

Virginia Lawyer Register

The Official Publication of the Virginia State Bar

www.vsb.org

Vol. 59/No. 2 | August/September 2010

In this issue:

2 Disciplinary Proceedings

3 Disciplinary Summaries

- Circuit Courts
- Disciplinary Board

5 Disciplinary Summaries

- District Committees

6 October Council Proposals —

Public Comment Requested

- Rules of Court Paragraph 13
Regulation of Multijurisdictional Practice
- Rules of Court Paragraph 17
*Council Oversight and
MCLE Board Quorum*
- Code of Virginia
*Unauthorized Practice of Law —
Statute of Limitation, Civil Remedy,
and Restitution*

7 Other Proposals for Public Comment

- Legal Ethics Opinion 1802
*Advising Clients on the Use of Lawful
Undisclosed Recording*

8 Notices to Members

- MCLE Postpones Limitation on
Prerecorded Programs
- VSB Ethics Hotline Now Accepts
Questions by E-mail
- Nominations Sought for VSB
Disciplinary Board, MCLE Board, and
Council Members at Large
- MCLE Administrative Suspensions

DISCIPLINARY PROCEEDINGS

Respondent's Name	Address of Record	Action	Effective Date	page
Circuit Courts				
Thomas Michael Blanks Jr.	Richmond, VA	Public Reprimand w/Terms	February 10, 2010	3
Hugh Fairley O'Donnell	Norton, VA	Dismissal for Exceptional Circumstances	April 9, 2010	3
David Loren Shurtz	Arlington, VA	Suspension — 18 months	June 25, 2010	3
Disciplinary Board				
Spiros S. Anthony	Arlington, VA	Revocation	June 28, 2010	3
Robert Britton Armstrong	Lexington, VA	Suspension — 30 days	June 25, 2010	3
Richard Johan Conrod Sr.	Virginia Beach, VA	Admonition w/Terms	May 27, 2010	3
Jon Ian Davey	Danville, VA	Suspension — 60 days	April 23, 2010	3
Anthony Gerome Davis	Birmingham, AL	Suspension — 4 years	October 19, 2009	4
Christopher Scott Dillon	Richmond, VA	Revocation	June 22, 2010	4
Robert Edley Jr.	Richmond, VA	Revocation	June 16, 2010	4
Diane Baily Fenton	Virginia Beach, VA	Suspension w/Terms — 60 days	April 30, 2010	4
Crystal Anita Gist Fisher	Waldorf, MD	Revocation	May 18, 2010	4
Joseph Marshall Garrett	Danville, VA	Public Reprimand w/Terms	May 12, 2010	4
Michael Mitry Hadeed Jr.	Alexandria, VA	Summary Suspension	May 27, 2010	4
Dean Spiro Kalivas	Seattle, WA	Revocation	June 15, 2010	4
Jay Lawrence Pickus	Richmond, VA	Suspension — 4 years	February 19, 2010	4
Kimberly Loyd Scott	Virginia Beach, VA	2 Public Reprimands w/Terms	May 17, 2010	4
John Lester Squires III	Richmond, VA	Suspension — 9 months	April 23, 2010	5
William David Timberlake	Virginia Beach, VA	Revocation	June 22, 2010	5
Paul Granville Watson IV	Eastville, VA	Suspension — 60 days	May 21, 2010	5
District Committees				
Stephen Alan Bamberger	Dumfries, VA	Public Reprimand	April 30, 2010	5
James Pearce Brice Jr.	Virginia Beach, VA	Public Reprimand w/Terms	April 20, 2010	5
Larry Cecil Brown Jr.	Alexandria, VA	Public Admonition	April 30, 2010	5
David Glenn Hubbard	Vienna, VA	Public Reprimand	April 26, 2010	5
John Edward Jessee	Abingdon, VA	Public Reprimand w/Terms	April 26, 2010	5
Vaughan Christopher Jones	Richmond, VA	Public Reprimand w/Terms	June 3, 2010	5
Ruth Arleathia Norrell	Richmond, VA	Public Dismissal De Minimis	April 20, 2010	6
Jan C. Smith	Montross, VA	Public Reprimand w/Terms	May 20, 2010	6
Nnika Evangeline White	Richmond, VA	Public Admonition w/Terms	May 7, 2010	6
Impairment Suspension				
James Berkley Priest	South Boston, VA		June 21, 2010	n/a
Suspension — Failure to Pay Disciplinary Costs				
Jeffrey Frederick Bradley	Erie, PA		June 17, 2008	
Stacy F. Garrett III	Midlothian, VA		April 19, 2010	
Anne Marston Lynch	Portsmouth, VA		June 28, 2010	
Anne Marie Miller	Roanoke, VA		May 17, 2010	
Peter Campbell Sackett	Lynchburg, VA		June 17, 2010	
Suspension — Failure to Comply with Subpoena				
Barbara Lyn Brackett	Vienna, VA		May 12, 2010	
Neville Paul Crenshaw	Chantilly, VA		May 12, 2010	
Michael Raymond Thames	Arlington, VA		June 21, 2010	
Karen Patricia Woolley	Southern Pines, NC		June 9, 2010	
David Redd Young Jr.	Leesburg, VA		June 9, 2010	

