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New Ethics Rules for the New Millennium

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NEW ETHICS RULES FOR THE NEW MILLENNIUM

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**VIRGINIA STATE BAR SPECIAL COMMITTEE TO STUDY
THE VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY**

**LIST OF
NEWLY REQUIRED, PROHIBITED,
AND PERMITTED CONDUCT**

**SUBSTANTIVE DIFFERENCES BETWEEN THE
VIRGINIA
RULES OF PROFESSIONAL CONDUCT
AND
CODE OF PROFESSIONAL RESPONSIBILITY**

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The Virginia Rules of Professional Conduct contain provisions that:

- require Virginia lawyers to take action that is not required under the Code;
- prohibit conduct that is permitted by the Code;
- permit conduct that is prohibited by the Code; and
- permit conduct that is not explicitly permitted by the Code.

The attached lists describe these four categories of substantive changes. Each change refers to the applicable Rules provision, as well as the relevant Code provision (if any).

For more detailed information, please refer to the Detailed Comparison Chart or the Rules themselves.

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**A. CONDUCT REQUIRED BY THE
VIRGINIA RULES OF PROFESSIONAL CONDUCT
BUT NOT REQUIRED BY THE CODE**

Deferring to Clients' Decisions

- Lawyers must defer to their clients' decisions about objectives, and consult with their clients about the means of pursuing those objectives (Rule 1.2(a)) (DR 6-101)

Advising of Appropriate Dispute Resolution Processes

- Lawyers must advise their clients of any dispute resolution processes that "might be appropriate" (Rule 1.2 Comment [1]; Rule 1.4 Comment [1a]) (DR 6-101)

"Informed Decisions"

- Lawyers must provide sufficient information to allow their clients to make "informed decisions" (Rule 1.4(b)) (DR 6-101(C); DR 7-101(B)(1))

Reporting Other Lawyers' Misconduct

- Lawyers must seek their clients' direction about reporting another lawyer's misconduct if it meets the required standard (Rule 1.6(c)(3)) (DR 1-103(A))

Business Transactions With Clients

- Lawyers must give their clients the opportunity to seek independent counsel and must obtain their clients' consent in writing before entering into a business transaction with them (Rule 1.8(a)) (DR 5-104(A))

Adversity to Former Clients

- Lawyers must obtain consents from both the former client and the current client before taking positions adverse to the former client if the lawyer represented the former client in the "same or a substantially related matter" or if the lawyer possesses material confidential information (Rule 1.9(a)) (DR 5-105(D))

Dealing With A Client Organization's Employees

- Lawyers who deal with employees of an organization they represent must explain their role if the organization's interests differ from the employee's interests (Rule 1.13(d))

Segregating Disputed Client Property

- Lawyers must segregate and maintain client property that is the subject of a dispute (Rule 1.15) (DR 9-102; DR 9-103)

Lawyers as Fiduciaries

- Lawyers must comply with new Rules governing their handling of clients' money as fiduciaries (Rule 1.15(d), (e)(2))

Advising Courts of "Controlling Legal Authority"

- Lawyers must advise a court of "controlling legal authority in the subject jurisdiction" (Rule 3.3(a)(3)) (EC 7-20)

Advising Tribunals of Material Facts

- Lawyers must advise tribunals of all material facts in ex parte proceedings (Rule 3.3(c))

Complying With Discovery

- Lawyers must make "reasonably diligent effort[s]" to comply with discovery requests (Rule 3.4(e)) (DR 7-102(A)(1); DR 7-102(A)(2))

Disclosure to Avoid Assisting Client Misdeeds

- Lawyers must disclose facts when "disclosure is necessary to avoid assisting a criminal or fraudulent act by a client" (Rule 4.1(b)) (DR 1-102(A)(4); DR 7-102(A)(3); DR 7-102(A)(5))

Advertisements

- Lawyers must list the full name and office address of a Virginia lawyer responsible for each advertisement (Rule 7.1(e))

Reporting Judicial Misconduct

- Lawyers must report judges' misconduct. (Rule 8.3(b))

