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Part I – ABA Model Rule 8.4(g): A Ban on Discrimination or a Violation of an Attorney's First Amendment Rights? (40 minutes)

The issue that I would like to speak with you about today is contentious and can evoke strong emotions in some attorneys. The reason that I chose it as the topic of this Ethics CLE is because it is both timely and relevant to not only our work as lawyers, but also the way we conduct ourselves in our communities and personal lives. Our current societal dialogue concerning intellectual free speech, protection of the most vulnerable in our society, triggering language, discrimination, and political correctness has resulted in a new ABA Model Rule for lawyers that both attempts to protect the vulnerable while seemingly limiting free speech of lawyers. In part I of this ethics CLE, I plan to lay out a comprehensive case both for and against this rule and welcome the audience to make up their own minds on the matter.

This part of the presentation will cover the following Virginia State Bar Rules of Professional Conduct (RPCs): 1.2, 1.6, 1.16, 4.1, 8.3, 8.4, and 8.5.

I. **Discrimination Rules in MD, D.C., VA, and the ABA Model Rule**
   a. **ABA MR 8.4(g)**[1]
      i. "It is professional misconduct for a lawyer to engage in conduct that the lawyer **knows or reasonably should know is harassment or discrimination** on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct **related to the practice of law**. This paragraph does not limit the ability of a lawyer to accept,

[1] MODEL CODE OF PROF'L RESPONSIBILITY R. 8.4 (2016).

decline or withdraw from a representation in accordance with Rule 1.16[2]. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules." (emphasis added)

ii. **Comment 3[3]-** This was the only part of the model rules that mentioned discrimination before the 8.4(g) went into effect. "Discrimination and harassment by lawyers in violation of paragraph (g) undermines confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g)."

iii. **Comment 4[4]-** Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

b. **Maryland Rule 8.4 (e)**

i. "It is professional misconduct for an attorney to …
(e) knowingly manifest by words or conduct when acting in a professional capacity bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status when such action is prejudicial to the administration of justice, provided, however, that legitimate advocacy is not a violation of this section."

ii. Comment [4] Section (e) of this Rule reflects the premise that a commitment to equal justice under the law lies at the very heart of the legal system. As a result, even when not otherwise unlawful, an attorney who, while acting in a professional capacity, engages in the conduct described in section (e) of this Rule and by so doing prejudices the administration of justice

[2] MODEL CODE OF PROF'L RESPONSIBILITY R. 1.16 (2016).
[3] MODEL CODE OF PROF'L RESPONSIBILITY R. 8.4 (2016).
[4] MODEL CODE OF PROF'L RESPONSIBILITY R. 8.4 (2016).

commits a particularly egregious type of discrimination. Such conduct manifests a lack of character required of members of the legal profession. A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule. A judge, however, must require attorneys to refrain from the conduct described in section (e) of this Rule.

c. **D.C. Rule 9.1**
    i. A lawyer shall not discriminate against any individual *in conditions of employment* because of the individual's race, color, religion, national origin, sex, age, marital status, sexual orientation, family responsibility, or physical handicap.

d. **Virginia**
    i. The Commonwealth has not adopted 8.4(g) and does not have a comment regarding discrimination.
    ii. It is joined by 13 other states with no comment in the rules.
    iii. There are still reasons why this rule is important for Virginia lawyers and it will be important to know the details of the ABA Model Rule when it inevitably comes up for debate as to whether it should be added to the Virginia RPC.

e. **Other States Non-adoption of the ABA Rule**
    i. The Montana legislature passed a joint resolution condemning changes to ABA Model Rule 8.4 on First Amendment grounds.[5]
    ii. The Attorney General of Texas stated, "A court would likely find that ABA Model Rule 8.4(g) infringes upon the free speech rights of members of the State bar." [6]
    iii. The Illinois State Bar Association Assembly voted against adoption.
    iv. The Supreme Court of South Carolina rejected ABA Model Rule 8.4(g).
    v. The comment period for Nevada and Utah closed this past summer.

II. The Case *For* ABA Misconduct Rule 8.4 (g)[7] and Why States Should Adopt It

a. History Behind ABA Model Rules and Discrimination

When the Model Rules were first adopted in 1983 they did not include

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[5]Eugene Volokh, *Montana Legislature expresses opposition to ABA-proposed lawyer speech code*, THE WASHINGTON POST, (April 12, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/04/12/montana-legislature-expresses-opposition-to-aba-proposed-lawyer-speech-code/?utm_term=.3c91104c3b78

[6] Eugene Volokh, *Texas AG: Lawyer speech code proposed by American Bar association would violate the First Amendment*, THE WASHINGTON POST, (Dec. 20, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/20/texas-ag-lawyer-speech-code-proposed-by-american-bar-association-would-violate-the-first amendment/?tid=a_inl&utm_term=.eab1f5b65519

[7] MODEL CODE OF PROF'L RESPONSIBILITY R. 8.4 (2016).

any mention of, or reference to bias, prejudice, harassment, or discrimination. An effort was made in 1994 to correct this omission; the Young Lawyers Division and the Standing Committee on Ethics and Professional Responsibility (SCEPR) each proposed language to add a new paragraph (g) to ABA Model Rule 8.4, "Professional Misconduct," to specifically identify bias and prejudice as professional misconduct. However, in the face of opposition these proposals were withdrawn before being voted on in the ABA House. But many members of the Association thought that something needed to be done to address this omission from the Model Rules. Therefore, four years later, in February 1998, the Criminal Justice Section and SCEPR developed separate proposals to add a new anti-discrimination provision into the Model Rules. These proposals were then combined into Comment (3) to Model Rule 8.4, which was adopted by the House at the ABA's Annual Meeting in August 1998.[8]

b. After more than two years of intense drafting and negotiation with entities, both from within and outside of the ABA, SCEPR Resolution 109 regarding a new ABA Model Rule 8.4(g) Misconduct was adopted unopposed on Aug. 8, 2016 by the ABA House of Delegates at the ABA Annual Meeting in San Francisco.

    i. 24 states and D.C. already had an anti-discrimination misconduct rule in their rules of professional responsibility.
    ii. 13 other states had similar language in their comments.

c. Other ABA Rules Addressing Discrimination

The ABA Model Rules are not the only conduct rules which recently added a rule on discrimination. In February 2015, the ABA House of Delegates adopted and revised the ABA Standards for Criminal Justice: Prosecution Function and Defense Function to include anti-bias provisions. The Standards explain that prosecutors and defense counsel should not, "manifest or exercise, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, gender identity, or socioeconomic status." This statement appears in the black letter of the Standards, not in a comment. This illustrates a recent ABA trend of specifying no discrimination, bias, or prejudice to its rules.

d. Potential Abuses are Overblown

Concerns have been raised that ABA Model Rule 8.4(g) will result in fraudulent complaints filed to gain an advantage in a case.

    i. In the jurisdictions that already have adopted provisions similar to ABA Model Rule 8.4(g), there is no evidence of parties filing spurious complaints against attorneys.

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[8] Myles Lynk, *Report to the House of Delegates,* A.B.A STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, (Aug., 2016), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/scepr_report_to_hod_rule_8_4_amendments_05_31_2016_resolution_and_report_posting.authcheckdam.pdf.

However, when attorneys engage in such conduct, there can and should be consequences.

ii. This opposition relies on a hollow slippery slope argument, which highlights the ability of this rule to be used for nefarious purposes. However, there is no evidence that it would be used in that way, or that a disciplinary board or court would uphold such unfounded allegations.

e. **ABA Model Rule 8.4(g) has a Limited Scope**

The scope of the rules only pertains to "conduct related to the practice of law." The rule is Constitutionally limited; it does not seek to regulate harassment or discrimination by a lawyer that occurs outside the scope of the lawyer's practice of law, nor does it limit a lawyer's representational role in our legal system. [9]

i. Comment [4] of ABA Model Rule 8.4(g) explains that conduct related to the practice of law includes, "representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities *in connection with the practice of law*." (Emphasis added.) The nexus of the conduct regulated by the rule is that it is conduct lawyers are permitted or required to engage in because of their work as a lawyer.[10]

a. The reason that law firm dinners and other social events were included in this rule is because there was a lot of anecdotal evidence provided to SCEPR showing that these were the type of events where sexual harassment takes place.

ii. The scope of ABA Model Rule 8.4(g) is actually narrower than is the scope of other model rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a non-professional capacity. ABA Model Rule 8.4(c) for instance, says that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. The conduct does <u>not</u> need to be related to the practice of law, just reflect adversely on the lawyer's fitness to practice law or involve moral turpitude.

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[9] Myles Lynk, *Report to the House of Delegates,* A.B.A STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, (Aug., 2016), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/scepr_report_to_hod_rule_8_4_amendments_05_31_2016_resolution_and_report_posting.authcheckdam.pdf.

[10] <u>Id.</u>

f. Promotion to Black Letter Rule Rather Than a Comment

One of the main reasons for moving the anti-discrimination provisions from the comment to the black letter of the rule was because the comments to the rule are only guidance, it was felt there was a need for a black letter rule that would be enforceable in disciplinary proceedings.

i. In the words of immediate past ABA President Paulette Brown, "The current Model Rules of Professional Conduct [...], however, do not yet reflect the monumental achievements that have been accomplished to protect clients and the public against harassment and intimidation. The association should now correct this omission. It is in the public's interest. It is in the profession's interest. It makes it clear that discrimination, harassment, bias and prejudice do not belong in conduct related to the practice of law."[11]

g. Lawyers Should be Held to a Higher Standard

i. The last people who should be discriminating against an individual or saying negative things about a person based on race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status are lawyers who may be tasked with protecting them.

ii. This rule does not only hold lawyers accountable, but sends a message to the general public that attorneys are committed to serving everyone equally.

h. Demographic Representation in the Profession of Law

LGBTQ lawyers, female lawyers, and lawyers of color are underrepresented in the profession and need protection.

i. Comment 4 specifically says that conduct to promote diversity is not prohibited.

ii. The legal profession is 64% male and 36% female[12]

iii. The legal profession is 88% White, 5% Black, 4% Hispanic, and 3% Asian American.

iv. The Commission on Sexual Orientation and Gender identity championed this rule so that the group of people (attorneys) charged with representing the rights of historically repressed populations would they themselves

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[11] Peter Geraghty, *ABA Adopts new Anti-discrimination Rule 8.4(g),* YOURABA NEWSLETTER, (Sept., 2016), https://www.americanbar.org/publications/youraba/2016/september-2016/aba-adopts-anti-discrimination-rule-8-4-g--at-annual-meeting-in-.html (July 20, 2017).

