II. Applying Ethics Rules to Evidence

3:30 - 4:30, Jeremy Flachs

A. Handling Prejudicial Evidence

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A. Handling Prejudicial Evidence

Most evidence is in a general sense, prejudicial to one side or the other. "All probative direct evidence generally has a prejudicial effect to the opposing party. Instead, the standard to have prejudicial evidence excluded is whether it rises to the level of unfair prejudice and whether the probative value of the evidence is substantially outweighed by that unfair prejudice." Lee v. Spoden, 290 Va. 235, 251, 776 S.E.2d 798 (2015)

But the rules of evidence make clear that some evidence is inadmissible and some evidence may be inadmissible, so tread carefully. Evidence of this nature is truly prejudicial and ignoring stop signs at trial can lead to sanctions and rulings which either exclude evidence or result in jury instructions harmful to your case.

Examples of Running a Stop Sign with Prejudicial Evidence

1. Mentioning Liability Insurance:

Eliciting testimony or mentioning to the jury that a party has liability insurance to pay any judgment. This runs afoul of the collateral source rule.

2. Mentioning Payment of a Plaintiff's Medical Bills By a Collateral Source:

Introducing evidence of payment of medical bills by health insurance which is a collateral source and is therefore generally inadmissible. Acuar v. Letourneau, 260 Va. 180, 531 S.E.2d 316 (2000). This includes payments by Medicaid and Medicare.

3. Improper Cross-Examination of Criminal Conviction;

Cross-examining a party with a criminal conviction which may not be a felony or misdemeanor involving moral turpitude. Or, attempting to elicit the specific nature of the crime rather than just establish that it was a felony or misdemeanor involving moral turpitude. See Payne v Carroll, 250 Va. 336 (1995) and Rule of Evidence 2:609.

4. Prior Medical Condition or Accident:

Stating in opening that the Plaintiff suffered a previous medical condition or prior accident with the knowledge that the opposing party has filed a motion in limine or will otherwise move to exclude the evidence.

Where there will be no evidence that Plaintiff's prior injuries have any connection with the injury for which Plaintiff is seeking compensation in the present lawsuit, the evidence of prior injuries should not be allowed. Carter v. Shoemaker, 214 Va. 16, 197 S.E.2d 181 (1973). The defense attorney should not be permitted to suggest the prior collision is medically relevant when he knows his own expert will not so testify.

5. Suggesting Intoxication of Driver Without Admissible Evidence;

Telling the jury that a vehicle operator was intoxicated when the evidence in support is insufficient, such as testimony the driver smelled of an alcoholic beverage, or that empty or partially empty containers were seen in the vehicle and other evidence suggesting but not proving intoxication is usually inadmissible. Hemming v. Hutchinson, 221 Va. 1143 (1981).

6. Prior Acts of Misconduct and Previous Negligent Conduct.

Collateral evidence of misconduct is inadmissible if it will distract the jury from the central issue of negligence, and inflame and mislead.

The circuit court did not err by denying plaintiff's attempts to cross-examine Dr. Ghramm about his alleged prior acts of misconduct and negligence relating to his former patients. The subjects of testimony upon which the plaintiff sought to cross-examine Dr. Ghramm were collateral, and such testimony would have certainly injected non-probative prejudicial evidence before the jury. Stottlemyer v. Ghramm, 268 Va. 7, 597 S.E.2d 191 (2004).

7. Reference to Illegitimacy of Heir of Decedent in Wrongful Death Case:

The administrator contends that the award of damages was grossly inadequate, and he attributes such inadequacy to the error of the trial court in admitting the highly prejudicial evidence showing that the decedent and his half-sister were illegitimate children of Maxine Lee Williams, and that the half-sister was pregnant before her marriage to the unborn child's father. We agree with the administrator's contention that it was error to admit the evidence complained of and that it could have influenced the jury in awarding damages. Edwards v. Syrkes, 211 Va. 600, 179 S.E.2d 902 (1971).