**B. CONDUCT PROHIBITED BY THE
VIRGINIA RULES OF PROFESSIONAL CONDUCT
BUT PERMITTED BY THE CODE**

Misuse of the Rules

- Lawyers may not use the Rules as "procedural weapons," and antagonists may lack standing to seek enforcement of the Rules (Preamble)

Clients' Gifts to Lawyers

- Lawyers in a firm may not prepare an instrument giving any lawyer in the firm or any of the lawyer's immediate relatives any "substantial gift" from a client who is not a relative (Rule 1.8(c); Rule 1.10(a)) (DR 5-105(E); DR 5-104(B))

Government Lawyers' Job Negotiations

- Government lawyers may not "negotiate for private employment" with a party or lawyer involved in a matter in which they are participating personally and substantially (except for law clerks) Rule 1.11(d)

Avoiding Frivolous Positions

- Lawyers may not "bring or defend a proceeding" or "assert" or "controvert an issue" unless there is a basis for doing so that is not "frivolous" (this replaces the Code's more subjective standard) (Rule 3.1) (DR 7-102(A)(1))

Avoiding Frivolous Discovery Requests

- Lawyers may not make frivolous discovery requests (Rule 3.4(e)) (DR 7-102(A)(1); DR 7-102(A)(2))

Avoiding Disruption of Tribunals

- Lawyers may not engage in conduct "intended to disrupt a tribunal" (this is a broader restriction than the Code's prohibition on intentional or habitual violation of rules of procedure or evidence) (Rule 3.5(d)) (DR 7-105(C)(5))

Pre-Trial Communications

- Lawyers may not issue pretrial communications in a criminal matter that will have a "substantial likelihood of interfering with the fairness of the trial by a jury" (this is broader language than the Code's "clear and present danger" standard) (Rule 3.6(a)) (DR 7-106(A))
- Lawyer-prosecutors may not direct or encourage anyone to make extrajudicial statements that violate the pre-trial communications rule (Rule 3.6(a); Rule 3.8(e))

Ex Parte Communications With Represented Adversaries

- Lawyers may not communicate with a "person" the lawyer knows to be represented by another lawyer in the matter, unless the other lawyer consents (this language is broader than the Code's reference to "party") (Rule 4.2) (DR 7-103(A)(1))

Treating Third Persons With Respect

- Lawyers may not engage in activity that has no purpose other than to "embarrass, delay or burden" a third person, or obtain evidence by methods violating a third person's legal rights (Rule 4.4)

Lawyers Supervising Other Lawyers and Non-Lawyers

- Lawyers supervising other lawyers may not order or ratify their misconduct or fail to take reasonable remedial action if they know of the misconduct (Rule 5.1)
- Lawyers supervising non-lawyers may not order or knowingly ratify Rules violations or (if they have direct supervisory authority over the non-lawyers) fail to take reasonable remedial action when it would have some effect (Rule 5.3(c)) (DR 3-104(C))

Cooperation With Admissions and Disciplinary Investigations

- Lawyers may not obstruct an admissions or disciplinary authority investigation or fail to respond to a lawful demand for relevant information in such an investigation (although they may protect confidential information) (Rule 8.1(c), (d))

Lawyers' Statements About Judges

- Lawyers may not make statements about "the qualifications or integrity of a judge or other judicial official" knowing them to be false or with "reckless disregard" (Rule 8.2) (EC 8-6)

Avoiding Assistance of Judicial Misconduct

- Lawyers may not knowingly assist judges' or judicial officers' misconduct (Rule 8.4(e))

Extra-Territorial Effect of the Virginia Rules

- Lawyers may not violate the Virginia Rules when engaging in activity outside Virginia (Rule 8.5) (DR 1-102(B))

**C. CONDUCT PERMITTED BY THE
VIRGINIA RULES OF PROFESSIONAL CONDUCT
BUT PROHIBITED BY THE CODE**

Referral Fees

- Lawyers may enter into fee-splitting arrangements without assuming full responsibility for co-counsel's conduct if the client consents after full disclosure (this essentially allows referral fees) (Rule 1.5(e)) (DR 2-105(D))