[12] Myles Lynk, *Report to the House of Delegates,* A.B.A STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, (Aug., 2016), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/scepr_report_to_hod_rule_8_4_amendments_05_31_2016_resolution_and_report_posting.authcheckdam.pdf.

err on the side of respect and civility in their encounters with these populations of people.

i. **Mens Rea Requirement**

ABA Model Rule 8.4(g) does say that the lawyer must know "or reasonably should know" that his "verbal conduct" is harassment or discrimination.

i. The Mens Rea requirement means a lawyer is not able to get in trouble for making an off-the-cuff remark they didn't believe would be offensive to someone.
    a. The lack of a mens rea requirement was a big point of contention in the originally proposed rule, but was added to protect against unknowingly saying the wrong thing.
ii. There is also a harm requirement because the speech has to show some sort of harassment or discrimination.

j. **How Does the New Rule Interact with the Other ABA Model Rules**

i. ABA Model Rule 1.16. Comments to ABA Model Rule 8.4(g) say that the rule "does not limit the ability of a lawyer to accept, decline, or withdraw from a representation." This comment was added to make it clear that rule 1.16 is not changed by 8.4 and lawyers still have the freedom to accept or deny clients.[13]
ii. ABA Model Rule 1.2. To address concerns that ABA Model Rule 8.4(g) would cause lawyers to reject clients with unpopular views or controversial positions, comment 5 reminds lawyers that representation of a client does not constitute an endorsement according to rule ABA Model Rule 1.2. So a lawyer would still be able to represent the Westboro Baptist Church without running afoul of ABA Model Rule 8.4(g).[14]
iii. ABA Model Rule 5.1. This rule says that a managing partner shall make reasonable efforts to insure that that the firm and the lawyers at the firm uphold the rules of professional responsibility. This means that managing partners would be the first line of defense in lawyers adhering to ABA Model Rule 8.4 because managing partners could be liable for a rules violation if the lawyers under them show a clear penchant for discrimination.[15]

k. **Targeting Discriminatory Conduct and Not Speech**

i. Just like ABA Model Rule 1.6, it is not unprecedented that speech can be regulated. When dealing with something that

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[13] MODEL CODE OF PROF'L RESPONSIBILITY R. 1.16 (2016).
[14] MODEL CODE OF PROF'L RESPONSIBILITY R. 1.2 (2016).
[15] MODEL CODE OF PROF'L RESPONSIBILITY R. 5.1 (2016).

doesn't deal merely with speech but with conduct as well, there is a very high bar for finding a violation.

ii. This is not a limit on freedom of speech but it is a limit on the negative and harmful conduct of a lawyer.

l. No Chilling Effect

i. There is no chilling effect because situations where complaints will arise are very narrow.

ii. Many attorneys are afraid that this new rule will be used as a political correctness tool and will give the Bar the ability to seek out viewpoints it does not like. However, in jurisdictions that have similar rules in place, this is not the case. It is important to have the rule in case outright racism is allowed to fall through the cracks of the current rules of professional conduct.

m. Self-Regulation and Perception

i. Self-regulation of lawyers is important for the perception of the profession.

ii. The public must have confidence in lawyers and rules such as this go a long way in creating that.

iii. If the public sees that no matter how discriminatory a lawyer is they cannot be disciplined based on existing professional conduct rules, it gives the general public less confidence in the legal profession.

iv. The character and fitness requirements to be a part of the legal profession require a "good moral character," but once you pass the bar exam and are admitted, the only tool to enforcing all of these specific standards of moral fitness required for bar passage is the continued application of the professional ethics rules.

n. Previous Failures

i. The previous iteration of the rule failed to cover bias or prejudice in other professional capacities or other professional settings.

ii. According to female employees of law firms, discrimination against them occurred most often in work outings outside the office.

iii. It is these grey area events that have an indirect but important relation to the practice of law; and include barred attorneys, other legal professionals, and clients, which the creators of ABA Model Rule 8.4(g) sought to protect.

III. The Case *Against* ABA Model Rule 8.4 (g) and Why States Should Not Adopt It

a. ABA Model Rule 8.4(g) is a Violation of Free Speech Rights

i. The new rule will be used to chill lawyer's expression of disfavored political, social, and religious viewpoints on various topics of public

concern.[16] A rule that threatens to discipline a lawyer for his or her speech on such issues should be rejected as a detriment to freedom of speech, free exercise of religion, and freedom of political belief in a diverse society that continually births movements for justice in a variety of contexts.[17]

ii. Even if courts do not enforce this rule to the letter of the law, it still chills speech of lawyers because good lawyers do not want to face a non-frivolous accusation that they are violating the rules.

iii. When ABA and State bar associations who adopt this rule issue ethics opinions, they will be telling lawyers to avoid saying things that are constitutional under the first amendment.

b. The Rule Disingenuously Uses the Concept of "Verbal Conduct"

i. The First Amendment applies to speech, but the ABA tries to get around that by labeling speech as "verbal conduct." In this way the ABA can say that lawyers shall not engage in verbal conduct that "manifests bias" without calling it biased speech which would clearly be a violation of the first amendment.

   a. ABA Model Rule 8.4(g) prohibits mere speech divorced from discriminatory action. If one holds a gun and says, "Give me your money or your life," he is engaging in conduct (robbery) accompanied by words. If one says, "I wish I had Warren Buffet's money," he is just engaging in speech.[18]

ii. The proposed ABA Model Rule 8.4(g) will apply even if no state statute bans the "verbal conduct" that the ABA's rule will prohibit because courts often imply causes of action from violation of the Rules of Professional Conduct. This will cause a chilling effect on lawyers if there is even a question on how to speak or act.

c. The Rule is Unconstitutionally Overbroad

i. Even if an enactment is otherwise clear and precise in what conduct it bans, the law may nevertheless still be unconstitutionally overbroad if its reach prohibits constitutionally protected speech.

ii. The terms "harmful verbal conduct" and "derogatory or demeaning verbal conduct" include in their domain a lot of speech that is clearly constitutionally protected.[19]

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[16] *The ABA Decision to Control What Lawyers Say: Supporting "Diversity But Not Diversity of Thought*," THE HERITAGE FOUNDATION, (October 6, 2017), http://www.heritage.org/report/the-aba-decision-control-what-lawyers-say-supporting-diversity-not-diversity-thought.

[17] Kimberlee Colby & Michael Schutt, *New Rule 8.4(g): Threat or Menace?,* CHRISTIAN LEGAL SOCIETY, (Feb. 2, 2017), https://clsnet.org/document.doc?id=1005.

[18] *The ABA Decision to Control What Lawyers Say: Supporting "Diversity But Not Diversity of Thought*," THE HERITAGE FOUNDATION, (October 6, 2017), http://www.heritage.org/report/the-aba-decision-control-what-lawyers-say-supporting-diversity-not-diversity-thought.

[19] *NLA Task Force Publishes Statement on New ABA Model Rule 8.4(g),* NATIONAL LAWYERS ASSOCIATION, (March 7, 2017), http://www.nla.org/wp-content/uploads/2017/03/NLA-Model-Rule-8.4g-Statement.pdf.

iii. Speech is not unprotected merely because it is harmful, derogatory or demeaning, in fact, that is precisely the sort of speech that is constitutionally protected. Speech that no one finds offensive needs no protection.
iv. When speech that is "derogatory" is made into an offense it is usually found to be unconstitutionally overbroad because it brushes constitutionally protected speech within its reach and thereby creates an unnecessary risk of chilling free speech.[20]

d. Attorneys Should Not Be Regulated Outside of their Work with Clients

i. Is there a public interest in the regulation of attorney conduct at CLE events or law firm social functions? Some of the areas regulated seem to bear a weak relation to the delivery of legal services to the public.
ii. ABA Model Rule 8.4(g), Comment 4 says: "Conduct related to the practice of law includes representing clients; *interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law, operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law*."[21] (emphasis added)
iii. Virtually everything a lawyer does is "conduct related to the practice of law." Swept up in the rule are dinners, parties, golf outings, conferences, and any other business or social activity that lawyers attend. Most likely, the rule includes all "business or social activities in connection with the practice of law" because there is no real way to delineate between the two. So much of a lawyer's social life can be viewed as business development and opportunities to cultivate relationships with current clients or gain exposure to new clients.[22]
iv. The December 2015 version of Comment 3 included language that the Rule "does not apply to conduct unrelated to the practice of law or conduct protected by the First Amendment." Should this language have been retained?

e. ABA Model Rule 8.4 Has Always Focused on Conduct that Interferes with the Proper and Efficient Operation of the Judicial System

In ABA Model Rule 8.4, before this change, all six of the types of conduct that were prohibited either had an adverse impact on attorney's fitness to

[20] Edwin Meese & Kelly Shackelford, how lawyers plan to stifle speech and faith, THE WASHINGTON TIMES, (AUGUST 17,2016). http://www.washingtontimes.com/news/2016/aug/17/how-the-lawyers-plan-to-stifle-speech-and-faith.
[21] MODEL CODE OF PROF'L RESPONSIBILITY R. 5.1, COMMENT 4 (2016).
[22] *NLA Task Force Publishes Statement on New ABA Model Rule 8.4(g),* NATIONAL LAWYERS ASSOCIATION, (March 7, 2017), http://www.nla.org/wp-content/uploads/2017/03/NLA-Model-Rule-8.4g-Statement.pdf.

practice law or would prejudice the administration of justice.[23] ABA Model Rule 8.4 has always been solely concerned with rooting out conduct that interferes with the proper and efficient operation of the judicial system. Those types of conduct include:

i. Violating the rules of professional conduct
ii. Committing criminal acts that reflect adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer.
iii. Engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.
iv. Engaging in conduct that is prejudicial to the administration of justice.
v. Stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules.
vi. Knowingly assisting a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct.

f. ABA Model Rule 8.4(g) Takes Misconduct in a Different Direction

With the adoption of ABA Model Rule 8.4(g), rule 8.4 has been taken in a completely different direction because the rule subjects attorneys to discipline for engaging in conduct that *neither adversely affects the attorney's fitness to practice law nor seriously interferes with the proper and efficient operation of the judicial system.* The conduct just has to be related to or performed in the practice of law but does not have to affect a lawyer's fitness to practice the law so the ABA has setup a unique and dangerous free floating rule with no historical precedent.

g. The Right to Decline a Prospective Client

The new ABA Model Rule 8.4(g) says that it "does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16."

i. But, if you read Comment 5 to ABA Model Rule 8.4(g) this right to refuse is interpreted very narrowly:[24]
    i. The comment states that the lawyer does not violate rule ABA Model 8.4(g) "by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law."
    ii. Generally, the existence of ABA Model Rule 8.4(g) makes it easier for a state court to find that refusing to represent a client violates general antidiscrimination laws. That is because courts may now point to ABA Model Rule 8.4(g) in

[23] *The ABA Decision to Control What Lawyers Say: Supporting "Diversity But Not Diversity of Thought*," THE HERITAGE FOUNDATION, (October 6, 2017), http://www.heritage.org/report/the-aba-decision-control-what-lawyers-say-supporting-diversity-not-diversity-thought.

