ETHICS PRESENTATION

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John's practice concentrates in the defense of local governments and constitutional officers of the Commonwealth in litigated matters, catastrophic personal injury, and the representation of employers as well as injured workers before the Virginia Workers' Compensation Commission. He also represents Constitutional Officers and local government officials throughout the Commonwealth in state and federal court actions involving claims under 28 U.S.C. § 1983, and habeas corpus proceedings.

Education
- Washington and Lee University School of Law, J.D. 1991
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- Member, Standing Committee on Lawyer Discipline, Virginia State Bar (1996 – 2002, Chair, 2000-2001)
- Chair, Sub-Committee on Disciplinary Efficiency, Virginia State Bar (2001-2002)
- Member, Task Force on Public Access to the Attorney Disciplinary System, Virginia State Bar (2000-2001)
- Member, Judicial Nominations Committee, Virginia State Bar (2002-2004, Chair 2004-2005)
- Member, General Practice Section Board, Virginia State Bar (2010-present, Chair 2013-2015)

BIOGRAPHY

Barbara Balogh Saunders is Assistant Ethics Counsel for the Virginia State Bar. She has held this position since June 2001. Ms. Saunders staffs the Ethics Department's "hotline," providing ethics advice to members of the Virginia Bar, and also is staff counsel responsible for reviewing and investigating unauthorized practice of law complaints.

Prior to joining the Virginia State Bar, Ms. Saunders was in private practice for twelve years. She was a partner at the law firm of Poindexter & Schorsch in Waynesboro where her practice focused on domestic relations, Workers Compensation, and Social Security disability. Prior to practicing in Waynesboro, Ms. Saunders practiced in Richmond.

Ms. Saunders graduated from Mary Washington College in 1983 with a BA in International Affairs. She graduated from T.C. Williams School of Law at the University of Richmond in 1989.

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Mr. Swiger began his legal career after graduating from the George Mason University-Antonin Scalia Law School with a Juris Doctor degree, with Distinction, in 1981. He attended Villanova University and earned a B.A. in History in 1978.

Following his legal education, Mr. Swiger worked as a law clerk to the United States District Court in Richmond, Virginia. Thereafter, he entered private practice and has primarily represented injured workers in Workers Compensation cases before the Virginia Workers Compensation Commission, the Court of Appeals of Virginia, and the Supreme Court of Virginia.

He has consistently received an AV-Preeminent rating from Martindale-Hubbell. He has been named a Best Lawyer in America from 2005-present. He has also been named a Virginia Super Lawyer in the area of Workers' Compensation Law. In 2019, he was named a Fellow, by the College of Workers' Compensation Lawyers.

ETHICS FOR THE WORKERS' COMPENSATION PRACTITIONER

HYPOTHETICALS

QUESTION ONE: VWCC RULE 4.2: FILING OF MEDICAL REPORTS

The claimant suffered a compensable injury for which the parties entered into agreements for certain medical benefits: a brief period of temporary partial disability, and temporary total disability beginning January 1, 2019 and continuing. On May 1, 2019, the adjuster filed an employer's application for hearing seeking termination of the outstanding award on the basis that the claimant had been released to return to work on April 30, 2019 in accordance with an occupational medicine specialist's report of the same date. That physician performed an examination pursuant to Virginia Code § 65.2-607.

The case was selected for an on-the-record proceeding. The employer and insurer retained counsel who filed a position statement with attachments, as well as a responsive position statement. The claimant, who was pro se, did not file a statement or documentary evidence. The record closed and the deputy commissioner issued an opinion relying upon the occupational medicine specialist's conclusion that the claimant could perform his full duties as of April 30, 2019 and was able to return to work with no restrictions. The deputy commissioner noted that there was no evidence offered by the claimant to refute or contradict the opinion of the occupational medicine specialist.

Claimant then retained counsel. In a motion to reconsider and vacate the deputy commissioner's opinion, counsel argued that the claimant, when unrepresented, was unaware of his obligation to submit a response to the commission. Counsel also sought leave to reopen the medical record for new evidence and requested an evidentiary hearing on the employer's application for hearing. In support of the motion, counsel attached medical evidence that was not included in the on-record hearing consisting of an April 20, 2019 office note and a May 15, 2019 medical report from the claimant's treating orthopedist, both of which contradicted the full duty release from the occupational medicine specialist. Claimant's counsel argued that these medical records should have been included for consideration in the on-record hearing.

DISCUSSION

Did employer/carrier's counsel have any obligation to the unrepresented claimant in the original hearing to submit other medical records?

Is employer/carrier's counsel obligated to file records with the Commission that do NOT support its request for hearing?

Is employer/carrier's counsel obligated to call to the Commission's attention medical evidence that contradicts her clients' position?

