Ethics of Attorneys’ Fees & Sanctions in Virginia

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ETHICS OF ATTORNEY FEES AND SANCTIONS IN VIRGINIA

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KEY ELEMENTS TO ETHICAL ATTORNEY FEES

- 5 Key elements to Ethical Compliance:
  - Setting the Fee;
  - Communicating the Fee;
  - Documenting the Fee Agreement;
  - Securing the Fee; and
  - Earning the Fee.

SETTING THE FEE

- Virginia State Bar Professional Guidelines mandate that the fee be “reasonable” (Rule 1.5).
8 FACTORS OF REASONABLENESS

- Reasonableness under Rule 1.5 is based on 8 factors:
  - Time, labor and skill required and the novelty of the question;
  - Likelihood acceptance of particular employment will preclude acceptance of other employment;
  - Fee customarily charged in the locality for similar services
  - Amount involved and results obtained;
  - Time limitations imposed by the client or other circumstances;
  - Nature and length of the attorney-client relationship;
  - Experience, reputation and ability of lawyer; and
  - Whether the fee is fixed or contingent.

SETTING THE FEE

**DO:** Define the scope of the services in light of the client's ability to pay.

**DO:** Set forth clearly the basis for calculating the fee.

**DON'T:** Enter into an agreement whereby services are to be provided only up to a stated amount, when it is foreseeable that more extensive services are likely to be required.
OTHER PROVISIONS

- Have the client commit to cooperation
- Specifically define the scope of the engagement
- Identify whether contingency fees apply to gross or net amount received
- Use of Evergreen Deposits

OTHER PROVISIONS

- Reserve the firm's right to allocate resources
- 30 days for billing cycle
- Interest on overdue accounts
- Fees for collection efforts (i.e.: attorney lien)

ARBITRATION CLAUSES OK, BUT...

- Client must consent to the arbitration clause after full disclosure of the provision's effect; and
- Client has been advised to seek independent counsel regarding the advisability of the provision. (LEO 1707)
WHY BE SO PRECISE IN THE BEGINNING

* "If they don’t have it now, why do you think they’re going to have it when the bill comes due?"
* "Careful intake really cuts down on the need for withdrawal. . . . The best risk-management tool is the front door."

- Retired Practitioner Robert Creamer of Evanston, Ill, Dir. of Assoc. of Professional Responsibility Lawyers

BOTTOM LINE

* Identify and avoid the client from hell

Solo Practitioner in Maryland - Halfway through discovery and months into representation, the client stopped responding to communications from the attorney and stopped paying her bill. The attorney has done over $30,000 worth of work for a now unresponsive and uncooperative client and now regrets failing to collect any retainer up front.

COMMUNICATING THE FEE

* Rule 1.5 mandates that the fee be *adequately explained* to the client.
* It is preferable to have the fee in writing.
* Communication regarding the fee must occur *before or “within a reasonable time after”* commencing representation.
* Must provide *basis* of fee upon request.
COMMUNICATING THE FEE

- Fee agreements modified after the relationship is established are presumptively invalid; Stiers v. Hall.

DOCUMENTING THE FEE AGREEMENT

- Using a written contract is always the best way for an attorney to document fees.

- Neither Rule 1.5 of the ABA Model Code nor Rule 1.5 of the Virginia Rules of Professional Conduct require a writing but both indicate that a writing is “preferable”.

SECURING THE FEE

- May collect the fee in advance, provided any unearned portions are returned to the client.
- May accept property provided acceptance does not result in attorney having proprietary interest in the cause of action or subject matter of litigation.
EARNING THE FEE: LEO #1606

- "Advanced legal fees": sums the attorney may draw from as service is rendered, returning any unearned portion to the client.
- **Fixed Fee**: administered like an advanced fee and is useful when the attorney can reasonably estimate how much work is needed in a particular matter.
- **True Retainer**: Advance sum paid to ensure the attorney's availability and does not need to be returned.

NOT EARNING THE FEE

- Massachusetts attorney suspended for 4 years after billing clients for 3500 hours annually and cannot apply for reinstatement until he has made restitution for his excessive billing.
- Wisconsin attorney suspended for 1 year after being accused of inflating his billable hours to qualify for $47,000 bonus.
- Minnesota attorney lost license indefinitely after admitting to having an affair with matrimonial client and billing her for meeting time spent having sex.

CONTINGENCY FEES

- Generally ok; Describe calculation method and percentage in writing.
- Contingency fees may NOT be charged:
  - In most **domestic relations** matters; or
  - In representing a **criminal defendant**.
ACCOUNTING

- Must deposit advanced funds into a separate, identifiable account (trust account), which does not contain funds belonging to the attorney.
- May deposit into the trust account funds which belong in part to the client and in part presently or potentially to the attorney. The portion belonging to the attorney must be withdrawn when earned unless the right to receive it is disputed by the client.
- Must promptly pay or deliver to the client or another all funds in the possession of the attorney which the client is entitled to receive.