8. References to Police Crash Report:

Accident reports are inadmissible. Va. Code 46.2-379. Even where an accident report is not introduced into evidence, it is error to allow numerous references to it during the trial, not only by the officer, but also the court and the attorneys. This amounted to an official stamp being placed on the document used to refresh Mills' recollection. Thus, the jury could have placed more weight on Mills' testimony than it might otherwise have done. As we said in Phillips, the references to the accident report "accomplished indirectly what Code § 46.2-379 forbids to be done directly. Acuar v. Letourneau, 260 Va. 180, 531 S.E.2d 316 (2000).

B. Candor With the Court

Virginia Rule of Professional Conduct 3.3. Candor Toward The Tribunal

(a) A lawyer shall not knowingly:

1) make a false statement of fact or law to a tribunal;

As an advocate, you are to present your client's case with persuasive force, and while such duty is qualified by the duty of candor to the court, an advocate does not vouch for the evidence submitted in the case. It is the duty of the court to assess its probative value. (Annotation #1). An advocate is responsible for the pleadings and the signature of the attorney constitutes a certification that the attorney believes, after reasonable inquiry, that there is a factual and legal basis for the pleading. But the attorney is not required to have personal knowledge of the matters asserted in the pleadings. Annotation #2.

(2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal controlling legal authority in the subject jurisdiction known to the lawyer to be adverse to the position of the client and not disclosed by opposing counsel;

A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(3), an advocate has a duty to disclose controlling adverse authority in the subject jurisdiction which has not been disclosed by the opposing party. Annotation #4,

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer SHALL take reasonable remedial measures. The annotations (10 & 11) to the Rule provide guidance for the required remedial measures.

i. First advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence.

ii. If that fails, and withdrawal from the representation is not permitted or will not undo the effect of the false evidence, disclose to the court only what is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done.

iii. Except in the defense of a criminal accused, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure can result in a sense of betrayal, loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperates in deceiving the court. If at the request of the client the lawyer remains silent, the client could in effect coerce the lawyer into being a party to fraud on the court.

(b) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(c) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer…., whether or not the facts are adverse.

(d) A lawyer who receives information clearly establishing that a person other than a client has perpetrated a fraud upon the tribunal in a proceeding in which the lawyer is representing a client shall promptly reveal the fraud to the tribunal.

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

As an officer of the court it is axiomatic that attorneys must demonstrate candor with the court at all times. The rare circumstance will most frequently arise when attempting to navigate around client confidences which you believe are false, and when arguing a motion to withdraw as counsel.

The following annotations are instructive:

[5] If false evidence is offered by a person NOT THE CLIENT, the lawyer MUST REFUSE TO OFFER IT REGARDLESS OF THE CLIENT'S WISH.

[6] When false evidence is offered BY THE CLIENT, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce evidence that is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the lawyer cannot convince the client to agree, THE LAWYER MUST TAKE REASONABLE REMEDIAL MEASURES. .

[8] The PROHIBITION against offering false evidence ONLY APPLIES IF THE LAWYER KNOWS THE EVIDENCE IS FALSE. A lawyer's reasonable belief or suspicion that evidence is false does NOT PRECLUDE ITS PRESENTATION AT TRIAL.

A lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, but the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(4) only PROHIBITS a lawyer from offering evidence the lawyer knows to be false, IT PERMITS THE LAWYER TO REFUSE TO OFFER TESTIMONY THE LAWYER REASONABLY BELIEVES IS FALSE. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify.

Perjury by a Criminal Defendant (annotation 13)

The most difficult situation arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.

The ultimate resolution of the dilemma is that the lawyer must reveal the client's perjury if necessary to rectify the situation. An accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence. See Rule 1.2(c).