Rule 4.2 of the Virginia Workers' Compensation Commission states, in part:

> *Each party shall promptly provide the other parties with copies of any medical records they receive as they receive them*. Unless otherwise directed by the Commission or these Rules, the parties shall not file medical records with the Commission until a hearing request is filed. *The requesting party shall promptly*
> *file medical records supporting the request, if applicable*. After a hearing request
> has been filed, the parties shall file with the Commission only medical records that are related to the hearing request. These records shall be filed upon receipt by the party filing them and are required reports subject to the provisions of 65.2-902. A party is not required to file copies of medical records that another party has already filed.

The Commission recently ruled that Rule 4.2 does not simply "require a party to file only records supporting their application. They must provide [the opposing party] with any … medical records they receive. They must also file with the Commission all medical records related to the hearing request, whether supportive of their position or not." *Hodge v. Yokahama Tire*, JCN VA000001510763 (Jan. 2, 2020) (Marshall). This decision suggests that if the employer/carrier had in its possession, at the time of the on the record hearing, the medical records that the claimant now wishes to open the record to include, it should have filed those along with the medical report supporting its own application for hearing.

Whether this creates ethical issues depends on how this rule of the Commission is applied and if it really does require all records to be filed, whether in support of or not, of a party's application for hearing. Rule 3.4(d) states that a lawyer shall not:

> Knowingly disobey…a standing rule…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…

Rule 3.4(g) states that a lawyer shall not:

> Intentionally or habitually violate any established rule of procedure…where such conduct is disruptive of the proceedings.

Rule 4.1(b) states that a lawyer shall not knowingly… "fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client."

There is nothing to indicate that counsel "knowingly disobeyed" or "intentionally" violated any rule of the tribunal or of procedure. Nor are there any facts to suggest that by not providing these other medical records, she was assisting the client in a criminal or fraudulent act. This situation illustrates primarily a procedural/legal issue and whether there has been a violation of a

procedural rule. Even if there has been, there would have to be shown some kind of purposeful intent to cause some kind of harm to make it rise to an ethical violation.

QUESTION TWO: CONTACT WITH EMPLOYEES OF A REPRESENTED EMPLOYER

Counsel for an injured worker files an original accident claim on behalf of the worker. The employer and insurer deny the claim. Discovery ensues. The employer and insurer retain counsel who enters an appearance on behalf of the employer. Employer's general manager contacts employer's counsel and reports that claimant's counsel has called several co-employees to interview them about the claimed injury and work in general. The general manager is irate. How dare opposing counsel contact our people?

The employees who were contacted include the CFO, Director of Human Resources, claimant's immediate supervisor, and three other workers who were in the vicinity when the accident allegedly occurred. Two of the three other workers are no longer employed.

DISCUSSION

Was it improper for claimant's counsel to contact these employees directly?

Rule 4.2 of the Virginia Rules of Professional Conduct states:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Comment 7 to Rule 4.2 states that:

> In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons in the organization's "control group" as defined in *Upjohn v. United States*, 449 U.S. 383 (1981) or persons who may be regarded as the "alter ego" of the organization. The "control group" test prohibits *ex parte* communications with any employee of an organization who, because of their status or position, have the authority to bind the corporation. Such employees may only be contacted with the consent of the organization's counsel, through formal discovery or as authorized by law. An officer or director of an organization is likely a member of that organization's "control group." The prohibition does not apply to former employees or agents of the organization, and an attorney may communicate *ex parte* with such former employee or agent even if he or she was a member of the organization's "control group." If an agent or employee of the organization is represented in the matter by separate counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule.

Applying this analysis to the scenario above, the CFO and the Director of Human Resources are likely members of the "control group" for the employer. The three co-workers are probably not members of the control group and may be contacted directly, assuming they are not otherwise represented. In particular, the employee that is no longer employed with the employer can be contacted directly, as former employees, even if formerly members of the "control group," are not subject to the prohibitions outlined in Comment [7]. Whether the immediate supervisor is a member of the control group is unclear under these facts. The question will center on whether, because of her status or position, she has the authority or capacity to bind the entity. Further investigation into her status would be warranted.

QUESTION THREE: COMMUNICATION WITH REPRESENTED PERSONS

It is Friday afternoon in the summer, and Able Associate cannot wait to get home. At 4:50 PM, the phone rings just as Able was packing up a stack of depositions to read over the weekend. When he answered the phone, the person on the other side was obviously distraught, and quickly shouted out that "I am tired of litigating this case, and tired of my *&^% Attorney not doing what I told him to do. I will settle this case today for $5000." Able listened to the person on the other side for about 45-60 seconds before he realized that it was the injured worker whom he deposed two weeks ago. Able told the person that he was sorry and could not help her and that she needed to contact her own lawyer.

Able had received settlement authority in this case just this past week for $15,000. He would look like a hero for settling the case at one third of the authority granted.

DISCUSSION

Did Able handle the phone call with the opposing party appropriately?

Can Able attempt to settle the case based on the opposing party's statement that he was willing to settle the case for $5000?