MISUSE OF CLIENT FUNDS

- Georgia attorney disbarred for not reporting employee's misuse of a guardianship client's funds.
- New York attorney suspended for 2 years for failing to safeguard client funds in his firm's escrow account, resulting in some $4 million being stolen by his brother, who also worked as the firm's bookkeeper.
- Chicago attorney facing a civil suit and legal ethics complaint over allegations that she used $2.3 million in client funds to purchase real estate.

FEE DIVISION

- Dividing fees between attorneys not in the same firm is only permissible if:
  - The client is advised and consents to participation of all attorneys;
  - Terms of the fee division are disclosed to the client;
  - The total fee is reasonable; and
  - Client's consent, preferably in writing, is obtained before rendering legal services.
TERMINATING REPRESENTATION

- Client may terminate the attorney-client relationship at any time.
- Attorney must return any unearned amount of advance legal fees. Advanced legal fees do not belong to the attorney until he has earned them.

TERMINATING REPRESENTATION

- Even when termination is breach of contract, attorney’s damages are limited to the portion of the fee he has earned. He cannot recover for breach of contract.
- Attorney limited to recovery in Quantum Meruit
- Quantum Meruit based on reasonable value of services; Heinzman v. Fine, Fine, Legum and Fine for factors.

HEINZMAN V. FINE, FINE, LEGUM AND FINE

- Quantum Meruit is “the most functional and equitable measure of recovery.”
- Attorney is entitled to:
  - a fee based upon quantum meruit for services rendered prior to discharge; and
  - the lien granted by Va. Code s 54-70 as security for such fee.
- Attorney cannot recover damages for breach of contract.
TERMINATING REPRESENTATION

- Always engage in a “quiet withdrawal”
  - Barebones motion
  - Offer to submit dispute with client in camera or under seal
- Avoid prejudice to client.

SANCTIONS BY VIRGINIA COURTS

- Va. Code § 8.01-271.1
  - Pleadings must be proper, warranted by law and grounded in fact.
- Ethical Purpose: hold attorneys responsible for specified failures involving the integrity of the documents they have signed.

ATTORNEY CONDUCT

- Court issued sanctions may violate Rules of Professional Conduct, specifically:
  - Rule 3.3
  - Rule 3.4
  - Rule 8.4
CANDOR TOWARDS THE TRIBUNAL: RULE 3.3

- Prohibits attorney from knowingly:
  - Making or failing to correct a false statement of law or fact;
  - Failing to disclose directly adverse, controlling legal authority; and
  - Offering or failing to remedy false evidence.

- Attorney must:
  - Remedy or disclose client’s fraudulent/criminal acts related to proceeding;
  - Disclose all relevant facts in ex parte proceeding.

- Duty continues to conclusion of proceeding

FAIRNESS TO OPPOSING PARTY AND COUNSEL: RULE 3.4

- Attorney shall not:
  - Unlawfully limit other party’s access to evidence;
  - Falsify evidence;
  - Knowingly disobey a valid obligation;
  - Make frivolous discovery requests;
  - Allude to irrelevant matters in trial; or
  - Request unrelated person to refrain from giving information about client.

MISCONDUCT: RULE 8.4

- Professional misconduct:
  - Violate, attempt to violate, knowingly assist or induce violation of the Rule of Professional Conduct (RPC);
  - Commit a criminal act that reflects adversely on honesty, trustworthiness or fitness as an attorney;
  - Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
  - Engage in conduct that is prejudicial to the administration of justice;
  - State or imply an ability to improperly influence a government agency or official or achieve results by violating the RPC or other law; or
  - Knowingly assist a judge or judicial officer violate applicable rules of judicial conduct or other law.
SANCTION CASES THAT MAY VIOLATE ETHICAL RULES

- **Taborda v. Daly Seven, Inc.**: attorney's petition for rehearing before Va. Supreme Court containing intemperate language resulted in 1 year suspension and $1,000 fine.

- **Lester v. Allied Concrete Co.**: counsel violated section 8.01-271.1 by participating in spoliation of evidence and falsely representing to court that paralegal's mistake, not his own misconduct caused the omission of evidence.

- **Boye v. Pruitt**: attorney and client sanctioned for spite suit including attorney fees and costs including, transcripts, mileage, photocopying, court fine and payment of Attorney General's costs.

EXAMPLES OF VA CONTEMPT CASES THAT MAY VIOLATE ETHICAL RULES

- **Nussbaum v. Berlin**: bailiff's observation of counsel pushing or shoving opposing counsel in court view of the jury upheld as contemptuous.

- **Scialdone v. Commonwealth**: attorneys who allegedly altered documents they sought to admit into evidence and created offensive website domain name about judge were denied due process when court failed to conduct a factual investigation.