Sanctions and Disbarment for Severe Violations

The case of Allied Concrete Co. v. Lester, 285 Va. 295, 736 S.E.2d 699 (2013); Lester v. Allied Concrete Co., 80 Va. Cir. 454, 2010 Va. Cir. LEXIS 153 (Charlottesville June 28, 2010) and Lester v. Allied Concrete Co., 83 Va. Cir. 308, 2011 Va. Cir. LEXIS 245 (Charlottesville Sept. 6, 2011) shows what can happen to an excellent lawyer who loses sight of these rules.

Lester's attorney filed a wrongful death case after Lester's wife was killed by a reckless trucker. During discovery the defense learned Lester had posted photos of himself partying or otherwise engaging in activity inconsistent with a grieving widower. When first requested in discovery, Lester's attorney objected to production arguing the defendant had hacked into the client's Facebook page. This was false. It was then discovered that the attorney asked his secretary to call Lester to "clean up" his social media, and at least one email between Lester and his lawyer's secretary confirmed the instructions, which resulted in photographs being deleted. When the defendant requested the emails in discovery, a request which was compelled by the court, the attorney omitted the email from his firm instructing Lester to "clean up" his Facebook page. When the omission was discovered, the attorney then attempted to blame it on his secretary. Eventually Lester's attorney admitted he was behind the efforts to deceive the court. Monetary sanctions exceeding $500,000 were imposed on the attorney, who also lost his license to practice law for a significant number of years.

C. "Coaching" Witnesses

There appear no reported decisions in Virginia state court discussing the coaching of witnesses, although there are reported decisions from federal courts in Virginia, as well as from other jurisdiction.

But first, a clarification in terminology. Used pejoratively, "coaching" a witness means the witness is saying what the attorney wants said, rather than the truth, or what the witness

actually remembers. As counsel, you have an obligation to prepare your client and trial witnesses, including experts, to rehearse them and listen to their answers, and to assist them to choose words which most effectively convey the theme of the case. It is also proper to anticipate cross-examination and assist the client and witnesses with responses. This is not improper coaching; it is your duty as a trial attorney. However, there is a line which one does not want to cross and that is coaching a witness to offer false testimony, including testimony the witness cannot recall. It is never acceptable to condone untruthful testimony and if you detect your client is considering such testimony, you must advise the client that as an officer of the court, you cannot continue as counsel if the client persists. If the client persists you should probably seek to withdraw as counsel.

A plaintiff's improper conference with an expert witness, during a break in a deposition, resulting in the witness changing his answer, constitutes improper coaching and is sanctionable. Depositions are to be conducted as if the witness were testifying at trial. Courts have ruled that once a deposition begins, counsel should not confer with the witness except to determine whether a privilege should be asserted. To confer and have the expert change his answer is sanctionable. Medicinova, Inc. v. Genzyme Corp., 2021 U.S. Dist. LEXIS 135060 (S.D. Cal. July 20, 2021) In Medicinova, the Plaintiff argued its expert misspoke during his deposition. Rather than approach the expert during a break and suggest a new answer, the court stated that a proper way for Plaintiff to remedy the issue would have been for Plaintiff's counsel to question Dr. Burger at the conclusion of the deposition.

Sanctions have been awarded when counsel engaged in a pattern of disruptive and abusive speaking objections during depositions. This includes objections designed to slow down the deposition and allow counsel time to coach his witnesses. Martinez v. Coloplast Corp., No. 2:18-cv-220, 2021 U.S. Dist. LEXIS 111818 (N.D. Ind. June 15, 2021)

Courts generally prohibit objections which suggest answers to or otherwise coach the witness, commonly called "speaking objections". Objections are to be brief, and are not contain any information that may serve to coach the witness. United States v. Santoso, 2018 U.S. Dist. LEXIS 136889 (D. Md. Aug. 14, 2018); Marksberr*y v. FCA*, US LLC, 2021 U.S. Dist. LEXIS 99423 (D. Kan. May 26, 2021).