This scenario borrows heavily from the case of *Zaug v. Virginia State Bar*, 285 VA. 457, 737 S.E.2d 914 (2013). In that case, an attorney whose firm represented a doctor in a medical malpractice action received a telephone call from one of the plaintiffs, who was distraught, concerning a scheduled deposition. In a conversation lasting approximately 60 seconds, the caller told the attorney about the toll the litigation was taking on her family and that the deposition needed to be cancelled. The attorney told the caller that she could not help her and that the caller needed to contact her own attorney. When the caller continued with an outpouring of emotion, the attorney reiterated that her office could not help the caller and that she needed to reach her own attorney. Plaintiff's counsel learned of the call and filed a complaint with the Virginia State Bar. A District disciplinary committee concluded that the attorney's conduct violated Rule 4.2 of the Virginia Rules of Professional Conduct. The attorney appealed to a three-judge panel of the circuit court which affirmed the findings of the district committee and the sanction of a dismissal *de minimis*. Zaug appealed to the Supreme Court of Virginia, which reversed the three-judge panel's decision and found no ethical violation under the specific facts of the case

The Supreme Court's *Zaug* opinion is cited in recently-approved LEO 1890, a compendium opinion addressing major issues in the application of Rule 4.2. For the Rule to apply, three elements must be established:

> (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. While the first two facts may occur in any order, both must occur before an attorney violates the Rule.

Zaug, supra, 285 at 463.

Comment [3] to Rule 4.2 states:

> The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

As the Supreme Court of Virginia explained in *Zaug*, *supra*, "immediately" does not mean "instantaneously." If a represented person contacts opposing counsel by telephone, for example, counsel must have an opportunity to ascertain the identity of the caller and to disengage politely from the communication, advise the represented person that the lawyer cannot speak with him directly about his case and should advise the represented person that he should speak with his lawyer.

Applying this analysis to our factual pattern, did Able Associate handle the telephone call with the represented injured worker appropriately? Yes, he did. As soon as he realized who he was talking to, he ended the conversation and advised the person to contact her own counsel. Able should now contact the opposing counsel to advise that counsel's client contacted Able directly and what happened on the phone call.

The thornier issue is how to approach settlement of the case. The injured worker indicated that she would "settle this case today for $5000." This amount is clearly within the authority provided by the defendant employer's insurance carrier. That said, Able cannot negotiate directly with the injured worker, he still must communicate only through the worker's counsel. But he can tell opposing counsel what the injured worker said and attempt to negotiate that amount. Whether that will be successful is another question.

QUESTION FOUR: CONFLICTS--WE CAN'T GO ON TOGETHER. [1]

[1] With apologies to The King.

Eidle Hands retains Able Associate to handle his Worker's Compensation claim. Eidle lives with his life partner, Sue Spicious, and uses her computer and her email address to receive email. He instructs Able to send all email to that address. Sue also accompanies Eidle to every meeting with his attorney and frequently sits in on all phone calls.

Able expresses concern about Sue's participation in conversations between the client and counsel, but Eidle repeatedly says "whatever you have to say to me, you can say to her. We are one and the same. But I want you to keep everything that we say to you confidential."

After nine months of extensive litigation and discovery, the parties settle on the eve of a hearing before the Commission. The standard 30-day order is entered. Settlement documents are exchanged and finally tendered for review. It is a huge settlement, and Able will finally be able to make enough to open his own firm.

Before the documents can be approved, Sue calls Able. She tells him that Eidle has left her for another person. She also tells him that Eidle was never really injured on the job but instead got hurt helping her hang artwork in her apartment one weekend. Sue says that she feels absolutely heartbroken about keeping this to herself and she just had to come clean with Able so that he could put a stop to the settlement. She said Eidle was committing fraud. If he won't stop it, she will reach out to defense counsel. The only contact information that Able has for Eidle is Sue's address, email, and phone.

What next?

DISCUSSION

A. If Able believes Sue, does he have information that clearly establishes that the client has, in the course of the representation, perpetrated a fraud upon a third party related to the subject matter of the representation? Is he required to disclose this information? Is he permitted to disclose? Is Able required to promptly reveal to either the tribunal or opposing counsel the intention of his client to commit a crime that will result in substantial injury to the financial interests of another? If so what should he do first?

B. What could Able have done at the outset of the representation to avoid this situation?

Rule 1.6(a) of the Virginia Rules of Professional Conduct states:

> (a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

Rule 1.6(b) lists a number of exceptions to the duty of absolute confidentiality which permit (but do not require) lawyers to disclose confidential information of a client without the client's consent. This list includes Rule 1.6(b)(3) which allows a lawyer to reveal information "which clearly establishes" that the client has perpetrated a fraud upon a third party "related to the subject of the representation." The question in this hypothetical is whether the information from Sue would constitute "information that clearly establishes" that Eidle perpetrated a fraud on the employer and carrier regarding his injury.