Paying Indigent Clients' Costs and Expenses

- Lawyers may pay court costs and expenses of litigation on behalf of indigent clients without the clients being ultimately responsible for them (Rule 1.8(e)(2)) (DR 5-103(B))

In-House Lawyer Indemnity

- Lawyers may enter into agreements prospectively limiting their malpractice liability if they are employed by the client and the client is separately represented in negotiating the agreement (Rule 1.8(h)) (DR 6-102(A))

Related Lawyers

- Related lawyers may represent clients adverse to each other if both clients consent (Rule 1.8(I))

Sale of Law Practices

- Lawyers may sell their practice (including "good will") under certain circumstances (Rule 1.17)

Advising Clients About Asserting Criminal Charges Against an Adversary

- Lawyers may advise their clients about threatening "criminal or disciplinary charges solely to obtain an advantage in a civil matter" (lawyers are still prohibited from presenting or threatening to present such charges) (Rule 3.4(h)) (DR 7-104(A))

Witness-Advocate Rule

- Law firms may continue to represent their client even if one of their lawyers must be a witness on the client's behalf (Rule 3.7(c)) (DR 5-101(B); DR 5-102)

Government-Approved Settlement Restrictions on Practice

- Lawyers may enter into agreements which broadly restrict their right to practice as part of a settlement if a tribunal or governmental entity approves (Rule 5.6) (DR 2-106(B))

Certified Specialists

- Lawyers may describe themselves as "certified" specialists in areas of the law other than patent and admiralty if the lawyers have been certified by the Virginia Supreme Court or name the certifying organization and "clearly state" that Virginia has no procedure for approving certifying organizations (Rule 7.4) (DR 2-104(A)(1))

**D. CONDUCT PERMITTED BY THE
VIRGINIA RULES OF PROFESSIONAL CONDUCT
BUT NOT EXPLICITLY PERMITTED BY THE CODE**

Diligent and Prompt -- Not "Zealous" -- Representation

- Lawyers may comply with their duty of loyalty to clients by acting with "reasonable diligence and promptness" (this contrasts with the Code's "zealous" standard, and allows the use of collaborative strategies when appropriate) (Rule 1.3(a)) (DR 7-101)

Contingent Fees in Domestic Relations Matters

- Lawyers may charge and collect a contingent fee in certain specified domestic relations matters (Rule 1.5(d)(1)) (EC 2-22)

"Mentoring"

- Lawyers may consult with colleagues or other lawyers under certain circumstances as long as they preserve confidences (this encourages "mentoring") (Rule 1.6(a) Comment [7a]) (DR 4-101(B)(1))

Adversity to Current Clients

- Lawyers may accept representations adverse to current clients if the clients consent and if the lawyers "reasonably believe[]" that their representations will not be adversely affected (this replaces the Code's more objective "obvious" standard) (Rule 1.7(a)) (DR 5-105©)

Adversity to Former Clients

- Law firms may be adverse to a client formerly represented by a lawyer no longer in the firm as long as it does not involve the "same or substantially related matter" as the former representation, and no lawyer remaining in the firm has any material confidential information (Rule 1.10(b))

Screening Former Government Lawyers and Judges

- Law firms that hire former government lawyers (who are disqualified because they "participated personally and substantially" in a matter) may avoid disqualification if they screen the lawyers (Rule 1.11(b), (e)) (DR 9-101(B))
- Law firms that hire former government lawyers (who are disqualified because they have material confidential information) may avoid disqualification if they screen the lawyers (Rule 1.11(c), (f))
- Law firms that hire former judges, adjudicative officers, arbitrators and law clerks (who are disqualified because they "participated personally and substantially" in a matter) may avoid disqualification if they screen the lawyers and notify the tribunal (Rule 1.12) (DR 9-101(A); EC 5-20)

Representing Organizations

- Lawyers representing organizations may report to upper levels of the organization if they discover that the organization is being harmed by an employee's misconduct (Rule 1.13) (EC 5-18)

Assisting Impaired Clients

- Lawyers whose clients' ability to make decisions becomes impaired may seek the appointment of a guardian or take "other protective action" if the lawyers believe that the clients cannot adequately act in their own interests (Rule 1.14)

