Ethical Considerations

Submitted by Edward R. Waugaman and
Updated by Ann K. Crenshaw

Ethical Considerations

A. Regulation.

1. The Consumer Real Estate Settlement Protection Act, ("CRESPA" or the the "Act") authorizes licensed title agents, real estate brokers. title insurance companies, financial institutions and attorneys to provide escrow, closing and settlement services in Virginia. (Va. Code §6.1-2.19, et seq.) CRESPA applies only to transactions involving residential real estate containing not more than four dwelling units. Although CRESPA does not specifically apply to commercial real estate, the Act was amended to authorize lay settlement agents as defined by CRESPA to conduct commercial closings. Regulation of non-attorney agents is subject to the appropriate governmental authority such as the Bureau of Insurance for title agents. Additionally, a broad area of regulation is established under RESPA and various state and federal and fair trade laws.

2. Attorneys. Attorneys are subject to the Rule of Professional Conduct (the "Rules"). The initial consideration for an attorney is to establish whether a party is the attorney's client, or simply a third party involved in the transaction (such as a seller when the attorney is representing the buyer only). When an attorney is involved with any third party and for whom the attorney is performing certain ministerial functions, the attorney may owe certain fiduciary dirties to that third party. When an attorney closes a real estate transaction and no other attorney (or settlement agent) is

involved, the attorney represents all the parties, and in that sense, all the parties are his clients (See: Pickus v. Virginia State Bar, 232 VA 5 (1986).

B. Attorneys Fees.

1. Deed. The buyer's attorney cannot impose a fee upon the seller for preparation of a deed and seller's attorney cannot impose fee upon buyer for preparation of notes and deed of trust, absent prior agreement.

2. Releases. Charges for release of a security instrument are improper without prior consent of the party to be charged. Fees charged by an attorney for releasing a deed of trust may not be treated as a line item relating to governmental charges for releases.

3. Title Fees. Title search and recordation fees may not be included as a part of the title insurance premium. Masking of an attorney's fee or lay settlement agent's fee under the guise of a title insurance premium is a deceptive and misleading practice.

4. Closing Fees. Absent the seller's prior consent or agreement, it is improper for a settlement attorney engaged by the buyer to impose a closing fee upon the seller. It is also improper for a seller's attorney to charge the purchaser a settlement fee when separate counsel represents the purchaser.

C. Conflicts of Interest.

1. Multiple Representations. An attorney must refuse employment where the interests of the client may conflict with the financial, business, property or

personal interest of the attorney, unless the client, after full disclosure, consents. See Rules 1.7 and 1.8.

a. It is not uncommon in the practice of real estate and title law for an attorney to represent multiple parties, especially the buyers and sellers of a residential property. This can be accomplished without violating ethical Rules as long as the attorney obtains the consent of all parties after a full and adequate disclosure. Although it may not violate the Rules, in practice it is still preferred to represent one side of a real estate transaction only; and in all events, withdraw from the representation of multiple parties when a dispute arises.

b. A settlement attorney representing both the buyer and seller is ethically obligated to disclose at the outset of the transaction that if a dispute arises he cannot represent one party against the other. It is ethically improper for an attorney who represents both the buyer and seller in a residential real estate transaction to thereafter initiate suit on behalf of the buyer against the seller for damages or specific performance.

c. An attorney representing both the seller and buyer in a transaction involving a deed of trust may not ethically represent the creditor against the debtor or foreclose under the deed of trust unless the former client consents. Where a law firm acts as settlement attorney and designates members of the firm as trustees under deeds of trust executed as part of the settlement, the trustee

relationship must be disclosed to the borrower, and the borrower's consent to such relationship must be obtained.

d. It is improper for an attorney who represents a seller in a residential real estate closing not to inform the buyer that he represents the seller only.

2. Financial Conflicts of Interest.

a. An attorney must refuse employment where the interests of the client may conflict with the financial, business, property or personal interest of the attorney, unless the client consents, after full disclosure.

b. Title Insurance. An attorney may have an interest in a title agency providing title insurance services under limited circumstances. (See Leo 1564). The title agency when located at the same site as the attorney should maintain separate signage and telephone listings, separate client files, and separated office space.

c. The attorney must make full disclosure of his relationship with the title agency.

d. The attorney must comply with the kickback statutes under 12 U.S.C., Section 2601-2617 (RESPA) and Va. Code Section 38.2-4614.

D. Duties of Competence and Diligence.

1. An attorney shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. (Rule 1.1)

2. An attorney shall act with reasonable diligence and promptness in representing a client. (Rule 1.3) An attorney shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under Rule 1.16. An Attorney shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6.

E. Obligation to Disclose Defects.

1. Virginia's Residential Property Disclosure Act (Section 55-517, et seq. Code of Virginia) sets forth the disclosures that the owner of residential real property shall furnish to a purchaser. The owner must either sign a Residential Property Disclaimer Statement, or complete a Residential Property Disclosure Statement, which makes specific representations relative to the condition of the real property.

a. If an attorney, in the course of his representation of a seller/owner, becomes aware of a defect in the property, or likewise, a defect in the title, does the attorney have a duty to disclose those facts to the buyer or the buyer's attorney?

b. An attorney may reveal a confidence or secret of his client with the consent of his client, after full disclosure, when required by law or court order, or when the information clearly establishes that his client has, in the course of the representation, perpetrated upon a third part a fraud related to the subject matter of the representation. An attorney shall reveal the stated intention of his client to commit a crime and the information necessary to present the crime.

c. Therefore, in the withholding of a defect in the condition or title of the property is stated by a client to be intentional so as to constitute fraud upon the buyer; an attorney would be required to disclose such defects. If a fraud has all ready been perpetrated, the attorney may, but is not required, to disclose the information relating to that fraud.

2. Disclosure of Knowledge of Material Facts. Often the attorney will have the responsibility of obtaining and reviewing settlement services, which would disclose defects in the physical condition of the real estate and improvements and the status of title. The burden is on the attorney to review these materials and decide as to the materiality of such information. If the title search discloses title encumbrances, which are otherwise insured over or deleted by the title insurance policy, does the attorney have a duty to inform the client of said matters? The answer is often in the scope of the engagement agreement that has been established by and between the attorney and client. Too often, the client will assume

that the attorney is responsible for "everything" conceivable. A concise description of what the attorney will and will not do should be included in the engagement agreement. The agreement should follow these guidelines:

a. A clear statement of the scope and purpose of the undertaking;

b. A clear statement of the fees to be charged or the basis upon which the fees are to be computed; and

c. A request that the client sign a copy of the engagement letter to be returned to the attorney.

d. Engagement letters are particularly important where initial client contact came by referral from a third party and where there is no prior existing relationship between the attorney and the client.

F. Unauthorized Practice of Law.

1. Unauthorized Practice Rule 6. Real Estate Practice.

a. UPL Opinion 59

Printing of Documents with Computerized Loan Closing.

b. UPL Opinion 63

Preparation of Construction Contracts/Purchase Agreements by Realtors

c. UPL Opinion 76

Preparation of Completion of Closing Documents

d. UPL Opinion 80

Certificate of Satisfaction Prepared by Title Company

e. UPL Opinion 86

Title Settlement Services

f. UPL Opinion 91

Preparation of Deeds by Escrow and Title Company

g. UPL Opinion 141

Fees charged by Real Estate Settlement Service

h. UPL Opinion 147

Paralegal Company providing support services to attorney's conducting Real Estate Closings

i. UPL Opinion 165

Land Surveyor Representing Potential Land Purchaser before City Planning Commission

j. UPL Opinion 177

Corporations; Employment of Lawyers; Real Estate Settlement Services offered through National Corporation; Attorney employed by Corporation; Providing legal services through private practice

k. UPL Opinion 197

Non-Lawyers Representation of Party to a Real Estate Transaction

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CONSUMER REAL ESTATE SETTLEMENT PROTECTION ACT (CRESPA)

§ **6.1-2.19.** Title, purpose and applicability.

A. This chapter shall be known as the Consumer Real Estate Settlement Protection Act.

B. The purpose of this chapter is to authorize existing licensing authorities in the Commonwealth of Virginia to require persons performing escrow, closing or settlement services to comply with certain consumer protection safeguards relating to licensing, financial responsibility and the handling of settlement funds.

C. This chapter applies only to transactions involving the purchase of or lending on the security of real estate located in this Commonwealth containing not more than four residential dwelling units.

D. Nothing in this chapter shall be construed to prevent a person licensed under Chapter 21 (§ 54.1-2100 et seq.) of Title 54.1, or such licensee's employees or independent contractors, from performing escrow, closing or settlement services, as defined by this chapter, to facilitate the settlement of a transaction in which the licensee is involved without complying with the provisions of this chapter, so long as the licensee, the licensee's employees or independent contractors, are not named as the settlement agent on the settlement statement and the licensee is otherwise not prohibited from performing such services by law or regulation.

(1997, c. 716; 1998, cc. 69, 162, 736.)

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§ 6.1-2.20. Definitions.

"Escrow" means written instruments, money or other items deposited by a party with a settlement agent for delivery to other persons upon the performance of specified conditions or the happening of a certain event.

"Escrow, closing or settlement services" means the administrative and clerical services required to carry out the terms of contracts affecting real estate. These services include, but are not limited to, placing orders for title insurance, receiving and issuing receipts for money received from the parties, ordering loan checks and payoffs, ordering surveys and inspections, preparing settlement statements, determining that all closing documents conform to the parties' contract requirements, setting the closing appointment, following up with the parties to ensure that the transaction progresses to closing, ascertaining that the lenders' instructions have been satisfied, conducting a closing conference at which the documents are executed, receiving and disbursing funds, completing form documents and instruments selected by and in accordance with instructions of the parties to the transaction, handling or arranging for the recording of documents, sending recorded documents to the lender, sending the recorded deed and the title policy to the buyer, and reporting federal income tax information for the real estate sale to the Internal Revenue Service.

"Licensing authority" shall mean the (i) State Corporation Commission acting pursuant to this title or Title 38.2; (ii) the Virginia State Bar acting pursuant to this chapter or Chapter 39 (§ 54.1-3900 et seq.) of Title 54.1; or (iii) the Virginia Real Estate Board acting pursuant to this chapter or Chapter 21 (§ 54.1-2100 et seq.) of Title 54.1.

"Party to the real estate transaction" means with respect to that real estate transaction, a lender, seller, purchaser or borrower, and with respect to a corporate purchaser, any entity which is a subsidiary of or under common ownership with that corporate purchaser.

"Person" means a natural person, partnership, association, cooperative, corporation, limited liability company, trust or other legal entity.

"Settlement agent" means a person other than a party to the real estate transaction who provides escrow, closing or settlement services in connection with a transaction related to real estate in this Commonwealth and who is listed as the settlement agent on the settlement statement for such transaction. Any person, other than a party to the transaction, who conducts the settlement conference and receives or handles money shall be deemed a "settlement agent" subject to the applicable requirements of this chapter.

"Settlement statement" means the statement of receipts and disbursements for a transaction related to real estate including, but not limited to, a statement prescribed under the Real Estate Settlement Procedures Act of 1974 (RESPA), 12 U.S.C. § 2601 et seq., as amended, and the regulations thereunder.

(1997, c. 716; 1998, cc. 69, 598; 2002, c. 375.)

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§ **6.1-2.21**. Licensing requirements, standards and financial responsibility.