Virginia Lawyer Register

The Official Publication of the Virginia State Bar

Editor: Rodney A. Coggin
Assistant Editor: Dawn Chase
Design & Production: Madonna G. Dersch

The Virginia State Bar publishes the *Virginia Lawyer Register* five times annually. The *Register* is primarily a compilation of disciplinary actions against attorneys licensed to practice law in the commonwealth; administrative suspensions; legal ethics opinions; and proposed amendments to the Rules of the Supreme Court of Virginia. All documents submitted

to the state bar for inclusion in the *Register* are subject to alteration as to typography and formatting, in order to conform to the requirements of the *Register*, without changing the intent of any document.

Virginia Lawyer (USPS 660-120, ISSN 0899-9473) is published ten times a year in alternating formats by the Virginia State Bar, Eighth & Main Building, 707 East Main Street, Suite 1500, Richmond, Virginia 23219-2800; telephone (804) 775-0500. Subscription Rates: \$18.00 per year for nonmembers. This material is presented with the understanding that the publisher and the authors do not render any legal, accounting, or other professional service. It is intended for use by attorneys licensed to practice law in Virginia. Because of the rapidly changing nature of the law, information contained in this publication may become outdated. As a

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POSTMASTER:
 Send address changes to
 Virginia State Bar Membership Department
 Eighth & Main Building
 707 East Main Street, Suite 1500
 Richmond, Virginia 23219-2800

The following are summaries of disciplinary actions for violations of the Virginia Rules of Professional Conduct (RPC) (Rules of the Supreme Court of Virginia, Part 6, § II, eff. Jan. 1, 2000) or another of the Supreme Court rules (Rules). References to Rules Part 6, Section IV Paragraph 13 are assumed to be the reformatted rules effective May 1, 2009, unless otherwise indicated.

Copies of complete disciplinary orders are available at the Web link provided with each summary or by contacting the Virginia State Bar Clerk's Office at (804) 775-0539 or clerk@vsb.org. VSB docket numbers are provided.

CIRCUIT COURTS

THOMAS MICHAEL BLANKS JR.

Richmond, Virginia
08-032-07321

On February 10, 2010, a three-judge court of the Circuit Court of the City of Richmond issued a public reprimand with terms to Thomas Michael Blanks Jr. for violating disciplinary rules that govern safekeeping property, responsibilities regarding nonlawyer assistants, and misconduct that reflects adversely on the lawyer's honesty, trustworthiness, or fitness to practice. Mr. Blanks acknowledged that he failed to preserve escrow funds of clients and failed to maintain escrow accounts as required by the Rules of Professional Conduct. This was an agreed disposition of misconduct charges. RPC 1.15(a)(1), (2), (c)(1-4), (e)(1)(i-v), (e)(2)(i-iii), (f)(2), (3), (4)(i), (ii), (5)(i-iii), (6); 5.3(a), (b), (c)(1), (2); 8.4(a), (b)

<http://www.vsb.org/docs/Blanks-022310.pdf>

HUGH FAIRLEY O'DONNELL

Norton, Virginia
07-102-2580

On April 9, 2010, a three-judge panel of the Wise County Circuit Court issued a dismissal for exceptional circumstances to Hugh Fairley O'Donnell. The court found he had violated disciplinary rules that govern scope of representation and communication, but there existed exceptional circumstances that mitigated against further proceedings. RPC 1.2(a); 1.4(b)

http://www.vsb.org/docs/ODonnell_04-16-10.pdf

DAVID LOREN SHURTZ

Arlington, Virginia
07-041-1154

On May 27, 2010, a three-judge court in Arlington County Circuit Court suspended David Loren Shurtz's license to practice law for eighteen months, effective June 25, 2010. Mr. Shurtz violated disciplinary rules that govern communication, conflict of interest: prohibited transactions, and misconduct that reflects adversely on a lawyer's honesty, trustworthiness, or fitness to practice. The violations occurred during his representation of a client in a personal injury case. The suspension originally was imposed on March 26, 2009, but was stayed by the Supreme Court of Virginia when Mr. Shurtz appealed. The Court denied his petition for rehearing on April 22, 2010. RPC 1.4(b), (c); 1.8(e)(1), (2); 8.4(b), (c)

http://www.vsb.org/docs/Shurtz_05-14-09.pdf

<http://www.vsb.org/docs/Shurtz-062510.pdf>

DISCIPLINARY BOARD

SPIROS S. ANTHONY

Arlington, Virginia
10-000-083868

On June 28, 2010, the Virginia State Bar Disciplinary Board revoked Spiros S. Anthony's license to practice law. In consenting to the revocation, Mr. Anthony acknowledged that in 2001 he pled guilty to felony embezzlement in the Loudoun County Circuit Court. Mr. Anthony's license was summarily suspended on May 27, 2010. Rules Part 6, § IV, ¶ 13-28