[24] Id.

addition to state antidiscrimination when they say a lawyer did not take the case of someone from a protected class.

ii. ABA Model Rule 8.4(g) is casting doubt on the historically significant right of an attorney to choose who he/she represents so that the client can be represented zealously.[25] There are good reasons why a lawyer should be able to choose clients based on moral and ethical considerations unique to that individual professional.

h. Including Specially Protected Classes Creates Complicated Issues

i. Attempting to create and maintain a list of specially protected classes results in inconsistency and brings disrepute upon the legal profession because different classes are protected in different professional codes.[26]

ii. Some of the classes that are included in ABA Model Rule 8.4(g) are not objectively definable. [27]

1. The ABA commission has admitted that socio-economic status cannot be defined, yet it was added to the list in 8.4(g) and was included in comment 3 for year beforehand. Likewise there has been much debate recently as to what constitutes sexual orientation and how to define that.
2. It seems as though there is a political agenda of what constitutes a protected class and that the categories might grow exponentially in the future. That is because interest groups might lobby to be included in 8.4(g) and the ABA won't have much of a defense to say no to them. [28]

i. Discriminatory Employment

i. Any employee or prospective employee of a law firm can now complain that they were fired or were not hired due to their status as a member of a protected class.

ii. Therefore, situations like these can more easily go before a full hearing of the state bar because it fits into a grey area of this rule.

iii. While the lawyer may not know an applicant or an employee is a member of a protected class any firing or non-hiring is a question on the merits and its assertion does not preclude a full hearing.

j. The Chilling Effect is Real

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[25] Id.

[26] 52 A.B.A. Member Attorneys, *Joint Comment Regarding Proposed Changes To ABA Model Rule of Professional Conduct*, LETTER TO A.B.A. (July 16, 2015). https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rule%208_4_comments/joint_comment_52_member_attys_1_19_16.authcheckdam.pdf.

[27] Id.

[28] Herbert Titus & William Olson, *The ABA's plan to impose political correctness on the practice of law*, American Thinker, (Aug., 2016), http://www.americanthinker.com/articles/2016/08/the_abas_plan_to_impose_political_correctness_on_the_practice_of_law.html.

The Rule may have a chilling effect on a lawyer's ability to critique matters of public concern, such as proposals to amend non-discrimination laws or highly publicized cases like *Obergefell v Hodges*.[29]

i. This is ironic because the Supreme Court in *Obergefell*[30] said that people of faith must be allowed to hold differing views on controversial issues.[31]
ii. ABA Model Rule 8.4(g) encourages viewpoint-based complaints and lawyers might be afraid opponents could use the rule tactically against them.[32]
iii. ABA Model Rule 8.4(g) could be used to punish right-leaning political viewpoints, memberships in organizations, and even try to preclude lawyers from representing religious clients with "controversial views."[33]

k. There is No Need for a Discrimination Rule

i. There is no need to create a rule as constricting as ABA Model Rule 8.4(g) since the discrimination talked about in the rule does not occur in the profession.
ii. In all the talk of a need for this type of rule there were never any statistics or facts given that necessitated a binding rule. It was more of an emotional argument that there are protected classes that must be protected just in case lawyers are discriminatory.
iii. The real reason behind the rule is that the ABA wanted to enact a cultural shift.
    a. The ABA report explaining the reasons for this controversial change starts by quoting then- ABA President Paulette Brown, who tells us that lawyers are "responsible for making our society better," and because of our "power," we "are the standard by which all should aspire."[34] That is a nice sentiment but there seems to be a lack of a concrete reason to stifle the free speech of lawyers with such a broad binding rule.

l. Discriminatory Comments do not have to Harm or be Directed Toward an Individual

i. Some critics have argued that the Rule should be limited to "severe or pervasive" harassment.

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[29] *Obergefell v Hodges*, 576 U.S. _____ (2015).
[30] Id.
[31] Edward Meese & Kelly Shackelford, *With its proposed Model Rule 8.4, the ABA threatens freedom justice, and religious liberty*, FIRST LIBERTY INSTITUTE, (Aug. 5, 2016), http://firstliberty.org/wp-content/uploads/2016/08/ABA-Letter_08.08.16.pdf.
[32] Id.
[33] Id.
[34] *The ABA Decision to Control What Lawyers Say: Supporting "Diversity But Not Diversity of Thought*," THE HERITAGE FOUNDATION, (October 6, 2017), http://www.heritage.org/report/the-aba-decision-control-what-lawyers-say-supporting-diversity-not-diversity-thought.

ii. As adopted by the ABA, there does not have to be any harm done to the listener, just intent on the part of the speaker.[35]

m. Reverse Discrimination

i. If a lawyer has two completely equal candidates apply for a job, then it is okay for the lawyer to hire one of the lawyers for the sole reason that the candidate is LGBTQ, female or a minority under these new rules.

ii. Comment 4 says: "Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations."

iii. The new rule could also easily be used to discriminate against particular viewpoints and religions. The ABA Business Law Section Ethics Committee said that the rule goes well beyond most civil rights legislation.[36]

iv. The United States Conference of Catholic Bishops and the Christian Legal Society said the rule would be used to punish their viewpoints and the viewpoints of their members, making it more difficult to obtain counsel.[37]

v. The ABA Section of Civil Rights admitted that the rule will punish people for viewpoints that are not necessarily discriminatory but are not regarded highly by the groups who promoted ABA Model Rule 8.4(g) in the first place.

n. Political Correctness

i. The new rule makes it okay for a lawyer to make jokes about being bald, fat or short but as soon as anything related to gender identity, marital status, socioeconomic status or any of the other protected classes comes up, then a State Bar that has adopted ABA Model 8.4(g) can come down on that lawyer for an ethics violation.[38] If that isn't a violation of the First Amendment right to free speech then what is?

o. The Repercussions of ABA Model Rule 8.4(g)

i. Bar disciplining authorities have their hands full with lawyers who are incompetent or who don't properly handle their client's money.

ii. This could open up the floodgates for the disciplining authorities to have to hear frivolous cases that tangentially fit into the new rule.

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[35] Eugene Volokh, *A speech code for lawyers, banning viewpoints that express 'bias,' including in law-related social activities*, THE WASHINGTON POST, (Aug. 10, 2017), https://www.washingtonpost.com/news/volokh.

[36] Edward Meese & Kelly Shackelford, *With its proposed Model Rule 8.4, the ABA threatens freedom justice, and religious liberty*, FIRST LIBERTY INSTITUTE, (Aug. 12, 2016), http://firstliberty.org/wp-content/uploads/2016/08/ABA-Letter_08.08.16.pdf.

[37] Id.

[38] Id.

iii. If someone brings a case and there is a question on the merits about the facts of the case, there is a possibility of innocent lawyers having their reputations hurt based on a situation in which they were not in the wrong.

p. New Rule for ABA CLE Programs

i. The veiled way in which the ABA is attempting to champion the cause of minority lawyers at the expense of other attorneys can also be seen in the June 2016 ruling that says at least 30 percent of all CLE panelists in any ABA-sponsored event with three or more panelists must include one of the favored classes as part of affirmative action.[39]

ii. This rule went into effect on March 1, 2017. Using specific numbers to establish diversity in a panel creates an "unnecessary focus on numbers rather than on quality and availability of speakers." According to the Senior Lawyers Council.[40]

iii. Establishing an "enforcement bureaucracy" will make it harder for volunteer ABA members to put CLE programs together.

iv. The ABA sponsors many CLE programs, and most states require lawyers to participate in a certain number of hours each year as a condition of keeping their law licenses.[41]

IV. ABA Model Rule 8.4(g) and its Relationship to VA/MD/DC Ethics Requirements

a. What Virginia Lawyers Need to Know to Protect Themselves

i. Virginia lawyers are not subject to ABA Model Rule 8.4(g), even if they are members of the ABA. Virginia has not even adopted ABA Model Rule 8.4, Comment 3, which is the predecessor to ABA Model Rule 8.4(g).

ii. There are still a number of rules that tangentially prohibit Virginia lawyers from discrimination: Virginia RPC 8.4(b) states that a lawyer may not "commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law."

a. It would be rare for this rule to be used for discrimination but "wrongful act" is broad and since there is no specific discrimination rule, the Virginia Bar might be apt to give victims other avenues to remedy wrongdoing.

iii. There is no current plan to adopt ABA Model Rule 8.4(g) into the Virginia rules and the Virginia State Bar has shown they are

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[39] Board of Governors Approves New Rule for Diversity in CLE Programs, A.B.A. VOICE OF EXPERIENCE NEWSLETTER, (July, 2016), https://www.americanbar.org/publications/voice_of_experience/20160/july-2016/bog-approves-new-rules-for-diversity-in-cle-programs.html.

[40] Id.