A. A person shall not act in the capacity of a settlement agent, and a lender, seller, purchaser or borrower may not contract with any person to act in the capacity of a settlement agent with respect to real estate settlements in this Commonwealth unless the person (i) has not been convicted of a felony and, if convicted, has not had his civil rights restored by the Governor or been granted a writ of actual innocence, and (ii) is licensed as an attorney under Chapter 39 (§ 54.1-3900 et seq.) of Title 54.1, is licensed as a title insurance company or title insurance agent under Title 38.2, is licensed as a real estate broker under Chapter 21 (§ 54.1-2100 et seq.) of Title 54.1, or is a financial institution authorized to do business in this Commonwealth under any of the provisions of Title 6.1 or under federal law or is a subsidiary or affiliate of such financial institution. Any title insurance agent acting in the capacity of a settlement agent shall be appointed by a title insurance company licensed in the Commonwealth pursuant to Chapter 18 (§ 38.2-1800 et seq.) of Title 38.2. Any such person, not acting in the capacity of a settlement agent, shall not be subject to the provisions of this chapter.

B. Notwithstanding any rule of court to the contrary, a settlement agent operating in compliance with the requirements of this chapter or a party to the real estate transaction may provide escrow, closing or settlement services and receive compensation for such services.

C. A settlement agent shall exercise reasonable care and comply with all applicable requirements of this chapter and its licensing authority regarding licensing, financial responsibility, errors and omissions or malpractice insurance policies, fidelity bonds, employee dishonesty insurance policies, audits, escrow account analyses and record retention.

D. A settlement agent other than a financial institution described in subsection A or title insurance company as defined in § 38.2-4601, shall maintain the following to the satisfaction of the appropriate licensing authority:

1. An errors and omissions or malpractice insurance policy providing a minimum of $250,000 in coverage;

2. A blanket fidelity bond or employee dishonesty insurance policy covering persons employed by the settlement agent providing a minimum of $100,000 in coverage. When the settlement agent has no employees except the owners, partners, shareholders or members, the settlement agent may apply to the appropriate licensing authority for a waiver of this fidelity bond or employee dishonesty requirement; and

3. A surety bond of not less than $100,000.

E. 1. A settlement agent, other than an attorney or a title insurance company if such company's financial statements are audited annually by an independent certified public accountant, shall, at its expense, have an audit of its escrow accounts conducted by an independent certified public accountant at least once each consecutive twelve-month period. The appropriate licensing authority shall require the settlement agent to provide a copy of its audit report to the licensing authority no later than sixty days after the date on which the audit is completed. A settlement agent that is a licensed title insurance agent under Title 38.2 shall also provide a copy of the audit report to each title insurance company which it represents.

2. In lieu of such annual audit, a settlement agent that is licensed as a title insurance agent under Title 38.2 shall allow each title insurance company for which it has an appointment to conduct an analysis of its escrow accounts in accordance with regulations promulgated by the State Corporation Commission or guidelines issued by the Bureau of Insurance of the State Corporation Commission, as appropriate, at least once each consecutive twelve-month period and each title insurance company conducting such analysis shall submit a copy of its analysis report to the appropriate licensing authority no later than sixty days after the date on which the analysis is completed. With the consent of the title insurance agent, a title insurance company may share the results of its analysis with other title insurance companies that will accept the same in lieu of conducting a separate analysis.

3. A title insurance company shall retain a copy of the analysis or audit report, as applicable, for each title insurance agent it has appointed and such reports and other records of the insurance company's activities as a settlement agent shall be made available to the appropriate licensing authority when examinations are conducted pursuant to provisions in Title 38.2.

F. A person who has been convicted of a felony involving fraud, deceit or misrepresentation shall not assist a

settlement agent in the performance of escrow, closing or settlement services involving, and a settlement agent shall not employ a person who has been convicted of a felony involving fraud, deceit or misrepresentation in an administrative or clerical capacity that involves, the receipt or disbursement of funds from real estate settlements in the Commonwealth.

(1997, c. 716; 1998, c. 69; 2000, c. 549; 2002, c. 464; 2007, c. 898.)

Legislative Information System

§ 6.1-2.22. Disclosure.

All contracts involving the purchase of real estate containing not more than four residential dwelling units shall include in bold face, ten-point type the following language:

Choice of Settlement Agent: You have the right to select a settlement agent to handle the closing of this transaction. The settlement agent's role in closing your transaction involves the coordination of numerous administrative and clerical functions relating to the collection of documents and the collection and disbursement of funds required to carry out the terms of the contract between the parties. If part of the purchase price is financed, your lender will instruct the settlement agent as to the signing and recording of loan documents and the disbursement of loan proceeds. No settlement agent can provide legal advice to any party to the transaction except a settlement agent who is engaged in the private practice of law in Virginia and who has been retained or engaged by a party to the transaction for the purpose of providing legal services to that party.

Escrow, closing and settlement service guidelines: The Virginia State Bar issues guidelines to help settlement agents avoid and prevent the unauthorized practice of law in connection with furnishing escrow, settlement or closing services. As a party to a real estate transaction, you are entitled to receive a copy of these guidelines from your settlement agent, upon request, in accordance with the provisions of the Consumer Real Estate Settlement Protection Act.

(1997, c. 716.)

Legislative Information System

§ 6.1-2.23. Conditions for providing escrow, closing, or settlement services and for maintaining escrow accounts.

A. All funds deposited with the settlement agent in connection with an escrow, settlement or closing shall be handled in a fiduciary capacity and submitted for collection to or deposited in a separate fiduciary trust account or accounts in a financial institution licensed to do business in this Commonwealth no later than the close of the second business day, in accordance with the following requirements:

1. The funds shall be the property of the person or persons entitled to them under the provisions of the escrow, settlement, or closing agreement and shall be segregated for each depository by escrow, settlement, or closing in the records of the settlement agent in a manner that permits the funds to be identified on an individual basis; and

2. The funds shall be applied only in accordance with the terms of the individual instructions or agreements under which the funds were accepted.

B. Funds held in an escrow account shall be disbursed only pursuant to a written instruction or agreement specifying how and to whom such funds may be disbursed. Funds payable to persons other than the settlement agent shall be disbursed in accordance with § 6.1-2.13, except:

1. Title insurance premiums payable to title insurers under § 38.2-1813 or to title insurance agents. Such title insurance premiums payable to title insurers and agents may be (i) held in the settlement agent's settlement escrow account, identified and itemized by file name or file number, as a file with a balance; (ii) disbursed in the form of a check drawn upon the settlement escrow account payable to the title insurer or agent but maintained within the settlement file of the settlement agent; or (iii) transferred within two business days into a separate title insurance premium escrow account, which account shall be identified as such and be separate from the business or personal funds of the settlement agent. These transferred title insurance premium funds shall be itemized and identified within the separate title insurance premium escrow account. All title insurance premiums payable to title insurers by title insurance agents serving as settlement agents shall be paid in the ordinary course of business as required by subsection A of § 38.2-1813; and

2. Escrows held by the settlement agent pursuant to written instruction or agreement. A settlement statement that has been signed by the seller and the purchaser or borrower shall be deemed sufficient to satisfy the requirement of this subsection.

C. A settlement agent may not retain any interest received on funds deposited in connection with any escrow, settlement, or closing; provided, however, that an attorney settlement agent shall maintain escrow accounts in accordance with applicable rules of the Virginia State Bar and the Supreme Court of Virginia.

D. Nothing in this chapter shall be deemed to prohibit the recording of documents prior to the time funds are available for disbursement with respect to a transaction, provided all parties consent to such recordation.

E. All settlement statements for transactions related to real estate governed by this chapter shall be in writing and identify, by name and business address, the settlement agent.

F. Nothing in this section is intended to amend, alter or supersede other sections of this chapter, or the laws of this Commonwealth or the United States, regarding the duties and obligations of the settlement agent in maintaining escrow accounts.

(1997, c. 716; 1998, c. 69; 2001, cc. 316, 512.)

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§ **6.1-2.23:1**. Falsifying settlement statements prohibited.

No settlement agent shall intentionally make any materially false or misleading statement or entry on a settlement statement. An estimate of charges made in good faith by a settlement agent, and indicated as such on the settlement statement, shall not be deemed to be a violation of this section.

(2000, c. 549.)

Legislative Information System

§ **6.1-2.23:2.** Separate charge for reporting transactions limited.

No settlement agent shall charge any party to a real estate transaction, as a separate item on a settlement statement, a sum exceeding $10 for complying with any requirement imposed on the settlement agent by § 58.1-316 or 58.1-317.

(2005, cc. 734, 780.)

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§ **6.1-2.24**. Record retention requirements.

The settlement agent shall maintain sufficient records of its affairs so that the appropriate licensing authority may adequately ensure that the settlement agent is in compliance with all provisions of this chapter. The settlement agent shall retain records pertaining to each settlement handled for a minimum of five years after the settlement is completed. The appropriate licensing authority may prescribe the specific record entries and documents to be kept.

(1997, c. 716.)

Legislative Information System

§ **6.1-2.25**. Rules and regulations.

Except as provided in § 6.1-2.26, the appropriate licensing authority may issue summonses, subpoenas, rules, regulations, and orders, including educational requirements, consistent with and necessary to carry out the provisions of this chapter. When the registration of a settlement agent is renewed, the appropriate authority shall notify the registrant of the provisions of § 17.1-223. A title insurance company domiciled in the Commonwealth or acting in the capacity of a settlement agent pursuant to this chapter shall account for funds held and income derived from escrow, closing, or settlement services in accordance with the applicable instructions of, and the accounting practices and procedures manuals adopted by, the National Association of Insurance Commissioners when filing the annual statements and reports required under Chapter 13 (§ 38.2-1300 et seq.) of Title 38.2.

(1997, c. 716; 2004, cc. 336, 597.)

Legislative Information System

§ 6.1-2.26. Settlement agent and financial institution compliance with unauthorized practice of law guidelines.

A. Every settlement agent subject to the provisions of this chapter shall be registered as such with the Virginia State Bar within ninety days of July 1, 1997. In conjunction therewith, settlement agents shall furnish (i) their names, business addresses and telephone numbers, (ii) information pertaining to licenses issued them by any licensing authority, and (iii) such other information as may be required by the Virginia State Bar. The Virginia State Bar shall accept in satisfaction of the requirements of this subsection, settlement agents' licensing forms submitted to any licensing authority, as defined in this chapter, if such forms contain substantially the same information required hereby. Each such registration (i) shall be accompanied by a fee not to exceed $100, and (ii) shall be renewed at least biennially thereafter.

B. The Virginia State Bar, in consultation with the Virginia State Corporation Commission and the Virginia Real Estate Board, shall promulgate regulations establishing guidelines for settlement agents designed to assist them in avoiding and preventing the unauthorized practice of law in conjunction with providing escrow, closing and settlement services. Such guidelines shall be furnished by the Virginia State Bar to (i) each settlement agent at the time of registration and any renewal thereof, (ii) state and federal agencies that regulate financial institutions, and (iii) members of the general public upon request. Such guidelines shall also be furnished by settlement agents to any party to a real estate transaction in which such agents are providing escrow, closing or settlement services, upon request.

C. The Virginia State Bar shall receive complaints concerning settlement agent or financial institution noncompliance with the guidelines established pursuant to subsection B and shall (i) investigate the same to the extent they concern the unauthorized practice of law or any other matter within its jurisdiction, and (ii) refer all other matters or allegations to the appropriate licensing authority.

D. The willful failure of any settlement agent or financial institution to comply with the provisions of this section shall be a violation of this chapter, and such agent shall be subject to a penalty of up to $5,000 for each such failure as the Virginia State Bar may determine.

(1997, c. 716.)

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§ **6.1-2.27.** Penalties and liabilities.