Former Clients' Files

- Lawyers may charge their former clients for copies the lawyers make of their files (other than client-furnished documents and originals of legal instruments or official documents) and may refuse to give their former clients "documents intended only for internal use," such as billing records (Rule 1.16(e)) (DR 2-108(D))

Collaborative Non-Advocate Roles

- Lawyers may act as advisors, intermediaries, evaluators, third party neutrals and mediators under certain circumstances (Rules 2.1, 2.2, 2.3, 2.10, 2.11, see also Rule 1.1 Comment [2a], Rule 1.3 Comment [1a], Rule 1.4 Comment [1a]) (EC 5-20)

Refusing to Offer False Evidence

- Lawyers may refuse to offer evidence that they "reasonably believe[]" is false (Rule 3.3(b))

Requesting Third Parties to Refrain From Cooperating With an Adversary

- Lawyers may request that a client's relatives or current or former employees or agents refrain from voluntarily giving relevant information to another party in a civil matter (Rule 3.4(g)) (DR 7-103(A)(2))

Permissible Non-Lawyer Misrepresentations

- Non-lawyers may engage in traditionally acceptable misrepresentations such as those involved in criminal "sting" operations and housing discrimination "tests" (Rule 5.3(c)) (DR 3-104(C))

Satisfying Pro Bono Goals Financially and Collectively

- Lawyers may satisfy their aspirational two percent pro bono obligation financially, and lawyers in a firm may satisfy it collectively (Rule 6.1) (ECs 2-28, 2-29, 2-30, 2-31, 2-32)

Legal Services Organizations

- Lawyers may serve in a legal services organization that represents clients adverse to the lawyers' clients (as long as the lawyers avoid participation) (Rule 6.3)

**VIRGINIA STATE BAR SPECIAL COMMITTEE TO STUDY
THE VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY**

EXPLANATORY LIST

**SUBSTANTIVE DIFFERENCES BETWEEN THE
VIRGINIA
RULES OF PROFESSIONAL CONDUCT
AND
CODE OF PROFESSIONAL RESPONSIBILITY**

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Format

The main distinction between the Rules of Professional Conduct and the Code of Professional Responsibility involves format.

The Rules:

- include mandatory Rules and interpretive Comments
- group the applicable Rules according to lawyers' roles and relationships (including descriptions of and guidelines for lawyers' various roles)

Substantive changes

The Rules differ in some substantive ways from the Code. When analyzing the differences, it is worth considering the justification for the new Rules.

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A. Rules That Explicitly State What Is Implicit in the Code

These Rules do not change any ethics principles governing Virginia lawyers, but rather offer explicit statements of ethics principles that the Virginia Bar always found implicit in the Code.

- Lawyers must allow clients to determine the objectives of a representation and must consult about the means of pursuing those objective (the Code does not specifically include these requirements) (Rule 1.2(a))
- Lawyers must provide clients enough information that they can make informed decisions (the current Code does not include this bedrock rule) (Rule 1.4(b))
- Specific rules governing permissible contingent fees in domestic relations matters (these follow the Bar's Legal Ethics Opinions) (Rule 1.5(d)(1))
- Lawyers deciding whether to report another lawyer's ethics violation -- when the disclosure requires client consent -- must request such consent (the general duty of communication may already require such client consultation, but this explicit provision assures client input and prevents lawyers from protecting their colleagues from discipline) (Rule 1.6(c)(3))
- Basic simultaneous conflict of interest rule prohibiting any lawyer from being adverse to a current client without the client's consent (the Code only implies this most elemental conflicts principle) (Rule 1.7(a))
- Lawyers who leave a firm may be adverse to that firm's clients in any matter unless the lawyers worked on that matter while at the firm or acquired material confidential information about the client while at the firm (the Code does not explicitly address lawyers moving, and does not explicitly state the "confidential information" component of this conflicts rule) (Rule 1.9(b))
- Law firms may be adverse to clients represented by a lawyer who is no longer in the firm as long as it is not the "same or substantially related" to the matter on which the lawyer represented the client, and no lawyer remaining in the firm has any material confidential information (this approach is consistent with the Code's emphasis on material confidential information as the key to determining if a lawyer may be adverse to a former client) (Rule 1.10(b))

