

ABUSIVE LITIGATION TACTICS?

An Excursion into the Ethical Considerations and Pragmatic Realities of Certain Litigation Tactics

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Master

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I. BASIC FACTUAL STATEMENT

Peter Plaintiff is employed on the production line of the Tasty Toaster Company which manufactures toasters. Peter brought one of Tasty's toasters home where it short-circuited, causing a fire that resulted in severe and permanent personal injury to Peter and his wife, Paulette. Peter and Paulette have retained you, an experienced and learned plaintiff's product liability litigation attorney, to assert appropriate claims against Tasty.

II. EX-PARTE COMMUNICATION

A. You are investigating your client's claims, have not yet contacted Tasty regarding these claims, and Peter and Paulette have identified three employees that you should interview:

1. John Doe, a current employee of Tasty who has first hand information regarding the wiring screw-ups that have occurred time after time at the factory;
2. Larry Lawyer, a former XYZ employee who was Corporate Counsel/Vice President of Tasty's Quality Control Department;
3. Sarah Snitch, a former XYZ employee who worked in the accounting department and knows about the stop work orders on this particular toaster.

QUESTIONS:

- a. Which of these may you interview?
- b. Although suit had not been filed, what if Tasty's defense counsel had identified herself? Or if suit had been filed and you were in discovery?
- c. What if Larry Lawyer had not been Vice President or Corporate Counsel?

B. As plaintiff's counsel, you know that Tasty always uses PayMePlenty Engineering Services as its expert witnesses.

QUESTIONS:

May you interview the PMP engineers ex parte before suit is filed?

May you interview PHP ex parte after suit is filed but before it has been designated as defendant's expert witnesses? After designation?

C. The evidence against defendant is damning, defendant appears to have no interest in settling, and you think defense counsel is simply not keeping their client informed.

QUESTION: Can you overcome defense counsel's obvious failure to keep his client informed?

D. As defense counsel, you anticipate that plaintiff's attorney will attempt to interview all of defendant's employees that may have had anything to do with the production or marketing of the toaster.

QUESTION: What advice can you give defendant to fend off plaintiff's investigation?

EX PARTE COMMUNICATION

- I. When may an attorney conduct ex parte communications with certain individuals in relation to prospective litigation? For example, when may an attorney make ex parte contact current or former employees of an adverse corporation? Alternatively, can an attorney conduct ex parte communications with an adverse party's expert witness prior to litigation? This section will seek to answer these questions, as well as other related questions.
- II. There are two rules under the Virginia Rules of Professional Conduct that apply to ex parte communications. These rules discuss the ABA Model Rules, as well as the seminal case of *Upjohn v. United States*, 449 U.S. 383 (1981).
 - A. **Virginia Rule of Professional Conduct 4.2** states that, while representing a client, an attorney shall not communicate about the subject matter of the representation with someone who the lawyer knows is represented in the same matter. The lawyer may contact such a person, however, if she obtains consent to do so from opposing counsel or if she is authorized by the law to do so.
 - i. Comment One of 4.2 states that the rule does not prohibit ex parte communication with a represented person when the communication concerns matters outside the scope of representation. This comment also allows for the parties in the matter to communicate directly with one another.
 - ii. Comment Two of 4.2 seeks to define the "authorized by law" language of the rule. Communications in a civil suit are considered authorized by law when authorized by judicial precedent. In a criminal matter, communications are allowed if judicial precedent supports pre-indictment investigation when the party is not yet in custody, so long as such communication does not violate the United States or Virginia Constitution.
 - iii. Comment Four of 4.2 states that an attorney may not contact anyone from an adverse organization who may be considered part of the organization's "control group" as set forth in *Upjohn v. United States*, 449 U.S. 383 (1981). An attorney is also prohibited from communicating with a person who may be considered as the "alter ego" of the organization. This "control group" language will be discussed below in depth. The comment also allows for an attorney to contact a former employee of an adverse organization, regardless

of whether that person was a member of the organization's control group or not.

- iv. Under Comment Five of 4.2, the rule covers all persons who are represented concerning the matter in question. It does not matter if the person is a named party in the action, so long as the person is represented by counsel. The comment also asserts that the purpose of the rule is to protect uncounselled persons from being taken advantage of by opposing counsel and to preserve the client-attorney relationship.
 - v. Comment 5a of 4.2 states that these concerns which the rule *Seeks* to protect extends to non-adjudicative proceedings such as a contract, situations where a witness has procured counsel, or in a criminal context.
- B. **Virginia Rule 4.3** provides that an attorney has a duty to make reasonable efforts to convey to an unrepresented party her role in the matter. The rule also prohibits an attorney from giving advice to an unrepresented person if the interests of this person are in conflict, or have a reasonable possibility of being in conflict, with her client. The lone caveat is that the attorney may advise the unrepresented party to seek representation elsewhere.
- C. **ABA Model Rule 4.2** is substantially the same as Virginia Rule of Professional Responsibility 4.2. The lone difference is that the ABA rule allows for an exception in the case of a court order.
- i. Comment One of ABA 4.2 states that the rule is intended to protect persons who have already chosen an attorney from an overreaching attorney representing the other party in the matter.
 - ii. Comment Three of ABA 4.2 states that the rule applies even when the represented party initiates or even consents to the communication. The attorney must consent.
 - iii. Comment Six of ABA 4.2 acknowledges that the rule allows for an attorney to seek a court order to both determine who may or may not be communicated with, as well as to determine whether communication with a represented party is allowable to avoid reasonably certain injury.
 - iv. Comment Seven of ABA 4.2 is the most pertinent to our discussion. It states: The rule prohibits communications with a constituent of a

represented organization if that person 1) supervises, directs, or regularly consults with the organizations lawyer concerning the subject matter, or 2) has the authority to obligate the organization with respect to the matter or whose act or omission in connection to the matter may be imputed to the organization for the purposes of civil or criminal liability.

- v. Comment eight states that the attorney must have actual knowledge that another person is represented. This knowledge may be inferred from the circumstances.

