

**WESTERN DISTRICT OF VIRGINIA  
NINTH ANNUAL BANKRUPTCY CONFERENCE**

**JUNE 16, 2023**

**ETHICS: THE DUTY TO SUPERVISE**

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**A. Virginia Code, Rules of Professional Conduct, and Rules of the  
Supreme Court of Virginia**

**Code of Virginia, § 54.1-3900. Practice of law; student internship program; definition.**

Persons who hold a license or certificate to practice law under the laws of this Commonwealth and have paid the license tax prescribed by law may practice law in the Commonwealth.

1. In short, you need a license or certificate to practice law in Virginia. If you don't have one, you are a non-lawyer. Non-lawyers are prohibited from practicing law in Virginia. Non-lawyers also prohibited from holding themselves out (in any manner) as authorized or qualified to practice law in Virginia – except as may be authorized by rule or statute.
2. Non-lawyer can be a person or entity (firm, association, corporation, etc.).
3. The practice of law includes:
  - a. receiving compensation (either directly or indirectly) for advice or counsel to an entity or person regarding the application of legal principles to facts,

- b. choosing, drafting, or completing legal documents or agreements affecting the legal rights of an entity or person,
  - c. representing another entity or person before a tribunal, which means an agency, authority, board, commission, or court when it determines the rights or obligations of parties, and
  - d. negotiating legal rights or responsibilities on behalf of another entity or person.
4. Exceptions include:
- a. an individual acting *pro se*,
  - b. paralegals under the direct supervision of a licensed attorney
  - c. providing legal services pursuant to Va. Code §54.1-3900 (third-year law students, military legal assistance attorneys, etc., and
  - d. attorneys admitted *pro hac vice*.

## **Rules of the Supreme Court of Virginia Part 6, §1**

### **Prohibition Against Unauthorized Practice of Law**

No non-lawyer shall engage in the practice of law in the Commonwealth of Virginia or in any manner hold himself or herself out as authorized or qualified to practice law in the Commonwealth of Virginia except as may be authorized by rule or statute. The term “non-lawyer” means any person, firm, association or corporation not duly licensed or authorized to practice law in the Commonwealth of Virginia. Any person or entity who practices law without being licensed or otherwise authorized to practice law shall be guilty of a Class 1 misdemeanor. Va. Code § 54.1-3904.

## **Rule 5.1 – Virginia Rules of Professional Conduct**

### **Responsibilities of Partners and Supervisory Lawyers**

(a) A partner in a law firm, or a lawyer who individually or together with other lawyers possesses managerial authority, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

## **Rule 5.3 – Virginia Rules of Professional Conduct**

### **Responsibilities Regarding Nonlawyer Assistants**

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner or a lawyer who individually or together with other lawyers possesses managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows or should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

5. Penalty for unlicensed or unauthorized practice of law is Class 1 misdemeanor

**Code of Virginia, § 54.1-3904. Penalty for practicing without authority.**

Any person who practices law without being authorized or licensed shall be guilty of a Class 1 misdemeanor. A collection agency may refer debts to an attorney for collection with the creditor's approval of the referral and the fee arrangement and shall not be deemed to be engaged

in the unauthorized practice of law. An attorney is permitted by the creditor's authorization to enter into such representation agreements.

## **B. Legal Ethics Opinions (“LEOs”)**

### **LEO 1850. Outsourcing of Legal Services.**

Lawyers frequently outsource legal and non-legal support services to lawyers and non-lawyers. Examples include “reproduction of materials, database creation, conducting legal research, case and litigation management, drafting legal memoranda or briefs, reviewing discovery materials, conducting patent searches, and drafting contracts” Lawyers who engage in such outsourcing must comply with four duties. First, such lawyers must “exercise due diligence in the selection of lawyers or non-lawyers,” must take reasonable steps to assure that they comply with the lawyers’ ethical rules, must review their work “on an ongoing basis,” and must “remain ultimately responsible for [their] conduct and work product.”