A. If the appropriate licensing authority determines that the settlement agent licensed by it or any of its other licensees has violated this chapter, or any regulation or order promulgated thereunder, after notice and opportunity to be heard, the appropriate licensing authority may order one or more of the following:

1. A penalty not exceeding $5,000 for each violation;

2. Revocation or suspension of the applicable licenses, or restraining order requiring such person to cease and desist from engaging in such act or practice; and

3. Restitution to be made by the person violating this chapter in the amount of any actual, direct financial loss.

B. In addition to the authority given in subsection A, and pursuant to § 12.1-13, the Commission, after determining that any person who does not hold a license from the appropriate licensing authority has violated this chapter or any regulation or order promulgated thereunder, may order one or more of the following:

1. A penalty not exceeding $5,000 for each violation;

2. A temporary or permanent injunction, or restraining order requiring such person to cease and desist from engaging in such act or practice;

3. Restitution to be made by the person violating this chapter in the amount of any actual, direct financial loss.

C. Nothing in this section shall affect the right of the appropriate licensing authority to impose any other penalties provided by law or regulation. Notwithstanding any provision contained in this section to the contrary, as to that portion of any complaint by a party to the real estate transaction arising under this chapter or any regulation or order promulgated thereunder relating to the unauthorized practice of law, the Virginia State Bar, after complying with applicable law and regulation relating to unauthorized practice of law complaints and concluding the activity was not authorized by statute or regulation, may refer that portion of such complaint to the Attorney General of Virginia or a Commonwealth's Attorney who shall have the power, in addition to any other powers conferred on him by law, to seek the issuance of a temporary or permanent injunction or restraining order against any person so violating this chapter or any regulation or order promulgated thereunder.

D. A final order of the licensing authority imposing a penalty or ordering restitution may be recorded, enforced, and satisfied as orders or decrees of a circuit court upon certification of such order by the licensing authority.

(1997, c. 716; 2000, c. 549; 2004, c. 597.)

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§ 6.1-2.27:1. Confidentiality of information obtained by the Commission.

A. Any documents, materials, or other information in the control or possession of the Commission that are furnished by a title insurance company or title insurance agent or an employee thereof acting on behalf of the title insurance company or title insurance agent, or obtained by the Commission in an investigation pursuant to this chapter shall be confidential by law and privileged, shall not be subject to inspection or review by the general public, shall not be subject to subpoena, and shall not be subject to discovery or admissible in evidence in any private civil action. However, the Commission is authorized to use the documents, materials, or other information in the furtherance of any regulatory or legal action brought as a part of the Commission's duties.

B. Neither the Commission nor any person who received documents, materials, or other information while acting under the authority of the Commission shall be permitted or required to testify in any private civil action concerning any confidential documents, materials, or information subject to subsection A.

C. In order to assist in the performance of the Commission's duties under this chapter, the Commission:

1. May share documents, material, or other information, including the confidential and privileged documents, materials, or information subject to subsection A, with other state, federal, and international regulatory agencies; with the National Association of Insurance Commissioners, hereafter referred to as the Association, its affiliates or subsidiaries; and with state, federal, and international law enforcement authorities, provided that the recipient agrees to maintain the confidentiality and privileged status of the document, material, or other information; and

2. May receive documents, materials, or information, including otherwise confidential and privileged documents, materials, or information, from the Association, its affiliates or subsidiaries and from regulatory and law enforcement officials of other foreign or domestic jurisdictions, and shall maintain as confidential or privileged any document, material, or information received with notice or the understanding that it is confidential or privileged under the laws of the jurisdiction that is the source of the document, material, or information.

D. No waiver of any applicable privilege or claim of confidentiality in the documents, materials, or information shall occur as a result of disclosure to the Commission under this section or as a result of sharing as authorized in subsection C.

E. Nothing in this chapter shall prohibit the Commission from releasing final, adjudicated actions including for-cause terminations that are open to public inspection pursuant to Chapter 4 (§ 12.1-18 et seq.) of Title 12.1 to a database or other clearinghouse service maintained by the Association, its affiliates, or subsidiaries.

(2006, c. 312.)

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§ 6.1-2.28. Severability.

If any provision of this chapter, or the application of the provision to any person or circumstance, shall be held invalid, the remainder of the chapter, and the application of the provision to persons or circumstances other than those to which it is invalid, shall not be affected.

(1997, c. 716.)

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§ 6.1-2.29. Compliance.

A settlement agent operating in this Commonwealth prior to July 1, 1997, shall have ninety days after July 1, 1997, to comply with requirements of §§ **6.1-2.21** and 6.1-2.23.

(1997, c. 716.)

Legislative Information System

§ 6.1-2.30. Title, purpose and applicability.

A. This chapter shall be known as the Real Estate Settlement Agent Registration Act.

B. The purpose of this chapter is to require lay persons performing escrow, closing or settlement services in relation to any real property located in the Commonwealth to comply with certain safeguards relating to licensure, registration, financial responsibility and the handling of settlement funds as detailed in the Consumer Real Estate Settlement Protection Act (§ 6.1-2.19 et seq.).

C. This chapter applies to transactions involving the purchase of or lending on the security of real estate located in this Commonwealth not otherwise covered by the provisions of the Consumer Real Estate Settlement Protection Act.

D. Nothing in this chapter shall be construed to prevent a person licensed under Chapter 21 (§ 54.1-2100 et seq.) of Title 54.1, or such licensee's employees or independent contractors, from performing escrow, closing or settlement services, as defined by § 6.1-2.20, to facilitate the settlement of a transaction in which the licensee is involved without complying with the provisions of this chapter, so long as the licensee, the licensee's employees or independent contractors, are not named as the settlement agent on the settlement statement and the licensee is otherwise not prohibited from performing such services by law or regulation.

(1999, c. 647.)

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§ 6.1-2.31. Definitions.

Unless otherwise provided for in this chapter, the definitions set forth in § 6.1-2.20 shall apply to the provisions of this chapter.

(1999, c. 647.)

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§ **6.1-2.32**. Lay real estate settlement agents.

A. Notwithstanding any rule of court to the contrary, (i) a lay real estate settlement agent may provide escrow, closing and settlement services for any real property located within the Commonwealth, and receive compensation for such services, provided he is registered pursuant to and is in compliance with the provisions of the Consumer Real Estate Settlement Protection Act (§ 6.1-2.19 et seq.), with the exception of subsection C of § 6.1-2.19 and (ii) a party to the real estate transaction shall have the same authority under this chapter as a party to the real estate transaction under the Consumer Real Estate Settlement Protection Act.

B. As used in this chapter, "lay real estate settlement agent" means a person who (i) is not licensed as an attorney under Chapter 39 (§ 54.1-3900 et seq.) of Title 54.1, (ii) is not a party to the real estate transaction, (iii) provides escrow, closing or settlement services in connection with a transaction related to any real estate in this Commonwealth, and (iv) is listed as the settlement agent on the settlement statement for such transaction.

(1999, c. 647.)

Legislative Information System

§ 55-66.3. Release of deed of trust or other lien.

A. 1. Except as provided in Article 2.1 of this chapter, after full or partial payment or satisfaction has been made of a debt secured by a mortgage, deed of trust, vendor's lien, or other lien, or any one or more obligations representing at least 25 percent of the total amount secured by such lien, but less than the total number of the obligations so secured, or the debt secured is evidenced by two or more separate written obligations sufficiently described in the instrument creating the lien, has been fully paid, the lien creditor shall issue a certificate of satisfaction or certificate of partial satisfaction in a form sufficient for recordation reflecting such payment and release of lien. This requirement shall apply to a credit line deed of trust prepared pursuant to § 55-58.2 only when the obligor or the settlement agent has paid the debt in full and requested that the instrument be released.

If the lien creditor receives notice from a settlement agent at the address identified in its payoff statement requesting that the certificate be sent to such settlement agent, the lien creditor shall provide the certificate, within 90 days after receipt of such notice, to the settlement agent at the address specified in the notice received from the settlement agent.

If the notice is not received from a settlement agent, the lien creditor shall deliver, within 90 days after such payment, the certificate to the appropriate clerk's office with the necessary fee for recording by certified mail, return receipt requested, or when there is written proof of receipt from the clerk's office, by hand delivery or by courier hand delivery.

If the lien creditor has already delivered the certificate to the clerk's office by the time it receives notice from the settlement agent, the lien creditor shall deliver a copy of the certificate to the settlement agent within 90 days of the receipt of the notice at the address for notification set forth in the payoff statement.

If the lien creditor has not, within 90 days after payment, either provided the certificate of satisfaction to the settlement agent or delivered it to the clerk's office with the necessary fee for filing, the lien creditor shall forfeit $500 to the lien obligor. No settlement agent or attorney may take an assignment of the right to the $500 penalty. Following the 90-day period, if the amount forfeited is not paid within 10 business days after written demand for payment is sent to the lien creditor by certified mail at the address for notification set forth in the payoff statement, the lien creditor shall pay any court costs and reasonable attorney's fees incurred by the obligor in collecting the forfeiture.

2. If the note, bond or other evidence of debt secured by such mortgage, deed of trust, vendor's lien or other lien referred to in subdivision 1 or any interest therein, has been assigned or transferred to a party other than the original lien creditor, the subsequent holder shall be subject to the same requirements as a lien creditor for failure to comply with this subsection, as set forth in subdivision 1.

B. The certificate of satisfaction shall be signed by the creditor or his duly authorized agent, attorney or attorney-in-fact, or any person to whom the instrument evidencing the indebtedness has been endorsed or assigned for the purpose of effecting such release. An affidavit shall be filed or recorded with the certificate of satisfaction, by the creditor, or his duly authorized agent, attorney or attorney-in-fact, with such clerk, stating that the debt therein secured and intended to be released or discharged has been paid to such creditor, his agent, attorney or attorney-in-fact, who was, when the debt was satisfied, entitled and authorized to receive the same.

C. And when so signed and the affidavit hereinbefore required has been duly filed or recorded with the certificate of satisfaction with such clerk, the certificate of satisfaction shall operate as a release of the encumbrance as to which such payment or satisfaction is entered and, if the encumbrance be by deed of trust or mortgage, as a reconveyance of the legal title as fully and effectually as if such certificate of satisfaction were a formal deed of release duly executed and recorded.

D. As used in this section:

"CRESPA" means the Consumer Real Estate Settlement Protection Act (§ 6.1-2.19 et seq.).

"Lien creditor" and "creditor" shall be construed as synonymous and mean the holder, payee or obligee of a note, bond or other evidence of debt and shall embrace the lien creditor or his successor in interest as evidenced by proper endorsement or assignment, general or restrictive, upon the note, bond or other evidence of debt.

"Mortgage" means any mortgage, deed of trust or vendor's lien.

"Obligor's designee" shall include an attorney or other settlement agent closing a transaction which results in the obligor's loan being paid off.

"Payoff letter" means a written communication from the lien creditor or servicer stating, at a minimum, the amount outstanding and required to be paid to satisfy the obligation.

"Satisfactory evidence of the payment of the obligation secured by the mortgage" means (i) any one of (a) the original canceled check or a copy of the canceled check, showing all endorsements, payable to the lien creditor or servicer, as applicable, (b) confirmation in written or electronic form of a wire transfer to the bank account of the lien creditor or servicer, as applicable, or (c) a bank statement in written or electronic form reflecting completion of the wire transfer or negotiation of the check, as applicable; and (ii) a payoff letter or other reasonable documentary evidence that the payment was to effect satisfaction of the obligation secured or evidenced by the mortgage.

"Servicer" means a person or entity that collects loan payments on behalf of a lien creditor.

"Settlement agent" has the same meaning ascribed thereto in § 6.1-2.20, provided that a person shall not be a settlement agent unless he is registered pursuant to § **6.1-2.26** and otherwise fully in compliance with the applicable provisions of Chapter 1.3 (§ 6.1-2.19 et seq.) of Title 6.1.

E. Release of lien by settlement agent.

A settlement agent may release a mortgage in accordance with the provisions of this subsection (i) if the obligation secured by the mortgage has been satisfied by payment made by the settlement agent and (ii) whether or not the settlement agent is named as a trustee under the deed of trust or otherwise has received the authority to release the lien.