D. *Upjohn v. United States*, 449 U.S. 383 (1981).

- i. The Supreme Court abolished the “control group test” as it relates to attorney-client privilege. This control group test states that communications between an attorney and the organizations senior management. *City of Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483 (E.D. Pa. 1962). Basically, if an employee is in a position to control or take substantial part in the making of a decision about the subject matter for which attorney-client communication is taking place, that person is represented by said attorney.
- ii. The Court reasoned that the control group test was lacking, as an employee outside the control group of the organization may possess information needed by the corporation’s counsel in order to craft an effective case.
- iii. The Court held that even middle-level and lower-level employees can, within the scope of their respective employment, expose the corporation to criminal and civil liability and therefore would possess information that the corporate lawyer would need to advise the corporation.
- iv. The Court held that in the present case, the communications at issue were made by non-control group employees to corporate counsel at the behest of senior management so that advice can be administered effectively. The communications regarded the scope of the employees’ duties and the employees were aware that the responses were to be used for legal advice; therefore, for the purposes of attorney-client privilege, the communications were privileged.

- v. The Court's analysis is more in line with the "subject matter test", under which communications between an employee and corporate attorney are protected if the subject matter of the communication is within the scope of the employee's corporate duties.

III. Ex Parte Communication with Current Employees of an Adverse Represented Client.

A. Virginia Legal Ethics Opinions.

- i. The Bar has asserted several times over the past fifteen years that a lawyer may contact an employee of an adversary unless the employee can commit the corporate entity to a specific course of action or can be characterized as the entity's "alter ego." This theory has been espoused in numerous LEOs. *See* Virginia LEO 801 (5/27/86); Virginia LEO 795 (5/27/86); Virginia LEO 507 (3/30/83); Virginia LEO 459 (7/21/82).
- ii. The Bar has not explicitly stated what type or level of employee falls within the purview of this test. The Bar has held that a corporation's regional manager is off limits, as well as a store manager. *See* Virginia LEO 507 (3/30/83); Virginia LEO 459 (7/21/82).

B. Virginia Court Cases

- i. In *Schmidt v. Norfolk & Western Railway Co.*, 32 Va. Cir. 326 (1994), the Circuit Court for the City of Roanoke held that low-level employees of a corporate adversary were allowed to speak to opposing counsel. The court, while bemoaning the fact that "no Virginia appellate decision" has dealt with the issue, stated that the Bar "has consistently opined that it is not impermissible for an attorney to directly contact and communicate with employees of an adverse party." The court further stated that this was dependent on the fact that the employee was not a member of the corporation's control group and are not able to commit the organization to a specific course of action which would lead someone to believe the employee is the corporation's alter ego. The court cited no cases, other than *Upjohn*, but cited several Virginia LEOs, including 347, 530, and 795.
- ii. In *Dupont v. Winchester Medical Center*, 34 Va. Cir. 105 (1994), the circuit court for the city of Winchester encountered the same issue. In the present case, the court had to determine if the attorney representing the plaintiff could participate in ex parte

communication with nurses who tended to the plaintiff during his stay. This was a medical malpractice case stemming from an alleged botched surgery. The attorney asked not to speak with nurses involved in the procedure, but rather nurses who tended to the plaintiff after the surgery. The court correctly posited that while the ABA Model Rule 4.2 and Virginia Rule 4.2 are substantially similar, they are each subject to interpretation and are applied differently depending on jurisdiction. Again, the circuit court bemoans the fact that the Virginia Supreme Court has not spoken to the issue. The court cited to Virginia LEO 1504, which parroted the language of LEOs 347, 530, and 795 from above. Basically, to be off limits, an employee must be a member of the “control group” of an organization or be able to commit the corporation to a specific course of action. The court looked to the nurses and their ability to “act on behalf of the corporation in the particular area which is the subject matter of the litigation,” citing Virginia LEO 905, which can therefore “control the destiny” of the corporation in the sense of vicarious liability. The court discussed how the test basically is whether an employee can either make a decision on behalf of the corporation or act on behalf of the corporation in the events which give rise to the cause of action which makes an employee *persona non grata* in terms of *ex parte* communication. The court, therefore, ruled that the plaintiff may not have discussions with any of the nurses involved in the alleged negligent procedures, but the attorney may have *ex parte* contact with nurses who worked at the medical center and who cared for the plaintiff after the surgery.

C. Federal District Court Cases

- i. The Federal Courts, in applying Model Rule 4.2, have held that a lawyer may not have *ex parte* communication with an adversary’s employees if the employee has “managerial responsibility” or if the employee’s act or omission in connection with the subject matter can be imputed for the purposes of liability or whose statement may constitute an admission by the corporation.
- ii. Therefore, the Model Rule approach seems to preclude *ex parte* communication with any employee involved in the subject matter being litigated, regardless of her level of responsibility within the organization.
- iii. In *Tucker v. Norfolk & Western Railway Co.*, 849 F. Supp. 1096 (E.D. Va. 1994), the court held that the Virginia and ABA Rule 4.2

are the same. However, as the circuit court in Winchester opined, these rules have been interpreted differently.

- iv. In *Armey v. Medshares Management Servs., Inc.*, 184 F.R.D. 569 (W.D. Va. 1998) held that “when one of the parties is a corporation, this disciplinary rule prohibits ex parte communication with: 1) persons having managerial responsibility for the corporate party; 2) any other person whose act or omission in connection with that matter may be imputed to the corporate party for the purposes of civil or criminal liability; or 3) any other person whose statement may constitute an admission on the part of the corporate party.”

IV. Ex Parte Communication with Former Employees of an Adverse Represented Client.

- A. ABA Model Rule states in comment seven that consent of the adverse corporation’s lawyer is not required for communication with a former employee. The attorney should not solicit information that she know, or reasonably should know, if privileged or confidential.
- B. Virginia LEOs 1670 and 533 assert that a lawyer may communicate ex parte former directors, officers, and employees of a corporate adversary, unless the lawyer knows that the person is represented.
- C. Virginia LEO 1749 states that the lawyer should not solicit information reasonably known to be confidential or privileged.
- D. A corporation, according to LEO 1749, can ask the former employee not to speak with opposing counsel.
- E. In *Armsey v. Medshares Mgmt. Servs., Inc.*, 184 F.R.D. 569 (W.D. Va. 1998), the Western District of Virginia held that: “It is improper for an opposing party to contact former employees of a corporation ex parte where the former employees can impute liability upon the corporation through their statements, actions, or omissions” in that specific situation. The court further stated that: “This opinion should not be interpreted as holding that any ex parte contact with any former employee of a represented corporate party is prohibited.” The plaintiff’s attorneys were attempting to impute liability to the defendant by gleaming information from ex parte interviews with former employees. The district court felt this tactic was impermissible.