Prior to revisions to Rule 1.6 and Rule 3.3 in 2016, Rule 1.6(c)(2) stated that:

> ...For the purposes of this paragraph and paragraph (b)(3), information is clearly established when the client acknowledges to the attorney that the client has perpetrated a fraud.

This language had also been used in the former Code of Professional Responsibility and was affirmed in several legal ethics opinions:

> The Committee interprets the meaning of "clearly establishes"...as to be only when "the client acknowledges to the attorney that he has perpetrated a fraud." To subscribe to a less stringent determination would create the anomalous situation where the attorney would be proscribed from revealing the same to the court.

LEO 1347 (1990). See also LEOs 1316, 1367 and 1663.

In the situation described in this hypothetical, Able has information only from Sue, who, apparently, may have her own agenda and ax to grind against Eidle. There is no indication that Able has discussed this with Eidle or that Eidle has otherwise "acknowledged" this possible wrongdoing to Able. Without that confirmation, Able cannot and should not disclose anything. Indeed, Rule 1.6(b)(3) is not a required disclosure, but, rather, a permissive disclosure. If Able doesn't know, for sure, that Eidle has perpetrated any fraud, and/or that Able's legal services are being used to further that fraud, he does not have to, and should not, disclose any information.

LEO 1367 addressed a situation in which a lawyer represented a client which exported materials overseas under a program which required that the materials be produced in the U.S. A dispute arose between this client and its shipping agent over responsibility for a penalty imposed by the customs service for failure to file proper forms regarding re-entry of items into the U.S. The client also faced charges from the U.S. government for allegedly misrepresenting goods exported as manufactured in the U.S. when they were not. The issue was whether the lawyer had to disclose this to the shipping agent's counsel and that the client's representations to the agent might not be correct. The client did not acknowledge any improper conduct or validate the government's charges. The committee opined, therefore, that:

> ...an attorney may not assume that any criminal charges brought against his client contrary to his client's statement present a clear indication of fraudulent activity on the part of his client. Therefore, it would be improper for the attorney to alert either the shipping agent's counsel or the customs service of the potential charges against the client...

With regard to disclosure to the tribunal and opposing counsel of Eidle's intention to "commit a crime reasonably certain to result in…substantial injury to the financial interests…of another," pursuant to Rule 1.6(c)(1), based on the information in this hypothetical, the answer is "no" at this point. There has been no "intention, *as stated by the client*" to commit such a crime, or any crime. Able only has the word of Sue, who is *not* the client and, again, who may have her own, personal agenda against Eidle.

At this point, Able should have a discussion with Eidle about all of this. A problem, certainly, is that Able's only means of communication with Eidle is through Sue. Able will need to seek other means to find and communicate with Eidle. Even if what Sue said is true, Able still needs to communicate with Eidle. And if Eidle doesn't contact Able on his own, Able may have to consider withdrawal from the representation. If Able can't confirm any of what Sue says with Eidle directly, Able could withdraw with no disclosure since his does not "know" that Eidle has done anything improper.

Able could (and should have) avoided this by establishing some other contact/communication with Eidle other than through Sue. Regardless of whether a client insists on having a third person involved in / present during a representation, the lawyer must advise the client, individually, as to the risks to confidentiality and attorney/client privilege in doing this and should always have some private/individual communication with the client.

QUESTION FIVE: JUDICIAL CRITICISM

CASE 1: A claimant files a claim for benefits for injuries to her right shoulder, arm, leg, and knee, seeking an award for medical benefits and temporary total disability benefits. The claim is denied, with the Deputy Commissioner finding that the claimant was not credible based on lack of medical evidence and evidence that the claimant was performing activity (shoveling snow), apparently without difficulty during the time benefits were sought. The claimant, by counsel, filed a request for review in which counsel criticized the Deputy Commissioner for having "…UNWITTINGLY EMBRACED THE FALSE TESTIMONY BY FINDING THAT THE BLATENTLY FALSE TESTIMONY AS BEING MORE CREDIBLE THAN THAT OF THE CLAIMANT SO AS TO DENY THE INJURED WORKER HER CLAIM," and that the Commission has a duty, "TO INVESTIGATE WHETHER OR NOT FALSE TESTIMONY HAS BEEN PRESENTED IN THIS CASE…" The claimant also requested that in the event of a remand, the case be assigned to a different, "more independent" Deputy Commissioner. Counsel's written statement also included "…liberal references to fraud, injustice and corruption. The Deputy Commissioner is accused of lacking independence. The Full Commission and the Court of Appeals are charged with committing, "INJUSTICE NO MATTER HOW HORRIFIC THE RESULT… [emphasis in original]"

CASE 2: Claimant sustained a compensable injury and the Commission entered an award for medical benefits and temporary total disability benefits. Later, the defendants filed an application for hearing seeking to terminate the disability benefits, based on an IME report. The claimant requested a review of the referral of this application to the docket, and the Full Commission affirmed the referral with one Commissioner dissenting. The case went forward to hearing, where the Deputy Commissioner found in favor of the claimant. The defendants filed a request

for review of this decision. In the request, defendants specifically asked that the Commissioner who had dissented in the prior Full Commission decision to refer the application to the docket recuse himself from adjudicating this new request for review on the grounds that his dissent in the Full Commission's decision demonstrated that he was prejudiced against the merits of the Employer's Application.