1. Notice to lienholder.

a. After or accompanying payment in full of the obligation secured by a mortgage, a settlement agent intending to release a mortgage pursuant to this subsection shall deliver to the lien creditor by certified mail or guaranteed overnight delivery service a notice of intent to release the mortgage with a copy of the payoff letter and a copy of the release to be recorded as provided in this subsection.

b. The notice of intent to release shall contain the name of the lien creditor and the servicer if loan payments on the mortgage are collected by a servicer, the name of the settlement agent, and the date of the notice. The notice of intent to release shall conform substantially to the following form:

NOTICE OF INTENT TO RELEASE

Notice is hereby given to you concerning the (mortgage) described on the (release of mortgage), a copy of which is attached to this notice, as follows:

1. The undersigned has paid the obligation secured by the (mortgage) described above.

2. The undersigned will release the (mortgage) described in this notice unless, within 90 days from the date this notice is mailed by certified mail or guaranteed overnight delivery service, the undersigned has received by certified mail or guaranteed overnight delivery service a notice stating that a release of the (mortgage) has been recorded in the clerk's office or that the obligation secured by the (mortgage) described above has not been paid, or the lien creditor or servicer otherwise objects to the release of the mortgage. Notice shall be sent to the address stated on this form.

(Signature of settlement agent)

(Address of settlement agent)

(Telephone number of settlement agent)

(Current Virginia CRESPA registration number of settlement agent)

2. Certificate of satisfaction and affidavit of settlement agent.

a. If, within 90 days following the day on which the settlement agent mailed or delivered the notice of intent to release in accordance with this subsection, the lien creditor or servicer does not send by certified mail or guaranteed overnight delivery service to the settlement agent a notice stating that a release of the mortgage has been recorded in the clerk's office or that the obligation secured by the mortgage has not been paid in full or that the lien creditor or servicer otherwise objects to the release of the mortgage, the settlement agent may execute, acknowledge and file with the clerk of court of the jurisdiction wherein the mortgage is recorded a certificate of satisfaction, which shall include (i) the affidavit described in subdivision 2 b of this subsection and (ii) a copy of the notice of intent to release that was sent to the lender. The certificate of satisfaction shall include the settlement agent's currently active CRESPA registration number issued by the Virginia State Bar and shall note that the individual executing the certificate of satisfaction is doing so pursuant to the authority granted by this subsection. After filing or recording the certificate of satisfaction, the settlement agent shall mail a copy of the certificate of satisfaction to the lien creditor or servicer. The validity of a certificate of satisfaction otherwise satisfying the requirements of this subsection shall not be affected by the inaccuracy of the CRESPA registration number placed thereon or the failure to mail a copy of the recorded certificate of satisfaction to the lien creditor or servicer and shall nevertheless release the mortgage described therein as provided in this subsection.

b. The certificate of satisfaction used by the settlement agent shall include an affidavit certifying (i) that the settlement agent has satisfied, and possesses satisfactory evidence of payment of the obligation secured by the mortgage described in the certificate; (ii) that the lien of the mortgage may be released; (iii) that the person executing the certificate is the settlement agent or is duly authorized to act on behalf of the settlement agent; and (iv) that the notice of intent to release was delivered to the lien creditor or servicer and the settlement agent received evidence of receipt of such notice by the lien creditor or servicer. The affidavit shall be substantially in the following form:

AFFIDAVIT OF SETTLEMENT AGENT

The undersigned hereby certifies that, in accordance with the provisions § 55-66.3 of the Code of Virginia of 1950, as amended and in force on the date hereof (the Code) (a) the undersigned is a settlement agent as defined in subsection D of § 55-66.3 of the Code or a duly authorized officer, director, member, partner or employee of such settlement agent; (b) the settlement agent has satisfied the obligation secured by the mortgage and possesses satisfactory evidence of the payment of the obligation secured by the mortgage described in the certificate recorded herewith; (c) the settlement agent delivered to the lien creditor or servicer in the manner specified in subdivision E 1 of § 55-66.3 of the Code the notice of intent to release and possesses evidence of receipt of such notice by the lien creditor or servicer; and (d) the lien of the mortgage is hereby released.

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(Authorized signer)

3. Effect of filing.

When filed or recorded with the clerk's office, a certificate of satisfaction that is executed and notarized as provided in this subsection, and accompanied by (i) the affidavit described in subdivision 2 b of this subsection, and (ii) a copy of the notice of intent to release that was sent to the lender, lien creditor or servicer shall operate as a release of the encumbrance described therein and, if the encumbrance is by deed of trust or mortgage, as a reconveyance of the legal title as fully and effectively as if such certificate of satisfaction were a formal deed of release duly executed and recorded.

4. Effect of wrongful or erroneous certificate; damages.

a. The execution and filing or recording of a wrongful or erroneous certificate of satisfaction by a settlement agent does not relieve the party obligated to repay the debt, or anyone succeeding to or assuming the responsibility of the obligated party as to the debt, from any liability for the debt or other obligations secured by the mortgage that is the subject of the wrongful or erroneous certificate of satisfaction.

b. A settlement agent that wrongfully or erroneously executes and files or records a certificate of satisfaction is liable to the lien creditor for actual damages sustained due to the recording of a wrongful or erroneous certificate of satisfaction.

c. The procedure authorized by this subsection for the release of a mortgage shall constitute an optional method of accomplishing a release of a mortgage secured by property in this Commonwealth. The nonuse of the procedure authorized by this subsection for the release of a mortgage shall not give rise to any liability or any cause of action whatsoever against a settlement agent or any title insurer by any obligated party or anyone succeeding to or assuming the interest of the obligated party.

5. Applicability.

a. The procedure authorized by this subsection for the release of a mortgage may be used to effect the release of a mortgage after July 1, 2002, regardless of when the mortgage was created, assigned or satisfied by payment made by the settlement agent.

b. This subsection applies only to transactions involving the purchase of or lending on the security of real estate located in the Commonwealth containing not more than four residential dwelling units.

c. The procedure authorized by this subsection applies only to the full and complete release of a mortgage. Nothing in this subsection shall be construed to authorize the partial release of property from a mortgage or otherwise permit the execution or recordation of a certificate of partial satisfaction.

d. No settlement agent utilizing the process provided in this subsection for release of a mortgage may take an assignment from a lien obligor or his designee of the right to collect the $500 penalty established in subsection A of this section.

(Code 1919, § 6456; 1926, p. 80; 1930, p. 69; 1932, p. 120; 1944, p. 198; 1958, c. 14; 1962, c. 39; 1972, c. 280; 1975, c. 469; 1980, c. 116; 1986, c. 462; 1987, c. 673; 1988, c. 546; 1991, c. 414; 1996, cc. 895, 949; 1997, c. 221; 2000, c. 28; 2001, c. 711; 2002, cc. 845, 862; 2003, c. 745; 2004, c. 596; 2006, c. 907.)

RULES OF PROFESSIONAL CONDUCT

RULE 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

COMMENT

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[2a] Another important skill is negotiating and, in particular, choosing and carrying out the appropriate negotiating
strategy. Often it is possible to negotiate a solution which meets some of the needs and interests of all the parties to a transaction or dispute, i.e., a problem-solving strategy.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. *See* also Rule 6.2.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education. The Mandatory Continuing Legal Education requirements of the Rules of the Supreme Court of Virginia set the minimum standard for continuing study and education which a lawyer licensed and practicing in Virginia must satisfy. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.

VIRGINIA CODE COMPARISON

Rule 1.1 is substantially similar to DR 6-101(A). DR 6-101(A)(1) provided that a lawyer "shall undertake representation only in matters in which . . . [t]he lawyer can act with competence and demonstrate the

specific legal knowledge, skill, efficiency, and thoroughness in preparation employed in acceptable practice by lawyers undertaking similar matters." DR 6-101(A) (2) also permitted representation in matters if a lawyer "associated with another lawyer who is competent in those matters."

COMMITTEE COMMENTARY

The Committee adopted the *ABA Model Rule* verbatim, but added the third paragraph of the Comment to make it clear that legal representation, in which a lawyer is expected to be competent, involves not only litigation but also negotiation techniques and strategies. In addition, the Committee added the second sentence under Maintaining Competence Comment section to note Virginia's Mandatory Continuing Legal Education requirements.

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RULE 1.3 Diligence

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.
(b) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under Rule 1.16.
(c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3.

COMMENT

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. *See* Rule 1.2. A lawyer's work load should be controlled so that each matter can be handled adequately.

[2] *ABA Model Rule* Comment [2] not adopted. Virginia comment [2] is as follows:
Additionally, lawyers have long recognized that a more collaborative, problem-solving approach is often preferable to an adversarial strategy in pursuing the client's needs and interests. Consequently, diligence includes not only an adversarial strategy but also the vigorous pursuit of the client's interest in reaching a solution that satisfies the interests of all parties. The client can be represented zealously in either setting.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

[5] A lawyer should plan for client protection in the event of the lawyer's death, disability, impairment, or incapacity. The plan should be in writing and should designate a responsible attorney capable of making, and who has agreed to make, arrangements for the protection of client interests in the event of the lawyer's death, impairment, or incapacity.

VIRGINIA CODE COMPARISON

With regard to paragraph (a), DR 6-101(B) required that a lawyer "attend promptly to matters undertaken for a client until completed or until the lawyer has properly and completely withdrawn from representing the client." EC 6-4 stated that a lawyer should "give appropriate attention to his legal work." Canon 7 stated that "a lawyer should represent a client zealously within the bounds of the law."
Paragraphs (b) and (c) adopt the language of DR 7-101(A) (2) and DR 7-101(A) (3) of the *Virginia Code*.

COMMITTEE COMMENTARY

The Committee added DR 7-101(A)(2) and DR 7-101(A)(3) from the *Virginia Code* as paragraphs (b) and (c) of this Rule in order to make it a more complete statement about fulfilling one's obligations to a

client. Additionally, the Committee added the second paragraph to the Comment as a reminder to lawyers that there is often an appropriate collaborative component to zealous advocacy.
The amendments effective February 28, 2006, added Comment [5].

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RULE 1.7 Conflict of Interest: General Rule.

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
(1) the representation of one client will be directly adverse to another client; or
(2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if each affected client consents after consultation, and:
(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
(2) the representation is not prohibited by law;
(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
(4) the consent from the client is memorialized in writing.

COMMENT

Loyalty to a Client

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined.

[2] *ABA Model Rule* Comment not adopted.

[3] The lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the parties and issues involved and to determine whether there are actual or potential conflicts of interest.

[4] If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. *See* Rule 1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[5] *ABA Model Rule* Comment not adopted.

[6] As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients.

[7] *ABA Model Rule* Comment not adopted.

[8] Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Nevertheless, a lawyer can never adequately provide joint representation in certain matters relating to divorce, annulment or separation — specifically, child custody, child support, visitation, spousal support and maintenance or division of property.

Conflict Charged by an Opposing Party

[9] Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment.

Lawyer's Interests

[10] A lawyer may not allow business or personal interests to affect representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. *See* Rules 1.1 and 1.5. Similarly, a lawyer may not refer clients to an enterprise in which the lawyer has an undisclosed interest. A lawyer's romantic or other intimate personal relationship can also adversely affect representation of a client.

Interest of Person Paying for a Lawyer's Service

[11-12] *ABA Model Rule* Comment not adopted.

[13] A lawyer may be paid from a source other than the client if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. *See* Rule 1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

[14-18] *ABA Model Rule* Comment not adopted.

Consultation and Consent

[19] A client may consent to representation notwithstanding a conflict. However, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. A lawyer's obligations regarding conflicts of interest are not present solely at the onset of the attorney-client relationship; rather, such obligations are ongoing such that a change in circumstances may require a lawyer to obtain new consent from a client after additional, adequate disclosure regarding that change in circumstances.

[20] Paragraph (b) requires that client consent be memorialized in writing. Preferably, the attorney should present the memorialization to the client for signature or acknowledgement; however, any writing will satisfy this requirement, including, but not limited to, an attorney's notes or memorandum, and such writing need not be signed by, reviewed with, or delivered to the client.