V. Ex Parte Communication with an Expert Witness.

- A. Both Virginia and the ABA hold that an attorney may not conduct ex parte communications with a represented party. If an expert witness is not represented, under the rules he may be contacted.
 - B. Virginia LEO 1076 stated that an attorney may contact the adversary's expert. The Bar further stated that, as a courtesy, the lawyer may wish to advise her adversary.
 - C. Even if a lawyer loses a motion in limine to take an expert's deposition, she may still conduct ex parte communication with that expert. *See* LEOs 1670.
 - D. Under the Federal Rules of Civil Procedure, there are strict guidelines regarding gleaming information from an adverse expert witness. Under Fed. R. Civ. Pro. 26(a)(2), counsel must disclose the names of her testifying experts, as well as a report containing information regarding the expert's opinions, qualifications, compensation, etc., 90 days before trial. At this point, these testifying experts may be deposed. *See* Fed. R. Civ. Pro. 26(b)(4)(A). Non-testifying experts retained by opposing counsel can only be deposed upon the showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain the information on the same subject by other means. *See* Fed. R. Civ. Pro. 26(b)(4)(B). The Federal Rules of Civil Procedure indicate that communication with an adverse expert witness must be done through formal discovery, not through ex parte communication.
- VI. Limitations on Virginia Rule 4.2 Regarding Ex Parte Communalization.
- A. Subject Matter - The communications must be about the subject matter of the representation. For example, if a person hires a lawyer to draft a will, that same person is not "represented" by counsel for a subsequent slip-and-fall accident. *See* Comment One for Virginia Rule of Professional Responsibility 4.2.
 - B. The rule governs lawyers, not their clients. Clients may participate in ex parte communications. *See* Virginia LEO 771. However, under Virginia LEO 233, a lawyer cannot instruct her client to call the adversary directly.
 - C. A lawyer needs the adverse lawyer's consent to contact the adversary directly. The adversary cannot consent to ex parte communication under Virginia LEO 1326.
 - D. Per ABA Model Rule 4.2 and Rule 4.2, Virginia RPC, ex parte contact may be "authorized by law." This includes contractually stipulated communication as well as communication allowed by statute.

- E. If the lawyer is a litigant in the matter, she may have direct communication with the adversary, unless that lawyer is representing himself in the matter. *See Virginia LEOs 771, 521.*

RELEVANT REFERENCES

Virginia Rule of Professional Conduct:

RULE 4.2 Communication With Persons Represented By Counsel

RULE 4.3 Dealing With Unrepresented Persons

Virginia Legal Ethics Opinions

LEO 801 (5/27/86)

LEO 795 (5/27/86)

LEO 507 (3/30/83)

LEO 459 (7/21/82)

LEOs 1670 (4/1/96)

Upjohn v. United States, 449 U.S. 383 (1981)

Armey v. Medshares Management Servs., Inc., 184 F.R.D. 569 (W.D. Va. 1998)

Tucker v. Norfolk & Western Railway Co., 849 F. Supp. 1096 (E.D. Va. 1994)

Schmidt v. Norfolk & Western Railway Co., 32 Va. Cir. 326 (1994)

III. MANAGEMENT OF ADVERSARY'S CONFIDENTIAL DOCUMENTATION

- A. In response to your request for production of documents, you receive a box of documents, one of which appears to be the following memorandum:

INTEROFFICE MEMORANDUM

TO: Edward Engineer
FROM: Teddy Technician
RE: Analysis of Defective Toasters

QUESTIONS:

- a. Can you read the document?
 - b. Would your answer be different if it the words "CONFIDENTIAL" were printed across the top?
 - c. What if it was "TO: LARRY LAWYER, CORPORATE COUNSEL?"
 - d. "TO: LARRY LAWYER, VICE PRESIDENT?"
 - e. What if it was "FROM: LARRY LAWYER, CORPORATE COUNSEL?"
- B. Your client, Peter, has handed you a copy of the following document:

EMPLOYEE MANUAL

TO: All Production Line Employees
FROM: Quality Control Department
RE: Insert into Chapter 12 of Employee Manual
"Disposal of Defective Toasters"

QUESTIONS

1. What are your obligations regarding this memorandum?
 2. Would your answer be different if Peter were a former employee?
 3. What if the memo was "FROM: Corporate Counsel"?
- C. In Monday morning's mail, you receive an envelope with no return address which contains what appears to be an original, signed document which reads:

To: Joe Schmoe, VP Marketing
From: Susan S. Slick, Director, R&D
Date: February 27, 2005

Dear Joe:

I told you we should have taken those faulty toasters off of the market. Now look at the mess we are in. Should we talk to Wally about getting rid of those Quality Control Report.

Susan S. Slick

QUESTIONS:

- a. May you use this document in the preparation of your lawsuit?
- b. Must you make an effort to return the document to Tasty?
- c. If suit has been filed or Tasty's counsel otherwise identified, must you notify her that you have the document?

MANAGEMENT OF SENSITIVE MATERIALS

- I. Is an attorney obligated to stop reading or not use material inadvertently sent to him/her by opposing counsel?
 - a. What are the considerations that an attorney receiving inadvertent material must evaluate before making a decision?
 - b. Are there any strict requirements about actions which an attorney must take?
- II. Virginia Legal Ethics Opinion 1702 (1997)
 - a. Across the board, “most ethics panels agree on one point: a lawyer who receives inadvertently transmitted confidential documents from the opposing lawyer has a duty to notify the opposing lawyer promptly.” VA LEO 1702 (1997) at 6.
 - b. “It is the committee's opinion that the conclusion reached in ABA Formal Opinion 92-368 correctly states the ethical duties of a lawyer who receives inadvertently transmitted confidential documents from opposing counsel or opposing counsel's client. Those ethical duties foster the bedrock ethical principle of safeguarding client confidences and secrets. See LEO No. 1643. Just as a lawyer may not take and use documents from opposing counsel's briefcase inadvertently left behind (LEO No. 651), it is not ethically permissible for a lawyer to keep and use documents inadvertently transmitted to him by opposing counsel. The situations are factually different, yet the sense of the Committee is that no difference exists in principle. Safeguarding client confidences and secrets is a categorical imperative that should not hinge on someone pushing the wrong number on a facsimile machine, or putting documents in the wrong envelope.” *Id.* at 9.
 - c. “The rules of evidence do not, however, displace ethical standards governing lawyers. See [Gunter v. Virginia State Bar, 238 Va. 617, 621 \(1989\)](#), rejecting the argument "if it's legal, it's ethical," as far too restrictive under the Code of Professional Responsibility:

