VIRGINIA BEACH BAR ASSOCIATION
ETHICS PRESENTATION
WITH
HON. EDWARD HANSON, JR.
FEBRUARY 2014

ANN K. CRENSHAW
Kaufman & Canoles

HYPOTHETICAL #1

USE OF RELEASE-DISMISSAL AGREEMENTS BY PROSECUTORS

Is it ethical for a prosecutor to enter into an agreement with a criminal defendant to dismiss criminal charges in exchange for the defendant's release of any civil claims arising out of the defendant's arrest, prosecution, and/or conviction?

HYPOTHETICAL #2

"OF COUNSEL" RELATIONSHIP

In this hypothetical, a solo practitioner, the sole member of a professional limited liability company (PLC), who specializes in federal and state income taxes and complex business and real estate transactions wishes to formalize his relationship with a law firm that he works with frequently. Currently, the firm associates him as co-counsel in cases that require his expertise, and he associates with the firm or outright refers it cases that involve litigation or commercial real estate transactions.

The parties wish to modify and formalize their arrangement as follows:

1. The firm and the lawyer will jointly market themselves and refer to the lawyer as either "Of Counsel" or "Affiliated Attorney;"

2. In accordance with ABA Formal Opinion No. 330 (1972), the lawyer will be individually designated as "Of Counsel" or "Affiliated Attorney," rather than his PLC, and the lawyer will not enter into this arrangement with more than two firms at any time;

3. When the firm and the lawyer act as co-counsel on a matter, they will provide a joint bill to the client, accompanied by separate invoices of their individual fees and expenses;

4. When the involvement is an outright referral, the referring firm will receive a referral fee, which will comply with Rule 1.5(e); and

5. Other than these specific matters, neither the firm nor the lawyer will communicate or reveal confidences or secrets of any other clients or permit access to any documents or databases that would jeopardize other clients' confidences or secrets.

HYPOTHETICAL #3

OBLIGATIONS OF A LAWYER IN HANDLING SETTLEMENT FUNDS WHEN A THIRD PARTY LIEN OR CLAIM IS ASSERTED

What are a lawyer's ethical responsibilities when, in the course of representing a client, the lawyer receives funds for the client that may be subject to a third party's claim to a portion of

the funds held by the lawyer. The applicable rule of conduct is Rule 1.15(b), which requires a lawyer to:

(4) promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer that such person is entitled to receive; and

(5) not disburse funds or use property of a client or third party without their consent or convert funds or property of a client or third party, except as directed by a tribunal.

Does Rule 1.15(b) Require that the Lawyer Have Actual Knowledge of a Third Party's Lien or Claim to the Funds Held by the Lawyer?

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

Hypothetical One – Duty to Investigate Potential Lien

A client retains a lawyer to pursue a claim for personal injuries. The client advises the lawyer that at least some of his medical bills were paid by an employer-sponsored health Plan ("the Plan").18 The lawyer is aware that Virginia has an anti-subrogation statute that bars health insurers from asserting subrogation rights. Va. Code § 38.2-3405. The lawyer is also aware that some health Plans are self-funded ERISA Plans that may preempt state law. The lawyer does not know if the client's Plan is self-funded and even if it is self-funded, the lawyer does not know if the Plan provides for reimbursement rights. The lawyer does not know if the Plan's administrator is aware of the client's personal injury claim.

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

Hypothetical Two – Reasonable Effort to Determine Validity of Claim

Assume now that the Plan administrator has sent to the lawyer a letter asserting subrogation rights. The lawyer has responded in writing requesting documents to determine whether the Plan has a meritorious claim to portions of the settlement funds. Specifically, the lawyer has requested documentation that the Plan is self-funded and documentation that the Plan has a right of reimbursement. The lawyer has requested the documentation in thirty days. After waiting thirty days with no response, the lawyer sends a second request to the health Plan administrator notifying the Plan administrator that if the requested documents are not received in fifteen days the lawyer will disburse the settlement without preserving any funds to reimburse the Plan.