[21–22] *ABA Model Rule* Comment not adopted.

Conflicts in Litigation

[23] Paragraph (a) (1) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by paragraph (a) (2). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met.

[23a] Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

[24] A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be materially limited. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

[25] *ABA Model Rule* Comment not adopted.

Other Conflict Situations

[26] Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is a potential conflict include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

[27] For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

[28] Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. The lawyer should make clear his relationship to the parties involved.

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the client's interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect the client's interests and the right to expect that the lawyer will use that information to that client's benefit. *See* Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining

each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. *See* Rule 1.2(b).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

[34] *ABA Model Rule* Comment not adopted.

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

VIRGINIA CODE COMPARISON

This Rule is similar to DR 5-101(A) and DR 5-105(C). DR 5-101(A) provided that "[a] lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client may be affected by his own financial, business, property, or personal interests, except with the consent of his client after full and adequate disclosure under the circumstances." DR 5-105(C) provided that "a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each." Rule 1.7(b) clarifies DR 5-105(A) by requiring that, when the lawyer's other interests are involved, not only must the client consent after consultation but also that, independent of such consent, the lawyer must believe that he can provide competent and diligent representation, that the representation must be lawful, and the representation must not involve asserting a claim on behalf of one client against another client in the same litigation or other proceeding before a tribunal. This requirement appears to be the intended meaning of the provision in DR 5-105(C) that "it [be] obvious that [the lawyer] can adequately represent" the client, and was implicit in EC 5-2, which stated that a lawyer "should not accept proffered employment if his personal interests or desires may affect adversely the advice to be given or services to be rendered the prospective client."

COMMITTEE COMMENTARY

Although there are few substantive differences between this Rule and corresponding provisions in the Virginia Code, the Committee concluded that the ABA Model Rule provides a more succinct statement of a general conflicts rule.

The amendments effective June 30, 2005, substituted entirely new paragraphs (a) and (b) for the former paragraphs (a) and (b); in Comment [1], the first sentence, substituted "and independent judgment are" for "is an," and added "s" to the word "element"; in Comment [2], deleted the reference to former Rule 2.2; in Comment [3], deleted the last sentence which stated "Paragraph (a) applies only when the representation of one client would be directly adverse to the other"; in Comment [4], deleted the former third sentence which stated "Paragraph (b) addresses such situations"; in Comment [4], substituted the new last sentence for "Consideration should be given to whether the client wishes to accommodate

the other interest involved"; Comments [5] – [9] are new, re-designating former Comments [5] – [15] as Comments [10] – [20]; in present Comment [10], the first paragraph, second sentence, deleted "as indicated in paragraph (a)(1) with respect to representation directly adverse to a client and paragraph (b)(1) with respect to material limitations on representation of a client" between present words "However" and "when a disinterested…"; in present Comment [10], the first paragraph, added the last sentence, and added the second paragraph; in present Comment [12], added the references to the current (a)(1) and (a)(2) and deleted the reference to the former Rule 2.2; in present Comment [14], the first sentence, substituted "materially limited" for "adversely affected"; in present Comment [16], the second sentence, inserted "a" before the word "potential" and substituted "conflict" for "for adverse effect" after the word "potential."

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RULE 1.8 Conflict of Interest: Prohibited Transactions

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless: (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client; (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and (3) the client consents in writing thereto.

(b) A lawyer shall not use information relating to representation of a client for the advantage of the lawyer or of a third person or to the disadvantage of the client unless the client consents after consultation, except as permitted or required by Rule 1.6 or Rule 3.3.

(c) A lawyer shall not solicit, for himself or a person related to the lawyer, any substantial gift from a client including a testamentary gift. A lawyer shall not accept any such gift if solicited at his request by a third party. A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer any substantial gift from a client, including a testamentary gift, unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, a person related to a lawyer includes a spouse, child, grandchild, parent, or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of all aspects of a matter giving rise to the representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that: (1) a lawyer may advance court costs and expenses of litigation, provided the client remains ultimately liable for such costs and expenses; and (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client consents after consultation; (2) there is no interference with the lawyer's independence of professional judgment or with the client lawyer relationship; and (3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice, except that a lawyer may make such an agreement with a client of which the lawyer is an employee as long as the client is independently represented in making the agreement.

(i) A lawyer related to another lawyer as parent, child, sibling or spouse, or who is intimately involved with another lawyer, shall not represent a client in a representation directly adverse to a person whom the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may: (1) acquire a lien granted by law to secure the lawyer's fee or expenses; and (2) contract with a client for a reasonable contingent fee in a civil case, unless prohibited by Rule 1.5.

(k) While lawyers are associated in a firm, none of them shall knowingly enter into any transaction or perform any activity when one of them practicing alone would be prohibited from doing so by paragraphs (a), (b), (c), (d), (e), (f), (g), (h), or (j) of this Rule.

COMMENT

Transactions Between Client and Lawyer

[1] As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable. Similarly, paragraph (b) does not limit an attorney's use of information obtained independently outside the attorney-client relationship.

[2-5] *ABA Model Rule* Comments not adopted.

[6] A lawyer may accept ordinary gifts from a client. For example, an ordinary gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide. Paragraph (c) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

[7-8] *ABA Model Rule* Comments not adopted.

Literary Rights

[9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraph (j).

[10] *ABA Model Rule* Comments not adopted.

Person Paying for a Lawyer's Services

[11] Paragraph (f) requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 1.6 concerning confidentiality, Rule 1.7 concerning conflict of interest, and Rule 5.4(c) concerning the professional independence of a lawyer. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure.

Family Relationships Between Lawyers

[12] Paragraph (i) applies to related lawyers who are in different firms. Related lawyers in the same firm are governed by Rules 1.7, 1.9, and 1.10. The disqualification stated in paragraph (i) is personal and is not imputed to members of firms with whom the lawyers are associated.

[13-15] *ABA Model Rule* Comments not adopted.

Acquisition of Interest in Litigation

[16] Paragraph (j) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. This general rule, which has its basis in common law champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these Rules, such as the exception for reasonable contingent fees set forth in Rule 1.5 and the exception for certain advances or payment of the costs of litigation set forth in paragraph (e).

VIRGINIA CODE COMPARISON

With regard to paragraph (a), DR 5-104(A) provided that a lawyer "shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full and adequate disclosure . . . ." EC 5-3 stated that a lawyer "should not seek to persuade his client to permit him to invest in an undertaking of his client nor make improper use of his professional relationship to influence his client to invest in an enterprise in which the lawyer is interested."

Paragraph (b) is substantially similar to DR 4-101(B) (3) which provided that a lawyer should not use "a confidence or secret of his client for the advantage of himself, or a third person, unless the client consents after full disclosure."

Paragraph (c) is substantially similar to DR 5-104(B) which stated that a lawyer "shall not prepare an instrument giving the lawyer or a member of the lawyer's family any gift from a client, including a testamentary gift, except where the client is a relative of the donee." EC 5-5 stated that a lawyer "should not suggest to his client that a gift be made to himself or for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or overreached the client. If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he should urge that the client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. Except in those instances in which the client is related to the donee, a lawyer may not prepare an instrument by which the client gives a gift to the lawyer or to a member of his family."

Paragraph (d) has no direct counterpart in the *Virginia Code*. EC 5-4 stated that in order to avoid "potentially differing interests" a lawyer should "scrupulously avoid [literary arrangements with a client] prior to the termination of all aspects of the matter giving rise to the employment, even though [the lawyer's] employment has previously ended."

Paragraph (e) (1) incorporates the provisions of DR 5-103(B), including the requirement that the client remain "ultimately liable" for such advanced expenses.

Paragraph (e) (2) has no direct counterpart in the *Virginia Code*, although DR 5-103(B) allowed a lawyer to advance or guarantee expenses of litigation as long as the client remained ultimately liable.

Paragraph (f) is substantially similar to DR 5-106(A) (1) and DR 5-106(B). DR 5-106(A) (1) stated: "Except with the consent of his client after full and adequate disclosure under the circumstances, a lawyer shall not . . . [a]ccept compensation for his legal services from one other than his client." DR 5-106(B) stated that "[a] lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services."

Paragraph (g) is substantially similar to DR 5-107, but also covers aggregated plea agreements in criminal cases.

The first portion of Paragraph (h) is essentially the same as DR 6-102(A), but the second portion of Paragraph (h) has no counterpart in the *Virginia Code*. The new provision allows in-house lawyers to arrange for the same indemnity available to other officers and employees, as long as their employers are independently represented in making the arrangement.

Paragraph (i) has no counterpart in the *Virginia Code*.

Paragraph (j) is substantially the same as DR 5-103(A).

Paragraph (k) had no counterpart in the *Virginia Code.*

COMMITTEE COMMENTARY

The Committee added "for the advantage of himself or a third person" from DR 4-101(B) (3) to paragraph (b) as a further limitation on a lawyer's use of information relating to representation of a client. The Committee added a further time limitation to paragraph (d)'s restriction. Borrowing language from EC 5-4, the restriction on agreements giving a lawyer literary or media rights extends through the conclusion of "all aspects of a matter giving rise to the representation." In Rule 1.8(e) (1), the Committee retained the requirement in DR 5-103(B) that a client must "remain ultimately liable for [litigation] expenses." However, the Committee adopted the limited exception for indigent clients that appears in Rule 1.8(e) (2). After lengthy debate, the Committee adopted 1.8(h), which retains the general prohibition on lawyers prospectively limiting their malpractice liability to clients (which appeared in *Virginia Code* DR 6-102). However, the Committee added a limited exception that allows in-house lawyers to arrange for the type of indemnity that other officers and employees of entities may obtain. The Committee voted to insist that the client be independently represented in agreeing to any such arrangement. In 1.8(i), the Committee adopted the *ABA Model Rule* approach, which permits lawyers who are members of the same nuclear family to represent clients adverse to each other, as long as both clients consent after full disclosure. The *Virginia Code* was interpreted to create a non-waivable *per se* conflict of interest in these circumstances. *See* LEO 190 (April 1, 1985).

The amendments effective January 1, 2004, in paragraph (c), added new first and second sentences; in current third sentence, deleted "as parent, child, sibling, or spouse" between the present words "lawyer" and "any substantial," and substituted "unless the lawyer or other recipient of the gift" for "except where the client," substituted "client" for "donee" and added the third sentence; added paragraph (k); in Comment [1], added the last sentence.

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RESIDENTIAL PROPERTY DISCLOSURE ACT

§ **55-517**. Applicability.

The provisions of this chapter apply only with respect to transfers by sale, exchange, installment land sales contract, or lease with option to buy residential real property consisting of not less than one nor more than four dwelling units, whether or not the transaction is with the assistance of a licensed real estate broker or salesperson. For the purposes of this chapter, a "real estate contract" means a contract for the sale, exchange, or lease with the option to buy residential real estate subject to this chapter.

(1992, c. 717; 2007, c. 265.)

Legislative Information System

§ **55-518**. Exemptions.

A. The following are specifically excluded from the provisions of this chapter:

1. Transfers pursuant to court order including, but not limited to, transfers ordered by a court in administration of an estate, transfers pursuant to a writ of execution, transfers by foreclosure sale or by a deed in lieu of a foreclosure, transfers by a trustee in bankruptcy, transfers by eminent domain, and transfers resulting from a decree for specific performance. Also, transfers by an assignment for the benefit of creditors pursuant to Chapter 9 (§ 55-156 et seq.) and transfers pursuant to escheats pursuant to Chapter 9 (§ 55-156 et seq.).

2. Transfers to a beneficiary of a deed of trust pursuant to a foreclosure sale or by a deed in lieu of foreclosure, or transfers by a beneficiary under a deed of trust who has acquired the real property at a sale conducted pursuant to a foreclosure sale under a deed of trust or has acquired the real property by a deed in lieu of foreclosure.