*The lowest common denominator, binding lawyers and laymen alike, is the statute and common law. A higher standard is imposed on lawyers by the Code of Professional Responsibility, We emphasize that more is required of lawyers than mere compliance with the minimum requirements of that standard. The traditions of professionalism at the bar embody a level of fairness, candor, and courtesy higher than the minimum requirements of the Code of Professional Responsibility.” *Id.* at 10.*

- d. “Boilerplate notices on fax cover pages do not necessarily put the receiving lawyer on notice of an inadvertent transmission to him. Hence, a rule prohibiting the receiving lawyer from reading an inadvertently transmitted document would violate reality. Even so, once the receiving lawyer discovers that he has a confidential document inadvertently transmitted by opposing counsel or opposing counsel's client, he has an ethical duty to notify opposing counsel, to honor opposing counsel's instructions about disposition of the document, and not to use the document in contravention of opposing counsel's instructions.” *Id.*
- e. “The committee is of the opinion that ABA Formal Opinion 94-382 fairly balances the competing interests and correctly states the ethical responsibility of a lawyer who receives from an unidentified source confidential/privileged documents taken without authorization from the file of the opposing lawyer or of the opposing party. LEO # 1076 is therefore overruled.” *Id.* at 15.

III. Other Sources of Ethical Opinions and Rules

- a. ABA Formal Opinion 94-382 (1994)
 - i. “...A lawyer who, without solicitation, receives materials which are obviously privileged and/or confidential has a professional obligation to notify the adverse party's lawyer that she possesses such materials and either follow the instructions of the adversary's lawyer with respect to the materials, or refrain from using the materials until a definitive resolution of the proper disposition of the materials is obtained from the court.” ABA Formal Opinion 94-382.
 - ii. Rule 1.6 Comment, Paragraph 5
 - 1. Rule is applicable to all information relating to the representation, whatever the source.
 - iii. However, in cases where the materials are sent by an unauthorized third party and the materials were improperly withheld in spite of a discovery request, “the receiving lawyer may be entitled to use them.” *Id.*
 - iv. “Although the Standing Committee does not believe that the mere unsolicited receipt of such materials constitutes a violation of a lawyer's professional responsibilities, lawyers should be aware that the receipt and/or initial review of such materials, in certain circumstances, may be the basis for a motion disqualifying the lawyer from continuing to represent her client in the matter at issue.” *Id.*

b. ABA Formal Opinion 92-368 (1992)

- i. “A satisfactory answer ... cannot be drawn from a narrow, literalistic reading of the black letter of the Model Rules. But it is useful, and necessary, to bear in mind the thoughts in the Preamble to the Model Rules that ‘many difficult issues of professional discretion . . . must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules,” and that “the Rules do not exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules.” ABA Formal Opinion 92-368 (1992).
- ii. “It is the view of the Committee that the receiving lawyer, as a matter of ethical conduct contemplated by the precepts underlying the Model Rules,
 1. Should not examine the materials once the inadvertence is discovered,
 2. should notify the sending lawyer of their receipt, and
 3. should abide by the sending lawyer's instructions as to their disposition.” *Id.*
- iii. Attorney-Client Privilege
 1. “The principle's primary basis is that, absent the guarantee of confidentiality, critical discussions will be either proscribed, circumscribed or intruded upon in a way that will impact directly on the ability of the lawyer to serve his or her client.” *Id.*
 2. ABA Model Rule 1.6 – Duties of confidentiality.
 3. “Disclosure to counsel does not have to result in disclosure to counsel's client.” *Id.*
 4. Waiver of the attorney-client privilege. (For more detailed discussion regarding privilege waiver, see ABA Formal Opinion 92-368 (1992)).
- iv. Law of Bailments
 1. Missent property (i.e. sensitive client materials) is construed as a constructive bailment.

2. There is an obligation of the bailee (recipient) to return the personal property of another
 - a. 8 Am. Jur. 2d *Bailments* § 64 (1980)
 - i. An essential element of the bailment relationship is the absolute obligation of the bailee to return the subject matter of the bailment upon termination of the bailment. *Id.* § 178 (1980). This obligation to return the property is necessarily implied from the mere fact of lawful possession of personal property of another. *Id.* § 178. Where the bailment is not for any particular time, the bailor may terminate it at will. *Id.* § 292. Indeed, the bailment terminates when an unauthorized use is made of the property. *Id.* § 295. If the bailee refuses to return the property, makes an unauthorized disposition of it, or uses it for purposes other than those agreed on, he may be liable for its conversion. *Id.* § 178.

v. Common Sense and Professional Courtesy.

1. “The immediate reaction of receiving counsel might be that the use of the missent materials can only serve to advantage his client. Nonetheless, it is clear there are advantages to doing just the opposite.” ABA Formal Opinion 92-368 (1992).
 - a. “Instances of inadvertent production of documents tend not to occur only on one side. While a lawyer today may be the beneficiary of the opposing lawyer's misstep, tomorrow the shoe could be on the other foot.” *Id.*
 - b. A judge may find that the inadvertently sent materials caused improprieties in the courtroom. For example a case “which occurred recently in Baltimore when the court learned after jury selection that defendants' jury selection strategy was misdirected to plaintiffs' counsel by fax. "I find that the plaintiffs' attorneys have an advantage over the defense attorneys. Specifically, the plaintiffs know pretty well which prospective jurors the defense is going to strike. . . . They knew the inner-most thinking of the defense counsel." Baltimore City Personal Injury and Wrongful

Death Asbestos Cases, Pretrial Hearing, June 5, 1991, Transcript at 4521, Circuit Court for Baltimore City, File No. 89236704. The judge struck the jury and ordered the entire process to begin again, at no small cost to plaintiffs, a cost that would have been expanded exponentially if the judge had not learned of this fact until the trial was over or when it was on appeal.”

- c. “The credibility and professionalism inherent in doing the right thing can, in some significant ways, enhance the strength of one's case, one's standing with the other party and opposing counsel, and one's stature before the Court.”
Id.

- vi. *Mendenhal v. Barber-Greene Co.*, 531 F.Supp. 951, 959 (N.D. Ill. 1982) – ‘We should require more than such negligence by counsel before the client can be deemed to have given up the [attorney-client] privilege’.