The plaintiff corporation designated its in-house patent counsel to testify at a 30(b)(6) deposition relating to Plaintiff's allegations of patent infringement. It was improper and sanctionable for counsel defending a deposition to engage in numerous obstreperous speaking objections which were thinly veiled attempts to coach his witness. Masco Corp. v. Price Pfister, Inc.,1994 U.S. Dist. LEXIS 20597 (E.D. Va. Oct. 7, 1994)

D. Withdrawing as Counsel During Litigation

Virginia Supreme Court Rule 1:5 - Counsel and Parties Appearing Without Counsel

Va. Sup. Ct. R. 1:5(b) "Counsel of record" includes counsel or a party who has signed a pleading in the case or who has notified the other parties and the clerk in writing that he or she appears in the case, or has endorsed a draft order of the court as provided in Rule 1:13.

Va. Sup. Ct. R.1:5(d)(1) Counsel of record may not withdraw from or terminate appearances in a case except by (i) leave of court after notice to the client of the time and place of a motion for leave to withdraw, or (ii) pursuant to the provisions in subpart (f)(4) of this Rule.

Va. Sup. Ct. R.1:5(d)(2) Any order permitting withdrawal must state the name, Virginia State Bar number, office address and telephone number of the attorney or law firm being

substituted as counsel of record for the party, along with any electronic mail (email) address and any facsimile number regularly used for business purposes by such counsel; or

Va. Sup. Ct. R.1:5(d)(3) If replacement counsel is not being designated at the time of withdrawal by an attorney or law firm, the order permitting withdrawal must state the address and telephone number of the formerly represented party for use in subsequent mailings or service of papers and notices, and the pro se party will be deemed counsel of record.

Va. Rules of Professional Conduct

Rule 1.16 Declining or Terminating Representation

Subsection (e) requires a prompt return of all original client furnished documents upon the termination of representation, regardless of whether outstanding attorney fees are due and owing. This includes the originals of any official documents (e.g. will, deed, corporate minutes) and if requested, the attorney must also provide copies of all transcripts, pleadings, discovery responses, working and final drafts of legal instruments, investigative reports, legal memoranda, research materials, and bills previously submitted to the client, and other attorney work product documents prepared or collected for the client in the course of representation.

Rule 1.6. Confidentiality of Information.

A lawyer shall not reveal information protected by the attorney-client relationship where it could embarrass or be detrimental to the client. There are a few exceptions for evidence the client will commit a crime or act causing death, bodily injury or substantial injury to property or financial interests or another.

You do not want to put anything on the record, or in any way advise opposing counsel or the spectators of the specifics of the impasse leading to your motion to withdraw. Even while arguing a motion to withdraw, an attorney cannot prejudice his client or harm the client's claim. About the only thing you can tell the court is that you and your client have "irreconcilable differences" which require withdrawal. With few exceptions, you cannot elaborate any further.

Rule 3.7 Lawyer as Witness

(a) A lawyer shall not act as an advocate in an adversarial proceeding in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer may be called as a witness other than on behalf of the client, the lawyer may continue the representation until it is apparent that the testimony is or may be prejudicial to the client.

(c) A lawyer may act as an advocate in an adversarial proceeding in which another lawyer in the lawyer's firm is likely to be called as witness unless precluded from doing so by Rule 1.7 or 1.9.

CAVEAT: Cumulative and Redundant Testimony

However, a law firm is not disqualified where testimony of attorney would be cumulative and redundant. -- A law firm should not be disqualified from representing a party to an action on grounds that the other party plans to call attorneys affiliated with the firm as witnesses, where their testimony would be cumulative and in some instances redundant. Chantilly Constr. Corp. v. John Driggs Co., 39 Bankr. 466 (E.D. Va. 1984) (decided under former DR 5-102).