3. Transfers by a fiduciary in the course of the administration of a decedent's estate, guardianship, conservatorship, or trust.

4. Transfers from one or more co-owners solely to one or more other co-owners.

5. Transfers made solely to any combination of a spouse or a person or persons in the lineal line of consanguinity of one or more of the transferors.

6. Transfers between spouses resulting from a decree of divorce or a property settlement stipulation pursuant to the provisions of Title 20.

7. Transfers made by virtue of the record owner's failure to pay any federal, state, or local taxes.

8. Transfers to or from any governmental entity or public or quasi-public housing authority or agency.

9. Transfers involving the first sale of a dwelling; provided, that this exemption shall not apply to the disclosures required by § 55-519.1.

B. Notwithstanding the provisions of subdivision 9 of this section, the builder of a new dwelling shall disclose in writing to the purchaser thereof all known material defects which would constitute a violation of any applicable building code. In addition, for property that is located wholly or partially in any locality comprising Planning District 15, the builder or owner, if the builder is not the owner of the property, shall disclose in writing whether the builder or owner has any knowledge of (i) whether mining operations have previously been conducted on the property or (ii) the presence of abandoned mines, shafts, or pits, if any. The disclosures required by this subsection shall be made by a builder or owner (i) when selling a completed dwelling, before acceptance of the purchase contract or (ii) when selling a dwelling before or during its construction, after issuance of a certificate of occupancy. Such disclosure shall not abrogate any warranty or any other contractual obligations the builder or owner may have to the purchaser. The disclosure required by this subsection may be made on the disclosure form described in § 55-519. If no defects are known by the builder to exist, no written disclosure is required by this subsection.

(1992, c. 717; 1993, c. 824; 1994, cc. 80, 242; 2005, c. 510; 2006, c. 706; 2007, c. 265.)

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§ **55-519**. Required disclosures.

With regard to transfers described in § 55-517 of this chapter, the owner of the residential real property shall furnish to a purchaser a residential property disclosure statement in a form provided by the Real Estate Board stating that the owner makes the following representations as to the real property:

1. The owner makes no representations or warranties as to the condition of the real property or any improvements thereon, and purchasers are advised to exercise whatever due diligence a particular purchaser deems necessary including obtaining a certified home inspection, as defined in § 54.1-500, in accordance with terms and conditions as may be contained in the real estate purchase contract, but in any event, prior to settlement on a parcel of residential real property;

2. The owner makes no representations with respect to any matters that may pertain to parcels adjacent to the subject parcel and that purchasers are advised to exercise whatever due diligence a particular purchaser deems necessary with respect to adjacent parcels in accordance with terms and conditions as may be contained in the real estate purchase contract, but in any event, prior to settlement on a parcel of residential real property;

3. The owner makes no representations to any matters that pertain to whether the provisions of any historic district ordinance affect the property and purchasers are advised to exercise whatever due diligence a particular purchaser deems necessary with respect to any historic district designated by the locality pursuant to § 15.2-2306, including review of any local ordinance creating such district or any official map adopted by the locality depicting historic districts, in accordance with terms and conditions as may be contained in the real estate purchase contract, but in any event, prior to settlement on a parcel of residential real property;

4. The owner makes no representations with respect to whether the property contains any resource protection areas established in an ordinance implementing the Chesapeake Bay Preservation Act (§ 10.1-2100 et seq.) adopted by the locality where the property is located pursuant to § 10.1-2109 and that purchasers are advised to exercise whatever due diligence a particular purchaser deems necessary to determine whether the provisions of any such ordinance affect the property, including review of any official map adopted by the locality depicting resource protection areas, in accordance with terms and conditions as may be contained in the real estate purchase contract, but in any event, prior to settlement on a parcel of residential real property;

5. The owner makes no representations with respect to information on any sexual offenders registered under Chapter 23 (§ 19.2-387 et seq.) of Title 19.2 and that purchasers are advised to exercise whatever due diligence they deem necessary with respect to such information, in accordance with terms and conditions as may be contained in the real estate purchase contract, but in any event, prior to settlement pursuant to that contract; and

6. The owner represents that there are no pending enforcement actions pursuant to the Uniform Statewide Building Code (§ 36-97 et seq.) that affect the safe, decent, sanitary living conditions of the property of which the owner has been notified in writing by the locality, except as disclosed on the disclosure statement, nor any pending violation of the local zoning ordinance which the violator has not abated or remedied under the zoning ordinance, within a time period set out in the written notice of violation from the locality or established by a court of competent jurisdiction, except as disclosed on the disclosure statement.

(1992, c. 717; 1996, c. 379; 1998, cc. 384, 795; 2005, c. 510; 2006, cc. 247, 514, 533, 705, 767; 2007, cc. 265, 784.)

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§ **55-519.1**. Required disclosures pertaining to a military air installation.

The owner of residential real property located in any locality in which a military air installation is located shall disclose to the purchaser whether the subject parcel is located in a noise zone or accident potential zone, or both, if so designated on the official zoning map by the locality in which the property is located on a form provided by the Real Estate Board. Such disclosure shall state the specific noise zone or accident potential zone, or both, in which the property is located according to the official zoning map.

(2005, c. 510; 2007, c. 265.)

Legislative Information System

§ 55-520. Time for disclosure; termination of contract.

A. The owner of residential real property subject to this chapter shall deliver to the purchaser the written disclosure statement required by this chapter prior to the acceptance of a real estate purchase contract or otherwise be subject to the provisions of subsection B of this section. For the purposes of this chapter, "acceptance" means the full execution of a real estate purchase contract by all parties. The residential property disclosure statement may be included in the real estate purchase contract, in an addendum thereto, or in a separate document.

B. If the disclosure statement required by this chapter is delivered to the purchaser after the acceptance of the real estate purchase contract, the purchaser's sole remedy shall be to terminate the real estate purchase contract at or prior to the earliest of (i) three days after delivery of the disclosure statement in person; (ii) five days after the postmark if the disclosure statement is deposited in the United States mail, postage prepaid, and properly addressed to the purchaser; (iii) settlement upon purchase of the property; (iv) occupancy of the property by the purchaser; (v) the purchaser making written application to a lender for a mortgage loan where such application contains a disclosure that the right of termination shall end upon the application for the mortgage loan; or (vi) the execution by the purchaser after receiving the disclosure statement required by this chapter of a written waiver of the purchaser's right of termination under this chapter contained in a writing separate from the real estate purchase contract. In order to terminate a real estate purchase contract when permitted by this chapter, the purchaser must, within the times required by this chapter, give written notice to the owner either by hand delivery or by United States mail, postage prepaid, and properly addressed to the owner. If the purchaser terminates a real estate purchase contract in compliance with this chapter, the termination shall be without penalty to the purchaser, and any deposit shall be promptly returned to the purchaser.

C. Notwithstanding the provisions of subsection B of § 55-524, no purchaser of residential real property located in a noise zone designated on the official zoning map of the locality as having a day-night average sound level of less than 65 decibels shall have the right to terminate a real estate purchase contract pursuant to this section for failure of the property owner to timely provide any disclosure required by § **55-519.1**.

(1992, c. 717; 1993, c. 818; 2005, c. 510; 2007, c. 265.)

Legislative Information System

§ 55-521. Owner liability.

A. Except with respect to the disclosures required by § **55-519.1**, the owner shall not be liable for any error, inaccuracy or omission of any information delivered pursuant to this chapter if: (i) the error, inaccuracy or omission was not within the actual knowledge of the owner or was based on information provided by public agencies or by other persons providing information that is required to be disclosed pursuant to this chapter, or the owner reasonably believed the information to be correct, and (ii) the owner was not grossly negligent in obtaining the information from a third party and transmitting it. The owner shall not be liable for any error, inaccuracy, or omission of any information required to be disclosed by § **55-519.1** if the error, inaccuracy, or omission was the result of information provided by an officer or employee of the locality in which the property is located.

B. The delivery by a public agency or other person, as described in subsection C below, of any information required to be disclosed by this chapter to a prospective purchaser shall be deemed to comply with the requirements of this chapter and shall relieve the owner of any further duty under this chapter with respect to that item of information.

C. The delivery by the owner of a report or opinion prepared by a licensed engineer, land surveyor, geologist, wood-destroying insect control expert, contractor or home inspection expert, dealing with matters within the scope of the professional's license or expertise, shall satisfy the requirements of this chapter if the information is provided to the prospective purchaser pursuant to a request therefor, whether written or oral. In responding to such a request, an expert may indicate, in writing, an understanding that the information provided will be used in fulfilling the requirements of this chapter and, if so, shall indicate the required disclosures, or portions thereof, to which the information being furnished is applicable. Where such a statement is furnished, the expert shall not be responsible for any items of information, or, portions thereof, other than those expressly set forth in the statement.

(1992, c. 717; 2005, c. 510; 2007, c. 265.)

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§ **55-522**. Change in circumstances.

If information disclosed in accordance with this chapter is subsequently rendered or discovered to be inaccurate as a result of any act, occurrence, information received, circumstance or agreement subsequent to the delivery of the required disclosures, the inaccuracy resulting therefrom does not constitute a violation of this chapter. However, at or before settlement, the owner shall be required to disclose any material change in the disclosures made relative to the property or certify to the purchaser at settlement that the disclosures made relative to the property are substantially the same as it was when the disclosure form was provided. If, at the time the disclosures are required to be made, an item of information required to be disclosed is unknown or not available to the owner, the owner may state that the information is unknown or may use an approximation of the information, provided the approximation is clearly identified as such, is reasonable, is based on the actual knowledge of the owner, and is not used for the purpose of circumventing or evading this chapter.

(1992, c. 717; 2007, c. 265.)

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§ **55-523**. Duties of real estate licensees.

A real estate licensee representing an owner of residential real property as the listing broker has a duty to inform each such owner represented by that licensee of the owner's rights and obligations under this chapter. A real estate licensee representing a purchaser of residential real property or, if the purchaser is not represented by a licensee, the real estate licensee representing an owner of residential real estate and dealing with the purchaser has a duty to inform each such purchaser of the purchaser's rights and obligations under this chapter. Provided a real estate licensee performs those duties, the licensee shall have no further duties to the parties to a residential real estate transaction under this chapter, and shall not be liable to any party to a residential real estate transaction for a violation of this chapter or for any failure to disclose any information regarding any real property subject to this chapter.

(1992, c. 717.)

Legislative Information System

§ **55-524**. Actions under this chapter.

A. Notwithstanding any other provision of this chapter or any other statute or regulation, no cause of action shall arise against an owner or a real estate licensee for failure to disclose that an occupant of the subject real property, whether or not such real property is subject to this chapter, was afflicted with human immunodeficiency virus (HIV) or that the real property was the site of:

1. An act or occurrence which had no effect on the physical structure of the real property, its physical environment, or the improvements located thereon; or

2. A homicide, felony, or suicide.

B. The purchaser's remedies hereunder for failure of an owner to comply with the provisions of this chapter are as follows:

1. If the owner fails to provide the disclosure statement required by this chapter, the contract may be terminated subject to the provisions of subsection B of § 55-520.

2. In the event the owner fails to provide the disclosure required by § 55-519.1, or the owner misrepresents, willfully or otherwise, the information required in such disclosure, except as result of information provided by an officer or employee of the locality in which the property is located, the purchaser may maintain an action to recover his actual damages suffered as the result of such violation. Notwithstanding the provisions of this subdivision, no purchaser of residential real property located in a noise zone designated on the official zoning map of the locality as having a day-night average sound level of less than 65 decibels shall have a right to maintain an action for damages pursuant to this section.

C. Any action brought under this subsection shall be commenced within one year of the date the purchaser received the disclosure statement. If no disclosure statement was delivered to the purchaser, an action shall be commenced within one year of the date of settlement if by sale, or occupancy if by lease with an option to purchase.