[41] Kimberlee Colby & Michael Schutt, *New Rule 8.4(g): Threat or Menace?,* CHRISTIAN LEGAL SOCIETY, (Feb. 2, 2017), https://clsnet.org/document.doc?id=1005.

not close to doing so judging by their non-adoption of Comment 3 to ABA Model Rule 8.4.

iv. The character and fitness rules to join the legal profession focus on good moral character, so discrimination or racism of any kind could bar a new attorney from joining the Virginia State Bar. What is unclear is whether that moral character requirement carries over to a practicing attorney who has already passed the character and fitness section of the bar.

v. All the rules under Chapter 8 of the ABA Model Rules try to do away with any attorney conduct that is prejudicial to the administration of justice; so discriminatory behavior relating to the law could come in under Rule 8.4. Since discrimination is in the forefront people's minds in bar associations throughout the U.S. and Virginia, it would not be surprising if certain adjudicators find creative ways to sanction lawyers for discriminatory behavior.

b. If a Virginia Lawyer Works on a Maryland Case

i. MD Rule 19-308.4 says that if you offer your services in the state of Maryland you open yourself up to their rules of professional responsibility.

ii. MD Rule 19-308.5 says that if you are working on a Maryland case and you break this rule then you not only open yourself up to sanctions but also the lawyer sponsoring you.

iii. If you have a case that crosses the Potomac River into Maryland, then 8.4(e) of the Maryland rules becomes very important to follow. Considering how the states have been at odds on a number of issues over the years, it would come as no surprise if Maryland wanted to make an example out of a Virginia lawyer.

c. If a Virginia Lawyer works on a D.C. Case

i. D.C. uses rule 9.1 for their discrimination rule. This rule is more employment-focused than the ABA Model rule.

ii. Rule 49 of the Rules of the D.C. Court of Appeals says that if someone is admitted *pro hac vice* to practice law in D.C., that person is bound to D.C.'s rules of professional responsibility.

iii. The D.C. bar practitioner must take responsibility for the quality of the other state's attorney and complaints concerning the lawyer's services.

Part II – Updates on the Intersection of Technology and the Law (40 minutes)

The legal profession, once accepted as an industry of tradition and incremental change, has been revolutionized since the start of the 21st century. Computers have completely transformed the way lawyers conduct almost every aspect of their practice. Some futurists even predict that computerized legal tools will eventually replace much of the legal workforce. Technology has made the legal profession more agile, accessible and modernized, yet at the same time more unsecure and uncertain. The never-ending forward progression of technology has changed the rules of evidence, created new legal subject areas, revolutionized legal research and changed the way trials are conducted. Part II of this presentation is meant to inform Virginia attorneys about the technology stories that are changing the landscape of the legal profession.

This part of the presentation will cover the following Virginia State Bar Rules of Professional Conduct (RPCs): 1.1, 1.3, 1.6, 1.15, 3.3, 3.4, 3.6, 7.1, and 7.3

I. Privacy

a. Law Firm Cybersecurity

i. **Amid Recent Attacks, Lawyers are Told Hackers will Keep Breaching their Systems**
At the 2017 Virginia State Bar TECHSHOW, technology experts told the Virginia lawyers in attendance that hackers are going to get into your system and you need to be prepared for the crisis. One of the scariest trends in cyber threats is called ransomware, which is a malicious program that takes over your network and blocks access to your files until you pay a ransom to the hackers. Ransomware attacks are up 400 percent this year and payments are on track to total more than $1 billion. Whether a law firm decides to pay the ransom or not, every law firm should have an incident response plan which includes contact information for a data breach attorney, digital forensics firm, the law office's bank, and copies of applicable insurance policies.

ii. **Law Firm Stuck with $65k Phone Bill Due to Hack**
A law firm in Virginia had its phone lines hacked and 195 calls made in a matter of 45 minutes from its account. The phone bill totaled $65,000 as a result. The calls were made to Serbia and Algeria. The FCC says that hackers can break into voicemail systems to make international collect calls. The

hackers target systems that have default passwords or systems with easy passwords.

iii. **Global Law Firm Blindsided by Major Cyberattack**
A major international law firm was paralyzed by a ransomware attack on computers in its offices across the world. The attack originated in the Madrid, Spain office that caused the entire system to have to shutdown for a close to a week. This is one example of the abundance of attacks that have plagued large law firms in the past year. It also illustrates the vulnerabilities of having one single system across multiple countries and continents.

iv. **ABA Releases Cyber Guidance, Says Law Firms Must Plan for Attacks**
ABA Journal is calling cybersecurity risks the number one threat to law firms in 2017. Mandiant estimates that 80 out of the largest 100 firms have been hacked since 2011. Considering that only 17.1 percent of all law firms have an incident response plan in place, the legal profession has a lot of work to do to prepare for cyber threats.

v. **Electronic Frontier Foundation (EFF) Releases Guidance on How to Protect your Data from Surveillance and at the Border**

1. As part of it's guide to protect your digital footprint from surveillance, the EFF recommends updating your operating system, End-to-End encryption, Two-factor authentication, strong passwords, and making sure that E-mail attachments are not compromised.
2. As part of their guidance on how to protect your data at the border, the EFF recommends that before your trip you should reduce the data you carry, use full-disk encryption, bolster your passwords, backup your data, remove saved login credentials, and power down your devices. When you are at the physical border, EFF recommends that you comply, prepare for the encounter if you are not a U.S. Citizen and just be calm and respectful.

vi. **Cyber Law Specialty Practices on the Rise**
With a 40 percent rise in data breaches on U.S. companies in 2016, law firms are answering the call and implementing cyber specialty practices within their firms. One national law firm has evolved their cyber capabilities into a cross-practice initiative that draws on HIPAA experts and government contract lawyers alike. Cyber practices work with clients before they are breached to advise on data notification laws if they are attacked and what other legal responsibilities they

may have. This area of the law is likely to grow rapidly in the coming years.

b. **Email Fraud**

i. **What to do if Someone Impersonates your Law Firm?**
A Virginia firm has been dealing with a fraudster for a good part of the last year that contacts people about a scam loan deal and backs up its legitimacy by sending an email in my name vouching for the fraudster and the loan. If the victim does not sign off on the deal in a timely way, the fraudster uses my email account to threaten them with legal action.

c. **Search Warrants on Electronic Devices**

i. **Police Want Access to Amazon Echo Recordings**
A murder in Arkansas has prompted police officers to ask to see information that may have been recorded on an Amazon Echo device. The Echo is not supposed to record at all hours but sometimes it randomly starts recording if it thinks it has been prompted. Amazon has refused to allow access to its servers citing privacy concerns. The Echo recording and devices like it have big implications for the future of electronic search warrants.

ii. **Law Enforcement's Ongoing Battle to get iPhone Access**
Florida's Second District Court of Appeals reversed a lower court's ruling, and demanded a voyeur reveal the passcode to his cell phone where he allegedly had incriminating pictures. The trial court judge had cited Fifth Amendment protections for not making the alleged voyeur give his passcode to law enforcement. There are courts all over the U.S. considering law enforcement access to phones and it is a subject area that the Supreme Court will most likely have to weigh in on.

iii. **Law Enforcement Looking for Ways to Access Encrypted iPhones**
Since the San Bernardino shootings in 2015, there has been a national debate about whether there should be a backdoor for law enforcement to retrieve information from encrypted iPhones. The Manhattan District attorney recently renewed his call for new laws to be enacted to infiltrate encrypted devices. Legislation was recently introduced in Congress for that exact purpose.

iv. **News Outlets Advise Leakers on Encryption Techniques**
The Washington Post, The New York Times, and ProPublica have launched web pages to give potential leakers modern and encrypted options to send anonymous tips. The Washington Post gives six digital options for government leakers on its page. The article does not say how the

journalists check the veracity of each leak or the legality of giving leakers methods to break the law. What is clear is that encrypted communications are on the rise and more sophisticated and secret than ever. Government surveillance technology is also rapidly improving so leakers are playing with fire even when they use encrypted methods of anonymous communication.

v. **Alleged Child Pornographer Loses Appeal to Keep His Hard Drives Secret**

A man lost an appeal to keep the contents of his external hard drives secret due to the suspicion that he might have child porn stored on them. The police have reason to believe he might have the pornographic images because they found illegal images on other devices that they were able to investigate. The lawyer for the accused says his client can use the Fifth Amendment to not incriminate himself by not allowing access to the hard drives. The lawyer also said that civil liberties were at stake when someone cannot use their constitutional rights to protect themselves. The man has been in custody for 18 months without being charged with a crime.

II. Interaction of Technology and the Law

a. Wearables

i. **Lawyers Using Data From Wearables as Evidence in Accidents**

In 2014 a cyclist was hit at the intersection between a bike path and a highway in Loudon County, VA**.** A lawyer used two wearable performance-monitoring devices to prove the cyclist (his client) did in fact stop at the intersection and was not at fault for the accident. The electronic documentation of real-time data will be key bits of evidence in lawsuits of the future.

ii. **Fitbit Contradicts Husband's Story of Wife's Murder**

On December 23, 2015, a woman was shot to death in her home and her husband claimed an intruder killed her. Police checked her Fitbit device and discovered that she had taken her last movement almost an hour after her husband said she had died. The husband had been zip-tied to a chair and had superficial knife wounds, but the police say the sniffer dogs did not pick up the scent of other people in the house in the hours before the death. Also, the gun that killed the wife was a handgun that the husband had purchased two months before. He was having a baby with another woman and investigators found hotel rooms and flowers billed to his credit card. While this case became pretty obvious due to the amount of evidence, the Fitbit was a strong starting point and devices like these are becoming more important as pieces of evidence.

iii. **Data from Pacemaker Deemed Admissible**
A Ohio Judge has decided that information taken from a pacemaker can be presented as evidence at trial. An Ohio man was charged with insurance fraud and arson when his house burnt down. A cardiologist said the man's story of the fire waking him up and him exiting out a window did not match the information that was retrieved from the pacemaker device. The man's lawyer sought to suppress the evidence but the judge said that there are a lot of things that should be kept private but heart rate is not one of them. As health data becomes more widespread, measurable devices on the human body will become key in trials if allowed into evidence by judges.

b. Drone Law

i. **Navigating Drone Laws Becoming a Lucrative Niche**
With the proliferation of drones in the U.S., laws surrounding drones has become a hot area of law for law firms. In a recent case, a large law firm defended an aerial filming company against an FAA sanction totaling $1.9 million. Another large British law firm with an already established aviation practice group started their unmanned aircraft system practice group in 2014. The FAA estimates that there are 1.6 million commercial drones registered in the U.S. The FAA Part 107 guidance and licensing went into effect in August 2016 and in January of this year more than 30,000 people had started the remote-pilot application process.