MORE SANCTION CASES THAT MAY VIOLATE ETHICAL RULES

- **In re Gould**: awarding attorney fees under sec. 1927 against attorney who multiplied proceedings by failing to adhere to trial judge's evidentiary ruling was not an abuse of discretion.

- **Newport News Holding Corp. v. Virtual City Vision**: Court affirms $10,000 sanction against attorney for untimely motion for recusal due to suspicious timing and significant substantive weakness of the motion.
FURTHER EXAMPLES OF CONTEMPTUOUS BEHAVIOR THAT MAY VIOLATE ETHICAL RULES

- **U.S. v. Griffin**: Contempt finding appropriate where contemptor-counsel willfully, repeatedly violated courtroom protocol and judge’s warning regarding line of questioning.

- **U.S. v. Ortlieb**: Summary criminal contempt sanctions appropriate because counsel’s repeated vulgar comments to opposing counsel and court required court to delay proceedings.

- **In re Ellenbogen**: Summary criminal contempt appropriate because counsel asked questions specifically prohibited by court.
BERNARD J. DiMURO, the managing partner of DiMuroGinsberg, is a highly regarded, experienced, and skilled litigator. He represents corporations and individuals in highly complex civil litigation in both the federal and state courts as well as administrative tribunals in many areas including business torts, corporate and employment law, product and professional liability, and defamation. He is often quoted in legal publications and is repeatedly called upon by other attorneys to provide legal insight into cases and to serve as an "Expert Witness." For these reasons and others he is continually recognized by his colleagues as one of Virginia's "Legal Elite." Most importantly, Mr. DiMuro has always "given back" to the legal community through his active involvement in a myriad of issues facing Virginia's legal community. Perhaps his greatest achievement to date is being chosen by his peers to serve as President of the Virginia State Bar.

Areas of practice:

- Appellate practice
- Business torts
- Corporate law
- Employment & labor law
- Litigation
- Professional liability & ethics
- Expert witness testimony

Admitted:

- 1979, Virginia
- 1980, Illinois
- 1985, District of Columbia
- U.S. Court of Appeals, Fourth and District of Columbia Circuits
- U.S. Supreme Court

Education

- J.D., George Washington University, 1979
- B.A. Northwestern University, 1976

Membership:

- Illinois State and American Bar Associations
- The District of Columbia Bar
- Virginia State Bar
  - President, 2002-2003
  - Co-Chair, Advertising Task Force, 2004
  - Member, Appellate Rules Advisory Committee, 2005-2008
  - Member, Leadership task Force, 2004
  - Member, Task Force on Corporate Counsel, 2000-2003
  - Chairman of the Virginia Supreme Court Disciplinary Board, 1992-1995 (Member since 1988)
  - Member, Faculty, Virginia State Bar Course on Professionalism, 1995-1998;
  - Committee on Advertising and Specialization (1989-1990); Member and Chairman,
  - Eighth District Grievance Committee (1985-1988)
Virginia Trial Lawyers Association (Member, Board of Governors, 1997)
The American Association for Justice
Public Justice Foundation
Board of Directors, Special Olympics Virginia

Publications & speeches:

- Co-Editor, Virginia Employment Law Letter, M.Lee Smith Publishers

Lectures on employment & labor law:

- Employment Law In Virginia: Age Discrimination, Virginia CLE
- Annual Employment Law, Fairfax Bar Association
- 6th Annual Employment Law Update, Virginia CLE
- Employment Law Update, Alexandria Bar Association
- Council on Education in Management 7th Annual Virginia Personnel Law Update
- "Defending Sexual Harassment Claims," National Business Institute
- "The Borderline Employee: Keep or Fire?" Council on Education in Management Annual District of Columbia Personnel Law Update
- "The Borderline Employee: Keep or Fire?" Council on Education in Management 6th Annual Virginia Conference Personnel Law Update
- Metropolitan Washington Employment Law Association Annual Seminar
- "Sexual Harassment in the Workplace: The Law & Litigation Tactics," Alexandria Bar Association
- "Defending Wrongful Discharge Claims Under Virginia Law," National Business Institute
- "Damages Issues In Jury Trials," Virginia Bar Association Annual Labor Conference
- Employment Law Update, Virginia State Bar CLE
- Council on Education in Management Personnel Law Update Conference

Lectures on professional responsibility & ethics:

- 14th Annual Advanced Real Estate Seminar
- Ethical Issues for Business Lawyers
- Advanced Business Litigation Institute, Virginia CLE
- 19th Annual Trust & Estates Seminar, Virginia CLE
- "Ethics in the Information Age," Alexandria Bar Association
- "Ethics Update for Virginia Lawyers", Virginia CLE
- "Ethics for Virginia Practitioners," Virginia CLE