Nothing contained herein shall prevent a purchaser from pursuing any remedies at law or equity otherwise available against an owner in the event of an owner's intentional or willful misrepresentation of the condition of the subject property.

(1992, c. 717; 1993, c. 847; 2005, c. 510; 2007, c. 265.)

Legislative Information System

§ **55-525.** Real Estate Board to develop form; when effective.

An owner shall be required to make disclosures required by this chapter for real property subject to a real estate purchase contract which is fully executed by all parties thereto on and after January 1, 2008. On or before January 1, 2008, the Real Estate Board shall develop the form for the residential property disclosure statement in accordance with § 54.1-2105.1. The Board may at any time amend the form as the Board deems necessary and appropriate.

(1992, c. 717; 1993, c. 848; 2007, c. 265.)

Legislative Information System

VA. CODE SECTION 38.2-4614

§ **38.2-4614**. Prohibition against payment or receipt of title insurance kickbacks, rebates, commissions and other payments; penalty.

A. 1. No person selling real property, or performing services as a real estate agent, attorney, or lender incident to any real estate settlement or sale, shall pay or receive, directly or indirectly, any kickback, rebate, commission, thing of value or other payment pursuant to any agreement or understanding, oral or otherwise, that business incident to the issuance of any title insurance be referred to any title insurance company, title insurance agency or agent. No title insurance company, title insurance agency or agent shall give any such kickback, rebate, commission, thing of value or other payment pursuant to any such agreement or understanding. For purposes of this section, "thing of value" means any payment, advance, funds, loan, service or other consideration. This section shall not prevent any federally insured lenders, holding companies to which they belong, or subsidiaries of such lenders or holding companies from being licensed by the Commission as title insurance agents or agencies and receiving commissions from the sale of the title insurance policies in their capacities as title insurance agents or agencies.

2. Nothing in this section shall be construed to prohibit (i) payments of sums spent for bona fide advertising and marketing promotions otherwise permissible under the provisions of the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 et seq. or (ii) providing educational materials or classes, wherein such materials or classes are provided to a group of persons or entities pursuant to a bona fide marketing or educational effort.

B. Any person who knowingly and willfully violates this section shall be guilty of a misdemeanor and subject to a fine of not more than $1,000 for each violation. Any criminal charge brought under this section shall be by indictment pursuant to Chapter 14 (§ 19.2-216 et seq.) of Title 19.2.

C. No person shall be in violation of this section solely by reason of ownership in a title insurance company, title insurance agency or agent as defined in this chapter, wherein such person receives returns on investments arising from the ownership interest. In addition, this section shall not prohibit (i) the payment to any person of a bona fide salary or compensation or other payment for services actually performed for the business of the title insurance company, title insurance agency or agent or (ii) any employer's payment to its own employees for referrals. Any employer's payment to its own employees for the referral of title insurance business shall be subject to the requirements of subdivision B 8 of § 38.2-1821.1.

(1975, c. 184, § 38.1-733.1; 1986, c. 562; 1987, c. 174; 1993, c. 147; 1996, c. 883; 2002, c. 599.)

UNAUTHORIZED PRACTICE OF LAW OPINIONS

VIRGINIA UPL OPINION 59

Printing of Documents Connected With Computerized Loan Closing.

It is not the unauthorized practice of law for a lay agency to print documents in connection with a computerized loan closing, when those documents have been prepared and approved by a law firm and thereafter electronically transmitted to the lay agency.

Committee Opinion
December 29, 1983

VIRGINIA UPL OPINION 63

Preparation of Construction Contracts/ Purchase Agreements by Realtors.

It is not the unauthorized practice of law for real estate brokers and/or agents to prepare a standard purchase agreement and the addendum to purchase agreement. [UPC 6-6]

Committee Opinion
August 28, 1984

VIRGINIA UPL OPINION 76

Preparation and Completion of Closing Documents.

It is the unauthorized practice of law for a real estate settlement service to prepare completed deeds of trust, deeds of bargain and sale and deed of trust notes on behalf of a real estate seller or purchaser even if the documents are sent subsequently to an attorney for the seller or purchaser for the attorney's review, final approval and use at settlement on behalf of the attorney's client. [UPR 6-103; UPC 6-4].

Committee Opinion
June 11, 1985

VIRGINIA UPL OPINION 80

Certificate of Satisfaction Prepared by Title Company.

It is not the unauthorized practice of law for a real estate company to charge a fee for the preparation of a certificate of satisfaction to be executed by a mortgage company. A certificate of satisfaction is similar to a "certificate of release" which a non-lawyer may prepare rather than a "deed of release" which a non-lawyer may not prepare. Furthermore, an escrow and title company may charge a "release fee" or a "closing fee" so long as these fees are not charged for the preparation of legal instruments or the provision of legal services. [UPC 6-7]

Committee Opinion
May 6, 1985

VIRGINIA UPL OPINION 86

Title Settlement Services.

It is the unauthorized practice of law for a title company and settlement service to prepare deeds, deeds of trust and notes in connection with a settlement referred to the company by an attorney, even though the documents may later be reviewed by the attorney. [*See* UPC 6-4 and 6-7; UPR 6-103 and 6-104; and UPL Opinion 76.]

It is not the unauthorized practice of law for the title company and settlement service to prepare HUD settlement statements. [See UPC 6-7 and UPR 6-104(A)(3).]

Committee Opinion
November 4, 1985

VIRGINIA UPL OPINION 91

Preparation of Deeds by Escrow and Title Company.

An escrow and title company may charge a "release fee" or a "closing fee" so long as these fees are not charged for the preparation of legal instruments or the provision of legal services. [UPL Op. No. 80, UPC 6-7]

An escrow and title company may not prepare deeds, deeds of trust, deeds of trust notes, or deeds of release. [UPC 6-7(K), UPC 6-104]

Committee Opinion
February 26, 1986

VIRGINIA UPL OPINION 141

Fees Charged by Real Estate Settlement Service.

I am writing in response to your letter of July 10, 1990, requesting an Unauthorized Practice of Law advisory opinion regarding whether a title company may charge a fee to a real estate seller for document preparation of a Deed, 1099 Form and Owners Affidavit.

At its August 3 and October 5, 1990 meetings, the Committee reviewed the issue you raise and has directed me to reply to your inquiry. The Committee has earlier opined that it is the unauthorized practice of law for a title company or real estate settlement service to prepare deeds, deeds of trust and notes on behalf of a real estate seller or purchaser. *See* UPL Opinions 76, 80, 86, and 91. Furthermore, the Committee has also opined that an escrow and title company may charge a "closing fee" so long as the fee is not charged for the preparation of legal instruments or the provision of legal services. *See* UPL Opinions 80 and 91. Finally, the Committee opines that, although Unauthorized Practice Rule 6 103(A)(4) permits a lender to prepare legal instruments affecting title to real estate securing the payments of its loan, for which no separate charge shall be made, no such preparation is permitted to a third party engaged in real estate settlement services. [emphasis added] *See*" UPL Opinion 112. Thus, the Committee is of the opinion that, since a settlement service which prepares deeds is engaged in the unauthorized practice of law, any provision which requires payment of a fee for such documents would appear to the committee to be void.

The Committee is of the opinion that questions as to other fees being charged to the seller by the settlement service raise issues of contract law beyond the purview of the Committee. However, the Committee does direct your attention to Legal Ethics Opinion 911, as recently reconsidered by the Bar's Standing Committee on Legal Ethics, citing Internal Revenue Code § 6045(e)(3) which makes unlawful any separate charge made to a customer by a real estate reporting person for complying with the requirement to file a Form 1099 return and statement relative to a transaction.

Committee Opinion
October 31, 1990

VIRGINIA UPL OPINION 147
Paralegal Company Providing Support Services to Attorney's Conducting Real Estate Closings.

It is not the unauthorized practice of law for a real estate paralegal company ["Company"] to provide assistance to an attorney in closing real estate loans which have been referred to the paralegal company by that attorney ["Closing Attorney"] using the following procedure:

1. Closing Attorney receives sales contract from real estate agents; reviews contract; opens file; determines which items can be accomplished by Company (e.g. survey, title insurance, private pay-off information); contracts real estate agent; and forwards file to Company for processing.

2. Company receives Closing Attorney's file; requests title search; orders survey; notifies lending institution; and receives package from lending institution unless lending institution sends package directly to closing Attorney who forwards package to Company.

3. Company completes non-legal documents (e.g. tax information, name affidavit, W-9 forms, commitment letter, HUD-1 statement); contacts client to determine name of hazard insurance company.

4. Company forwards note and deed of trust requests to Closing Attorney; if lending institution has completed documents, Company provides those to Closing Attorney for review prior to closing.

5. Company receives survey and forwards to title insurance company. Upon receipt of title binder, same if forwarded by Company to seller's Attorney for completion of deed and seller's documents. Deed and seller's documents are reviewed by Closing Attorney and lender prior to closing.

6. Completed approved package carried by Company to Closing Attorney for review prior to meeting with clients. Single charge for closing is made and shown on "title examination" line of HUD-1 statement. [*See also* Legal Ethics Opinion No. 1220.]

7. Clients meet with Closing Attorney to sign all required documents; package is returned to Company with any changes to be made noted by Closing Attorney; documents requiring recordation are recorded by Company with instructions from Closing Attorney; Company does not record until Closing Attorney determines procedure once any encumbrance is disclosed.

8. Following recording, Company assembles various executed documents and certified copies of documents required by lender and delivers same to lender within required time.

9. Company writes disbursement checks out of Closing Attorney's escrow account upon request (Company has no signatory power over Closing Attorney's account); Closing Attorney reviews and signs checks to be disbursed.

10. Upon receipt, Attorney transmits recorded instruments to Company which prepares cover letter for Closing Attorney's review and signature before forwarding to appropriate individual/institution.

Committee Opinion
April 19, 1991

VIRGINIA UPL OPINION 165

Land Surveyor Representing Potential Land Purchaser Before City Planning Commission.

This is in response to your letters of December 22, 1992 and January 5, 1993 requesting an Unauthorized Practice of Law advisory opinion dealing with a land surveyor representing before a city Planning Commission a potential purchaser of land.

You have indicated that the surveyor submitted, on behalf of the potential purchaser, a petition to change zoning classification of the land. You also indicate that the surveyor communicated with adjacent landowners, met with them to discuss the plan, made changes to the plan and certain proffers based upon those discussions, submitted those proffers to the Planning Commission, and served as principal spokesman for the potential purchaser at the Planning Commission hearing.

You have asked the Committee to opine as to whether the enumerated activities constitute the unauthorized practice of law.

The Committee considered your inquiry at its January 7, 1993 and February 11, 1993 meetings and has directed me to transmit its conclusions to you.

The practice of law, as defined in Virginia, involves a non-lawyer's engaging in any one of three activities:

1) Advising another, not one's regular employer, for direct or indirect compensation, in any matter involving the application of legal principles to facts or purposes or desires;

2) Preparing for another, with or without compensation, legal instruments of any character; or

3) Representing the interest of another before any tribunal, with or without compensation.

Part Six: Section I: Rules of the Virginia Supreme Court.

In addition, Unauthorized Practice Consideration 1-1, in pertinent part, defines the term "tribunal" to include any body which determines the rights and obligations of parties to proceedings before it, as opposed to promulgating rules and regulations of general applicability.

The Committee is of the opinion that the Planning Commission does not act as a tribunal since its goal in this instance is to make a recommendation on a rezoning application which is ultimately a legislative rather than an adjudicative function.

Thus, the Committee is of the opinion that the specific activities you have enumerated, including the land surveyor presenting facts, figures, and factual conclusions to the Planning Commission on behalf of the potential purchaser and further negotiating the manner in which the zoning ordinance may be amended do not constitute the practice of law and thus may be carried out by a non-lawyer. Conversely, activities conducted on behalf of the potential purchaser before a body which does constitute a tribunal by virtue of its role in adjudicating disputes, such as the Board of Zoning Appeals, would constitute the unauthorized practice of law.