What are the ethical implications for the conduct of the lawyers in these two cases?

DISCUSSION

Case 1:

Rule 8.2 of the Rules of Professional Conduct states:

> A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge or other judicial officer.

In the first case, claimant's counsel's *ad hominem* attacks directed towards the Deputy Commissioner and the Full Commission potentially could come within the scope of Rule 8.2. In the actual case on which this hypothetical is based, the Full Commission issued an opinion admonishing the claimant's counsel for his comments:

> Generalized proclamations of injustice and clear comments of disrespect to the Commission and the Courts are not persuasive.
>
> ... We remind claimant's counsel that his appearance before the Commission is on behalf of a client, not so he can impugn the integrity of the Deputy Commissioner and subject the Commission to churlish screed.

As a practical matter, the bench and bar of the workers' compensation system in Virginia is a relatively small group. If counsel has a legitimate complaint regarding the impartiality of a Deputy Commissioner or a Full Commissioner, such a matter must be handled with great discretion and professionalism. It certainly was not in this case. *Garcia v RG Home Healthcare Inc.*, 16 WC UNP. VA 02000021063 (2016)

In addition to Rule 8.2, conduct such as outlined in this hypothetical could have implications for Rule 3.4(f) ("In trial...state a personal opinion as to the justness of a cause [or] the credibility of a witness...") and Rule 3.5(f) ("A lawyer shall not engage in conduct intended to disrupt a tribunal.")

Case 2:

To the extent counsel's comments were meant to accuse the Commissioner of violating his duty of impartiality and integrity, this could be an issue under Rule 8.2. While a lawyer is not prohibited from seeking recusal of a judge or judicial officer, she must do so with great care and consideration and must not impugn the judge or judicial officer in the process. In the case on which this hypothetical was based, the Full Commission stated:

Our judicial system is intended to fairly and peacefully resolve disputed. The legislature tasked the Commission with adjudicating such controversies as arise under the provisions of the Act. See VA Code §65.2-201 (A) The statutorily mandated composition of the 3-member Commission contemplates the potential for disagreement. As with any judicial system presided over by multiple judges with a diversity of backgrounds and human experience, dissent is anticipated and inevitable. Predicating an accusation of impermissible bias upon one tasked with fairly weighing evidence and applying the law solely because of a disagreement over a limited issue, expressed in a recent dissent, is unwarranted. Indeed, it is offensive, necessarily accusing the judicial officer of violating his duty of impartiality as dictated by Canon 3, of the Canons of Judicial Conduct. Advancing this claim is untenable. If the recusal motion was pursued strategically, then it implicates Rule 8.2 of the Virginia Rules of Professional Conduct.

QUESTION SIX: CONFLICTS

A claimant suffered a right ankle sprain for which he was paid Temporary Total Disability benefits and a 5% loss of use to the right lower extremity. In a second case, the claimant suffered a lumbar strain and trunk contusion for which he was awarded medical benefits only. He then filed claims on both cases seeking continuing medical care. Upon consideration of these claims, the Deputy Commissioner found that the claimant was entitled to ongoing medical treatment related to the ankle sprain. Counsel for the carrier covering the ankle sprain filed a request for review.

In the first claim, the employer was insured by VADA and represented by attorney John Smith. In the second case, the employer was insured by Merchant's and represented by attorney Jane Doe. After the Deputy Commissioner's decision in favor of the claimant's ongoing medical treatment for his ankle injury, but before VADA filed a request for review, Jane Doe joined John Smith's firm. In its request for review, VADA listed several assignments of error, including that the medical treatment for which the Deputy Commissioner found it responsible, should have been the responsibility of Jane Doe's former client.

Is there a conflict for John Smith to continue representation of VADA now that Jane Doe has joined his firm?

DISCUSSION

The answer is probably yes. Rule 1.9 and Rule 1.10 of the Rules of Professional Conduct will control this question. If Jane Doe has a conflict under Rule 1.9, then she imputes that conflict to the entire firm and John Smith would be disqualified.

Rule 1.9(a) states that a lawyer cannot

represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of [a] former client unless both the present and former client consent after consultation.

Rule 1.9(c), which is applied independently of Rule 1.9(a), states:

> A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> (1) use information relating to or gained in the course of the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or
>
> (2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

Rule 1.10(a) imputes conflicts to all attorneys who practice together:

> (a) While lawyers are associated in a firm, none of them shall represent a client when the lawyer knows or reasonably should know that any one of them practicing alone would be prohibited from doing so by Rules 1.6, 1.7, 1.9, or 2.10(e).