<http://www.vsb.org/docs/Anthony-070110.pdf>

ROBERT BRITTON ARMSTRONG

Lexington, Virginia
09-080-078374, 09-080-077694

Effective June 25, 2010, the Virginia State Bar Disciplinary Board suspended Robert Britton Armstrong's license to practice law for thirty days for violating the professional rule that governs misconduct that reflects adversely on the lawyer's honesty, trustworthiness, or fitness to practice. Mr. Armstrong acknowledged that he was recorded making a sexual advance toward a client who was in jail. He pled no contest to misdemeanor sexual assault in a criminal prosecution of the case. This was an agreed disposition of the disciplinary charges. RPC 8.4(b)

<http://www.vsb.org/docs/Armstrong-062410.pdf>

RICHARD JOHAN CONROD SR.

Virginia Beach, Virginia
06-021-2496

On November 11, 2009, the Virginia State Bar Disciplinary Board imposed a public admonition with terms on Richard Johan Conrod Sr. for violating disciplinary rules that govern safekeeping property. The matter involved his failure to reconcile his real estate trust account as required. The board heard the matter on appeal of a VSB Second District Committee decision. The board dismissed one of the committee's findings of misconduct, but upheld two others and the sanction imposed. Mr. Conrod appealed the board's decision to the Supreme Court of Virginia, which dismissed the appeal on May 27, 2010. RPC 1.15(e)(1), (f)(5)

<http://www.vsb.org/docs/Conrod-112009.pdf>

JON IAN DAVEY

Danville, Virginia
09-090-079865, 09-090-079790

On April 23, 2010, the Virginia State Bar Disciplinary Board suspended Jon Ian Davey's license to practice law for sixty days for violating professional rules that govern diligence and communication. Mr. Davey failed to perfect appeals to the Virginia Court of Appeals in three criminal cases and failed to appear for oral arguments in two other cases. RPC 1.3(a); 1.4(a)

<http://www.vsb.org/docs/Davey-052110.pdf>

DISCIPLINARY SUMMARIES

ANTHONY GEROME DAVIS

Birmingham, Alabama

10-000-083444

On June 10, 2010, the Virginia State Bar suspended Anthony Gerome Davis's license to practice law for four years, effective October 19, 2009. Mr. Davis did not comply with the board's order to refund money and pay expenses of a complainant in a previous disciplinary case. Mr. Davis received an eight-month suspension in that matter and has been ineligible to practice law since October 19, 2009. Rules Part 6, §IV, ¶ 13–18(O)

<http://www.vsb.org/docs/Davis-070110.pdf>

CHRISTOPHER SCOTT DILLON

Richmond, Virginia

10-032-083489

On June 22, 2010, the Virginia State Bar Disciplinary Board revoked Christopher Scott Dillon's license to practice law. In consenting to the revocation, Mr. Dillon acknowledged the material facts of a pending disciplinary complaint and that he violated the professional rule that governs safekeeping client property. Rules Part 6, § IV, ¶ 13–28

<http://www.vsb.org/docs/Dillon-072210.pdf>

ROBERT EDLEY JR.

Richmond, Virginia

09-033-076276, 09-033-076344, 09-033-076751, 09-033-077278

On June 16, 2010, the Virginia State Bar Disciplinary Board revoked Robert Edley Jr.'s license to practice law. In consenting to the revocation, Mr. Edley acknowledged the material facts of four pending disciplinary cases and that he could not successfully defend against the charges. Rules Part 6, § IV, ¶ 13–28

<http://www.vsb.org/docs/Edley-061710.pdf>

DIANE BAILEY FENTON

Virginia Beach, Virginia

09-022-078407

On April 23, 2010, the Virginia State Bar Disciplinary Board suspended Diane Bailey Fenton's license to practice law for sixty days, effective April 30, 2010, and imposed terms, for violating professional rules that govern diligence and declining or terminating representation. Ms. Fenton stipulated that, during her representation in a child support matter, she failed to respond in a timely fashion to requests for discovery and to other communications. RPC 1.3(a); 1.16(a)(3)

<http://www.vsb.org/docs/Fenton-051210.pdf>

CRYSTAL ANITA GIST FISHER

Waldorf, Maryland

08-042-074643, 09-042-079863, 09-042-077378

On May 18, 2010, the Virginia State Bar Disciplinary Board revoked Crystal Anita Gist Fisher's license to practice law. In consenting to the revocation, Ms. Fisher acknowledged the material facts of pending disciplinary charges and that she could not successfully defend herself against the charges. Rules Part 6, § IV, ¶ 13–28