Finally, the Committee cautions that activities such as interpretations of applicable laws and regulations, legal analysis, and assurances based upon those interpretations and analyses might constitute the provision of legal advice to another and, when provided for compensation, would therefore constitute the unauthorized practice of law.

Committee Opinion
February 22, 1993

VIRGINIA UPL OPINION 177

Corporations; Employment of Lawyers; Real Estate Settlement Services Offered Through National Corporation; Attorney Employed By Corporation Providing Legal Services Through Private Practice.

I am writing in response to your letter of March 2, 1994 requesting an Unauthorized Practice of Law advisory opinion dealing with real estate settlement practice. The Committee considered your inquiry at its March 3, 1994 meeting and has directed me to transmit its conclusions to you.

You have provided the Committee with two hypotheticals for consideration.

A. The first involves an attorney who is an active member of the Virginia State Bar and who is employed by a national corporation performing duties as senior attorney managing the corporation's residential real estate settlement department. As corporate counsel, the attorney is aware that he may not offer or provide legal counsel to another [client of the corporation] nor may he prepare for another [client of the corporation] legal instruments of any character except as provided in the Unauthorized Practice Rules.

   The attorney seeks to prepare legal instruments related to residential real estate transactions (notably deeds and other necessary documentation) for others in his capacity as an active status attorney, in his own name as legal counsel. All communications, billing, etc., would clearly note that these services are being performed by the attorney in his capacity as an active licensed attorney. The attorney also seeks to give advice to purchasers when necessary, including how to take title to property. The attorney would be compensated for the advice/document preparation, which compensation would be noted separately on the settlement statement on the "document preparation" line as "Attorney, Esquire." The compensation would be paid directly to the attorney, and would not be paid to the corporation which would be compensated on a separate line for settlement services.

As to this first hypothetical, you have requested that the committee opine as to whether the giving of advice and preparation of legal documents by the attorney, acting in his capacity as an active, licensed attorney while employed by the corporation, constitutes the unauthorized practice of law.

The appropriate and controlling Virginia Unauthorized Practice Rule are contained in the (a) preamble to Part Six: Section I: (B): Rules of the Supreme Court of Virginia and (b) Unauthorized Practice Rule 6.

The former, in pertinent part, generally defines the practice of law as (I) advising another, not his regular employer, for direct or indirect compensation, in matters involving the application of legal principles to facts, purposes, or desires; (2) preparing for another, with or without compensation, legal instruments of any character; or (3) representing the interest of another, with or without compensation, before any tribunal. Subsection (A) of the same preamble prohibits a non-lawyer from engaging in the practice of law or in any manner holding himself out as authorized or qualified to practice law in the Commonwealth of Virginia except as may be authorized by rule or statute.

The latter specifically delineates the parameters of a non-lawyer's activities in the area of real estate practice, including the giving of legal advice (UPR 6-101), the preparation of legal instruments (UPR 6-103), the conduct of real estate closings (UPR 6-104), and the referral of business to lawyers by parties interested in real estate transactions.

The Committee has earlier opined that it would constitute the unauthorized practice of law for a lay corporation to provide legal services to its customers and that it would be improper for any attorney employee of a lay corporation to assist the lay corporation in that unauthorized practice of law. UPL Op. 57, Approved by the Supreme Court of Virginia, December 2, 1983, Effective March 1, 1984.

Thus, the Committee is of the opinion that it would not constitute the unauthorized practice of law for the lawyer to maintain a private practice through which he would deliver legal services to the parties to a real estate transaction. *See also* UPL Ops. 76, 86, 91; Legal Ethics Opinion 1329 (April 20, 1990). In accord with UPL Op. 57, however, the Committee cautions that the giving of advice and preparation of legal documents by the attorney, acting in his capacity as an active, licensed attorney while employed by the corporation would be improper if provided under the auspices of the corporation.

In addition, however, the Committee cautions that, should the attorney's private clients be referred to the attorney by the corporate employer, the employer is required to comply with the dictates of UPR 6-106 which mandates that the [real estate transaction] customer must first have the opportunity to select a lawyer of his own choosing and, if the customer does not so select a lawyer, the corporation must submit a list of lawyers from which the customer may make his selection.

B. The second hypothetical involves the attorney, in his capacity as corporate counsel performing duties as senior attorney managing the corporations residential real estate settlement department, seeking to determine from purchaser customers the manner in which the customer wishes to take title to the property. The attorney has devised a form which states the facts as to the several types of property ownership, but does not advise the customer which form of ownership would better serve the customers

needs. The proposed form requests that the customer complete the bottom portion of the form noting how the customer wishes to take title, and requests that the form be returned to the corporate settlement department. That information would then be communicated to the seller's attorney for the purpose of having the deed and other seller documents prepared.

You have requested that the Committee opine as to whether either the provision of the information contained in the form or the conveyance of the form and return of the same to the corporate settlement department similarly constitutes the unauthorized practice of law.

The Committee is of the opinion that those segments of the Part Six: Section I: Unauthorized Practice Rules of the Supreme Court of Virginia which are cited above are similarly appropriate and controlling to this question.

The Committee has consistently opined that a non-lawyer's provision of general legal information to the general public does not constitute the unauthorized practice of law provided that the non-lawyer does not give assistance in the completion of any forms or render any legal advice concerning the completion of the forms. *See* UPL Ops. 56, 73, 104, 116, 131, 153.

Thus, the Committee is of the opinion that it would not constitute the unauthorized practice of law for the corporation to either provide a form which would include information as to the several types of property ownership; to convey the form to the purchaser; or to accept the return of the same for purpose of communicating the information to the seller's attorney so that the deed and other seller documents may be prepared.

Committee Opinion
March 15, 1994

VIRGINIA UPL OPINION 197

Non-Lawyer Representation of Party to a Real Estate Transaction.

You have presented a hypothetical situation in which an Attorney who is the settlement agent for a real estate transaction has received a contract with an addendum which indicates that the settlement agent was chosen by the purchaser and that seller will have a separate attorney. The contract further states, "Fees for the preparation of the deed, that portion of the Settlement Agent's fee billed to the Seller, costs of releasing existing encumbrances, appropriate legal fees and any other proper charges assessed to the Seller shall be paid by the Seller." Subsequently, the Attorney receives a letter from a title company stating: 1) that the title company has been retained to represent the seller; 2) that the title company will prepare the sellerís documents, including the deed, the Certificate of Satisfaction, etc.; and 3) that Attorney's settlement statement should show no charges to the seller from Attorney. The letter further states that the title company's fee to the seller should be shown on the settlement statement, payable to the title company, and that seller will sign all documents in the title company's office.

The Committee considered your inquiry at its December 14, 2000 meeting and has directed me to transmit its conclusions to you.

Under the facts you have presented, you have asked the committee to opine on the following questions:

1. Can the title company be retained to represent the seller in the real estate transaction if the title company is not the settlement agent named in the contract?

a. If so, does representation by a title company put the named settlement agent in the same position as if the sellers were represented by an attorney, i.e., does this representation by a title company relieve the seller of any charges by the settlement agent except those disclosed and agreed to by the seller?

b. If the title company can represent the seller, can the fee to the title company on the settlement statement include the preparation of the deed, or should this be itemized separately with the preparing attorneyís name?

No. The Committee has determined that based upon your facts that since the title company is not serving as the settlement agent in this transaction under the Consumer Real Estate Settlement Protection Act (CRESPA), the Act does not apply, and the company cannot provide any escrow, settlement or closing services under the Consumer Real Estate Settlement Protection Act (CRESPA).

Since the Act does not apply, the title company is not authorized to prepare any legal instruments on behalf of seller or collect a fee for doing so. [1] UPRs 6-101, 6-102 and 6-103. Further, the title company cannot hold itself out as authorized to undertake a legal representation of a person and is not authorized to give legal advice to the seller or prepare legal instruments because such activity constitutes the unauthorized practice of law. Va. S. Ct. R., pt. 6, §I, UPR 6-101 (A). [2]

n response to your sub questions, it is the opinion of the committee that the named settlement agent is placed in the position of dealing with sellers who are not represented by counsel, because the title company is not authorized by law to act as an attorney for sellers. Since the title company cannot lawfully prepare the deed on behalf of the sellers, the fee charged by the title company on the settlement statement cannot include a fee for the preparation of the deed by the title company. [3] If an attorney not directly employed by the title company prepared the deed, the fee charged for deed preparation should be itemized separately with the preparing attorney's name and paid to that attorney.

2. If Attorney complies with the instructions of the title company, is Attorney aiding the unauthorized practice of law and thus subject to disciplinary action?

This is an ethics question, not an unauthorized practice matter, and is beyond the purview of this committee. This issue has been referred to the Standing Committee on Legal Ethics.

3. Would the answers be different if the person representing the title company is an attorney who owns or is employed by the title company?

No. Your inquiry presents two scenarios, one in which a Virginia licensed attorney in private practice owns the title company and another in which the attorney is an employee of the title company. In both situations, it would appear that the attorney is representing the *title company* and not the seller. If the seller needs or desires legal representation, the seller cannot be represented by the attorney employed by the title company. The title company is a lay entity which is not authorized to practice law, and cannot employ its attorney to provide legal services to its customers. *Richmond Ass'n of Credit Men v. Bar Ass'n of City of Richmond,* 167 Va. 327, 189 S.E. 153 (1937); UPL Op. #60 (1985). Under both CRESPA and the UPL rules, only an attorney engaged in private practice specifically retained by the seller may undertake legal representation of the seller.

4. Can an attorney acting in his capacity as an owner/employee of a title company ethically perform legal services for clients of the title company, or is he considered to be the same as a non-attorney in his relationship with title company clients? Are the clients considered to be represented by their own attorney in this situation?

Generally it is the unauthorized practice of law for a lawyer employed by a lay corporation to provide legal services to its customers. *Richmond Ass'n of Credit Men v. Bar Ass'n of City of Richmond, supra.* Therefore, the committee would regard such an attorney as a non-lawyer in the circumstances you present. The committee opines that only a Virginia licensed attorney engaged in the private practice of law may undertake a legal representation of a party to a real estate closing. Thus, in the facts you present, the attorney employed by the title company is to be treated as a non-attorney for purposes of your inquiry and the seller is not to be considered as represented by their own attorney in this situation.

Committee Opinion
Issued June 26, 2000

Revised January 22, 2001

Approved by Council
June 14, 2001

Approved by Va. Supreme Court
October 1, 2001

1. A non-lawyer settlement agent registered under CRESPA is authorized to prepare settlement statements and complete form documents and instruments selected by and in accordance with instructions of the parties to the transaction. Virginia Code § 6.1-2.20. A non-lawyer shall not, with or without compensation, prepare for another legal instruments of any character affecting the title to or use of real estate UPR 6-103 (A).

2. Even if the title company were serving as a registered settlement agent pursuant to the Consumer Real Estate Settlement Protection Act (CRESPA), the title company is prohibited from giving legal advice to the parties to the transaction. See, e.g., Va. Code § 6.1-2.22 (No settlement agent can provide legal advice to any party to the transaction except a settlement agent who is engaged in the private practice of law in Virginia and who has been retained or engaged by a party to the transaction for the purpose of providing legal services to that party). However, CRESPA has no application to this inquiry since the title company is not acting as settlement agent.

3. A non-lawyer is not entitled to collect a fee for providing legal services which they are not authorized to perform. Va. S. Ct. R., pt. 6, § I (Introduction) ("Any fees charged by a person engaged in the unauthorized practice of law are not collectible in court."); UPL Op. #112 (1990) (It is the unauthorized practice of law for a mortgage company to make a separate charge for the preparation of legal instruments affecting title to real estate in connection with a real estate closing.)