to acknowledge client’s commitment to pay consultant's fees out of settlement proceeds. The prohibition in Rule 3.4(c) applies to expert witnesses, not to consultants. LEOs 449, 1182.

d. Counsel cannot communicate with adverse party’s insurer when he or she knows insurer has obtained counsel, absent consent from insurer’s counsel. Opposing counsel can communicate with insurer, including adjuster, when the insured is represented by counsel provided by the insurer. LEOs 1169, 1524, 1863.

C. Communication with or Investigation of Jurors

1. Before or during the trial of a case, a lawyer connected therewith shall not, directly or indirectly, communicate with a juror or anyone he or she knows to be a member of the venire from which the jury will be selected for the trial of the case, except as permitted by law. Rule 3.5(a)(1). See In re Rivers, 331 S.E.2d 332 (S.C. 1984) (lawyer publicly reprimanded for having private investigator communicate, before trial of case, with persons known to be members of jury venire and their relatives).

2. Rule 3.5(a) does not prohibit a lawyer from communicating with venire men or jurors in the course of official proceedings.

3. After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his or her actions in future jury service. Rule 3.5(a)(2)(i).

4. A lawyer shall not conduct or cause, by financial support or otherwise, another to conduct a vexatious or harassing investigation of either a venire man or a juror. Rule 3.5(a)(3).

5. All restrictions imposed by Rule 3.5(a) upon a lawyer also apply to communications with or investigations of members of the immediate family or household of a venire man or a juror. Rule 3.5(b).

6. A lawyer shall reveal promptly to the court improper conduct by a venire man or a juror, or by another toward a venire man or a juror or a member of his or her family, of which the lawyer has knowledge. Rule 3.5(c).

7. Post-Trial Interviews - After trial, communication by a lawyer with jurors is permitted so long as he or she refrains from asking harassing or embarrassing questions. A lawyer may need to interview jurors to determine if the verdict is subject to legal challenge. A lawyer should act with circumspection and restraint toward jurors and members of jurors' families. Rule 3.5(a)(2)(i)(ii)(iii); see LEO 1549.

8. Practical Observations:
   a. It is improper for a lawyer to communicate by letter with members of a jury his or her thanks for the manner in which they completed their service. Such communications create at least the appearance of an effort to influence juror actions in the future. LEO 417.
   b. An attorney who conducted survey to determine if defendant could obtain a fair trial and who unknowingly contacted three persons on venire list did not violate Rule 3.5(a)(1). LEO 412.
   c. U.S.D.C. Local Rule 47(A)(1) (E.D. Va.) prohibits contact with a juror or family in an effort to secure information.
   d. Post-trial contact proper in some jurisdictions, but only if you are very careful and circumspect. Always check local rules and practice. For example: U.S.D.C. Local Rule 47 (C) (E.D. Va.) prohibits contact without leave of court.
   e. If juror refuses to talk, don’t press. (See Rule 3.5(a)(2)(iii))
   f. Do not make statements of “how in the world” or other suggestion of mistake by jury.
   g. Don’t go fishing for improper conduct by juror, but reveal it if uncovered.

9. Examples
a. Improper to communicate with jurors to thank them for serving as jurors; this creates the appearance of an effort to influence jurors’ actions in future service. LEO 417.

b. Requests to interview jurors post trial to determine if verdict was tainted by extraneous information or pressure are disfavored; a threshold showing of improper outside influence is required. U.S. v. Gravely, 840 F.2d 1156 (4th Cir., 1988); citing Tanner v. U.S., 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987); but see LEO 1549.

D. Trial Publicity. Rule 3.6.

1. General Rule - A lawyer participating in or associated with investigation or prosecution or defense of a criminal matter that may be tried to a jury, shall not make or participate in making any extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication that the lawyer knows or should know will have a substantial likelihood of interfering with the fairness of trial by jury. Rule 3.6(a); see also LEO 1542, 1594.


2. Ethical Considerations

a. The goal of our legal system is that each party shall have his or her case, criminal or civil, adjudicated before an impartial tribunal. For example, in a criminal matter likely to go to a jury, a lawyer should not make a statement that relates to: (a) character, police record or reputation of accused; (b) possibility of a plea of guilty; (c) the existence or contents of confession; or (d) the results or performance of any tests or examinations. Rule 3.6.

b. Case Law Regarding Trial Publicity

i. Near v. Minnesota, 283 U.S. 697 (1931). The power of the courts to actively restrain media coverage of litigation has been limited.

ii. Nebraska Press Association v. Stuart, 427 U.S. 539 (1976). A court may have some power to restrict pretrial publicity where it is clearly shown that the publicity would interfere with the right to a fair trial.