<http://www.vsb.org/docs/Fisher-052110.pdf>

JOSEPH MARSHALL GARRETT

Danville, Virginia

09-090-079759, 10-090-080731

On May 12, 2010, the Virginia State Bar Disciplinary Board issued a public reprimand with terms to Joseph Marshall Garrett for violating professional rules that govern safekeeping property and responsibilities regarding nonlawyer assistants. In two cases, which occurred after Mr. Garrett's bookkeeper became disabled, Mr. Garrett failed to account for client fees as the rules require. This was an agreed disposition of misconduct charges. RPC 1.15(a)(1), (2), (c)(3), (e)(1)(i–v), (f)(2), (3), (4)(i), (ii), (5)(i–iii), (6); (7); 5.3(a), (b), (c)(1), (2)

<http://www.vsb.org/docs/Garrett-051310.pdf>

MICHAEL MITRY HADEED JR.

Alexandria, Virginia

10-000-077606

On May 27, 2010, the Virginia State Bar Disciplinary Board summarily suspended Michael Mitry Hadeed Jr.'s license to practice law based on his 2009 conviction in the U.S. District Court for the Eastern District of Virginia, Alexandria Division, of conspiracy to commit immigration fraud and other charges. The board ordered him to appear June 25, 2010, to show cause why his license should not be further suspended or revoked. On June 16, 2010, the board continued the case to August 27, 2010. Rules Part 6, §IV, ¶ 13–22 A.

DEAN SPIRO KALIVAS

Seattle, Washington

06-053-3184

Effective June 15, 2010, the Virginia State Bar Disciplinary Board revoked Dean Spiro Kalivas's license to practice law. The board found he had failed to comply with professional rules that govern fees, safekeeping property, unauthorized practice of law, firm names and letterheads, and misconduct that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice. The misconduct included trust account violations. This was an agreed disposition of disciplinary charges. RPC 1.5(c); 1.15(a)(1), (2); 5.5(a)(1); 7.5(a); 8.4(b)

<http://www.vsb.org/docs/Kalivas-062510.pdf>

JAY LAWRENCE PICKUS

Richmond, Virginia

09-033-076639

On February 19, 2010, the Virginia State Bar Disciplinary Board suspended Jay Lawrence Pickus's license to practice law for four years for violating professional rules that govern diligence, communication, fees, and safekeeping property. The misconduct occurred in Mr. Pickus's representation in a federal lawsuit and included failure to maintain his client's accounts as required by the Rules of Professional Conduct. RPC 1.3(a); 1.4(a–c); 1.5(b); 1.15(a)(2), (c)(3), (e)(1)(i–iv), (f)(2), (3), (4)(i), (ii), (5)(i–iii), (6)

http://www.vsb.org/docs/Pickus_04-23-10.pdf

KIMBERLY LOYD SCOTT

Virginia Beach

10-000-082142

On May 17, 2010, the Virginia State Bar Disciplinary Board issued a public reprimand with terms to Kimberly Loyd Scott for violating the Virginia Consumer Real Estate Settlement Protection Act and fined her \$6,000. This is an agreed disposition of the CRESPA charges. Virginia Code 6.1-2.21.C.D.(1–3); 6.1-2.23.A(1), (2),B(1), (2); 15 VAC 5-80-30; 15 VAC 5-80-50(1), (2), (3)B

<http://www.vsb.org/docs/Scott-051910-CRESPA.pdf>

DISCIPLINARY SUMMARIES

09-021-076863, 09-021-078757

On May 17, 2010, the Virginia State Bar Disciplinary Board issued a public reprimand with terms to Kimberly Loyd Scott for violating professional rules that govern competence, diligence, safekeeping property, and misconduct that reflects adversely on a lawyer's fitness to practice. The misconduct occurred in two real estate closings. This was an agreed disposition of disciplinary charges. RPC 1.1; 1.3(a-c); 1.15(c)(4); 8.4(c)

<http://www.vsb.org/docs/Scott-051910.pdf>

JOHN LESTER SQUIRES III

Richmond, Virginia

09-031-076263, 09-031-076442

On April 23, 2010, the Virginia State Bar Disciplinary Board suspended John Lester Squires III's license to practice law for nine months for violating disciplinary rules that govern diligence, communication, fees, safekeeping property, declining or terminating representation, and misconduct that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice. Mr. Squires stipulated that he abandoned his practice and did not protect the interests of his clients in two cases. RPC 1.3(a), (b); 1.4(a); 1.5(b); 1.15(c)(4); 1.16(d); 8.4(b)

<http://www.vsb.org/docs/Squires-052110.pdf>

WILLIAM DAVID TIMBERLAKE

Virginia Beach, Virginia

10-000-083869

On June 22, 2010, the Virginia State Bar Disciplinary Board revoked William David Timberlake's license to practice law. In consenting to the revocation, Mr. Timberlake acknowledged the material facts of pending disciplinary charges and that he could not successfully defend against the charges. The board summarily suspended Mr. Timberlake's license on May 27, 2010, after he pled guilty to a felony in the United States District Court. Rules Part 6, § IV, ¶ 13-28