WHEN IN DOUBT, EMAIL OR CALL THE VIRGINIA BAR'S ETHIC'S HOTLINE

Lawyers now can use e-mail to submit their ethics questions to the Virginia State Bar Ethics Hotline by going to https://www.vsb.org/site/regulation/ethics/ and clicking E-mail Your Ethics Questions. The hotline will continue to accept questions by phone at (804) 775-0564. The confidential service is available to members of the Virginia State Bar and their staffs.

E. Enforcing an Assignment of Benefits Signed by Client

Legal Ethics Opinion 1865 (November 16, 2012) discusses the obligations of a lawyer handling settlement funds when a third-party lien or claim is asserted.

The applicable rule of conduct is Rule of Professional Conduct 1.15(b)(4)&(5), which requires a lawyer to:

> * Promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer that such person is entitled to receive; and

* Not disburse funds or use the property of a client or third party without their consent or convert funds or property of a client or third party, except as directed by a tribunal.

Comment 4 to Professional Conduct Rule 1.15 provides more specificity:

* There exists no obligation to protect funds on behalf of the client's general creditors who have no valid claim to an interest in the specific funds in the lawyer's possession.

* But if funds are claimed by the lawyer's client and a third person, such as a previous attorney asserting a lien, the funds must be protected.

* You cannot release the funds to the client even upon demand by the client, and accordingly may refuse to surrender the property to the client. For example, if a lawyer has actual knowledge of a third party's lawful claim to an interest in the specific funds held on behalf of a client, such as a healthcare provider lien. workers' compensation, an attorneys' lien, a valid assignment executed by the client, past-due child support, or a lien on the subject property created by a recorded deed of trust, the lawyer has a duty to hold the funds.

* The lawyer must either deliver the funds or property to the third party or, if a dispute exists, safeguard the contested property or funds until the dispute is resolved.

* And where the client has "a non-frivolous dispute" with the third party's claim, then the lawyer cannot release those funds without the agreement of all parties, and the court will have to determine who is entitled to receive the funds.

When Is a Third Party "Entitled" to Funds Held by the Lawyer?

Rule of Professional Conduct 1.15 (b)

Although Rule of Professional Conduct 1.15 (b) does not make the third party a "client" of the lawyer, the lawyer's duty with respect to funds to which the third party is entitled is the same as if the person were a client.

As Comment 4 states, a third party must have a valid claim to an interest in the specific funds held by the lawyer. Otherwise, the lawyer owes no duty to a creditor of the client and must act in the best interests of the client. The mere assertion of an unsecured claim by a creditor does not create an "interest" in the funds held by the lawyer. Therefore, claims unrelated to the subject matter of the representation, though just, are not sufficient to trigger duties to the creditor without a valid assignment or perfected lien.

All ethics opinions and legal authorities agree that an "interest" in the funds held by the lawyer include a statutory lien, a judgment lien and a court order or judgment affecting the funds. Likewise, agreements, assignments, lien protection letters or other similar documents in which the client has given a third party an interest in specific funds trigger a duty under Rules of Professional Conduct 1.15 (b)(4) and (5) even though the lawyer is not a party to such agreement or has not signed any document, if the lawyer is aware that the client has signed such a document.[1]

Before the lawyer may give a third party an assurance of payment, the lawyer should discuss the matter with the client, because it is ultimately a matter for the client to decide. If the lawyer is asked to sign a document assuring payment, the lawyer should

[1] *See, e.g.*, Virginia State Bar v. Timothy O'Connor Johnson, CL 09-2034-4 (August 11, 2009) (while Respondent did not sign the agreement, his client did, and Respondent was aware that his client had directed that his chiropractor be paid directly out of settlement proceeds administered by his lawyer). *See also* LEO 1747 and Comment 4

explain to the client the ramifications, including the lawyer's potential ethical and civil liability, and ensure that the client understands the explanation. The lawyer should then obtain the client's informed consent.[2]