- Prohibition on pre-trial public communications in a criminal case that will have a "substantial likelihood of interfering with the fairness of the trial by a jury" (this replaces the "clear and present danger standard" in the Code and complies with the United States Supreme Court standard) (Rule 3.6(a))
- Lawyers may not act as advocates in an "adversarial proceeding" in which they are likely to be a "necessary" witness (this approach is consistent with the LEOs and case law, which apply the witness-advocate rule to proceedings other than trials, but only if the lawyer must be a necessary witness) (Rule 3.7(a))
- Lawyers may not communicate ex parte with any represented "person" without the other lawyer's consent (the term "person" rather than the current "party" matches the Bar's application of this rule to non-litigation contexts) (Rule 4.2)

B. Rules That Are Consistent with the Code and That Probably Should Have Been Included in the Code

These Rules correct what might be seen as "oversights" in the Code by stating principles that many Virginia lawyers already think apply.

- The prohibition on lawyers' preparing instruments under which they receive benefits from a non-relative client extends to the lawyers' entire firm (this imputed disqualification rule rests on the same prophylactic basis as the prohibition itself) (Rule 1.8(c); Rule 1.10(a))
- Lawyers may not be adverse to former clients in the "same or a substantially related matter" unless both the former and present client consent (on its face, the Code only requires the former client's consent) (Rule 1.9(a))
- Rules prohibiting lawyers from assisting a judge's improper conduct, requiring lawyers to report judicial misconduct, and governing former judges, arbitrators and mediators (these Rules fill gaps in the Code) (Rule 1.12, Rule 8.3(b), Rule 8.4(e))
- Lawyers must advise the Court of "controlling legal authority" (the Code has only an aspirational statement to this effect) (Rule 3.3(a)(3))
- Lawyers may refuse to offer evidence they "reasonably believe" is false (the Code prohibits lawyers from offering evidence they "know" is false, but provides no guidance for lawyers who suspect falsity) (Rule 3.3(b))
- Lawyers in ex parte proceedings must advise the court of all facts the court needs to make an informed decision (this is the factual equivalent of the duty to disclose controlling authority) (Rule 3.3(c))
- Lawyers may not engage in conduct intended to disrupt a tribunal (the Code forbids such conduct only if it would violate a rule of procedure or evidence) (Rule 3.5(d))
- Lawyer-prosecutors may not encourage anyone associated with the prosecutor to make unethical extrajudicial statements (this prevents prosecutors from doing indirectly what they cannot do directly) (Rule 3.8(e))
- Lawyers must disclose their clients' confidences if disclosure is necessary to avoid assisting a crime or fraud (the Code forbids the assistance but does not include this corollary requirement) (Rule 4.1(b))

- Lawyers may not use means that have no purpose other than to "embarrass, delay or burden" a third person, or obtain evidence by violating the legal rights of such a person (the Code's general provisions would prohibit such conduct) (Rule 4.4))
- Advertisements must include the name and address of a Virginia lawyer responsible for their content (most states' ethics rules include this requirement, which is the only difference in the advertising provisions between the Rules and the Code) (Rule 7.1(e))
- Lawyers may not obstruct or withhold non-confidential information from bar admissions or disciplinary authorities (this Rule is analogous to the provisions applicable to tribunals) (Rule 8.1(c)(d))
- Lawyers may not make statements with knowing falsity or "reckless disregard" about the "qualifications or integrity of a judge or other judicial officer" (this Rule makes mandatory what is "aspirational" in the Code) (Rule 8.2).
- Lawyers must report another lawyer's ethics violation which meets the specified standard if they have "reliable" information about the violation (the Code uses the term "information," but the LEOs have required that the information be reliable) (Rule 8.3(a)).

**C. Rules That Provide Limited Exceptions to
General Ethics Principles in the Rules and the Code**

These Rules offer limited exceptions to ethics principles found in the Rules and in the Code -- based on Virginia's experience with the Code.