<http://www.vsb.org/docs/Timberlake-062310.pdf>

PAUL GRANVILLE WATSON IV

Eastville, Virginia

09-022-077938

On May 21, 2010, the Virginia State Bar Disciplinary Board suspended Paul Granville Watson IV's license to practice law for sixty days for violating disciplinary rules that govern diligence, communication, and failing to respond to a lawful demand from a disciplinary authority. The misconduct occurred in a court-appointed criminal appeal. RPC 1.3(a); 1.4(a); 8.1(c)

<http://www.vsb.org/docs/Watson-052110.pdf>

DISTRICT COMMITTEES

STEPHEN ALAN BAMBERGER

Dumfries, Virginia

08-052-074046

On April 30, 2010, a Virginia State Bar Fifth District-Section II Subcommittee issued a public reprimand to Stephen Alan Bamberger for violating professional rules that govern competence, diligence, communication, safekeeping property, and declining or terminating representation. The misconduct occurred in his representation of the executor of an estate. This was an agreed disposition of misconduct charges. RPC 1.1; 1.3(a); 1.4(a), (b); 1.15(c)(4); 1.16(d), (e)

<http://www.vsb.org/docs/Bamberger-043010.pdf>

JAMES PEARCE BRICE JR.

Virginia Beach, Virginia

09-022-076815

On April 20, 2010, a Virginia State Bar Second District Subcommittee issued a public reprimand with terms to James Pearce Brice Jr. for violating professional rules that govern fees and declining or terminating representation. This was an agreed disposition of misconduct charges. RPC 1.5(a)(1-8); 1.6(a)(3)

http://www.vsb.org/docs/Brice_04-27-10.pdf

LARRY CECIL BROWN JR.

Alexandria, Virginia

07-053-1194

On April 30, 2010, a Virginia State Bar Fifth District-Section III Subcommittee issued a public admonition to Larry Cecil Brown Jr. for violating professional rules that govern communication, safekeeping property, and declining or terminating representation. The misconduct occurred in Mr. Brown's employment to appeal a murder conviction in Maryland. This was an agreed disposition of misconduct charges. RPC 1.4(b); 1.15(a)(2); 1.16(d)

<http://www.vsb.org/docs/Brown-043010.pdf>

DAVID GLENN HUBBARD

Vienna, Virginia

07-032-1466, 07-032-062224

On April 26, 2010, a Virginia State Bar Third District-Section II Subcommittee issued a public reprimand to David Glenn Hubbard for violating disciplinary rules that govern diligence, communication, declining or terminating representation, and failing to respond to a lawful demand for information from a disciplinary authority. The misconduct occurred in two criminal representations and the ensuing bar investigations. This was an agreed disposition of misconduct charges. RPC 1.3(a); 1.4(a); 1.16(c); 8.1(c)

http://www.vsb.org/docs/Hubbard_04-29-10.pdf

JOHN EDWARD JESSEE

Abingdon, Virginia

09-102-079600

On April 26, 2010, a Virginia State Bar Tenth District-Section II Subcommittee issued a public reprimand with terms to John Edward Jessee for violating disciplinary rules that govern safekeeping property and responsibilities regarding nonlawyer assistants. Mr. Jessee failed to manage and reconcile a real estate escrow account from which a bookkeeper for his law firm embezzled funds. This was an agreed disposition of misconduct charges. RPC 1.15(a), (e)(1)(i-v), (f)(2), (4)(i), (ii), (5)(i-iii), (6); 5.3(a), (b), (c)(1), (2)

http://www.vsb.org/docs/Jessee_04-26-10.pdf

VAUGHAN CHRISTOPHER JONES

Richmond, Virginia

10-033-082001

On June 3, 2010, the Virginia State Bar Third District Committee imposed a public reprimand with terms on Vaughan Christopher Jones for violating disciplinary rules that govern diligence, declining or terminating representation, and failing to respond to a lawful demand for information from a disciplinary authority. The misconduct occurred in his withdrawal from a criminal defense representation. RPC 1.3(a); 1.16(c); 8.1(c)

<http://www.vsb.org/docs/Jones-061710.pdf>

RUTH ARLEATHIA NORRELL

Richmond, Virginia

08-032-072392

On April 20, 2010, a Virginia State Bar Third District-Section II Subcommittee issued a public dismissal de minimis to Ruth Arleathia Norrell for violating a disciplinary rule that governs unauthorized practice of law. The committee determined she held herself out as a practicing lawyer while she was an associate member of the Virginia bar. RPC 5.5(a)(1) (in effect during the 2007 facts of the case)