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

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

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

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

HYPOTHETICAL #4

MAY A CRIMINAL DEFENSE LAWYER AGREE THAT HE WILL NOT GIVE CERTAIN DISCOVERY MATERIALS TO HIS CLIENT DURING THE COURSE OF THE REPRESENTATION, AND THAT HE WILL REMOVE CERTAIN MATERIALS FROM HIS FILE PRIOR TO THE END OF THE REPRESENTATION?

In this hypothetical, a prosecutor wishes to provide broad discovery to defense lawyers in the course of criminal prosecutions, in order to make defendants aware of the weight of the evidence against them, to ensure that the defense lawyer has access to all potentially useful evidence, and to encourage reasonable resolutions of criminal cases in light of that evidence. Because of the nature of much of this evidence, including the identities and locations of cooperating witnesses and graphic photographs of the victims, the prosecutor does not want to permit defendants to physically possess this evidence. Accordingly, the prosecutor asks all defense lawyers who receive any discovery that is not legally required to sign an agreement that provides:

I, _____, counsel for the above referenced defendant, (or authorized agent of counsel for such defendant) hereby acknowledge receipt of [the discovery materials].

Although the Commonwealth is required to allow me to inspect exculpatory evidence, I agree that, with the exception of those materials described in Rule 3A:11(b)(1), the Commonwealth is not required to provide me with copies of any evidentiary materials or to allow me to copy any evidentiary materials.

In consideration of the Commonwealth providing me with copies of these evidentiary materials other than those described in Rule 3A:11(b)(1), I agree that, until this case is concluded, I will not allow these materials or any copy thereof to leave my possession or control. While I have the right to share and show the contents of these materials to my client, I agree to not give these materials, except the materials described in Rule 3A:11(b)(1), to my client until this case is concluded.

I understand that, although I may review my client's criminal and DMV records in the Commonwealth's Attorney's office, the Commonwealth Attorney is prohibited from giving me these records absent a specific court order.

I understand that [certain discovery materials] are particularly sensitive and that the Commonwealth is loaning me copies thereof for my convenience. In consideration of the Commonwealth providing me with such copies rather than merely allowing me to inspect them, I agree to return them to the Commonwealth's Attorney prior to the conclusion of my representation of the defendant.

QUESTION PRESENTED

Does a criminal defense lawyer violate Rule 1.4 and/or Rule 1.16(e) by agreeing that, to the extent the prosecutor provides any discovery in excess of that required by law, the defense lawyer will share the information with his client but will not give any discovery materials or copies to the client during the representation, and will return any copies of "sensitive" discovery materials to the Commonwealth's Attorney so that his client is not entitled to receive them upon termination of the representation?

HYPOTHETICAL #5

MAY A LAWYER COMMUNICATE WITH AN INSURANCE ADJUSTER WHEN THE INSURED IS REPRESENTED BY A LAWYER PROVIDED BY THE INSURER?

In this hypothetical, a defendant/insured in a personal injury case is represented by a lawyer provided by his liability insurer. The plaintiff is also represented by a lawyer. The defendant/insured's lawyer has not indicated to the plaintiff's lawyer whether he represents the insurer or only the insured. The plaintiff's lawyer asks whether he may communicate directly with the insurance adjuster, an employee of the insurer, without consent from the defendant/insured's lawyer.

QUESTION PRESENTED

In a pending personal injury case where the defendant is represented by counsel provided by his insurance carrier, may the plaintiff's lawyer contact the insurance carrier without the consent of the defendant/insured's lawyer?

HYPOTHETICAL #6

"TIMELY DISCLOSURE" OF EXCULPATORY EVIDENCE AND DUTIES TO DISCLOSE INFORMATION IN PLEA NEGOTIATIONS

In this hypothetical, in a pending criminal prosecution, the prosecutor is aware of exculpatory evidence, in the form of witness statements accusing another individual of the offense with which the defendant is charged. The prosecutor is also aware that the primary inculpatory witness, an eyewitness to the offense, has died and therefore will not be available to testify in future proceedings in the case. There is an upcoming preliminary hearing scheduled in the case, although the prosecutor has offered a plea bargain in which the defendant would plead guilty to a lesser offense and waive the preliminary hearing. The prosecutor has not disclosed either the exculpatory evidence or the death of the primary witness.