IV. Materials not covered under attorney-client privilege – Virginia Legal Ethics Opinion 1786 (2004)

- a. A balance must be found between the interests of maintaining confidentiality and the requirements of disclosure.
- b. ABA Model Rule 1.6 – Duty to maintain information confidential which falls under attorney/client privilege and the exceptions (client’s fraud, criminal activity, etc.)
- c. ABA Model Rule 3.4 – “A lawyer shall 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 such act.”
- d. ABA Model Rule 4.4 – An attorney must not “use methods of obtaining evidence that violate the legal rights of a third person.” Also, see 4.4(b) which requires a lawyer who receives inadvertently sent material to notify the sending attorney of the received material.
- e. “Assum[ing] that these [sensitive] materials do not contain information subject to the attorney/client privilege or the work product doctrine... ..the attorney may review the documents and make use of the information so long as doing so would not violate Rule 4.4. In particular, that rule prohibits acquiring evidence in a

manner that ‘violates the legal rights of others.’” Virginia LEO No. 1786 (2004) at 5-a.

- f. Where the materials do not contain material subject to the attorney/client privilege or the work product doctrine “the notification and document return duties outlined in LEO 1702 are inapplicable... Therefore, the attorney may refrain from informing the [original source] about the receipt of these documents (and from returning them), so long as that silence does not violate Rule 3.4(a), which prohibits a lawyer from concealing evidence with the “purpose of obstructing a party’s access to evidence.” *Id.* at 5-b.
 - g. However, “when the attorney learns that his client has read a document containing attorney/client communications of [the adverse party], the attorney should direct the client not to share the information with the lawyer, explaining that his ethical responsibilities include refraining from soliciting such information.” *Id.* at 7-d.
 - h. Rule 4.4(b) Comment 3
 - i. Attorney may return a document unread without violating the duty of zealous representation.
- V. Duties to aggressively represent client and using inadvertently sent materials
- a. ABA Model Rule 1.3 – Duty to represent client diligently and promptly
 - i. See Comment 1 – Discussion on obligation to act with “zeal in advocacy on client’s behalf.”
 - b. Opinion 256 of DC Bar
 - i. Where there is no indication that materials were not intended for recipient, there is no reason not to read, use and retain materials.
 - ii. Once read, the information becomes part of the body of the knowledge of the lawyer. Therefore, the lawyer could not properly represent the client while trying to suppress the newly acquired knowledge.
 - iii. This would be analogous to requiring the lawyer to maintain a conflictive attorney-client privilege with the opposition, which would essentially disqualify the lawyer under rule 1.7(b)(4) and 1.16(a)

iv. *Aerojet-General Corp. v. Transport Indemnity Ins.*, 22 Cal. Rptr. 862 (Ct. App. 1993):

1. "Once [the receiving lawyer] had acquired the information in a manner that was not due to his own fault or wrongdoing, he cannot purge it from his mind. Indeed, his professional obligation demands the he utilize the knowledge about the case on his client's behalf." *Id.* at 867-68

c. Rule 4.4 – Discussion

- i. Only requires notification to the sender about the materials once it is known that it was inadvertently sent
- ii. *Mira, Inc. v. O'Brien*, Mass. Super. Ct. No. 02-5545-H, 11/3/03, 2003 Westlaw 22283384 – Reading the [inadvertently sent] material was "quite proper", furthermore, the recipient was permitted to use the material, depose the author and impeach witnesses at the trial with it.

VI. Discussion of relevant authority

a. Policy behind the attorney-client privilege:

- i. The gain is the effect that confidentiality produces on the client, essentially promoting openness between client and attorney.
- ii. The cost is the increased difficulty in garnering information.
- iii. What effect is produced if clients believe that their confidential information can be waived by one erroneous push of a button?
 1. You might win the battle and lose the war.

b. Professional reasons to support the attorney-client privilege in cases of inadvertently sent sensitive material:

- i. Promote confidence in the legal profession
- ii. Encourage professional etiquette among lawyers
- iii. Golden Rules:
 1. Do unto others as you would have them do unto you.

2. What comes around goes around.
- c. Permitting the use of inadvertently received materials punishes the client for the attorney's actions.
 - i. It is completely unfair to the client.
 - ii. The attorney-client privilege belongs to the client, not to the attorney; therefore, it is only for the client to waive, not the attorney.
 - iii. There may be no remedy against the attorney where the client has lost something due to the inadvertent submission (i.e. How do you measure the loss of child custody when attempting to calculate damages?).
 - iv. Where the lawyer knows of the inadvertence, the lawyer is required to:
 1. seek guidance from sending attorney
 2. comply with the guidance

RELEVANT REFERENCES

Virginia Legal Ethics Opinions

LEO No. 1702 (1997)
LEO No. 1786 (2004)

Virginia Cases

Gunter v. Virginia State Bar, 238 Va. 617, 621 (1989)

Virginia Rules of Professional Conduct - <http://www.vsb.org/profguides/rules.pdf>

Rule 1.3 (Compare with ABA Rule 1.3)

Rule 4.4 (Compare with ABA Rule 4.4, Virginia Rule 4.4 does not contain section b)

ABA Formal Opinions

ABA 94-382
ABA 92-384

ABA Model Rules

1.3
1.6
3.4
4.4
8.4

Other Notable Materials

8 Am. Jur. 2d *Bailments* § 64 (1980)
DC Bar Opinion 256 (1995)
“The Worst Laid Plans, What Do I Do When Privileged Material Reaches Me By Mistake?”, Troyer, Trent M. <http://www.mass.gov/obcbbo/worst.htm>
Mendenhal v. Barber-Greene Co., 531 F. Supp. 951, 959 (N.D. Ill. 1982).
Aerojet-General Corp. v. Transport Indemnity Ins., 22 Cal. Rptr. 862 (Ct. App. 1993).
Mira, Inc. v. O’Brien, Mass Super. Ct. No. 02-5545-H, 11/3/03, 2003 Westlaw 22283384.

IV. SURREPTITIOUS VIDEO AND AUDIO RECORDING

A. You have been practicing for 30 years, and after getting spun around by clients, witnesses, and opposing counsel more times than you can remember, you decide to routinely tape record every telephone conversation you have with:

- i. Opposing counsel;
- ii. Every client;
- iii. Every fact witness you interview

QUESTION: May you do so without notice? Without consent?

B. Peter advises you that when he drives home, he occasionally takes with him various line employees, or the vice president of marketing who has been dealing with customer complaints, and Larry Lawyer, Corporate Counsel, and that sometimes they have conversations about the faulty toasters. Peter wants to install a voice-activated tape-recorder in his car and record these conversations.