Jane Doe was, apparently, the primary counsel for Merchant's when she was at her former firm. Merchant's is now going to continue to be involved in this workers' compensation case and, based on VADA's assignment of error in its request for review, will be directly adverse to VADA. Based on Rule 1.9, Jane Doe would not be able to take on representation of VADA and so neither can John Smith continue to do so unless there is disclosure to and consent from both VADA and Merchant's. That said, they must also consider Rule 1.9(c) and whether Jane Doe has confidential information that could be used to Merchant's detriment. She still has an obligation to keep that information confidential and it is not appropriate to ask a former client for consent to use such information against him/her. Unless consent can be obtained as prescribed by Rule 1.9, Rule 1.10(a) will operate to disqualify John Smith and his firm from continued representation of VADA.

In the actual case upon which this hypothetical is based, Merchant did raise the issue of conflict and disqualification and the Full Commission applied Rule 1.10(a) to disqualify John Smith and his firm.

QUESTION SEVEN: IMPROPER ATTORNEY'S FEE

A claimant was injured in the course of her employment. She hired an attorney to represent her in pursuing her workers' compensation claim. The attorney was able to negotiate a compromise settlement of the claim in the amount of $15,000.00 and filed a petition with the Commission for approval of the settlement.

The petition was signed by the claimant, the employer and claimant's counsel, all agreeing to the settlement and that the settlement was in the claimant's best interest. There was also a provision requesting that the Commission award a reasonable attorney's fee to claimant's counsel for legal services rendered, such fee to be paid directly from the settlement.

The Commission approved the settlement, with an award of $2500.00 as fee to claimant's counsel. Some time later, the claimant wrote to the Commission questioning the fee and advising that while the $2500.00 approved by the Commission had been deducted from the claimant's proceeds, the claimant's attorney then told her she had to pay him an additional $2500.00 pursuant to a contingency fee agreement that the claimant had signed with the attorney at the time she hired him for the case. Claimant's attorney never disclosed this when the settlement was presented to the Commission.

Has claimant's attorney done anything wrong to charge a fee in addition to what was approved by the Commission?

DISCUSSION

Yes. The attorney violated §65.2-701 and §65.2-714 of the Code of Virginia and Rule 1.5 and Rule 8.4(b) of the Rules of Professional Conduct.

Section 65.2-701of the Worker's Compensation Act in the Code of Virginia requires that a settlement of a claim must be submitted and approved by the Commission and, if approved, is binding on the parties. Section 65.2-714 provides that:

> ...fees of attorneys...shall be subject to the approval and award of the Commission. The Commission shall have exclusive jurisdiction over all disputes concerning such fees...and may order the repayment of the amount of any fee which has already been paid that it determines to be excessive...

Rule 1.5(a) and (b) of the Rules of Professional Conduct requires that all fees must be reasonable and must be adequately explained to the client. A contingent fee may be used except if prohibited by Rule 1.5(d) or other law. (Rule 1.5(c)). Rule 8.4(b) establishes that it is professional misconduct for a lawyer to "commit a...deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law."

In this scenario, the statutes are clear that settlements and fees must be approved by the Commission. This claimant's lawyer did not provide the Commission with all of the information related to his fee agreement with the client and so the Commission could not and did not address and approve the contingent fee that this lawyer and client apparently had agreed to. The only fee approved by the Commission was the $2500 as part of the settlement. Following the statutes, that is all the lawyer could collect. Under Rules 1.5 and 8.4, a lawyer cannot charge an illegal/improper fee. For this lawyer to have collected both the $2500 fee approved by the Commission and another $2500 pursuant to the contingency fee agreement was improper.

In the case on which this hypothetical was based, the Commission ordered the lawyer to return the additional $2500 to the claimant and this order was affirmed by the Virginia Court of Appeals. The lawyer was also disciplined, with the Virginia State Bar Disciplinary Board imposing a public reprimand, finding that the lawyer charged an illegal fee. The Virginia Supreme Court affirmed this disciplinary action. *See Virginia State Bar v. Robert P. Hudock,* Docket No. 84-38; *Robert P. Hudock v. Virginia State Bar,* Supreme Court of Virginia, Record No. 850604 (1987).

QUESTION EIGHT: USE/PRODUCTION OF SURVEILLANCE VIDEO

Surveillance of a claimant was done over the course of three days, with four hours of video taken. Defense counsel brought the video to claimant's treating physician, who upon watching the video became disillusioned with claimant's allegations of disability. However, the physician was shown only seven minutes of the video and was not shown other portions of the video portraying pain/guarding behaviors.

Does defense counsel have an ethical obligation to present a fair portrayal to the treating physician?

Can defense counsel edit the videos to portray only selected activities or movements?