<http://www.vsb.org/docs/Norrell-042010.pdf>

JAN C. SMITH

Montross, Virginia

09-060-076463

On May 20, 2010, a Virginia State Bar Sixth District Subcommittee imposed a public reprimand with terms on Jan C. Smith for violating disciplinary rules that govern competence, diligence, communication, and failure to respond to a lawful demand for information from a disciplinary authority. This was an agreed disposition of disciplinary charges. RPC 1.1; 1.3(a); 1.4(a-c); 8.1(c)

<http://www.vsb.org/docs/Smith-062510.pdf>

NNIKA EVANGELINE WHITE

Richmond, Virginia

09-031-076943, 09-031-078618

On May 7, 2010, a Virginia State Bar Third District-Section I Subcommittee issued a public admonition to Nnika Evangeline White for violating professional rules that govern diligence, communication, and failing to respond to a lawful demand for information from a disciplinary authority. The misconduct occurred in her representations in a bankruptcy and a divorce. This was an agreed disposition of disciplinary charges. RPC 1.3(a); 1.4(a); 8.1(c)

<http://www.vsb.org/docs/White-051410.pdf>

Multijurisdictional practice is now authorized in Virginia pursuant to several provisions of the Rules of Court. As a result, a lawyer not admitted in Virginia is subject to the disciplinary authority of Virginia if he or she provides, holds himself or herself out as providing, or offers to provide legal services in Virginia. (See, for example, Rule 8.5(a), Rules of Professional Conduct.)

The proposed changes provide the bar with needed procedural authority to implement these rules and apply its disciplinary authority to multijurisdictional respondents.

The proposed changes also incorporate in Paragraph 13 certain requirements for persons serving as members of a district committee, the Disciplinary Board, and COLD. These requirements are also found in the Bylaws of the Virginia State Bar.

Details: http://www.vsb.org/docs/prop-para13_7-27-10.pdf

OCTOBER COUNCIL PROPOSAL:

**PROPOSED AMENDMENTS TO
RULES OF THE SUPREME COURT OF VIRGINIA
PART 6, § IV, ¶ 17
MANDATORY CONTINUING LEGAL EDUCATION RULE
*PROPOSAL TO ESTABLISH COUNCIL OVERSIGHT AND
INCREASE MCLE BOARD QUORUM***

Deadline for comment: September 15, 2010

The Task Force on Paragraph 17, chaired by former Virginia State Bar president Howard W. Martin Jr., recommendeds changes that would give the VSB Council authority to reject regulations or amendments to regulations adopted by the Mandatory Continuing Legal Education (MCLE) Board on or after July 1, 2010. The proposed Paragraph 17 amendments also would increase the number of MCLE Board members required to pass a proposed new rule or amendment.

Paragraph 17 sets forth the requirement that Virginia lawyers must attend twelve hours of approved continuing legal education each year. It also establishes the regulatory framework by which the MCLE Board carries out its functions as delegated to it by the Supreme Court of Virginia.

Under current procedures, the MCLE Board presents proposed regulatory changes to the council for comment only. The MCLE Board has authority to adopt or amend regulations without formal approval by the council, which represents Virginia's more than twenty-nine thousand active lawyers. The MCLE Board has twelve members, but under the current rule new MCLE regulations or amendments could be adopted by a majority of a quorum of five members of the twelve-person board, although this has never been known to occur.

The proposed changes would require the MCLE Board (1) to approve new regulations or amendments by a majority of the full twelve-person membership, (2) to bring proposed amendments or new regulations to the council for advice and comment prior to being adopted by the MCLE Board, and (3) to permit the council to reject regulations or amendments by a two-thirds vote of those members of council present and voting, once such regulations or amendments were adopted by the MCLE Board.

Specifically, the task force recommends that the following changes to Paragraph 17(B):

- (2) Notice of Meetings/Quorum:

The board shall meet on reasonable notice by the Chair, Vice chair or the Executive Director. Five members shall constitute a quorum and the action of a majority of a quorum shall constitute action of the Board; however, new regulations or amendments shall be approved by a majority of the full membership of the Board.

OCTOBER COUNCIL PROPOSALS – PUBLIC COMMENT REQUESTED

The following proposals are published for public comment and will be considered at the Virginia State Bar Council meeting on October 15, 2010. Comments should be submitted in writing to Karen A. Gould, Executive Director, Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, VA 23219, no later than end of business on the day of deadline.

OCTOBER COUNCIL PROPOSAL:

**PROPOSED AMENDMENTS TO
RULES OF THE SUPREME COURT OF VIRGINIA
PART 6, § IV, ¶ 13
PROCEDURE FOR DISCIPLINING, SUSPENDING,
AND DISBARRING ATTORNEYS**

REGULATION OF MULTIJURISDICTIONAL PRACTICE

Deadline for comment: September 15, 2010

On June 2, 2010, the Virginia State Bar Standing Committee on Lawyer Discipline (COLD) approved the proposed procedures for regulating lawyers who are not members of the Virginia State Bar, but who are authorized to conduct a limited practice here.