QUESTION PRESENTED

1. Is the "timely disclosure" of exculpatory evidence, as required by Rule 3.8(d), broader than the disclosure mandated by Brady v. Maryland, 373 U.S. 83 (1963), and other case law interpreting the Due Process clause of the Constitution? If so, what constitutes "timely disclosure" for the purpose of Rule 3.8(d)?

2. During plea negotiations, does a prosecutor have a duty to disclose the death or unavailability of a primary witness for the prosecution?

HYPOTHETICAL #7

MAY A LAWYER SERVING AS A BANKRUPTCY TRUSTEE COMMUNICATE WITH THE DEBTOR WITHOUT CONSENT BY THE DEBTOR'S LAWYER?

In this hypothetical, a Virginia lawyer is appointed to serve as trustee in a Chapter 7 bankruptcy case. The trustee's duties are established by 11 U.S.C. §704, and include investigating the debtor's financial affairs and, if advisable, opposing the discharge of the debtor. The trustee is authorized to retain counsel to represent the estate, but typically does not do so unless the proceeding becomes contested. The debtor in this case is represented by a lawyer who has not consented to the trustee communicating directly with the debtor.

QUESTION PRESENTED

Does Rule 4.2 prohibit a bankruptcy trustee, who is also a lawyer, from communicating directly with a debtor who is represented by counsel?

HYPOTHETICAL #8

MAY A CRIMINAL DEFENSE LAWYER DISCLOSE INFORMATION TO A GOVERNMENT LAWYER AFTER A FORMER CLIENT MAKES A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL?

In this hypothetical, a criminal defense lawyer has been contacted by a government lawyer who is responsible for handling a petition for habeas corpus filed by the defense lawyer's former client. The petition alleges that the defense lawyer provided ineffective assistance of counsel to the former client. Citing Virginia Code §8.01-654(B)(6)[1], the government lawyer requests that the defense lawyer provide information concerning his representation of the former client to the government in order for the government to prepare a response to the petition. The defense lawyer asks whether he can reveal this information in response to the government's request prior to any evidentiary hearing on the former client's petition and without a court order requiring disclosure of the information. The former client has not given informed consent to the disclosure of this information. The defense lawyer indicates that, in his experience, habeas petitions are overwhelmingly dismissed on legal or procedural grounds; in those cases, the court never reaches the substantive issues presented.

QUESTION PRESENTED

May a criminal defense lawyer whose former client claims that the lawyer provided constitutionally ineffective assistance of counsel disclose confidential information to government lawyers prior to any hearing on the defendant's claim, without a court order requiring the disclosure or the informed consent of the former client, in order to help to establish that the defense lawyer's representation was competent?

HYPOTHETICAL #9

MAY A LAWYER COMMUNICATE WITH AN INSURANCE ADJUSTER WHEN THE INSURED IS REPRESENTED BY A LAWYER PROVIDED BY THE INSURER?

In this hypothetical, a defendant/insured in a personal injury case is represented by a lawyer provided by his liability insurer. The plaintiff is also represented by a lawyer. The defendant/insured's lawyer has not indicated to the plaintiff's lawyer whether he represents the insurer or only the insured. The plaintiff's lawyer asks whether he may communicate directly with the insurance adjuster, an employee of the insurer, without consent from the defendant/insured's lawyer.

QUESTION PRESENTED

In a pending personal injury case where the defendant is represented by counsel provided by his insurance carrier, may the plaintiff's lawyer contact the insurance carrier without the consent of the defendant/insured's lawyer?

HYPOTHETICAL #10

ACQUIRING AN INTEREST IN LITIGATION — PERSONAL INJURY REPRESENTATION: ASSISTING CLIENT TO OBTAIN LOAN FROM FINANCE COMPANY.

You advise that you have represented personal injury clients for many years and are confronted 90 percent of the time with an innocent victim of an automobile accident who has incurred unanticipated medical bills and injuries which have put him or her out of work. In almost half of these cases, your clients do not have the benefit of health insurance or disability insurance. You are also confronted daily with requests for a loan from your clients in order to obtain proper medical treatment and medication so they may continue to pay their mortgages as well as provide food and other necessities for their families. On numerous occasions, you have referred your clients to banks to obtain loans; however, due to the loss of their jobs as a result of their injuries, they are poor credit risks and it is virtually impossible for them to obtain loans. There being no other alternative, you attempt to obtain liens against your clients' cases to provide them credit which, in most cases, the landlords and hospitals simply reject.