QUESTION:

- i. What advice can you give him?
- ii. What if Peter had already recorded these conversations before he ever came to you? Can you use them as a basis for drafting your suit? Cross examining witnesses?
- iii. Do you need to tell opposing counsel you have the recordings?

C. With Peter's consent, can you videotape record having lunch with any of these people at the neighborhood McDonalds?

D. What if Peter tells you that because he has a big yellow Hummer, people around the plant like various line employees, the vice president of marketing who has been dealing with customer complaints, and Larry Lawyer, Corporate Counsel, have been asking to borrow his car and take it for a "test ride." Peter wants to know whether he can install the voice activated tape recorder in his car, and lend it to each of them in the hopes that they will have cell phone conversations about the toasters, which would be recorded, for use in the lawsuit.

QUESTION: What advice can you give Peter?

SURREPTITIOUS VIDEO AND AUDIO RECORDING

I. Legality of Recording without Consent of Both Parties. When does action by an individual who records a conversation violate the criminal law?

A. Virginia Criminal Law on the Interception of Wire, Electronic, or Oral Communications

- a. Va. Code § 19.2-61 – Definitions (what is covered, and by what methods).
- b. Va. Code § 19.2-62 – One-Party Requirement (19.2-62(B)(2) states that it is not a criminal offense to intercept communication where a person is a party to the communication or where one of the parties has given prior consent).
- c. Va. Code § 19.2-69 – Civil cause of action against individual who intercepted, disclosed or used such communications, or against an individual who procured another to do the same.
- d. Va. Code § 19.2-65 – Intercepted communications and evidence derived from such communications are not to be received into evidence.
- e. Va. Code § 8.01-420.2 – Limitation on the use of recorded telephone conversations as evidence (cannot be used in a civil action unless all parties to the conversation were aware that the conversation was being recorded, or if one party is aware and the recorded conversation served as an admission of criminal conduct which is the basis for the civil suit).

B. District of Columbia Criminal Law on Interception of Communications

- a. D.C. Code § 23-542 – One-party requirement (D.C. Code § 23-542(b)(3) states that it is not a criminal offense where a person is party to the conversation or where one of the parties has given prior consent)

C. Maryland Criminal Law on Interception of Communications

- a. Md. Code § 10-402 – Two party requirement (Md. Code § 10-402(c)(3) states that it is not an offense when *all the parties* to the communication have given prior consent)

II. Ethics Rules of the ABA regarding surreptitious recording

- A. ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 337 (1974)**
- a. Stated that (with the possible exception of prosecuting attorneys), no lawyer should record any conversation whether by tapes or other electronic device, without the consent or prior knowledge of all parties to the conversation.
 - b. Relied on Model Code of Prof'l Responsibility DR 1-102(A)(4), which provided that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation, as well as Canon 9, which provided that a lawyer should avoid even the appearance of impropriety.
 - c. Narrow exception to prohibition for law enforcement purposes
- B. States' Reaction to ABA Formal Op. 337**
- a. Some adopted 337's broad prohibition (Texas, South Carolina, Colorado).
 - b. Others agreed with the general premise, but adopted numerous exceptions (Arizona, Kentucky, Tennessee).
 - c. Some concluded that 337 was overly broad and advised that whether a recording is deceptive and unethical is situation specific (New York, Oklahoma, Michigan).
- C. ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 01-422 (2001)**
- a. Since Formal Op. 337 had been decided, the ABA adopted the Model Rules of Professional Conduct, which omitted the "appearance of impropriety" as a basis for professional discipline, but still preserved the prohibition on conduct involving deceit and misrepresentation (under Model Rule 8.4(c)).
 - b. In June 2001, the ABA Ethics Committee withdrew Formal Op. 337 and held that a lawyer who electronically records a conversation without the knowledge of the other parties to the conversation does not necessarily violate the Model Rules of Professional Conduct.
 - c. The Ethics Committee based its change in position on the fact that:
 - a) The belief that non-consensual taping is inherently

deceitful is not universally accepted today;

- b) Broad prohibition would defeat legitimate and sometimes necessary activity (recognizing the many exceptions that had been made to the general rule);
- c) Newer ABA Model Rules of Professional Conduct had removed the “appearance of impropriety” as a basis for professional discipline.
- d. The ABA Ethics Committee held that such recordings could still be an ethical violation if done to embarrass a third party, or if the lawyer falsely states that he is not recording the conversation.
- e. The ABA Ethics Committee was divided on whether a lawyer may record a client-lawyer conversation without the knowledge of the client, but all agreed that it was inadvisable to do so.

III. Virginia Case Law on Surreptitious Recording

- A. ***Gunter v. Virginia State Bar, 238 Va. 617 (1989)*** – Husband went to lawyer, suspecting wife of adultery. Lawyer hired private investigator. Lawyer, with client’s permission, had the private investigator install a recording device on the phone in the couple’s home. The recordings revealed no evidence of adultery, but there were conversations between wife and her friends about how she had talked to lawyers about a divorce. Lawyer then advised his client to close their joint bank account (so that wife could not cash joint checks without husband’s endorsement).

Wife found out. Lawyer was tried under Va. Code § 19.2-62 for violation of the wiretapping statute, but was found not guilty.

Lawyer argued that since he did not violate the law, his actions were not dishonest or deceitful under DR 1-102(A)(4) – that is, so long as his actions were legal, they were also ethical. The Virginia Supreme Court said that the Code requires that an attorney do more than simply refrain from criminal conduct, and that conduct may be unethical even if it is not unlawful. ABA Formal Op. 337 had stated that recordation by a lawyer of *any* conversation without the consent or prior knowledge of all parties to the conversation was a violation (with exceptions for law-enforcement officers). In this case, the Court held that lawyer’s conduct was deceitful conduct and therefore an ethical violation.

- B. **Virginia Legal Ethics Opinion 1217 (4/19/1989)** – May a lawyer tape conversations with opposing counsel?