III. New Forms of Digital Currency

a. The Rising Tide of Cryptocurrencies

i. Businesses are turning to cryptocurrencies to avoid the regulated capital-raising process required by banks or VC's. In the first half of 2017 alone Initial Coin Offerings (ICOs) had raised $180 million, according to Smith and Crown[42]. The founders of the startups keep a large portion of the new currency and give the rest to investors in exchange for capital investments. Many of these startup-sponsored cryptocurrencies are then exchangeable for Bitcoin (BTC), Ethereum (ETH), Ubiq (UBQ), and other cryptocurrencies, or for U.S. Dollars (USD) and foreign currencies.

ii. **Is a Cryptocurrency a Security?**

a. One important aspect of ICOs is whether they fit inside the scope of securities regulations. Because if they qualify as securities and you disregard the law,

[42] Ari Levy**,** *Here comes the ICO, a Wild New Way for Cryptocurrency Start-Ups to Raise Money,* CNBC (May 26, 2017), http://www.cnbc.com/2017/05/25/bitcoin-ico-cryptocurrency-start-up-civic-raising-money-initial-coin-offering.html.

the SEC can file a lawsuit that could severely damage a startup business. U.S. Federal Courts give regulators considerable latitude in determining what is and what is not a security. In instances like cryptocurrencies where the instrument is novel, the law will disregard the form of the investment and instead focus on the economic reality of the transaction. ICOs may yet fall into the official grasp of the SEC.

b. To determine whether an ICO is a security and must be regulated by the SEC, one must look to the test developed in *SEC v. Howey*, 328 U.S. 293 (1946)[43]. In *Howey*, the Supreme Court determined that for a deal to be regulated there must be an (1) investment of money due to an (2) expectation of profits arising from a (3) common enterprise, which depends solely on the efforts of (4) a promoter or third party. The first of the four prongs is usually satisfied because there is already a ruling by a court that says Bitcoin is a currency or form of money. The second prong of expectation of profits runs into problems due to lack of voting rights in the company. This might prevent an investor from having an expectation of profits or enough of a stake in the company to qualify. Because of the lack of an official stake in the company when one buys a coin it is known simply as a donation. The last two prongs, including "common enterprise" and "efforts of a third party," are also grey areas that can go either way. It is advisable to investigate each coin-buy to see if all four prongs are met. However, even if your deal fails one of the prongs does not mean you don't have a security are not subject to SEC regulations.

c. Coinbase Inc. advises adherence to six principles when conducting ICOs[44]. The principles include publishing a white paper, committing to a development roadmap, using an open public blockchain, using fair pricing in a token sale, marketing the token as something other than an investment and determining the amount of tokens set aside by the development team. Coinbase says that using a public blockchain may strengthen the arguments against the second and third criteria of the

[43] *SEC v. Howey*, 328 U.S. 293 (1946).

[44] *A Securities Law Framework for Blockchain Users*, COINBASE.COM, (May 25, 2017), https://www.coinbase.com/legal/securities-law-framework.pdf .

Howey test, because participants are less reliant on the initial developers and the coins are seen as a separate entity from the startup.

iii. **What are the Tax Implications of Cryptocurrencies?**

a. Taxing ICOs is just as important as the securities aspect and can be equally as tricky. Businesses involved in ICOs want to know when their virtual money will be taxed and for how much. In 2014, the IRS published guidance[45], which said that cryptocurrencies should be, treated as property so the general tax rules associated with property transactions apply. This also means that the long-term or short-term capital gains tax applies to cryptocurrencies.
b. On one hand this is a great outcome for investors because if they keep the coins for a year and a day then all profits will be taxed at the preferential long-term capital gains rates. On the other hand, where a taxpayer exchanges one currency for another, 26 U.S. Code § 1031 says that the gains from exchanging foreign currencies can be deferred if both currencies are held for trade or business or for the production of income and both currencies are considered to be of "like-kind." Cryptocurrencies are not considered, as of now, "like-kind" because they are not legal tender so those deferments of capital gains taxes on exchange do not occur. Also, the IRS does not consider cryptocurrencies a "foreign currency" because foreign governments do not sponsor them.
c. Beyond taxes and the regulation of cryptocurrencies, there is the legal question of compensating employees with cryptocurrencies. Considering the fluctuation of cryptocurrency prices and the Fair Labor Standards Act, which requires U.S. dollar payment for the satisfaction of overtime and minimum wage pay, employee compensation is difficult where cryptocurrencies are concerned. And, even when employees are paid in cryptocurrency, their tax withholdings, unemployment contributions, and other payroll taxes have to be remitted in U.S. Dollars to the appropriate taxing authority. Furthermore,

[45] Notice 21, 2014- I.R.B. 36.

payments of cryptocurrency with vesting schedules to employees or independent contractors as compensation for services can be taxed as income under 26 U.S.C. §83 (1934)[46], just like stock options. Employees receiving such compensation may need to make an 83(b) election to avoid having a tax recognition event at a time when they may not be able to liquidate their cryptocurrency holdings. With this complexity, the tax repercussions must be looked at closely for each individual situation.

IV. Social Media in Litigation and Your Practice

i. Family of Girl Killed in Accident Sues Apple Because the Other Driver was Using Facetime

The parents of a girl who was killed in a car accident are suing Apple because the driver of the other vehicle was using FaceTime at the time of the accident. The lawsuit says that Apple could have introduced a feature into the application that disabled its use while driving. An April 2014 patent aimed to lock out users while driving but that feature was never implemented. According to a study conducted by AT&T, 43 percent of teenagers text or email while they drive. This case is part of a growing trend of litigation dealing with technology being blamed for serious injury or death.

ii. Posting Photos of your Kids May Breach their Privacy

When you post a picture of your children on social media you might be violating their right to privacy. The term for parent's sharing pictures of their children is known as "sharenting" and it is causing concern among privacy experts. One of the reasons for the consternation about the practice is that parents do not know what happens to the pictures after are posted online. Also, it is difficult to figure out at what age children should have the right to say whether they do or don't want their picture posted on social media. The tension between parents' rights to share their experiences and a child's right to privacy will continue to be at odds.

iii. Social Media Pitfalls Employers Must Avoid

More than 40 percent of employers use social media platforms to obtain information about prospective job candidates. The benefit of using social media is that it is cheap, quick, and effective in gathering information about a candidate. However, employers must be careful they don't use it incorrectly and get caught in a trap. It is illegal for an employer to discriminate based on gender, race, national origin, religion or marital status and if they are looking at social media accounts of a

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[46] 26 U.S.C. §83 (1934)

candidate then they open themselves up to a lawsuit if they do not hire that person. One method is to have a buffer layer between the person in charge of hiring and the person looking through social media. There is also a scenario where employers may be liable for posts by their employees on personal social media websites. The reason is that if an employer is aware of the conduct and ignores it then the employer may be liable for a hostile work environment. Social media becomes an extension of the workplace. There is an even greater danger in completely ignoring employee's social media because then there is no warning of what could be going on.

iv. **Social Media and Marketing the Firm**

According to a recent ABA study, 74% of law firms maintain a presence on a social network and 76% of lawyers report that they personally use one or more social media networks for professional purposes. Social media is especially prevalent among solo attorneys and smaller firms with 25% of attorneys stating that they had clients retain them due to their social media presence. Social media, however, plays the smallest role in large firm marketing as only 16% of lawyers from large law firms stated that they had clients retain them due to their social media presence.

V. Technology in your Practice

i. **Tips to Successfully use Technology at Trial**

Many lawyers are utilizing trial technology to help tell a story to a jury. While videos, animations and audio presentations can certainly be helpful; they can also hurt your case if you run into difficulties. Some tips for making sure these presentations go smoothly include working with the courtroom staff in advance, confirming that the judge is on board and making sure your trial team is familiar with the venue. Also, it is important to plan the length of the video within the limits of the overall case you are presenting, make sure you have someone on the team with technology expertise, and have a backup plan if the technology fails.

ii. **Technology Assisted Review Deemed Not Mandatory for Discovery Response**

A judge in California recently ruled that it is the responding party's right to choose what type of electronic discovery technology they want to utilize when responding to discovery requests. The ruling came in response to the requesting party demanding technology-assisted review (TAR) in the discovery process. TAR has the potential to expedite and improve the accuracy of the search and review process as compared to linear document review with search terms. The court

reasoned, "the responding party is the one best situated to decide how to search for and produce electronic discovery."

iii. **No Sanctions for Unintentional, Automatic Deletion of Web History**
The plaintiff in this case sought a jury instruction to help mitigate the harm of the defendant failing to preserve web browser history. The Court said that the Plaintiff had not established one of the main elements to show a breach of Rule 37 because there were still avenues available to find internet browser search information such as depositions. The court also said that because the browser history was being erased automatically and without the knowledge of the defendant, the necessary intent was not there for a finding of deprivation of evidence. At most, the failure to preserve web browser history was negligent and would not support an award of sanctions.

Part III – Developments in Virginia Legal Ethics (35 minutes)

The Virginia State Bar and the Supreme Court of Virginia regularly update the Virginia Rules of Professional Conduct; amend the rules of procedure and appeals, and issue legal ethics opinions. These updates inform attorneys barred in the Commonwealth about the smallest of procedure modifications to the most major of ethics decisions. In addition to this past year's array of changes, Part III covers the newest trends in legal ethics as well as a sampling of disciplinary rulings from Virginia and other jurisdictions.

A. Legal Ethics Opinions Updates

i. **LEO 1885 (Proposed)**: Ethical considerations regarding a lawyer's participation in an online attorney-client matching service.