- Lawyers involved in a fee-split arrangement may take a portion of the fee without being totally responsible for co-counsel's activities (this "referral fee" provision allows clients to consent to their lawyers' associating others who may be more experienced in dealing with the client's matter) (Rule 1.5(e))
- Lawyers who are close relatives may be adverse to one another if the clients consent (a per se prohibition might deprive clients of their chosen lawyers) (Rule 1.8(c))
- Indigents need not be ultimately responsible for litigation costs (this exception serves societal goals by easing indigents' access to the legal system) (Rule 1.8(e)(2))
- In-house lawyers may arrange with their clients/employers to limit their liability if the client/employer is separately represented in making the arrangement (this allows in-house lawyers to obtain the type of indemnification other corporate officers enjoy, while assuring that the client/employer has independent counsel in agreeing to the liability limit) (Rule 1.8(h))
- Lawyers are not prohibited from "participating" in presenting criminal charges to gain an advantage in civil litigation -- allowing them to fully advise their clients (the prohibition remains on lawyers "presenting or threatening to present" charges) (Rule 3.4(h))
- Disqualification under the witness-advocate rule is not imputed to the entire firm (this should discourage disqualification motions filed for tactical reasons) (Rule 3.7(c))
- Lawyers may restrict their right to practice as part of the settlement if the settlement is approved by a tribunal or a governmental entity (this narrow exception applies only for officially-approved settlements) (Rule 5.6)

**D. Rules That Provide Guidance on Ethics Issues
That Lawyers Have Always Confronted but
That Are Not Addressed in the Code**

These Rules provide guidance in situations that Virginia lawyers may have faced for many years, but which are not addressed in the Code.

- Lawyers must be "diligent" in representing clients, a broad term interpreted to include collaborative strategies (the Code's "zealous representation" requirement sometimes inhibits collaborative approaches) (Rule 1.3(a))
- Lawyers representing clients who seem unable to make informed decisions may, as a last resort, seek the appointment of a guardian or take "other protective action" (the Code contains no guidance for lawyers facing this difficult situation) (Rule 1.14)
- Lawyers representing an organization must explain that they represent the organization when dealing with employees with interests potentially adverse to the organization, and must work within the organization to seek corrective action before disclosing an employee's wrongful conduct to outsiders (this Rule includes specific suggestions for lawyers dealing with these issues) (Rule 1.13)
- Lawyers supervising other lawyers and non-lawyers are responsible for their unethical conduct if the lawyers directed or ratified the misconduct, or could have stopped it in time to avoid harm (this Rule will encourage lawyers to adequately supervise their employees) (Rules 5.1, 5.3)
- Virginia lawyers "should" devote two percent of their time to pro bono work (this aspirational provision offers specific guidance for lawyers heeding our profession's noble calling; lawyers may satisfy this responsibility through financial contributions, and lawyers in a firm may satisfy it collectively) (Rule 6.1)

E. Rules That Provide Guidance on Ethics Issues That Have Become Increasingly Important in Recent Years and Therefore Are Not Addressed in the Code

These Rules provide ethics guidance in situations that Virginia lawyers traditionally have not faced or that have become increasingly important in recent years.

- Lawyers must advise their clients of ADR options in "appropriate" circumstances (this assures that clients are fully informed of their options) (Rule 1.2 Comment [1], Rule 1.4 Comment [1a])
- Extensive ethics Rules governing lawyers' possible alternative dispute resolution roles as advisor (Rule 2.1), intermediary (Rule 2.2), evaluator (Rule 2.3), third party neutral (Rule 2.10), mediator (Rule 2.11) (the Code offers no guidelines for lawyers acting in these roles) (Rule 2.1-2.3, 2.10-2.11), see also Rule 1.1 Comment [2a], Rule 1.3 Comment [1a], Rule 1.4 Comment [1a]
- Extensive Rules governing lawyers holding their clients' money as fiduciaries (the Code did not contain any explicit provisions) (Rule 1.15(d))
- Lawyers may carefully seek the advice or "mentoring" of colleagues without violating client confidentiality principles (this reflects current practice and ultimately serves clients by allowing lawyers -- especially young lawyers -- to obtain wisdom from other lawyers) (Rule 1.6(a) Comment [7a])
- More extensive Rules governing in-house lawyers (Rule 1.8(h)'s approval of indemnity; Rule 1.13's guidance for lawyers representing organizations)
- Extensive provisions governing former government lawyers (allowing their firms to avoid disqualification with notice to the government and creation of an "ethics screen") and government lawyers who moved from private practice (prohibiting participation in matters in which they "personally and substantially" participated while in private practice, and negotiations for a job from their opponents) (these will provide guidelines for lawyers moving to and from the government and ease the transition so lawyers are not discouraged from public service) (Rule 1.11)
- Detailed provisions governing former judges, other adjudicative officers,