You have asked the Committee to consider the propriety of your persuading a finance company to agree to loan funds ranging from $1,000 to $10,000 to personal injury clients who cannot get bank loans. You have proposed that the company would investigate the case to confirm the liability, damages, and insurance coverage with the client's written consent. If the investigation revealed facts or evidence pertinent to the case which the client's attorney did not already know, said facts would be conveyed to that attorney at no expense. If the loan is approved, the loan would become due upon resolution of the case either by settlement or trial and the borrower would be charged at a lawful interest, similar to that used by major credit card companies. Upon obtaining a favorable settlement or verdict the client would direct the attorney involved to repay the loan out of the case proceeds. In no way would the attorney guarantee, cosign, or be responsible for the loan, except that he would honor a lien on the case.

HYPOTHETICAL #11

GUARDIAN AD LITEM AS VISITATION SUPERVISOR AND WITNESS IN SAME MATTER

An attorney is involved in litigation in which a guardian ad litem has served as the visitation supervisor. There are contested issues of material fact involving events which occurred during a visitation, and the guardian ad litem will have to testify in that regard. The guardian ad litem's testimony may be impeached or contradicted by the testimony of one of the parties present during the visitation.

May the guardian ad litem (GAL) represent the client and testify as a witness to disputed issues of material fact, or, must a new GAL be appointed?

HYPOTHETICAL #12

TRIAL CONDUCT: ATTORNEY WRITING LETTERS TO OPPOSING COUNSEL AND WITNESS WITH COPIES TO THE COURT

You have presented a situation in which attorney C represents the natural father, who is seeking full custody, in a child custody case in juvenile and domestic relations court. The other parties to the suit are the maternal grandparents (represented by attorney A), who presently have custody of the child per court order, and the natural mother (represented by attorney B), who seeks to either obtain custody or continue the current custody order. The court has set a hearing date and ordered home studies of all parties. Attorney C has written letters to a child psychologist, who will be a witness at the hearing, and to attorney A, with copies of the letters to the court. You indicate that the letters contain the attorney's opinion as to the merits of the case as well as his version of the facts.

You have asked the committee to opine whether, under the facts of the inquiry, it is improper for the natural father's attorney to communicate information to the court in the child custody case.

HYPOTHETICAL #13

ADVERTISING AND SOLICITATION: LAW FIRM'S SOLICITATION OF MEDICAL PROVIDERS

You have presented a hypothetical situation in which a law firm represents many medical providers regularly in their business and personal affairs. The firm also handles personal injury cases involving clients who are treated for their injuries by many of the same medical providers. You state that, in an effort to limit any potential conflicts of interest between the medical provider clients and the personal injury clients, the firm advises its personal injury clients during the initial consultation of the following: (1) that it represents most of the medical providers in the community; (2) that a medical provider can claim a lien in a portion of the settlement proceeds up to a statutory maximum but that the law does not require an attorney to make any payments to the medical providers out of the settlement proceeds beyond the statutory lien amounts; (3) that because it represents many of the medical providers, the firm only accepts personal injury cases in which the client agrees, in advance, that all of the medical providers will be paid in full for their services rendered to the personal injury client as a result of the personal injury to the extent that settlement proceeds are available for payment of these bills; (4) that the firm is not required to do this by law, and that other attorneys handling personal injury cases may not make this a condition of representation, and (5) that if the potential personal injury client is in agreement with this medical bill arrangement, he must sign a document authorizing the firm to pay all medical bills from the proceeds to the extent of such proceeds.

You further state that the firm has never had a client refuse to grant the authorization and that it believes that most clients want to pay their medical bills. You also state that most of the firm's medical provider clients are unaware of the arrangement with the firm's personal injury clients.