Applicable Virginia RPCs: 1.2, 1.5, 1.15, 1.16, 2.1, 5.4, 7.3 and 8.4

The standing committee on legal ethics decided not to send this draft opinion to council and is seeking public comment. The committee considered whether Virginia professional rules of conduct would be violated if a lawyer participated in an online attorney-client matching service operated by a for-profit entity (Avvo) where the matching service provides a client with limited scope legal services advertised to the public for a legal fee set by the matching service. The arrangement would also allow for the matching service to collect full and prepaid legal fees from the client and not pass that onto the lawyer until the legal service is completed. When it is passed to the lawyer the money would go straight to the lawyer's operating account. Finally, the arrangement

would allow the marketing service to withdraw a marketing fee from the lawyer's account.

The Virginia Rules of Professional Conduct do not prohibit a lawyer from participating in an Internet program operated by a for-profit attorney-client matching service (ACMS), which identifies limited scope services available to the public for fixed fees. Before accepting a legal matter from a prospective client, the lawyer must consult with the client regarding the limited scope of the proposed legal services and be satisfied that the services can be competently performed consistent with the Rules of Professional Conduct.

Before accepting a prospective client's legal matter, the lawyer must exercise independent professional judgment and assure herself that the fee set by the ACMS is reasonable for the legal task to be undertaken for the client, taking into consideration the reasonable fee factors enumerated in Rule 1.5(a).

It would be ethically impermissible for a lawyer to participate in a program whereby a client's advanced legal fee is to be held by a lay business firm, contrary to the lawyer's obligations under Rule 1.15. A lawyer who permits a lay business entity to retain and dispose of a client's advanced legal fees surrenders her ethical obligation to refund unearned legal fees to the client at the termination of representation as required by Rule 1.16(d).

A lawyer must not participate in a program whereby the lawyer pays a for-profit business entity a portion of the legal fee charged to the client as compensation for the lawyer's having received the client from the firm which operates the program. The payment constitutes an impermissible sharing of fees with a non-lawyer, and violates the rule prohibiting a lawyer from giving anything of value to one who recommends the lawyer's services.

ii. **LEO 1886 (Approved)**: Duty of Partners and Supervisory Lawyers in a Law Firm When Another Lawyer in the Firm Suffers from significant impairment.

Applicable Virginia RPCs: 1.16, 5.1, and 8.3

In this advisory opinion, the Committee analyzes the ethical duties of partners and supervisory lawyers in a law firm when they reasonably believe another lawyer in the firm may be suffering from a significant impairment that poses a risk to clients or the general public. What are the remedial measures the lawyers must take in this situation?

The Virginia Rules of Professional Conduct do not explicitly require lawyers to deal with an impaired lawyer in the firm unless there is reliable information that the impaired lawyer has committed a violation of the rules that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness to practice law. The law firm may be able to work around or accommodate some impairment situations. For example, the firm might be able to reduce the impaired lawyer's workload, require supervision or monitoring, or remove the lawyer from time-sensitive projects. The impaired lawyer may not be capable of handling a jury trial but could serve in a supporting role performing research and drafting documents.

In order to protect its clients and according to Virginia RPC 5.1, the firm must have an enforceable policy that would require the impaired lawyer to seek appropriate assistance, counseling, therapy, or treatment as a condition of continued employment with the firm. For example, the firm could recommend, encourage or direct that the impaired lawyer contact Lawyers Helping Lawyers for an evaluation and assessment of his or her condition and ask for a referral to appropriate medical or mental health care professional for treatment and therapy.

Alternatively, making a confidential report to Lawyers Helping Lawyers may be an appropriate step for the firm. The firm or its managing lawyers might instead find it necessary or appropriate to consult with a professional medical or health care provider for advice on how to deal with and manage an impaired lawyer, including considering options for an "intervention" or other means of encouraging the lawyer to seek treatment or therapy.

iii. **LEO 1887 (Approved)** Duties when a lawyer over whom no one has supervisory authority is impaired.

Applicable Virginia RPCs: 1.16 and 8.3

The Virginia State Bar's Standing Committee considered the circumstances in LEO 1886 (above) and compared it to a situation where a sole partner in a firm or solo lawyer is impaired and there are no other lawyers in the firm to take action. In LEO 1886, it was ruled that lawyers do not have an explicit duty to address the impairment of other lawyers. Action is only required when the reporting lawyer has reliable information that the impaired lawyer has committed a violation of the rules that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness to practice law.

In one hypothetical scenario concerning this LEO, a solo practitioner practices primarily criminal defense; he has been practicing in the same community for decades and is well respected within the legal community. Recently, judges, prosecutors, and other lawyers have noticed that his representation of his clients is not up to his previous standards, but he still appears to be competent – he sometimes comes across as scattered and disorganized but is still able to manage a court proceeding appropriately.

Rule 1.16(a)(2) (requiring a lawyer to withdraw/decline representation if "the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client") is violated in many cases where an impaired lawyer continues representing clients, and that rule violation will often trigger a reporting duty under Rule 8.3(a) since a "material impairment" in a lawyer's ability to represent the client almost by definition raises a substantial question as to the lawyer's fitness to practice law. Again, in a situation like the first hypothetical in this opinion, there may be cases where a lawyer believes it is clear that another lawyer is mildly impaired, and that clients are at risk in the future if no action is taken, although there is no evidence that the lawyer's ability to represent clients is currently compromised. In these situations, the lawyers have no duty to take any action to address the solo lawyer's impairment.

A different scenario involves a lawyer who is the sole owner and managing partner of a law firm that employs associates and non-lawyer assistants. After a car accident, she becomes increasingly moody and forgetful, sometimes lashing out at the other employees of the firm or opposing counsel when they have to correct her or remind her of something. The associates are aware of a number of near misses where the partner would have missed a significant deadline if someone else in the firm had not intervened to remind her, and they have also noticed that she overlooks important, and obvious, issues in conversations with clients and with members of the firm. Based on their interactions with her, the associates believe the managing partner is not able to competently and diligently represent clients on her own. She is also not receptive to any help or input from the associates, and no one in the firm has any authority to require her to accept oversight or assistance since she is the sole partner.

In the second hypothetical, where associates of an impaired lawyer have reliable information that the impaired lawyer is currently materially impaired in her ability to represent clients, and is continuing to represent those clients in violation of Rule 1.16(a)(2),

Rule 8.3(a) requires them to report the impaired lawyer's conduct to the Bar. The duty to report is subject to the associates' duty of confidentiality to clients of the firm under Rule 8.3(d), but in many cases a report may be accomplished without disclosing information that would be embarrassing or detrimental to the firm's clients.

The associates may also choose to seek guidance from Lawyers Helping Lawyers or another lawyer assistance program to try to convince the impaired partner to seek treatment to manage her impairment or transition out of the practice of law without awaiting the conclusion of the disciplinary process. As LEO 1886 emphasized, reporting a lawyer's impairment to both the Bar and to LHL is important, and each report serves different purposes. Neither report removes the need for the other; together they can address both the misconduct that has already occurred and the underlying situation that contributed to the misconduct.

B. Updates to Practice and Procedure Rules of the Supreme Court of Virginia

Adopted Changes to the Rules of the Supreme Court of Virginia- Article VI, Section 5 of the Constitution of Virginia authorizes the Supreme Court of Virginia to make rules governing the course of appeals and the practice and procedures used in the courts of the Commonwealth.

i. **Rule 5:5. Filing Deadlines; Post Trial Proceedings Below; Timely Filing by Mail; Inmate Filing; Extension of Time**
The times prescribed for filing the notice of appeal have changed to include 5:21(a)(3), and 5:21(b)(2) and exclude 5:21(c). Petition for appeal have changed to include Rule 5:21(g) and exclude 5:21(a)(6)**.**

ii. **Rule 5:32 and 5A:25. Procedure Following Perfection of Appeal**
The information that changed for this rule included the website where guidelines are posted regarding the appendix to the brief. From http://www.courts.state.va.us/online/vaces/resources/guidelines.pdf. To http://www.vacourts.gov/online/vaces/resources/guidelines.pdf.

iii. **Rule 3B:2 and Rule 3C:2. Traffic Infractions and Uniform Fine Schedule**
The Virginia Supreme Court has changed the dollar amount of a number of traffic fines. They include improper failure to drive on the right side of the highway, which increased from a $30 fine to a $100 fine. There has also been an increase from a $30 fine to a $100 fine for improper failure to observe lanes marked for traffic, which includes the following infractions: failure of

slow moving traffic to keep right, improperly driving in the center, changing lane without first ascertaining safety of move, improperly driving in center lane of 3-lane highway, improperly crossing solid line driver's lane, and improperly crossing double solid line.

There were also two parking or stopping violations that have been added to the traffic infractions and uniform fine schedule which include stopping or parking in violation of a highway sign for a driver to sleep or rest which is a $20 fine and parking too near a fire apparatus which is also a $20 fine. There was also a slight change to Virginia hunting fines that included the addition of a pink gear option for hunters to wear in addition to the blaze orange option. Not wearing either will still result in a $25 fine.

iv. **Parts 5 and 5A Forms**

The bond forms for appeals have been amended and updated and are available at http://www.courts.state.va.us/courts/scv/amendments/2017_0215_part_five_and_five_a_forms.pdf.

v. **Rule 5A:5(B)(2). Appendix**

The Virginia Supreme Court made two changes to the Appendix requirements that must be filed by an appellant. These changes include lowering the number of printed copies from four to three and a change in the URL of the website which contains the guidelines from http://www.courts.state.va.us/online/vaces/resources/guidelines.pdf to http://www.vacourts.gov/online/vaces/resources/guidelines.pdf.

vi. **Rule 5:13(c). Record on Appeal: Preparation and Transmission**

The Virginia Supreme Court has changed the amount of time the clerk of the trial court shall retain the record of the appeal from 21 days to 90 days.

vii. **Rule 5:17(a)(1) Petition for Appeal**

When there is an appeal direct from a trial court to the Supreme Court of Virginia, the appealing party has not more than 90 days after the entry of the order appealed from to file for the appeal instead of the previous rule that said you have three months.

viii. **Rule 5:20. Petition for Rehearing After Refusal of Petition for Appeal, Refusal of Assignments of Cross-Error, or Disposition of an Original Jurisdiction Petition.**