arbitrators and law clerks (prohibiting them from participating in matters in which they were earlier involved unless all parties consent; disqualification will not extend to their new law firm if they are screened and notify the tribunal) (Rule 1.12(a)(c))

- Judges, other adjudicative officers and arbitrators may not negotiate for employment with a party or lawyer in a matter in which they are "participating personally and substantially"; law clerks may do so if they notify the judge (Rule 1.12(b))
- Lawyers who intend to stop practicing may sell their practice as long as the affected clients explicitly consent (this Rule will create a "level playing field" between lawyers practicing by themselves or in small firms and lawyers in large firms, as well as help clients in the transition) (Rule 1.17)
- New "civility" provisions (Preamble's prohibition on using the Rules as a procedural weapon or to support a cause of action; Rule 3.4(e)'s prohibition on frivolous discovery requests and failing to diligently respond to discovery; Rule 3.5(d)'s prohibition on conduct intended to disrupt a tribunal; Rule 3.7(c)'s elimination of imputed disqualification under the witness-advocate rule)
- Lawyers may serve in a legal services organization whose clients are adverse to the lawyers' clients as long as the lawyers recuse themselves in the case of conflicts (this new provision applies the general rules that govern lawyers' involvement in other organizations) (Rule 6.3)
- Lawyers may advertise that they are "certified specialists" as long as they identify the organization and include a disclaimer that Virginia has no procedure for approving such organizations (this increases the information consumers receive without misleading them) (Rule 7.4)
- Choice of law rule for lawyers with licenses in multiple jurisdictions (lawyers are governed by the ethics rules of the state most affected by their behavior) (Rule 8.5)

F. Rules That Reflect Conscious Policy Changes

These Rules reflect deliberate changes in the ethics principles governing certain matters.

- Under the most elemental conflicts principle, a lawyer may not be adverse to a current client (even on matters unrelated to the representation of the client) unless: (1) both clients consent; and (2) the lawyer "reasonably believes" that the representation will not adversely affect the relationship with the clients (this is an essentially subjective standard, in contrast to the more objective standard of the Code -- which requires that "it is obvious" that the lawyer may adequately represent each client) (Rule 1.7(a))
- Lawyers entering into business transactions with their clients must give the clients the opportunity to seek independent counsel, and must obtain their clients' consent to the transaction in writing (the Rules add these two prerequisites, while continuing the requirement that the transaction be fair to the client) (Rule 1.8(a))
- Whether they are paid or not, lawyers must give former clients all original documents provided by the client (without charging for copying) and other work product prepared during the representation (the lawyer may bill the client for copying but may not withhold these documents until the copy bill is paid); lawyers are not required to give former clients documents intended for internal use (including memoranda discussing "difficulties arising from the lawyer/client relationship") (this provides detailed guidance for lawyers facing disputes with clients about files, in contrast to the Code's vague "prejudice" standard) (Rule 1.16(e))
- Lawyers may bring or defend cases or take positions only if there is an objectively-determinable non-frivolous basis for doing so (unless the lawyer is arguing for a modification of law or is defending a criminal case)(this objective test contrasts with the Code's emphasis on the lawyer's knowledge and intent) (Rule 3.1)
- Lawyers may ask relatives or clients' current or former employees or agents to refrain from voluntarily giving information to civil litigation adversaries (this allows lawyers to ask those on the periphery of the attorney-client relationship to insist on formal rather than informal ex parte discovery by an adversary) (Rule 3.4(g))