The Committee understands that there will be occasions when a lawyer may not be able to determine whether a third party is entitled to funds held by the lawyer, for example, when there exists a dispute between the client and the third party over the third party's entitlement. Legal and factual issues may make the third party's claim to entitlement or the amount claimed uncertain. *Rule 1.15 (b)(4) and (5) does not require the lawyer to make that determination.* When faced with competing demands from the client and third party the lawyer must be careful not to unilaterally arbitrate the dispute by releasing the disputed funds to the client.[3] Conversely, a lawyer should not disburse the client's funds to a third party if the client has a non-frivolous dispute with the third party. When the client and a third party have a dispute over entitlement to the funds, the lawyer should hold the disputed funds in trust for a reasonable period of time or interplead the funds into court. To avoid or reduce the occurrence of such conflicts, the Committee recommends that at the outset of the representation, preferably in the engagement letter or contract, the lawyer clearly explain that medical liens will be protected and paid out of the settlement proceeds or recovery.

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[2]ABA Standing Comm. on Ethics and Professional Responsibility, Informal Op. 1295 (1974).

[3] Virginia State Bar v. Timothy O'Connor Johnson, supra (lawyer acted unethically by making unilateral decision to disburse to client's chiropractor less than the full amount of the lien); LEO 1747.

Does Professional Conduct Rule 1.15(b) Require that the Lawyer Have Actual Knowledge of a Third Party's Interest in Funds Held by the Lawyer?

Rules of Professional conduct 1.15(b)(4) and (5) and Comment 4 appear to require that a lawyer have "actual knowledge" of a third party's interest in funds held by the lawyer. Comment 4 states in pertinent part:

> ….additionally, a lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. For example, if a lawyer has **actual knowledge** of a third party's **lawful** claim to an interest in the specific funds held on behalf of a client, then by virtue of a statutory lien (e.g., medical, workers' compensation, attorney's lien, a valid assignment executed by the client, or a lien on the subject property created by a deed of trust), the lawyer has a duty to secure the funds claimed by the third party.

Where the attorney is aware the client has received treatment through Medicaid or Medicare, the attorney must contact and communicate with the government and secure a final lien notice before disbursing the settlement to the client.[4]

Hypothetical One – Duty to Investigate a Potential Lien

A client retains a lawyer to pursue a claim for personal injuries. The client advises the lawyer that at least some of his medical bills were paid by an employer-sponsored health plan ("the Plan").[5] The lawyer is aware that Virginia has an anti-subrogation statute that bars health

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[4] A written notice of lien is not required if the lawyer is on notice that the client's medical care was provided or paid for by the Commonwealth of Virginia (Medicaid). Va. Code §8.01-66.5(A). Medicare liens do not require notice and there is no statute of limitations. See 42 U.S.C. §§ 1395y(b)(1) & (2), 2651-2653.

[5] Most employer-sponsored health care Plans are governed by the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U. S. C. §1001 *et seq.*

insurers from asserting subrogation rights. Va. Code § 38.2-3405. The lawyer is also aware that some health plans are self-funded ERISA plans that may preempt state law.[6] The lawyer does not know if the client's Plan is self-funded and even if it is self-funded, the lawyer does not know if the Plan provides for reimbursement rights. The lawyer does not know if the Plan's administrator is aware of the client's personal injury claim.

Do the Rules of Professional Conduct permit the lawyer to disburse the settlement proceeds to the client without investigating whether the Plan is entitled to assert a claim against the client's settlement?