iii. Hirschkop v. Virginia State Bar, 594 F.2d 359 (4th Cir. 1979). An attorney brought suit to challenge the constitutionality of Disciplinary Rule 7-107. Now, Rule 3.5(a)-(c). The Fourth Circuit Court of Appeals upheld the Rules regarding extra-judicial statements in connection with criminal trials; however, it struck down the Rule as unconstitutionally overbroad as it related to civil trials and administrative hearings.

iv. Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991), upheld the “substantial likelihood” test codified in ABA Model Rule 3.6(a). This varies from the previous “clear and present danger” test used in Virginia’s DR 7-105 which has been abandoned for Rule 3.6(a). ABA Rule 3.6(a) states:

A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding. (emphasis added)

Virginia Rule 3.6 also adopted the “substantial likelihood” standard, abandoning “clear and present danger”.

c. Local Criminal Rule 57.1 of the U.S. District Court (E.D. Va.):

(i) Covers publicity regarding criminal trial, grand jury or other pending investigation;

(ii) Prohibits statements prior to trial or disposition of case regarding: (a) prior criminal record; (b) confessions; (c) examinations or tests; (d) witnesses; (e) possibility of a plea of guilty; and (f) opinions regarding accused’s guilt or innocence or merits of case;
(iii) Does not prohibit statements concerning circumstances of arrest, announcements regarding seizure of evidence, nature of charge, public records regarding case;

(iv) During a jury trial, prohibits public statements relating to trial, parties and issues of trial.

(v) There is no rule of court or court order which would prohibit representatives of news media from broadcasting or publishing any information relating to a criminal case.

d. An attorney was found in criminal contempt and sanctioned in federal court for willfully violating Local Criminal Rule 57. The courts rejected the attorney’s challenge that the rule was a restriction on his freedom of speech. *In re Joseph D. Morrissey*, 996 F. Supp. 530 (E.D. Va. 1998), aff’d 168 F.3d 134 (4th Cir. 1999) (press conference called by defense attorney and interview with press were likely to make jury selection more difficult and interfere with prospective witnesses).

E. Avoiding the Implication of Improper Influence. Rule 1.11 (a).

1. General Rule - A lawyer should not state or imply that he or she is able to influence improperly or upon irrelevant grounds any tribunal, legislative body or public official. Rule 8.4 (d), Rule 1.11(a).

2. LEOs Regarding Improper Influence

   a. An attorney who holds public office as a city councilman, member of board of supervisors, or member of the General Assembly may represent a client before any tribunal on a charge of violating a city, county or state ordinance or law. The attorney must comply with provisions of Rule 1.11(a) and Rule 3.7. LEO 683.

   b. It is not improper to place a portrait of a retired judge in his or her former courtroom or in the court building where he or she and firm members regularly practice. Although no impropriety would result, it might be more tasteful to use alternative location rather than courtroom. Lawyers in the firm where former judge practices should be alert not to trade upon the former status of their partner in violation of Rule 1.11(a)(1). LEO 433.

   c. It is improper for a lawyer to lobby a public body when his or her partner is a member of the legislature regardless of disclosure and abstention by the legislator and disclosure by lobbyist. Rule 1.11(a)(1). LEOs 419, 537, 1502. Compliance with the conflict of interest laws does not cure the appearance of impropriety. LEO 1718, 1763.

   d. It is improper for a lawyer/law firm to represent a client in a matter before a governing body when a member of the firm is a member of the governing body even if there is disclosure of the conflict and the member recUSES him/herself from participation and voting in the matter. LEOs 1278, 1718, 1763, 1773.

   e. It is improper for attorney whose law partner is a member of City Council to seek from Council a cable TV franchise for a corporation in which lawyer and councilman are shareholders. Rule 1.11(a)(2). LEO 375.

   f. See Rule 1.11 regarding lawyers in government service. LEOs 419, 1430.

   Rule 1.11(a)(1) states that a lawyer who holds public office shall not use his or her public position to influence, or attempt to influence, an act in favor of himself/herself or a client.

V. RULES OF THE ROAD FOR THE ATTORNEY

A. Your reputation is like a bank account. Make daily deposits and very few withdrawals. Arguably, your reputation as a thorough, honest and tough, but fair-minded lawyer is the single biggest asset you can bring to bear in favor of your client.

B. Your word is your bond. Other lawyers, judges, witnesses and clients must be able to rely on you. Never lie to or mislead any of them.

C. Don’t place undue emphasis on what other lawyers say about an adversary. Try hard to begin with a clean slate. Similarly, decline to take part in public bad-mouthing of another lawyer.

D. Forget the notion that consent to a reasonable request from opposing counsel means weakness or worse; it does not.
E. Always consider what the court will do before deciding whether to oppose a particular request or motion from opposing counsel. It is a huge disservice to any client to make needless, costly trips to court when the outcome is predictable.