Claimant propounds discovery to obtain a copy of the surveillance video. Does defense counsel have to disclose all four hours of the video? Or just the portions shown to the treating physician that defendants will be relying upon at hearing? Would the results change if defense counsel had not edited the video, but rather requested the private investigators to send defense counsel only the "relevant" portions of the video? Does defense counsel have an obligation to request the video in its entirety from the investigators?

DISCUSSION

Defense counsel has an ethical obligation of candor when dealing with third parties under Rule 4.1:

> In the course of representing a client a lawyer shall not knowingly:
>
> (a) make a false statement of fact or law; or
>
> (b) fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

Rule 8.4(c) states that it is professional misconduct for a lawyer to:

> engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law…

Defense counsel may not edit the videos to portray only selected activities or movements if doing so is misleading and deceptive. Thus, if defense counsel removes or deletes portions of

the video that would show claimant suffered pain, became tired over time, or collapsed as a result of the portrayed activity, this conduct would violate Rules 4.1 and 8.4(c).

With regard to production under discovery, defense counsel has to produce all four hours of video. Defense counsel may not leave it to the investigators to decide what is "relevant" and what is to be produced to respond to claimant's discovery requests. Defense counsel has an obligation to comply with "a legally proper discovery request by an opposing party." Rule 3.4(e).

Claimant is entitled to discover and has likely framed her discovery request to seek production of and all video the defense has in its custody or control portraying the claimant. Defense counsel may try to limit the discovery only to video (edited or unedited) that they intend to rely on at trial or hearing and possibly assert work product protection for material they do not intend to use or rely on at trial. However, there may be problems with this. First, any selective editing of the video raises questions of spoliation and incomplete response to discovery. Rule 3.4(a) states that a lawyer may not:

> 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.

Defense counsel may not have the investigators determine and select which portions of the video are relevant. Lawyers may employ non-lawyers to perform investigative tasks but determining which portions of the video are relevant is the practice of law. Defense counsel would be assisting the investigators in the unauthorized practice of law. *See* Rule 5.5(c). Comment [2] to Rule 5.5 explains:

> The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unauthorized persons. Paragraph (c) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, *so long as the lawyer supervises the delegated work and retains responsibility for their work.* See Rule 5.3. (emphasis added).

Thus, as part of their duty to supervise the work of their investigators, and to avoid intentional or inadvertent spoliation of evidence, defense counsel has a duty to obtain the video recording in its entirety and to instruct the investigators to not edit or delete any portions.

QUESTION NINE: USE OF SOCIAL MEDIA FOR INVESTIGATION

Can defendants or defense counsel search and review an employee's public profiles on SM to discover information related to her WC claim?

ANSWER: Yes. Visiting the employee's SM public profile, blog or web page is permissible and not an attempt to communicate with a represented person.

A lawyer may view the public portion of a person's social media profile or public posts even if such person is represented by another lawyer. However, the lawyer must be aware that certain

social media networks may send an automatic message to the person whose account is being viewed which identifies the person viewing the account as well as other information about such person. Making a "friend" request or invitation to connect is a communication and a violation of Rule 4.2 of the Rules of Professional Conduct if the person is represented by counsel. Even if the person is not represented, defense counsel may not employ means that are deceptive to connect with a witness or unrepresented employee and may not use non-lawyer agents to do so. For example, it would be unethical for a defense counsel or an agent under their supervision to use a false identity. Some bar opinions require that the investigator or attorney state the reason why they are seeking to connect with the person on FB or LinkedIn. *See, e.g. New York State Bar Ass'n Social Media Guideline No. 3B*:

> A lawyer may request permission to view the restricted portion of an unrepresented person's social media website or profile. However, the lawyer must use her full name and an accurate profile, and she may not create a different or false profile in order to mask her identity. If the person asks for additional information from the lawyer in response to the request that seeks permission to view her social media profile, the lawyer must accurately provide the information requested by the person or withdraw her request.

In New York, there is no "deception" when a lawyer utilizes her "real name and profile" to send a "friend" request to obtain information from an unrepresented person's social media account. NYCBA Formal Op. 2010-2 (2010). In New York, the lawyer is not required to disclose the reasons for making the "friend" request. *Id.* New Hampshire, however, requires that a request to a "friend" must "inform the witness of the lawyer's involvement in the disputed or litigated matter," the disclosure of the "lawyer by name as a lawyer" and the identification of "the client and the matter in litigation." N.H Bar Ass'n Ethics Advisory Comm., Op. 2012-13/05 (2012). San Diego requires its lawyers to disclose the lawyer's "affiliation and the purpose for the request." San Diego County Bar Ass'n Legal Ethics Comm., Op. 2011-2 (2011). Philadelphia notes that the failure to disclose that the "intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness" constitutes an impermissible omission of a "highly material fact." Phila. Bar Ass'n Prof'l Guidance Comm., Op. Bar 2009-2 (2009). In Oregon, there is an opinion that, if the person being sought out on social media "asks for additional information to identify the lawyer, or if the lawyer has some other reason to believe that the person misunderstands her role, the lawyer must provide the additional information or withdraw the request. Oregon State Bar Comm. on Legal Ethics, Formal Op. 2013-189 (2013).