Under the circumstances presented in Hypothetical 1, the Committee believes that the answer is a qualified "yes." The facts presented in the instant hypothetical are quite different from those in the cited authorities requiring the lawyer to protect a third party's claim to the funds being administered by the lawyer. A lien or claim has not been asserted and the lawyer has insufficient information to know whether a valid lien or claim even exists. Here, the lawyer would have to affirmatively investigate both the facts and the law to determine whether the Plan has a lien on or entitlement to a portion of the funds held by the lawyer. In so doing, it is likely that the lawyer would have to communicate with the Plan to determine if the Plan is exempt from Virginia's anti-subrogation statute. The lawyer would also have to find out if the Plan has a right of reimbursement and, if so, the amount to which the Plan claims to be entitled. By having these communications with the Plan the lawyer would be disclosing to the Plan's agents that a Plan beneficiary is seeking a recovery or settlement

[6] The pivotal issue is whether the client has received medical care paid under an insured Plan—in which case the Plan may be subject to the anti-subrogation statute, or a self-funded Plan—in which case the ERISA laws may preempt state law and the anti-subrogation statute may not apply. If the Plan is self-funded, the terms of the Plan documents control the extent of its claimed right of subrogation or reimbursement. If the Plan is not self-funded, the Virginia anti-subrogation statute bars subrogation in contracts of health insurance.

against a third party. Communication with the Plan could remind or encourage the Plan to perfect a lien or claim to the client's settlement of which the Plan was not aware. Depending on the circumstances, such a disclosure could be detrimental to the client and contrary to the client's interests. Rule 1.6(a) prohibits a lawyer from disclosing information that the client has requested not be disclosed "or the disclosure of which would be likely to be detrimental to the client, unless the client consents after consultation. . . ."

A lawyer faced with the circumstances presented in Hypothetical 1 must first consult with the client about whether to have communications with the Plan, explaining to the client both the risks and benefits of having such communication and obtain the client's informed consent to affirmatively investigate the Plan's possible claim to an interest in the client's settlement.

While a lawyer may not knowingly disregard a lien or third-party claim that has been properly asserted against the settlement funds, the question raised in this hypothetical is whether the lawyer has an ethical duty, without authorization from the client, to actively investigate a third party's potential claim against the settlement funds. The Committee believes that, under the circumstances presented in the first hypothetical involving ERISA Plan claims, the Rules of Professional Conduct do not impose such a duty on the lawyer unless the client has authorized further communication with the Plan and further investigation of the Plan's unasserted right of reimbursement.

Hypothetical Two – Reasonable Effort to Determine Validity of Claim

Assume now that the Plan administrator has sent to the lawyer a letter asserting subrogation rights. The lawyer has responded in writing requesting documents to determine whether the Plan has a meritorious claim to portions of the settlement

funds. Specifically, the lawyer has requested documentation that the Plan is self-funded and documentation that the Plan has a right of reimbursement. The lawyer has requested the documentation in thirty days. After waiting thirty days with no response, the lawyer sends a second request to the health Plan administrator notifying the Plan administrator that if the requested documents are not received in fifteen days the lawyer will disburse the settlement without preserving any funds to reimburse the Plan.

If the Plan administrator does not respond to the lawyer's second request within fifteen days, do the Rules of Professional Conduct permit the lawyer to disburse the settlement funds to the client without preserving any funds to reimburse the health Plan?

The Rules of Professional Conduct are rules of reason. A lawyer cannot be reasonably expected to hold or preserve funds indefinitely on the possibility that the Plan might at some point in the future demonstrate its entitlement to the funds it claims. Most opinions hold that the lawyer may not sit on the funds for a prolonged period of time because of the lawyer's obligation to act diligently under Rule 1.3 and Rule 1.15(b)(4)'s requirement that the lawyer "promptly pay or deliver" funds to the client or third party.

In this hypothetical, the lawyer has exercised reasonable diligence to determine whether the Plan has a valid subrogation claim or lien but the Plan has not responded to the lawyer's inquiries. The lawyer still does not know whether the Plan has a valid claim or lien. Under the circumstances presented in hypothetical 2, the Committee believes that the lawyer has acted reasonably and in good faith to determine if the Plan has a claim to or interest in the funds in the lawyer's custody or control and may, after consultation with the client, disburse the settlement funds to the client without holding back funds to reimburse the Plan.