F. You have a duty to tell the truth. You do not have a duty voluntarily to educate your adversary or “spill your guts” about your knowledge of the case.

G. Don’t burn bridges with other lawyers. Most of us will deal with many of the same lawyers frequently during our careers. Do not embarrass another lawyer in front of his or her client.

H. Treat opposing counsel as you expect to be treated, perhaps no better, but certainly no worse. Remember: what goes around comes around. Do not expect a reasonable approach from opposing counsel unless you have been reasonable.

I. Avoid personalizing your complaints or arguments - use “my client” and “your client,” not “you” and “I.”

J. Don’t get mad, get even. There may be times when you will be sure that opposing counsel has acted improperly, unethically or at least below the standards you have set for yourself. Nothing will be gained by descending to that level. Instead, work harder, try to be philosophical and increase your resolve to prevail.

K. Talented, honest and fair lawyers win without resort to perversion of the rules or dirty tricks. ‘Good guys’ do not finish last in the legal profession.

L. Avoid quick, emotional reaction to surprising developments. Force yourself to delay your response until all of the facts are known. If at all possible, consult others with greater experience.

M. Put it in writing. It is naive and unrealistic to assume that opposing counsel will always have the same recollection of your conversation.

N. Do not fault opposing counsel merely for requiring adherence to court rules or established local customs. Even if you might do otherwise, a lawyer is entitled to follow the rules and insist that you do likewise.

O. Recognize and sympathize with a lawyer who has a difficult client. All of us represent such people occasionally, so don’t penalize another lawyer because of the strident views of his or her client.

P. Taking advantage of technical mistakes is a risky business. Put yourself in the other lawyer’s shoes and act accordingly.

Q. It is essential that the schedules of other lawyers, witnesses and non-parties be respected, within reason. Don’t depend on favors from opposing counsel, but conduct yourself so you can get one if you need it.

R. A lawyer reflects his or her client in the eyes of an opponent, i.e., reasonable people hire reasonable lawyers. Taking extreme positions, forcing the other side to incur needless additional costs and acting unprofessionally will usually rebound against your client. Everyone, even a party opponent, is entitled to simple courtesies. Remember that psychology is at work here and that your goal is to receive fair, favorable treatment from an adversary. Little things count.

S. Recognize that non-party witnesses do not want to get involved. Your case is not the most important thing on their docket and you must give them adequate notice and accommodate their schedules. Simply issuing a subpoena without advance notice is rude and will almost always backfire.

T. Cultivate relationships with court clerks, sheriffs, marshals and other court personnel. They can be invaluable, especially in a time of crisis.

U. Do not issue threats. State your position without invective or emotion. Name-calling and hyperbole are improper, in or out of court. When you resort to such an approach, you have lost one of the most important assets of a good lawyer, the ability to be rational and objective on behalf of your client. Learn to resist baiting by other lawyers.

V. No case or client is worth bending your ethics or crossing the line in hopes of winning. Strive for improvement of your personal and working relationships with other lawyers. Every lawyer keeps two mental lists of trustworthy and untrustworthy lawyers. Those who find themselves on the wrong list have a much more difficult time dealing with opposing counsel, the result of which can be increased costs and aggravation to you and your client.
W. On discovery disputes and other motions, call or write opposing counsel before filing the motion to see if it can be resolved.

X. Sanctions are inappropriate in the great majority of cases. Do not convert every disagreement into an allegation that your adversary’s position is frivolous or unreasonable.

Y. Learn to be gracious in defeat, especially as to opposing counsel and the court. Fight the good fight and put it behind you. Don’t hold grudges, become bitter or lash out at the system in public.

VI. LEGAL ETHICS ASSISTANCE

When facing an ethical quandary, an attorney may obtain guidance from two sources within the Virginia State Bar.

A. Legal Ethics Counsel

The Bar employs four ethics counsel who work full time assisting members of the bar with matters involving legal ethics. An attorney in need of assistance need only call the Ethics Hotline (804) 775-0564 or send an e-mail inquiry to ethicshotline@vsb.org. All inquiries and consultations are confidential.

B. Standing Committee on Legal Ethics

There is also a Standing Committee on Legal Ethics of the Virginia State Bar which is empowered to promulgate legal ethics opinions. See, generally, Part 6 of the Rules of Court, § IV:¶ 10.

These opinions are advisory only; they have no legal effect and are not binding on judicial or administrative tribunals.

An opinion may be obtained by submitting a completed form for request of a LEO, (available through the Virginia State Bar website, www.vsb.org or by request to the Ethics Department) to the Legal Ethics Committee, Virginia State Bar, 707 E. Main Street, Suite 1500, Richmond, VA 23219.