You indicate that the firm wishes to prepare a letter to its medical provider clients and to all other medical providers in the community advising them of the firm's practice of only accepting personal injury cases where the client agrees, in advance and in writing, to allow the firm to pay all outstanding medical bills related to the accident out of the settlement or trial proceeds to the extent that such proceeds are available and without regard to the lien amount. The proposed letter would also indicate that such bills would be paid from proceeds before any money is delivered to the personal injury client. Finally, the proposed letter would also state the firm's policy of attempting to give a medical provider thirty days' notice prior to a summons or subpoena for his testimony.

You have asked the committee to opine whether, under the facts of the inquiry, the letter is proper as to (1) the firm's current medical provider clients and (2) non-client medical providers.

HYPOTHETICAL #14

SETTLEMENT NEGOTIATIONS IN A CRIMINAL CASE

This hypothetical considers a criminal case in which the Commonwealth's Attorney (CA) and the defense counsel seek to negotiate a plea agreement. Generally, the CA has no legal or ethical obligation to a particular witness in this case; however, the CA wishes to "protect" Witness X by restricting dissemination of the witness' identity and involvement. The CA communicates a settlement offer to the defense counsel, advising the defense counsel of material witnesses in the case, including the name and involvement of Witness X whom the CA wishes to "protect." A condition of the proffered plea agreement requires that the defense counsel neither reveal to the client the identity of Witness X nor the scope of Witness X's involvement in the case. The CA makes it clear to the defense counsel that if the defendant is made aware of Witness X's identity and involvement, then the plea offer will be withdrawn.

QUESTIONS PRESENTED

1. May a CA make a settlement offer to the defense counsel in a criminal case, requiring the defense counsel to refrain from providing relevant information to his or her client as a condition of the settlement offer?

2. May the defense counsel in a criminal case withhold from the client relevant information if withholding such information results in a desirable plea agreement for the client?

HYPOTHETICAL #15

OBLIGATIONS OF A LAWYER WHO RECEIVES CONFIDENTIAL INFORMATION VIA LAW FIRM WEBSITE OR TELEPHONE VOICEMAIL

(A) Lawyer A, a solo practitioner in a small town, advertises in the local yellow pages. The advertisement details Lawyer A's areas of practice and also includes Lawyer A's office address and telephone number. After returning from court one afternoon, Lawyer A retrieves a voicemail message from an individual seeking representation in a criminal matter.

The caller also provides information about the multiple felony drug charges he incurred as one of several co-defendants in a local drug ring. The caller provides his name and requests a consultation with Lawyer A, who realizes, after running a conflicts check, that he already represents one of the other co-defendants.

HYPOTHETICAL #16

OBLIGATIONS OF A LAWYER WHO RECEIVES CONFIDENTIAL INFORMATION VIA LAW FIRM WEBSITE OR TELEPHONE VOICEMAIL

(B) Law Firm B maintains a passive website which does not specifically invite consumers to submit confidential information for evaluation or to contact members of the firm by e-mail but the website does, however, provide contact information for every lawyer in the firm, including e-mail addresses in the biographies of each lawyer in the firm. One of the domestic lawyers in the firm receives an e-mail from a woman seeking a divorce from her husband detailing the circumstances surrounding the demise of the marriage, including her affair with another man. The lawyer reads the e-mail before he discovers that he is already representing the woman's husband.

HYPOTHETICAL #17

ETHICAL DUTY OF A GUARDIAN AD LITEM TO INVESTIGATE AND REPORT ALLEGATIONS OF CHILD ABUSE AND NEGLECT

In this hypothetical, a husband and wife are involved in a contentious custody and visitation dispute over the couple's 7-year-old daughter. A guardian ad litem ("GAL") is appointed to the case. In meeting with the GAL, the mother asserts that the father has subjected the daughter to abuse and the daughter does not want continued visitation with the father. Further, the mother is asking for any visitation, if ordered, to be supervised because of the father's continued abuse. The GAL then meets with the daughter who asks the GAL not to repeat what she tells her because she is afraid her parents might get angry with her and also says she is afraid of her father and does not want to visit him. When the GAL meets with the father, the father denies all such allegations as being contrived by the mother in an effort to deny him custody and visitation. The mother insists that the GAL proceed with an investigation into the allegations of child abuse in spite of daughter's reluctance and father's denial.

This hypothetical involves the special role of a GAL and the question of whether a GAL may reveal information received from the child, against the child's wishes.