The Virginia Supreme Court has made electronic filing mandatory for a petition for rehearing after refusal or dismissal

of petition of appeal except in limited situations. The court also added refusal of assignments of cross-error to this rule. The E-mail to which the PDF Filing should be sent was changed from scvpfr@court.state.va.us to scvpfr@vacourts.gov.

ix. **Rule 5:21(a)(6). Special Rules Applicable to Certain Appeals of Right**
The Supreme Court of Virginia has changed the amount of time that a party filing a notice of appeal has to file a petition of appeal and a filing fee in the office of the clerk of the Supreme Court from 4 months to 120 days.

x. **Rule 1:24. Requirements for Court Payment Agreements for the Collection of Fines and Costs**
The Supreme Court of Virginia changed much of the language in Rule 1:24 including lowering the amount of a defendant's down payment and changing the wording from a payment plan to a payment agreement.

xi. **Rule 5:37. Rule 5A:15A. Rule 5A:33. Rule 5A:34.**
The Supreme Court of Virginia changed these four rules to reflect the updated E-mail the required PDF appeal filings should be sent to. The update changes the e-mail address from scvpfr@court.state.va.us to scvpfr@vacourts.gov.

xii. **Rule 1:5A. Curing Signature Defects**
This is a rule that was newly created to protect Pro Se litigants when they forget to sign a document. This rule gives the litigant the opportunity to seek leave of court to properly sign the pleading or have a representative do the same when notice is given to opposing parties. The Court has discretion when deciding if litigant shall be granted the right to cure signature defects.

xiii. **Rule 4:5. Depositions Upon Oral Examination**
The Supreme Court of Virginia amended 4:5(c)(2) in two ways. The first change is that objections should just be noted in the record, but a deposition should continue in the face of an objection. The second change that was made is that a person may be instructed not to answer a specific question but only when it is necessary to preserve a privilege or protection for attorney work-product, to enforce a limitation ordered by the court, or to present a motion.

C. Amendments To Virginia Rules of Professional Conduct

i. **Amendments to Virginia RPCs 7.1-7.5 on Lawyer Advertising**
After making significant changes to the advertising rules just a few years ago, the Supreme Court of Virginia has passed further significant revisions to Rules 7.1-7.5, governing lawyer advertising. The changes went into effect on July 1, 2017 and include the deletion of Rules 7.4 and 7.5 and the streamlining

of Rule 7.1 to a statement about a lawyer's services and that the lawyer shall not make false or misleading declarations. Statements about specialization and firm names previously addressed by Rules 7.4 and 7.5 respectively are now addressed by comments to Rule 7.1.

The Virginia State Bar's Standing Committee on Legal Ethics decided and the Supreme Court of Virginia agreed that since 7.4 and 7.5 were just specific examples of the general obligation not to make false or misleading statements, they did not need their own rule. The required disclaimer for statements of case results has been removed from Rule 7.1, again shifting to a general false or misleading standard rather than a mandatory technical requirement. Only minor changes have been made to Rule 7.3, on solicitation of clients, to more clearly define the term "solicitation" and to expand the comments to more clearly explain how the Rules apply to paying for marketing services, including paying for lead generation. The rule also deletes a former provision that completely barred in-person solicitation of clients in personal injury and wrongful cases, and now permits all in-person solicitation except when it involves "harassment" and when the prospective client has informed the lawyer it's unwelcome.

The new changes to Rules 7.1, 7.4, and 7.5 largely derive from a report and recommendation issued by a committee of the Association of Professional Responsibility Lawyers (APRL) describing the need to simplify and modernize lawyer advertising rules in light of changes caused by the rise of internet marketing and communications, and in light of increasing concern about the viability of constitutional or antitrust challenges to advertising regulations. Virginia is the first state to make changes based on this report.

Many advertising rules were developed in a time when print advertising was the only form of marketing, and as a result are unwieldy or impractical when applied to now-common Internet communications. For example, the requirement that a disclaimer must precede each statement of case results makes it impossible to ever mention a case outcome on Twitter, because the disclaimer alone would exceed the character limit of a Twitter post. The cross-border nature of Internet communications also raises difficult issues, as advertising rules vary greatly from state to state and lawyers often find it

impossible to comply with all the rules that could possibly apply to their communications.

ii. **Amendments to Clients' Protection Fund Rules**

On February 25, 2017, the Virginia State Bar (VSB) Council approved amendments to the Clients' Protection Fund (CPF) Rules. The amendments outline the purpose, funding, authority, and administration of the fund. The amendments also change the structure and organization of the rules of procedure that outline the administration of the fund, including the procedure for processing claims. The purpose of the amendments is to clarify the authority for the fund as well as to facilitate understanding of the fund for both Virginia State Bar members and the public.

Some attorneys misunderstand the CPF Board. The purpose of the board is to reimburse clients (or others to whom a fiduciary duty is owed) for losses caused by the dishonest acts of a VSB member when there is no other recourse (as described in the rules.) It is most certainly not some type of malpractice insurance. The fund balance as of December 31, 2016 was $9,087,748.98.

D. Trends in Virginia Legal Ethics

i. **Pro Bono Reporting Requirements Narrowly Voted Down**

A Virginia Supreme Court commission is recommending that the VSC justices to require all Virginia lawyers to report pro bono hours. The proposal would have added two questions to lawyer's annual license renewal form asking the number of hours worked and the amount of money donated to legal services for the public good. The reasoning behind reporting pro bono hours is that empirical data indicates that reporting hours make positive impacts on the amount of pro bono contributions by lawyers. The Virginia State Bar Council voted to not endorse the recommendation because they viewed it as an insulting attempt to measure charity. Also, it requires administrative hours to compile the report, which could be used for additional pro bono hours. The measure went ahead despite the non-endorsement vote from the Virginia State Bar Council, but was recently rejected by the Virginia Supreme Court, which declined "to impose a mandatory reporting requirement."

ii. **VSB Hopes to Increase Emeritus Members (Opinion)**

There is currently only one emeritus member of the Virginia State Bar and a new proposal by the Virginia State Bar Council hopes to increase that number. The proposed changes to the Emeritus member rule are helpful and reduce some barriers

for older members of the bar to transition from active practice to this limited, volunteer practice. However, the largest concern I would have as an emeritus member is that of malpractice liability. What attorney would want to put their retirement savings and other assets at risk, even if they have a desire to help the public through voluntary and unpaid work? While many qualified legal services providers offer some malpractice coverage to their volunteer attorneys, the limits are often low ($250,000 per claim, for example).

If the bar is serious about wanting experienced attorneys to provide volunteer service in retirement, the bar should consider relaxing the rules on prospective waivers of malpractice liability, to allow an emeritus attorney to limit their liability to be equal to the amount of malpractice insurance coverage provided by their associated qualified legal services provider, or to allow the attorney to be insulated from personal liability, with only the qualified legal services provider and/or its insurance carrier liable to the client. That would, in my mind, significantly change the landscape for older attorneys, to allow them to bring their wealth of experience to bear for the public, without the worry that they could lose their retirement savings.

iii. **Assembly to Consider Changes in Lawyer Discipline**
There is currently a shortcut for judges and citizens to file attorney misconduct cases in circuit court. Legislation has been introduced to the Virginia General Assembly to eliminate this shortcut and rely solely on the confidential Virginia State Bar investigation to weed out bad claims. There is a similar bill that has been introduced on the house side that has been referred to committee. The VSB approved the changes to the State code.

iv. **VA Supreme Court Revamps Reciprocal Discipline Rules**
One of the purposes of the new rules, which took effect March 1, 2017, was to clarify what qualifies as another jurisdiction for reciprocal discipline purposes. The rule now states that only action by another state bar authority, as opposed to courts or other government agencies, triggers automatic suspension by the VSB. The rule also added that a lawyer could be subject to the same or "equivalent" discipline under VSB procedure. The new rules also allow for leniency by the VSB if the lawyer can present an argument with good evidence. Another change eliminates automatic license suspension on the VSB's rule to show cause when the other jurisdiction's suspension order has been suspended or stayed. The panel said the change is intended to address fairness concerns that a lawyer's Virginia license should not be suspended prior to a hearing if the

respondent remains authorized to practice law in the other jurisdiction.

E. Disciplinary Cases: Embezzlement, Fraud, Incompetence and More

i. **Alcohol Involved in Virginia Attorney's Contempt Citation**
A Virginia lawyer was found to have a blood alcohol level of 0.15 or twice the legal limit when a Montgomery County Judge cited him for contempt of court. The lawyer was defending a client in a methamphetamine case, but it was the lawyer who was held without bail. Virginia law allows a judge to find someone guilty of contempt for obstructing the functioning of the court, threatening or using violence, using bad language, or disobeying an officer of the court.

ii. **Lawyer Suspended 2 years Over Disputed Fee Payment**
A Virginia lawyer and former president of the Old Dominion Bar Association has been suspended from practice for two years for receiving $15,000 from a client's wife, denying ever receiving the money and failing to place the funds in a trust account. The lawyer repaid the money to the wife in the full amount. The disciplinary board said the bar had proved violations involving a deliberately wrongful act and conduct involving dishonesty, fraud, deceit or misrepresentation. The trouble started with a missed hearing, which the lawyer blamed on missing calendar entries as a result of a damaged phone. That did not explain why she subsequently stopped communicating with the opposing counsel and the client. The lawyer did admit to rule violations that included competence issues, diligence, client communication, safekeeping property, and responding to bar requests for information.

iii. **DC Lawyer Disciplined for Unlicensed Practice in Virginia**
The Virginia State Bar has suspended a D.C. lawyer for 15 months and a similar punishment could follow in D.C. after she made two court appearances and tried to negotiate a plea deal in Virginia. After she attended an arraignment and took part in a hearing on a motion to continue, the lawyer met with an assistant commonwealth attorney to work out a plea agreement. The commonwealth attorney told her she needed to find a Virginia attorney to associate herself with and both attorneys she contacted declined. The D.C. Court of Appeals had previously publically censured her in 2014 for unauthorized practice in Maryland. In that instance she represented a husband in a divorce case for six months until opposing council discovered she was not licensed in Maryland.