VII. THE ATTORNEY DISCIPLINARY SYSTEM

A. Introduction

1. By statute, the Supreme Court of Virginia is authorized to adopt rules and regulations for the conduct of attorneys and to develop a procedure for attorney discipline. The Virginia State Bar is created by statute as the “administrative agency of the court for the purpose of investigating and reporting…” violations of the court’s rules. See Va. Code §§ 54.1-3909 and -3910.


3. Disciplinary proceedings exist primarily to protect the public.


VIII. THE JUDICIAL GRIEVANCE SYSTEM

Complaints involving perceived violations of the Canons of Judicial Conduct may be filed with the Judicial Inquiry and Review Commission, Suite 600, 101 North 8th Street, Richmond, Virginia 23219; telephone 804/786-6636. The Canons of Judicial Conduct are found in Part 6, § III of the Rules of the Virginia Supreme Court.
A lawyer is a representative of clients or a neutral third party, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

A lawyer may perform various functions. As advisor, a lawyer provides a client with an informed understanding of the client’s legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. As third party neutral, a lawyer represents neither party, but helps the parties arrive at their own solution. As evaluator, a lawyer examines a client’s legal affairs and reports about them to the client or to others.

In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

A lawyer’s conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer’s business and personal affairs. A lawyer should use the law’s procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer’s duty, when necessary, to challenge the rectitude of official action, it is also a lawyer’s duty to uphold legal process.

As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

Many of a lawyer’s professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession’s ideals of public service.

A lawyer’s responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system and to the lawyer’s own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct assist in resolving such conflicts.
Conduct prescribe terms for resolving such conflicts. Within the framework of these Rules, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession’s independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

The legal profession’s relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

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**CLIENT-LAWYER RELATIONSHIP**

**RULE 1.1 Competence**

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

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**CLIENT-LAWYER RELATIONSHIP**

**RULE 1.3 Diligence**

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

(b) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under Rule 1.16.

(c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3.

**COMMENT**

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a
client’s cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. A lawyer's work load should be controlled so that each matter can be handled adequately.

[2] Additionally, lawyers have long recognized that a more collaborative, problem-solving approach is often preferable to an adversarial strategy in pursuing the client's needs and interests. Consequently, diligence includes not only an adversarial strategy but also the vigorous pursuit of the client's interest in reaching a solution that satisfies the interests of all parties. The client can be represented zealously in either setting.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

[5] A lawyer should plan for client protection in the event of the lawyer's death, disability, impairment, or incapacity. The plan should be in writing and should designate a responsible attorney capable of making, and who has agreed to make, arrangements for the protection of client interests in the event of the lawyer’s death, impairment, or incapacity.

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ADVOCATE

RULE 3.1 Meritorious Claims And Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Comment

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client’s cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and is never static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law’s ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery.
Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person, or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

ADVOCATE

RULE 3.3 Candor Toward The Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal;

(2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, subject to Rule 1.6;

(3) 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; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(c) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(d) A lawyer who receives information clearly establishing that a person other than a client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

Comment

[1] The advocate’s task is to present the client’s case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate’s duty of candor to the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.

ADVOCATE

RULE 3.4 Fairness To Opposing Party And Counsel

A lawyer shall not:

(a) Obstruct another party’s access to evidence or alter, destroy or conceal a document or other material having potential evidentiary value for the purpose of obstructing a party’s access to evidence. A lawyer shall not counsel or assist another person to do any such act.

(b) Advise or cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein.

(c) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law. But a lawyer may advance, guarantee, or pay:

   (1) reasonable expenses incurred by a witness in attending or testifying;

   (2) reasonable compensation to a witness for lost earnings as a result of attending or testifying;

   (3) a reasonable fee for the professional services of an expert witness.

(d) Knowingly disobey or advise a client to disregard a standing rule or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take steps, in good faith, to test the validity of such rule or ruling.

(e) Make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.

(f) In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

(g) Intentionally or habitually violate any established rule of procedure or of evidence, where such conduct is disruptive of the proceedings.

(h) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

   (1) the information is relevant in a pending civil matter;

   (2) the person in a civil matter is a relative or a current or former employee or other agent of a client; and

   (3) the lawyer reasonably believes that the person’s interests will not be adversely affected by refraining from giving such information.

(i) Present or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.
(j) File a suit, initiate criminal charges, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

MAINTAINING THE INTEGRITY OF THE PROFESSION

RULE 8.1 Bar Admission And Disciplinary Matters

RULE 8.2 Judicial Officials

RULE 8.3 Reporting Misconduct

RULE 8.4 Misconduct

RULE 8.5 Disciplinary Authority; Choice Of Law

*The entire list of Virginia Rules of Professional Conduct can be found on the Virginia State Bar website at the following link: http://www.vsb.org/pro-guidelines/index.php/main/print_view.