(3) Powers:

The Board shall have those general administrative and supervisory powers necessary to effectuate the purposes of this Rule, including the power to adopt, following the advice and comment of Council, reasonable and necessary regulations consistent with this Rule. The Council may reject any regulations or amendments to the regulations adopted by the board on or after July 1, 2010, by a 2/3 vote of those members of Council present and voting. The Virginia State Bar shall have the responsibility for funding the Board and for enforcing Mandatory Continuing Legal Education requirements.

Current rule: <http://www.vsb.org/pro-guidelines/index.php/bar-govt/mandatory-continuing-legal-education-rule/>

OCTOBER COUNCIL PROPOSAL:

PROPOSED AMENDMENTS TO CODE OF VIRGINIA

§ 19.2-8. LIMITATION OF PROSECUTIONS

§ 54.1-3904. PENALTY FOR PRACTICING WITHOUT AUTHORITY

The Standing Committee on the Unauthorized Practice of Law (UPL) seeks authority from the VSB Council to ask the General Assembly for statutory amendments that would:

- extend the statute of limitation for prosecution of UPL from one year to two years with a limit of five years from the commission of the crime;
- impose a civil penalty of up to \$5,000 per violation; and
- allow the court to order restitution.

The UPL Committee requests the authority in order to strengthen the bar's ability to prosecute violators, to provide a civil penalty for UPL, and to protect the public.

Details: <http://www.vsb.org/site/regulation/proposal-statute-extension-UPL>

OTHER PROPOSALS FOR PUBLIC COMMENT

The VSB Standing Committee on Legal Ethics requests public comment on the following proposed advisory ethics opinion. Comments should be submitted in writing to Karen A. Gould, Executive Director, Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, VA 23219, no later than end of business on the day of deadline.

PROPOSED LEGAL ETHICS OPINION 1802

*ADVISING CLIENTS ON THE USE OF
LAWFUL UNDISCLOSED RECORDING*

Deadline for comment: September 23, 2010

This proposed legal ethics opinion (LEO) generally addresses the ethical implications of a lawyer's advising clients regarding the use of undisclosed recording. The Standing Committee on Legal Ethics introduces the opinion by discussing the legality of undisclosed recording since, fundamentally, a lawyer cannot advise a client to engage in conduct that is illegal or fraudulent. Rules of Professional Conduct 1.2(c). The committee notes that federal law and more than two-thirds of the states permit "one party consent recording." Virginia falls within this two-thirds majority. See Virginia Code Section 19.2-62(B)(2). The question then presented is, "May a lawyer advise a client to engage in lawful undisclosed recording without violating Rule 8.4(c)'s prohibition of deceitful conduct?"

Prior to answering this question, the committee provides an in-depth analysis of *Gunter v. Virginia State Bar*, 238 Va. 617, and reviews its prior legal ethics opinions

regarding undisclosed recordings. The committee notes that its first ethics opinions on the subject did not impose a per se or general ban on undisclosed recording, but instead took the view that undisclosed recording violates ethical rules only when it occurs in conjunction with other unethical conduct. In *Gunter*, the Supreme Court of Virginia ruled that the lawyer engaged in conduct involving "dishonesty, fraud, and deceit" for recording telephone conversations between third persons without consent or prior knowledge of each party to the conversation. The recordings made were illegal under federal and state law.

It was after *Gunter* that the Legal Ethics Committee issued a number of opinions resulting in a blanket ban on lawyers using or even advising their clients to use one-party consent recording. Not until LEOs 1738 and 1765 did the committee carve out any ethical exceptions to this blanket prohibition. Concluding that prior opinions sweep too broadly, the committee acknowledges in LEO 1738 that three circumstances exist where such recording would be ethical: in a criminal investigation, in a housing discrimination investigation, and in situations involving threatened or actual criminal activity in which the recording lawyer was the victim. LEO 1765 carves out an additional exception for a lawyer involved in government intelligence activities using nonconsensual tape recording as well as misrepresentation of identity and purpose. The committee reiterates in LEO 1765 the admonition in *Gunter v. Virginia State Bar* "that conduct that is legal may nevertheless be unethical for a lawyer"; however, the committee further notes that "while these principles are important, they must also be balanced against the lawyer's ethical obligations to the client." The committee then examines two situations in which it believes that a lawyer may ethically advise or counsel a client to use lawful undisclosed recording to obtain information relevant to the client's legal matter.

The first example reexamines the hypothetical presented in LEO 1448, in which a father sexually abused his daughter for an extended period of time during her childhood. Since the father, in talking to the daughter, openly acknowledges the abuse, the daughter's lawyer suggests that she engage in undisclosed recording. In balancing the competing interests of Rule 1.3 (requiring the lawyer to pursue the legal objectives of his client), Rule 1.2(a) (requiring the lawyer to consult with the client as to means by which the client's objectives are to be pursued), Rule 1.2(c) (prohibiting the lawyer from counseling the client to engage or assist the client in conduct that the lawyer knows is criminal or fraudulent), and Rules 1.4(b) and (c) (requiring the lawyer to explain and give the client pertinent facts about a matter), the committee overturns LEO 1448 and opines that that the lawyer may "advise, suggest or recommend" that the daughter lawfully record her conversation with her father without disclosing that the conversation is recorded.