HYPOTHETICAL #18

PROSECUTOR THREATENING TRIAL BY JURY TO DISSUADE A DEFENDANT FROM APPEALING A CRIMINAL CONVICTION TO THE CIRCUIT COURT

The represented defendant just after sentencing had asked the court about his right of appeal. The Commonwealth Attorney then informed the court that if the defendant appeals, he will be tried by a jury and requests that the clerk of court note that on the warrant. In this

jurisdiction, it is commonly known that a jury will usually impose a longer sentence than the judge for this offense. The defendant subsequently chose not to exercise his right of appeal.

Did the prosecutor violate any provision of the Rules of Professional Conduct by making this statement in the presence of the defendant?

HYPOTHETICAL #19

REPRESENTATION ADVERSE TO FORMER CLIENT CO-DEFENDANTS

There were four co-defendants, A, B, C and D in a criminal matter in which each were charged with manufacturing marijuana. Attorney X was appointed to represent co-defendant A and Attorney Y was hired to represent co-defendant D. After the preliminary hearing, Attorney X became employed by the Commonwealth's Attorney's office, withdrew from representing A and had no further involvement with this case. The Commonwealth's Attorney's office entered into an agreement with three of the co-defendants, including co-defendant A previously represented by Attorney X. A, B and C were granted transactional immunity in exchange for their testimony against D. A special prosecutor was appointed to prosecute the remaining co-defendant, D, who continued to be represented by Attorney Y. At the trial of co-defendant D's case, B and C testified that D manufactured the marijuana without any assistance from them. Co-defendant A was not called to testify. The trial resulted in a hung jury, and the prosecutor announced he intended to retry the matter. By this time, Attorney X had left the Commonwealth's Attorney's office and was employed as an associate of Attorney Y.

Is it proper for Attorney Y to continue the representation of his client, D?

HYPOTHETICAL #20

UNDISCLOSED RECORDING OF THIRD PARTIES IN CRIMINAL MATTERS

In this hypothetical, a Criminal Defense Lawyer represents A who is charged with conspiracy to distribute controlled substances. An unindicted co-conspirator, B, who is unrepresented by counsel, has information and will give a statement that will prove helpful to A's defense, for example, that A's involvement and participation in the conspiracy was nominal. B has other charges against him pending that are unrelated to the conspiracy with which A has been charged. A has told Criminal Defense Lawyer that B has been contacted by law enforcement authorities in regard to the investigation of the charges against A. Criminal Defense Lawyer is concerned that B might change his story to give a less favorable statement about A in order to negotiate a more favorable disposition of the charges against B. To preserve B's statement, Criminal Defense Lawyer wants to record an interview with B after identifying himself before B could consider changing his statement later. At the very least, Criminal Defense Lawyer reasons, he/she will be able to attack B's credibility in the event B testifies against A and B's statement is inconsistent with the statement B gave during the recorded interview.

QUESTIONS PRESENTED:

1. You have asked the Committee to reconsider prior opinions and opine as to whether it would be ethical under the Virginia Rules of Professional Conduct for a Criminal Defense Lawyer to participate in, or employ an agent to participate in, a communication with a third party which is being recorded with the full knowledge and consent of one party to the conversation, but without the knowledge or consent of the other party. Stated differently, are there circumstances under which Criminal Defense Lawyer, or an agent under his/her direction, acting in an investigative or fact-finding capacity, may ethically tape record the conversation of a third party, without the latter's knowledge?

2. Also, your question raises a second question. Under the Virginia Rules of Professional Conduct, must a Criminal Defense Lawyer participating in, or employing an agent participating in, a communication with a third party which is being recorded with the full knowledge and consent of one party to the conversation, but without the knowledge or consent of the other party, inform that other party of the lawyer's role in the matter under discussion? Stated differently, must Criminal Defense Lawyer or his/her agent inform the third party that he/she is the defendant's lawyer or an agent of the defendant's lawyer?

HYPOTHETICAL #21

CAN A DEFENSE ATTORNEY WAIVE A CLIENT'S RIGHT TO A JURY TRIAL AND FAIL TO DISCLOSE TO THE COURT THAT THE CLIENT HAS NOT AUTHORIZED THE WAIVER?