Hypothetical Three – Reasonable Effort to Determine Validity and Amount of Claim

Another question is raised by a different hypothetical. Lawyer represents an 80-year old client who fell at a hospital and sustained a hip fracture. She had a Medicare Advantage (MA) Plan which paid most of the medical bills. The lawyer settled with the hospital in mediation. The lawyer sent the Plan's lawyer an email indicating that the lawyer does not believe it has subrogation rights, based on the written health Plan, which is silent on subrogation, and the relevant case law. Lawyer received a written response from the Plan's lawyer asserting subrogation rights and citing to the federal regulations. The letter did not provide the lawyer with the amount of its claim. The letter invited the lawyer to provide cases and the Plan language the lawyer was relying upon to challenge the Plan's right of subrogation. The lawyer promptly emailed a letter back to the Plan, citing cases in support of the lawyer's position and referencing the absence of a subrogation provision in the health Plan. The lawyer specifically requested the amount of the claim and any legal authority the Plan relies upon to counter the cases cited by the lawyer. A month has now passed since the lawyer replied to the health Plan and the lawyer has not received a response back from the Plan's lawyer even though the lawyer has sent at least 3 follow-up emails and left a voicemail message with the Plan's lawyer.

Under these circumstances, has the lawyer exercised reasonable diligence and good faith to determine both the validity and amount of the Plan's claim such that the Rules of Professional Conduct permit the lawyer to disburse the settlement funds to the client without preserving any funds to reimburse the health Plan?

As in hypothetical 2, the Committee believes that the lawyer has exercised reasonable diligence and good faith to determine both the validity and the amount of the Plan's claim, such that the lawyer may, after consultation with the client, disburse the settlement funds to the client without preserving any funds to reimburse the health Plan.

What IF THERE IS NO ASSIGNMENT BUT YOU ARE AWARE OF UNPAID BILLS?

A. § 8.01-66.2. Lien against person whose negligence causes injury

Whenever any person sustains personal injuries caused by the alleged negligence of another and receives treatment in any hospital, public or private, or nursing home, or receives medical attention or treatment from any physician, or receives nursing service or care from any registered nurse, or receives physical therapy treatment from any registered physical therapist in this Commonwealth, or receives medicine from a pharmacy, or receives any emergency medical services and transportation provided by an emergency medical services vehicle……

Such providers shall each have a lien on the claim of such injured person against the person, firm, or corporation whose negligence is alleged to have caused such injuries……

For the amount of a just and reasonable charge for the service rendered

But not exceeding:

$ 2,500 in the case of a hospital or nursing home,

$ 750 for each physician, nurse, physical therapist, or pharmacy, and

$ 200 for each emergency medical services provider or agency.

* PHYSICIAN INCLUDES CHIROPRACTOR
* ALSO APPLIES TO WRONGFUL DEATH CASES

B. Virginia Code § 8.01-66.3

The healthcare provider lien is secondary to the attorney's lien for fees and costs.

C. Virginia Code § 8.01-66.5

WRITTEN NOTICE IS REQUIRED TO CREATE HEALTHCARE PROVIDER LIEN

: The writing should include a description of services provided and the amount claimed;

: Must include the name of the provider;

: Must include the name of the injured person.

* There is some uncertainty about exact language required to create a lien due to the somewhat vague language in the statute.

The notice must be provided to the injured person or the attorney unless the plaintiff or his/her attorney knew that medical bills were paid by Medicaid or another program funded by the Commonwealth of Virginia or by Medicare.

D. Virginia Code § 8.01-66.6

The Insurance company **or attorney** receiving the notice of lien is personally liable to the provider for the amount of the lien, up to the maximum limits set forth in Code § 8.01-66.2 (unless the lienholder is a state run facility).

E. Virginia Code § 8.01-66.7

The plaintiff may challenge the reasonableness of the charges in a lien by petition, with 5 days notice to the provider. The provider may also file a petition if the plaintiff challenges the reasonableness of the charges.