- a. If it was a violation of the law, then it is clearly a violation of DR 1-102(A)(3), which proscribed a lawyer's commission of a crime. However, even if the recording is legal, additional facts may make it a violation of DR 1-102(A)(4).
- C. **Virginia Legal Ethics Opinion 1324 (2/27/1990)** – Wife had previously taped her husband's phone calls (to obtain evidence of adultery). Lawyer tells her to stop making the recordings.
- a. Lawyer must preserve this information as a confidence or secret of the client (as required under DR 4-101. In LEO 1087, the committee opined that it would be improper for a lawyer to reveal knowledge he gained from his client's past crime). It would not be improper to continue to represent the wife or to use the tape recordings (acquisition of which may or may not have been legal), provided that the attorney was not a conspirator or an accessory to the obtaining of the tapes.
 - b. Committee warns that husband's conversations with his attorney may be protected, and that review may result in unwitting invasion of privileged communication.
- D. **Virginia Legal Ethics Opinion 1448 (1/6/1992)** – Attorney represents client in a civil suit regarding sexual abuse by client's father. Attorney suggests that client record her conversations with her father when they meet next.
- a. Advising one's client to initiate a conversation under possibly false pretenses and to secretly record such a conversation is improper. The attorney may be attempting to do indirectly (through the client) what the attorney could not ethically do personally.
- E. **Virginia Legal Ethics Opinion 1635 (2/7/1995)** – The opposing defense attorney secretly taped a phone call with your client, the plaintiff, before litigation began. Although the plaintiff knew opposing counsel was an attorney, opposing counsel did not indicate that he was acting as an attorney for the defendants during the conversation with your client.
- a. Even if the non-consensual recoding is legal, it would be improper and a violation of DR 1-103(A) for a lawyer to engage in such conduct. Here, LEO 1324 is dispositive, as the disciplinary rule is not specifically applicable to activities undertaken in an attorney-client relationship. Therefore, the outcome would not be different if opposing counsel was acting only as an officer of the defendant's corporation and not as their attorney.

- b. Because opposing counsel may have engaged in conduct involving dishonesty, fraud, deceit or misrepresentation, you may have to report him to the Legal Ethics Committee.
- F. **Virginia Legal Ethics Opinion 1738** (4/13/2000) – May an attorney participate in electronic recording without the consent of the party being recorded?
- a. LEO 1738 permits exceptions to *Gunter's* general prohibition on surreptitious recordings, specifically permitting recording for law-enforcement, discriminatory housing testing, and where the lawyer is a target of threats.
 - b. The Committee was concerned that its prior opinions had expanded the holding in *Gunter*, resulting in a “categorical ban, without qualification or exception, of any tape recording by an attorney or under the supervision of an attorney.”
 - c. “In certain limited circumstances, the interests served by surreptitious recordings outweigh the interests protected by prohibiting such conduct through professional standards.”
 - d. “The committee recognizes that there may be other factual situations [beyond the exceptions found within LEO 1738] in which the lawful recording of a telephone conversation by a lawyer, or his or her agent, might be ethical. However, the committee expressly declines to extend this opinion beyond the facts cited herein and will reserve a decision on any similar conduct until an appropriate inquiry is made.”
- G. **Virginia Legal Ethics Opinion 1765** (2/6/2004) – The Committee noted revised Virginia Rule 8.4(c) (changing the language of prohibited conduct to those actions “which reflect adversely on the lawyer’s fitness to practice law”) and ABA Formal Ethics Opinion 01-422 (which reversed its prior position in Formal Opinion 337). However, Virginia Rule 8.4(c) and ABA Op. 01-422 do not change the series of Virginia Legal Ethics Opinions, which still rely on *Gunter*.
- a. LEO 1765 provides another exception to the prohibition on surreptitious recording without the consent of the parties. It permits federal law enforcement and intelligence agents to conduct non-consensual tape-recording as part of intelligence or covert activities.

IV. Tensions in Current Virginia Ethics Law

- a. It appears that under Virginia law surreptitious recording is permitted when the recording person is party to the conversation OR if the recording person obtains consent from ONE of the parties to the conversation

- b. *Gunter*, however, seems to generally prohibit lawyers from secretly recording conversations. Moreover, LEO 1738 and 1765, though not exhaustive, limit recording by attorneys to narrow exceptions, i.e. housing discrimination testers or federal law enforcement personnel acting within intelligence operations. Assuming an attorney legally records a conversation, and there is no misrepresentation, fraud or deceit – is the recording ethical?

RELEVANT REFERENCES

STATUTES

Virginia

Va. Code § 19.2-61
Va. Code § 19.2-62
Va. Code § 19.2-69
Va. Code § 19.2-65
Va. Code § 8.01-420.2

District of Columbia

D.C. Code § 23-542

Maryland

Md. Code § 10-402

ABA MATERIALS

ABA Comm. on Prof'l Ethics and Grievances:

Formal Opinion 337 (1974)
Formal Opinion 01-422 (2001)

ABA Model Rules of Professional Conduct:

Rule 8.4(c)

VIRGINIA MATERIALS

Gunter v. Virginia State Bar, 238 Va. 617 (1989)

Virginia Legal Ethics Opinions:

LEO 1217 (4/19/1989)
LEO 1324 (2/27/1990)
LEO 1448 (1/6/1992)
LEO 1635 (2/7/1995)
LEO 1738 (4/13/2000)

Virginia Rules of Professional Conduct:

Rule 8.4(c)

V. THREATENING DISCIPLINARY OR CRIMINAL ACTION OR SANCTIONS

- A. During discovery, you obtained and reviewed the hard drives in Tasty's Quality Control Department, and discovered erased e-mails between corporate counsel and various corporate officers and board members which demonstrate that Tasty's Vice President for Research and Development testified falsely in significant material ways during his depositions. In discussing this with Peter, he says, "To hell with the law suit. Let's use this information to generate a quick, quite and substantial settlement in exchange for not reporting them to the Commonwealth Attorney's office."

QUESTION: How, if at all may you use this information? May you threaten to report Tasty to the Commonwealth Attorney's office if they do not settle the case?

- B. You think you have discovered erased incriminating e-mails on these hard drives and inform defense counsel accordingly. However, defense counsel promptly advises you that the e-mails were forgeries planted by a renegade ex-employee seeking to get the company in trouble. Defense counsel also warns that if you seek to amend your complaint allegations relating to the alleged perjury, she will immediately proceed to seek sanctions against you.