Lawyers arranging for overseas outsourcing “should” enter into a written agreement confirming these steps. Second, lawyers who hire “a temporary lawyer to work on a client’s matter” must advise the client. Similarly, such lawyers “must obtain informed consent from the client if the lawyer is outsourcing legal work to lawyer or non-lawyer who is not associated with or working under the direct supervision of a lawyer in the firm that the client retained, even if no confidential information is being shared outside of the firm.” Third, lawyers “must secure the client’s consent in advance” if they will share “confidential client information” to a lawyer or non-lawyer who is not “associated with the firm nor directly supervised” by a firm lawyer. Lawyers should obtain written confidentiality agreements, and “should also ask the nonlawyer whether he or she is performing services for any parties adverse to the lawyer’s client.” Fourth,

lawyers charging clients for outsourced work as a disbursement must disclose any mark-up. Under ABA LEO 379 (12/6/93), lawyers need not disclose any mark-up or staffing agency fee if they outsource to lawyers or non-lawyers working “under the direct supervision of the lawyer such that they are considered ‘associated’ with the firm.”

### **LEO 187. Virtual Law Office and Use of Executive Office Suites**

Lawyers must be mindful of their confidentiality, supervision, and marketing responsibilities, among other things, if they practice "virtually," or if they combine a virtual practice with an "executive office suite" for meetings and other activities requiring a physical office. Lawyers sharing a space with nonlawyers must take reasonable steps to protect client confidences. Lawyers must also take reasonable steps to protect their clients' confidential information when dealing with technology, including examining "the third party provider's use of technology and terms of service" before using such provider's cloud computing or other services (lawyers unable to assess these factors on their own "will have to consult with someone qualified to make that determination").

Lawyer might also have an obligation to explain to their clients the risk of using certain methods of communication and storage. A lawyer not physically present with colleagues and staff must nevertheless comply with the normal duties of supervising subordinate lawyers and nonlawyers. Lawyers may not use misleading marketing by listing as an office a place where the lawyer does not actually practice (analyzing the situation using such factors as the frequency with which the lawyer uses the space, whether nonlawyers also use the space, signage, etc.). Under the current Virginia regulations (which are the subject of proposed amendments), lawyers

admitted by motion to practice in Virginia must maintain an office where they can see clients (which does not include a "virtual office or shared occupancy arrangements."

## **C. Hypotheticals**

### **Hypothetical #1**

Attorney is retained by client to file a chapter 7 case. A foreclosure sale is scheduled for May 16<sup>th</sup>, so the case is filed on May 15<sup>th</sup> to prevent the sale from going forward. The debtor informs the bank that the bankruptcy case was filed, and the bank's representative calls Attorney's office to confirm the filing.

Attorney's administrative assistant answers the phone and confirms the bankruptcy case was filed on May 15<sup>th</sup> and gives the bank's representative the case number. Any issues?

*No issues. Assistant is simply providing publicly available information. This doesn't entail (a) giving advice or counsel regarding the application of legal principles to facts, (b) choosing, drafting, or completing documents affecting legal rights, (c) representing an entity or person before a tribunal, or (d) negotiating legal rights or responsibilities.*

The bank's representative asks if the debtor has claimed a homestead exemption against the residence. The administrative assistant confirms the exemption claim. Any issues?

*As phrased (meaning simple confirmation of the exemption), no issues. Assistant, again, is simply providing publicly available information either based on the debtor's schedules or homestead deed. This doesn't entail (a) giving advice or counsel regarding the application of legal principles to facts, (b) choosing, drafting, or completing documents affecting legal rights, (c) representing an entity or person before a tribunal, or (d) negotiating legal rights or responsibilities. The Assistant probably does not want to volunteer any further information here.*

The administrative assistant informs the bank's representative the residence is exempt in its entirety. Any issues?