iv. **Former Virginia Bar Leader Surrenders License**
A Virginia lawyer and former chair of the Criminal Law Section of the Virginia State Bar has been disbarred because his practice was deemed an "imminent danger to the public" because he failed to comply with terms of an earlier disciplinary action and was accused

of continuing to mishandle client's money. The lawyer suffered a fall that ended his law practice before bar prosecutor's petition for an expedited hearing could go through. The first reprimand occurred when the bar found that he was using his trust account to pay for personal expenses and his bank because of excessive overdrafts, had closed his operating account. The lawyer consented to revocation of his law license once his bank reported overdrafts on two more occasions.

v. **Judge Fired for Commenting Abuses at Readers of Online New Articles**

A judge in Kent, England was fired from his job for making abusive comments toward other readers of a newspaper website. He was also condemned for making comments on the pages of Facebook friends. The stories he was commenting on were two cases he was intimately involved in. In one case he was the judge and in the other he was the barrister. Some of the abuses he is understood to have written include calling someone "a donkey, narrow-minded and bigoted." He thought the posts he made to Facebook were private and said it was unfair that tracking of anonymous material put him in his current position.

vi. **Law firm, Client Both Sanctioned for Discovery Abuse**

A Virginia Court has privately sanctioned a large law firm and its computer security client for numerous discovery violations related to ineffective searches for responsive documents. The sanctions came in addition to a settlement between the parties. The original case was a claim by one software maker that another software maker infringed patents for computer software security. The complainant contended that the board meeting and presentation notes that were sought during discovery were late in coming and that 154 of those documents were after the deadline and just a week before trial. A partner at the law firm that received sanctions decided not to produce the board meeting material because it would have been duplicative. He did not think there was much value in the records. The undisclosed sanctions were entered into at the end of January and just days after a larger technology firm bought the company at fault.

vii. **Lawyer Convicted in Home Invasion Gives up License**

A Virginia lawyer who assisted her husband in a prolonged torture and attack of her former law firm's boss and partner was sentenced to 45 years in prison and gave up her Virginia bar license. The victim of the highly publicized incident lived but the attack resulted in the former employee being guilty of principal in the second degree to two counts of abduction with intent to gain pecuniary benefit, two counts of aggravated malicious wounding and one count of burglary while in possession of a deadly weapon. The former employee thought she had been wrongly terminated from a

prestigious Arlington law firm and her husband, who suffered from PTSD and was an attorney himself, sought revenge on her boss.

viii. **Lawyer Gets Reprimand and Probation for Threatening his Litigation Adversaries**
The Virginia State Bar has given a pubic reprimand and put on probation a Virginia lawyer who repeatedly threatened to report his litigation adversaries to government authorities. There were more than 30 examples of the lawyer sending threatening letters to witnesses or opposing counsel. The bar highlighted two such letters in bringing ethics charges. The bar said that when the lawyer threatened to report the opposing party to the Federal Trade Commission that he was breaking Rule 3.4 of the Virginia Rules of Professional Conduct which says that a lawyer shall not "present or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.

ix. **Lawyer Surrenders License after Escrow Money Taken**
A Virginia lawyer gave up her license after her business associate stole more than $700,000 from her escrow account. The Virginia State Bar found no wrongdoing on her end yet she allowed others to control real estate settlement disbursements for more than a decade. The lack of supervision of her trust account gave the owner of four title and settlement companies the opportunity to engage in a scheme of embezzlement and fraud. The lawyer is being sued by the insurance underwriter and two homebuyers affected by the missing money. The litigation is ongoing because a number of homebuyer's purchase money disappeared and mortgage payoff checks bounced.

x. **Lawyer Surrenders Law License after Missed Deadlines**
A Virginia lawyer gave up her law license as a result of missing deadlines on three criminal appeals, cutting-off communication with a client regarding a child visitation matter and stonewalling a Virginia State Bar investigator when asked about her conduct. The lawyer also failed to notify other clients and courts that her law license was suspended for 45 days in 2015 for the mishandling of another criminal case.

xi. **Lawyer Suspended Two Years for Felony Conviction**
A Virginia lawyer, who knowingly concealed $20,400 in income when he filed for bankruptcy in 2010, was suspended from the practice of law for two years. The lawyer had been investing in residential real estate and transferred profit into his wife's name so that he would not have to include it in his bankrupt investment business. The lawyer owed a total of $327,703 as a result of the real estate deal that ended up with the transfer of the $20,400.

xii. **Lawyer Ignores State Bar Suspension Procedures and Loses Law License**
A Virginia lawyer failed to close his practice in a timely manner

after receiving a suspension due to a bar subpoena. He is now losing his law license as a result of failing to follow procedures required to notify clients, courts and opposing counsel of his suspension. The Virginia State Bar Disciplinary Board said there was clear and convincing evidence that procedures were not followed when required notices were not sent. They also found that he waited until the night before a hearing to notify a client that he would be unable to continue with a Virginia circuit court case.

xiii. **Lawyer Who Blamed a Fictitious Legal Volunteer for Mistakes is Suspended**
A Virginia lawyer strung along a client for nearly two years while not working on the case, reported false court dates and filings and blamed issues on a fictitious volunteer legal assistant. The lawyer has been suspended for 21 months and refunded the client's money and attorney's fees. The attorney was originally paid $2,300 to see if a jeweler had damaged a ring during cleaning. The lawyer claimed he met the fictitious legal volunteer at a Home Depot where she volunteered to learn about the legal profession by working in his office.

xiv. **Lawyer is Suspended for Not Depositing Funds in Client Trust Account**
A Virginia lawyer agreed to give up her law license for a year after being charged with rule violations regarding failing to hold nonrefundable fees for mortgage modifications in a trust account. She also is accused of charging a client $630 for the time she spent preparing her defense to that client's bar complaint. Not only is she accused of not holding the fees but also failing to refund the fees in cases where clients complained of inadequate work. The bar said that her conduct was not intentional or malicious but the one-year suspension and three-year probation is necessary in this case.

xv. **State Bar to Strip Attorney's Law License in Fraud Case**
A Virginia attorney has been suspended and has lost her law license after she was convicted and sentenced to four years in a federal prison due to her involvement in a timeshare fraud. The fraud included creating fake purchasers for more than 1,000 timeshares. The other individuals who spearheaded the operation are currently serving sentences in federal prison. The lawyer was paid $250 per transaction, which included drawing up deeds and paperwork. She plead guilty to one count of conspiracy to commit mail and wire fraud. She is also required to forfeit $244,000 in fees she earned from the fraudulent transactions as part of her conviction.

xvi. **Lawyer Facing Bar Charges for Greedy Estate Fee**
An Alexandria, VA attorney is facing bar charges of dishonesty and deliberate wrongdoing for paying himself $1.135 million for handling a nearly $9 million estate. Virginia code guidelines would have limited the attorney to $199,000 in fees but he asked the

beneficiaries for a gift of ten percent of the estate value and never gave them the full picture nor suggested they consult outside counsel. The attorney admitted that asking for more than $900,000 on top of his fee was "greedy." The judge in the case said that the attorney made material misstatements and that the fees were "unreasonable under any circumstances."

xvii. **Lawyer who Embezzled From Her Church Seeks Reinstatement to the Bar**
A former Virginia attorney who was convicted of embezzling from her church nearly eight years ago is seeking reinstatement to the bar. She says that since that incident she has lived a life of probity and demonstrated good moral character and integrity. She added that the earlier incident happened as a result of an impairment that affected her coping skills. Her petition must be investigated by bar prosecutors and then considered by the disciplinary board. The board makes recommendation to the Supreme Court of Virginia who make the final decision. Reinstatement requires proof by clear and convincing evidence that the person has honest demeanor and good moral character.

xviii. **Lawyer Receives Bar Reprimand for Being Drunk in Court**
An Alexandria, VA lawyer received a public reprimand when he showed up in the Alexandria General District Court and was observed by police officers to be intoxicated. He refused a Breathalyzer test and was charged with being drunk in public. The charge was dropped after the attorney agreed to withdraw his appeal of an earlier DWI conviction in the same court. The reprimand was done in public and the lawyer had a separate private reprimand.

xix. **Lawyer Failed to Disclose Bar Sanctions to Bankruptcy Judge**
A Richmond lawyer failed to disclose both a contempt-of-court fine and a Virginia State Bar penalty when he applied to practice in a bankruptcy court two years ago. The lawyer faces ethics violations because he specifically stated that he had never been reprimanded in any court. The lawyer contends that the disclosure concerns an agency of the Virginia Supreme Court as opposed to the Court itself and therefore did not require a disclosure. The judge felt that the lawyer was being untruthful and had a weak argument. The lawyer added that the reason he did not disclose the contempt-of-court penalty was because a clerk of the court had advised him he did not have to disclose it.

xx. **Lawyer Declared an Imminent Danger to the Public**
A Winchester lawyer was suspended after failing to appear at eight court appearances. After she was suspended she continued to practice law and represented three clients. Virginia State Bar prosecutors declared that this lawyer was an imminent danger to the public and expedited the discipline hearing against her. The

hearing is set for next month.

xxi. **Lawyer Acting as Escrow Agent in Investment Fraud Scam faces VSB Charges**

A Roanoke County lawyer was accused of involvement in an investment fraud scam. The lawyer did not act in any legal capacity but acted simply as an escrow agent in the transaction. While he was cleared of personal liability in the federal jury case, he now faces Virginia State Bar charges. VSB prosecutors stated that the lawyer's hands were not entirely clean and while he didn't act in a legal capacity, he still held himself out as a Virginia lawyer and as such he was entrusted with the monies placed in his hands. He faces rule violations for committing a criminal or deliberately wrongful act and conduct involving dishonesty, fraud, deceit or misrepresentation.

xxii. **Lawyer Must Pay CPF debts before Reinstatement**

A Martinsville bankruptcy lawyer had his license revoked after he was convicted for tax violations and spent time in federal prison. The Client Protection Fund paid a $13,333.33 claim filed by a former client of the attorney. After numerous attempts to reinstate his license the Virginia State Bar stated that the lawyer would be reinstated on the condition he pays the CPF fees paid to the former client. The attorney disputed the fee payment amount and remains unlicensed. However, the VSB remains unmoved on reinstatement without fee payment as the debt serves a public purpose to ensure that the lawyer is fit to resume the practice of law and therefore repayment is mandatory for reinstatement.

Q&A (5 Minutes)