QUESTION TEN: CASE RESULTS

Can you ethically post your high-profile victories and case outcomes on social media? If not, why is it permissible to do so with Virginia Lawyers Weekly and interviews with newspaper reporters?

ANSWER: Yes, provided that the case outcomes are not false or misleading.

Effective July 1, 2017, lawyers are not required to use the mandatory disclaimer to publicize specific case results; however, some specific outcomes may need explanation and placed in context to avoid making a misleading statement or claim or unjustified expectations about the results the lawyer can achieve. For example, a lawyer may claim that he won a $1 Million verdict in court, which on its face may be true. However, the statement is misleading if the lawyer fails to disclose that the opposing party offered $2 Million to settle before trial.

STATUTORY HEADS UP

Virginia Code §65.2-312 makes it a Class 6 felony to knowingly make, file or use any writing or document knowing the same to contain any materially false, fictitious or fraudulent statement or entry in connection with an award under this title. Virginia Code §65.2-312 (C) specifically indicates any person convicted of a violation of this section who is licensed to, "...practice law pursuant to Chapter 39 and who committed the violation while engaged in such practice may have such license suspended or revoked in accordance with the provisions of Chapters 29 and 39.

There is a dearth of decisions interpreting this section but certainly all counsel should be aware of the broad language used in this section, particularly since it makes it unlawful for any person to aid or abet another in violation of this section.

APPENDIX

Rules of Professional Conduct Preamble: A Lawyer's Responsibilities

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 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.

Rule 1.6 - Confidentiality of Information

(a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

(b) To the extent a lawyer reasonably believes necessary, the lawyer may reveal:

(1) such information to comply with law or a court order;

(2) such information to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(3) such information which clearly establishes that the client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation;

(4) such information reasonably necessary to protect a client's interests in the event of the representing lawyer's death, disability, incapacity or incompetence;

(5) such information sufficient to participate in a law office management assistance program approved by the Virginia State Bar or other similar private program;

(6) information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes, provided the lawyer exercises due care in the selection of the agency, advises the agency that the information must be kept confidential and reasonably believes that the information will be kept confidential.

(7) such information to prevent certain death or substantial bodily harm.

(c) A lawyer shall promptly reveal:

(1) the intention of a client, as stated by the client, to commit a crime reasonably certain to result in death or substantial bodily harm to another or substantial injury to the financial interests or property of another and the information necessary to prevent the crime, but before revealing such information, the attorney shall, where feasible, advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client's criminal intention unless thereupon abandoned. However, if the crime involves perjury by the client, the attorney shall take appropriate remedial measures as required by Rule 3.3; or

(2) information concerning the misconduct of another attorney to the appropriate professional authority under Rule 8.3. When the information necessary to report the misconduct is protected under this Rule, the attorney, after consultation, must obtain client consent. Consultation should include full disclosure of all reasonably foreseeable consequences of both disclosure and non-disclosure to the client.

(d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access, to information protected under this Rule.

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;

(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 the tribunal in a proceeding in which the lawyer is representing a client shall promptly reveal the fraud to the tribunal.

(e) The duties stated in paragraphs (a) and (d) continue until the conclusion of the proceeding, and apply even if compliance requires disclosure of information protected by Rule 1.6.

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.

Rule 3.5 Impartiality And Decorum Of The Tribunal

(a) A lawyer shall not:

(1) before or during the trial of a case, directly or indirectly, communicate with a juror or anyone the lawyer 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;

(2) after discharge of the jury from further consideration of a case:

(i) 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 the juror's actions in future jury service;

(ii) communicate with a member of that jury if the communication is prohibited by law or court order; or

(iii) communicate with a member of that jury if the juror has made known to the lawyer a desire not to communicate; or

(3) conduct or cause, by financial support or otherwise, another to conduct a vexatious or harassing investigation of either a juror or a member of a venire.

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

(c) A lawyer shall reveal promptly to the court improper conduct by a member of a venire or a juror, or by another toward a venireman or a juror or a member of the juror's family, of which the lawyer has knowledge.

(d) A lawyer shall not give or lend anything of value to a judge, official, or employee of a tribunal under circumstances which might give the appearance that the gift or loan is made to influence official action.

(e) 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, except:

(1) in the course of official proceedings in the cause;

(2) in writing if the lawyer promptly delivers a copy of the writing to opposing counsel or to the adverse party who is not represented by a lawyer;

(3) orally upon adequate notice to opposing counsel or to the adverse party who is not represented by a lawyer; or

(4) as otherwise authorized by law.

(f) A lawyer shall not engage in conduct intended to disrupt a tribunal.

Rule 4.1

Truthfulness In Statements To Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of fact or law; or

(b) fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

Rule 5.3

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.

Rule 8.2 Judicial Officials

A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge or other judicial officer.