*Yes, this is a problem. This involves the application of legal principle to fact and (arguably) could entail the negotiation of legal rights and responsibilities on behalf of someone else.*

The administrative assistant then tells the bank's representative that the sale must be cancelled because there is an automatic stay that prohibits the bank from taking any further action. Any issues?

*Yes, this is a problem. Assistant is applying legal principles to facts and negotiating legal rights or responsibilities.*

## **Hypothetical #2**

Potential Client sends email to Attorney about the possibility of filing a chapter 7 case. Attorney asks Paralegal to respond and request a list of creditors so a conflict check can be run. Paralegal runs the conflict check and meets with the Debtor to explain the chapter 7 process. The Debtor fills out the paperwork and gives it to the Paralegal to be put in final format. Prior to filing, the Attorney and Paralegal meet with the Debtor to review the paperwork and explain what chapters are available to the Debtor and what will happen when the case is filed. Any issues?

*It depends. Provided the paralegal informed the debtor that he/she is not an attorney and is simply gathering information so the necessary paperwork can be completed, there should be*



*no issue, because the Attorney and Paralegal meet with the Debtor to review the paperwork and explain the legal process before the case is filed. It is far more problematic if the Attorney has not met with the Debtor prior to the case being filed.*

What if the case is a chapter 13 case? Any issues?

*Chapter 13 can be significantly more complicated than chapter 7, but the answer above applies here as well.*

### **Hypothetical #3**

Attorney has an office in Charlottesville. She has opened a satellite office in Winchester and that office is staffed by a Paralegal and Administrative Assistant. Debtor contacts the Winchester office to file a chapter 7 petition. The Paralegal meets with the Debtor and explains the necessary paperwork. The Debtor completes the paperwork and returns it to the Paralegal. The Paralegal finalizes the forms, obtains the Debtor's signature, and files the petition under the Attorney's electronic signature. The Attorney attends the meeting of creditors and any hearings. Any issues?

*This is a problem. The paralegal has given (a) advice or counsel regarding the application of legal principles to facts and (b) chosen, drafted, and completed documents affecting legal rights. Nothing in the hypothetical suggests an attorney supervised the paralegal or reviewed the paralegal's work.*

### **Hypothetical #4**

Creditor in a bankruptcy case contacts its Attorney when it receives notice of the bankruptcy filing. Creditor has a general unsecured claim so it just wants the Attorney to

monitor the case. Attorney's Administrative Assistant drafts a notice of appearance under the Attorney's name and electronically files it. The Attorney never sees the notice of appearance before it is filed. Any issues?

*This should not be a problem due to the nature of the document being filed. This doesn't entail (a) giving advice or counsel regarding the application of legal principles to facts, (b) choosing, drafting, or completing documents affecting legal rights, (c) representing an entity or person before a tribunal, or (d) negotiating legal rights or responsibilities.*

The Creditor's attorney receives notice of the need to file a proof of claim. The Attorney directs the Administrative Assistant to prepare and file a proof of claim. The Administrative Assistant works with the Client to get the information necessary to prepare the proof of claim. Once the proof of claim is prepared the Administrative Assistant electronically signs it for the Attorney, using her name and bar number, and electronically files it. The Attorney reviews the proof of claim for the first time a couple of days after it's filed, and it looks great. Any issues?

*This is a problem. The assistant has given (a) chosen, drafted, and completed documents affecting legal rights and (b) represented an entity or person before a tribunal.*

## **Hypothetical #5**

Attorney A represents the Debtor in a chapter 11 case. Attorney B represents the largest secured creditor. Attorney A fires her Administrative Assistant, and one week later Attorney B hires the Administrative Assistant.

What are Attorney A's responsibilities? *While the Administrative Assistant worked for Attorney A, it was her responsibility to ensure the Administrative Assistant understood the critical importance of client confidentiality. Rule 5.3.*

What are Attorney B's responsibilities? *When Attorney B hires the Administrative Assistant, Attorney B must not attempt to garner any confidential information from the administrative assistant relating to Attorney A's clients.*