The second hypothetical involves an employee of a company who is being subjected to a hostile work environment, where a co-worker repeatedly makes sexually offensive remarks in the workplace. The opinion questions whether the company's in-house counsel violates Rule 8.4(c), directly or indirectly via Rule 8.4(a), by advising management of the company to have the employee wear a hidden recording device. The committee opines that, while this scenario does not fall within the limited exceptions outlined in LEOs 1738 and 1765, those opinions acknowledge that there may be other circumstances under which a lawyer may use or advise another to use lawful undisclosed recording. The committee opines that under this example, the lawyer has not violated Rule 8.4(c) directly or indirectly.

In conclusion, the Legal Ethics Committee notes that in both of the examples provided, the committee is faced with situations in which the client has asked the lawyer for his or her opinion on how to address the client's legal problem. Further, the proposed undisclosed recording in both examples is not only lawful, but it could very well be the only means by which the client can obtain relevant information. The committee believes that the circumstances presented are easily distinguishable from and stand in stark contrast to the illegal wiretapping case presented in *Gunter*.

Proposal: http://www.vsb.org/docs/Draft-LEO-1802_20100722.pdf

MCLE BOARD POSTPONES EFFECTIVE DATE OF AMENDED REGULATIONS

The Mandatory Continuing Legal Education Board has postponed until November 1, 2011, the implementation of amended regulations, including a requirement that four of the twelve hours of annual MCLE be live and interactive.

The remaining eight MCLE hours can be either prerecorded or live and interactive.

MCLE Regulations 102, Requirements and Computations, as amended, states:

- (a) ... Of the twelve credit hours required, no more than eight (8) may be earned from prerecorded courses. <http://www.vsb.org/docs/MCLE-regs-eff-110110.pdf>

The MCLE Board decided on July 21, 2010, that more time is needed so that lawyers and MCLE providers have an opportunity to clearly understand the regulations before they go into effect.

VSB ETHICS HOTLINE NOW ACCEPTS QUESTIONS BY E-MAIL

Lawyers now can use e-mail to submit their ethics questions to the Virginia State Bar Ethics Hotline by going to <http://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.

NOMINATIONS SOUGHT FOR VSB DISCIPLINARY BOARD, MCLE BOARD, AND COUNCIL MEMBERS AT LARGE

Deadline for Nominations: September 7, 2010

Virginia State Bar President Irving M. Blank has appointed a nominating committee to consider nominees for board vacancies in 2011 to be filled by the Supreme Court. The nominating committee consists of Jon D. Huddleston, chair; Brian L. Buniva; Mark B. Holland; Ray W. King; Darrel T. Mason, Jean K. Niebauer; and Edna Ruth Vincent.

Vacancies beginning on July 1, 2011, are listed below. Appointments are for the terms specified. The nominating committee's recommendations will be acted on by the Virginia State Bar Council in October 2010, and the names of the nominees will then be forwarded to the Supreme Court of Virginia for consideration.

Nominations, along with a brief résumé, should be sent to Jon D. Huddleston, Chair, VSB Nominating Committee, Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, VA 23219, or e-mailed to Valerie Breeden at breeden@vsb.org.

COUNCIL MEMBERS AT LARGE

Three vacancies (of which two incumbents are eligible for reappointment to a second term). May serve two consecutive three-year terms.

DISCIPLINARY BOARD

Five lawyer vacancies and two lay member vacancies (of which two lawyer members are eligible for reappointment to a second three-year term, one lawyer member is eligible for reappointment to a full three-year term, and two lay members are eligible for reappointment to a second three-year term). District committee service is preferred. May serve two consecutive three-year terms.

MANDATORY CONTINUING LEGAL EDUCATION BOARD

Five lawyer vacancies (of which three current members are eligible for reappointment to a second term). May serve two consecutive three-year terms.

MCLE ADMINISTRATIVE SUSPENSIONS

A list has been posted of Virginia State Bar members who have been administratively suspended for failure to comply with the Mandatory Continuing Legal Education requirements described in Part 6, Section IV, Paragraphs 17, 13.2, and 19, Rules of the Supreme Court of Virginia.

The VSB has been unable to contact some of these attorneys. The bar requests that members report the location and practice status of any person on the list of contacting the MCLE Department at (804) 775-0577 or MCLE@vsb.org. The posted list is current as of July 20, 2010.

List: <http://www.vsb.org/site/members/administrative-suspensions/>

For easier access to the documents cited in this magazine, the Virginia Lawyer Register is posted with live Internet links at http://www.vsb.org/docs/valawyer magazine/Register_2010-08.pdf.