QUESTION:

- i. Has she violated any rules?
 - ii. What if her threat was to immediately file a bar complaint against you pursuant to Virginia's Procedures for Disciplining, Suspending, and Disbarring Attorneys, Part 6, Section IV, Paragraph 13, Rules of Supreme Court of Virginia?
 - iii. What if her threat is to file a bar complaint against you pursuant to § 54.1-3935, Code of Virginia (Procedure for Revocation of License)?
 - iv. What if her threat was to immediately file a bar complaint against you pursuant to the Federal Rules of Disciplinary Enforcement?
- C. As Tasty's in-house counsel, your dealings with the Federal Trade Commission (FTC) regarding your toasters have become very hostile. You receive a letter from the FTC's General Counsel advising that since there is a dispute between Tasty and the FTC, you must communicate only with the General Counsel and not individual FTC employees on matters relating to Tasty's toasters, otherwise a bar complaint will be filed against you.

QUESTION: Has the FTC's General Counsel crossed over the ethics line?

THREATENING DISCIPLINARY OR CRIMINAL ACTION OR SANCTIONS

- I. Is it ever permissible for an attorney to threaten criminal prosecution for the purposes of gaining an advantage in a civil matter? What about threatening disciplinary actions or sanctions for purposes of gaining an advantage in a civil matter? This section will seek to provide you with a starting point for answering these questions.
- II. There is one primary rule under the Virginia Rules of Professional Conduct that deals with fairness to opposing party and counsel and applies to threatening disciplinary actions or criminal actions or sanctions.
 - A. **Virginia Rules of Professional Conduct Rule 3.4(i)** states that a lawyer shall not present or threaten to present criminal or disciplinary charges solely to gain an advantage in a civil matter.
 - i. Comment 5 of 3.4 states that although a lawyer is prohibited by paragraph (i) from presenting or threatening to present criminal or disciplinary charges solely to obtain an advantage in a civil matter, a lawyer may offer advice about the possibility of criminal prosecution and the client's rights and responsibilities in connection with such prosecution.
- III. There are some additional Rules and Legal Ethics Opinions that an attorney should be aware of when considering whether that demand letter goes too far.
 - A. **ABA Model Rules**
 - i. **ABA Model Rules 3.4** has no similar provision to the Virginia Rules of Professional Conduct, however, Comment 1 states that fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.
 - ii. **ABA Model Rule 3.1** states that a lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.
 - iii. **ABA Model Rule 8.3 (a)** states that a lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

- a. Comment 1 states that self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

B. Virginia Rules of Professional Conduct

- a. **Virginia Rules of Professional Conduct Rule 3.1**, Meritorious Claims And Contentions, state that 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.
 - i. Comment 2 states that 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...
- b. **Virginia Rules of Professional Conduct Rule 8.3**, Reporting Misconduct, (a) A lawyer having reliable information that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness to practice law shall inform the appropriate professional authority.
 - i. Comment 1 states that self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.
- c. **Virginia Rules of Professional Conduct Rule 8.4**, Misconduct, states that it is professional misconduct for a lawyer to:(a) violate or attempt to violate the Rules of Professional Conduct... and (d) state or imply an ability to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official; or...

C. Sanctions

- a. Virginia Code § 8.01-271.1 allows for the imposition of an appropriate sanctions for filing motions that are intended to harass.
- b. FRCP 11 also provides for imposition of sanctions if a motion is submitted for the purpose of harassment.

D. Legal Ethics Opinion

- a. **LEO 760** - Threatening to file a motion under Rule 11 does not violate the Code, even if the sole purpose is to induce settlement. (4/10/1986)
- b. **LEO 1338** - A lawyer's groundless accusations of unethical conduct solely to gain an advantage in a civil matter could themselves be unethical. (4/20/1990)
- c. **LEO 1166** – Threatening to file a motion for sanctions under Rule 11 or Va. Code § 8.01-271.1 does not violate the prohibition on threatening or filing “disciplinary charges” to gain an advantage in a civil matter. (10/28/1988)
- d. **LEO 1388** – “Advising” an adverse party that a criminal law might have been violated is tantamount to a threat and therefore unethical (1/14/1990)
- e. **LEO 1603** – Although threatening a motion for sanctions under Rule 11 or its state equivalent does not violate the Code’s prohibition on threatening disciplinary action, it may violate the Code’s prohibition on advancing a claim unwarranted under existing law or merely for the purposes of harassment. (7/21/1994)
- f. **LEO 1755** - A lawyer’s letter warning an adversary’s lawyer against ex parte contacts with the lawyer’s client and threatening to “take the matter up with Judge and the Commonwealth’s Attorney” if the ex parte calls continue: (1) violated the first prong of the prohibition on threatening criminal charges “solely to obtain an advantage in a civil matter,” because reference to the Commonwealth’s Attorney “presents a definite threat of criminal prosecution”; (2) did not violate the second prong (that the threat be made “solely to obtain an advantage in a civil matter”), because “the letter does not make the usual demand for payment/settlement by threatening prosecution,” but instead was “meant to stop a certain action” (the ex parte contacts) that was itself improper. (5/7/2001)

- g. **ABA 363** – The Model Rules do not prohibit a lawyer from using or threatening criminal prosecution to gain an advantage for a client in a civil matter as long as: the criminal matter is related to the civil claim; the lawyer has a well-founded belief that the civil claim and the criminal charges are warranted by law and facts; the lawyer does not attempt to exert or suggest improper influence over the criminal process. (7/6/1992)

- h. **ABA 383** - A lawyer's threat to file disciplinary complaint against his adversary to gain an advantage in civil case would violate the Model Rules if: the adversary's conduct required reporting; the misconduct was unrelated to the civil matter; the disciplinary charges are not well-founded in fact or law; or the threat is designed solely to harass. (7/5/1994)

RELEVANT REFERENCES

Virginia Rule of Professional Conduct

- Rule 3.1 Meritorious Claims and Contentions
- Rule 3.4 Fairness to Opposing Party and Counsel
- Rule 8.3 Reporting Misconduct
- Rule 8.4 Misconduct

Virginia Legal Ethic Opinions

- LEO 760 (4/10/1986)
- LEO 1166 (10/28/1988)
- LEO 1338 (4/20/1990)
- LEO 1388 (1/14/1990)
- LEO 1603 (7/21/1994)
- LEO 1755 (5/7/2001)

NOTE: For a comprehensive list of LEOs relating to threatening criminal or disciplinary action, please see www.mcguirewoods.com/services/leo

ABA Model Rules

- Rule 3.1 Meritorious Claims and Contentions
- Rule 3.4 Fairness to Opposing Party and Counsel
- Rule 8.1 Reporting Professional Misconduct

ABA Opinions

- ABA 363 (7/6/1992)
- ABA 383 (7/5/1994)