You have presented a hypothetical involving a criminal defense attorney's selection of a bench trial for her client. The attorney serves as an assistant public defender and was assigned the case of Mr. Smith. At the preliminary hearing, the matter was certified for trial to the Circuit Court. Local rules require that the defense attorney advise the court prior to the next docket call whether to schedule the case as a jury trial or a bench trial. If set as a bench trial, the court does not summons a jury. The attorney had been unable to contact her client[1] and was, therefore, unable to determine if he wishes to waive a jury trial and be tried by the court. Aware that juries have imposed lengthy sentences in similar cases, the attorney assumed the defendant would not want a jury trial. She advised the Commonwealth's Attorney and the court that she wished the matter to be set for trial as a bench trial. She did not inform the prosecutor or the court that she had not spoken with her client, nor had he consented to waiving the jury trial. The case was set on the court's docket as a bench trial. On the day of the trial, with the witnesses present, the defendant was asked by the judge if he consented to waiving a jury and being tried by the court. The defendant said that he did not consent and requested a jury trial. As a result, the case had to be continued to a later date.

Regarding this hypothetical, you have asked the following questions:

1. Does the fact that the lawyer had requested that the case be set as a bench trial, thereby waiving the defendant's right to a jury trial, without express authorization from the client to do so, violate Rule 1.2(a)?

2. Does the lawyer's failure to disclose to the court that she had not consulted with her client regarding waiving a jury and that she did not have authority from her client to do so constitute an affirmative misrepresentation to the court?

HYPOTHETICAL #22

CAN LAWYER INCLUDE IN A FEE AGREEMENT A PROVISION ALLOWING FOR ALTERNATIVE FEE ARRANGEMENTS SHOULD CLIENT TERMINATE REPRESENTATION MID-CASE WITHOUT CAUSE

You have presented a hypothetical in which an attorney who regularly represents plaintiffs in personal injury cases wants to include the following language in her standard fee agreement:

> Either Client or Attorney has the absolute right to terminate this agreement. In the event Client terminates this agreement, the reasonable value of Attorney's services shall be valued at $200 per hour for attorney time and $65 per hour for legal assistant time for all services rendered. In the alternative, the Attorney may, where permitted by law, elect compensation based on the agreed contingency fee for any settlement offer made to Client prior to termination.

Based on the facts presented, you have asked the committee to opine as to whether the provision in the third sentence of that language is ethically permissible and legally enforceable. First, the committee notes that the issue of legal enforceability would involve an application of contract law to this provision and, as such, is outside the purview of this committee. The committee will limit its response to the question of ethical permissibility. The Committee further limits its response to situations where the client has terminated the attorney's services without cause. While the committee notes that this request does not specifically ask about the permissibility of the second sentence of the proposed language, the committee nonetheless will address that provision as well.

HYPOTHETICAL #23

CONFIDENTIALITY OF INITIAL CONSULTATION

You have presented a hypothetical situation in which a husband and wife are planning to divorce. They live in a small community with a limited number of attorneys. The husband wishes to prevent his wife from obtaining adequate counsel. Therefore, he visits each family law attorney in succession, shares his situation, but with no intent to hire them. He in fact already knows that he will retain Attorney A. The wife goes to one of the visited attorneys, Attorney B, seeking representation. When Attorney B writes the husband's attorney (A) establishing B's representation of the wife, Attorney A sends a letter back stating the wife's attorney (B) has a conflict of interest and must withdraw from the representation.

Prior to hiring her attorney, the wife first had gone to Attorney A for representation. Before their initial interview, Attorney A had the wife sign a disclaimer stating that:

> I understand that my initial interview with this attorney does not create an attorney/client relationship and that no such relationship is formed unless I actually retain this attorney.

He then listened to her story. After the interview, the attorney did a conflicts check, and announced he could not represent her as he already represented her husband. As part of their discussion, the wife had shared information regarding her finances and her personal life, including details that would relate to child custody issues. The wife tells her own attorney, Attorney B, of that appointment, and he writes Attorney A and asks him to withdraw from representing the husband.

Under the facts presented you have asked the committee to opine as to whether either attorney needs to withdraw from this matter.