

ETHICS FOR THE WORKERS' COMPENSATION PRACTITIONER

Preamble to the Virginia Rules of Professional Conduct

At the outset of the Virginia Rules of Professional Conduct found in Part Six, Integration of the State Bar, Section II, Rules of Supreme Court of Virginia, there is a "Preamble: A Lawyer's Responsibilities". This Preamble states that "[a] lawyer is a representative of clients or a neutral third party, an officer of the legal system and a public citizen having special responsibility for the quality of justice." The Preamble discusses various functions of a lawyer, including an advisor, an advocate, a negotiator, an intermediary, a third party neutral, and an evaluator. It is noted that in all professional functions, a lawyer should be competent, prompt, and diligent, and that a lawyer shall maintain communication with a client concerning the representation.

The Preamble states that a lawyer's conduct should conform to the requirements of the law, both in professional service to clients, and in the attorney's business and personal affairs. A lawyer should demonstrate respect for the legal system and for those who serve the system, including judges, public officials, and other lawyers. It is noted that "[a] lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession's ideals of public service."

A note on Scope under the Preamble states that an attorney's failure to comply with an obligation or a prohibition imposed by a Rule of professional conduct is a basis for invoking the disciplinary process. It is stated that "the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations." Moreover, the Rules are designed to provide guidance to lawyers, and to provide structure for regulating conduct through disciplinary agencies; they are not, however, designed to be a basis for civil liability, according to the Scope under the Preamble of the Virginia Rules of Professional Conduct. Further, "nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty."

It is recommended that attorneys read the entire "Preamble: A Lawyer's Responsibilities," including the entire note on Scope, at the beginning of the Virginia Rules of

Professional Conduct, found in Part Six, Integration of the State Bar, Section II, Rules of Supreme Court of Virginia, and attached to this outline.

General Ethical Considerations:

The Virginia Rules of Professional Conduct follow the same format as the current American Bar Association Model Rules of Professional Conduct. The Virginia Rules of Professional Conduct apply to all lawyers, whether practicing in the private sector or the public sector. The disciplinary process is invoked for the failure to comply with an obligation or a prohibition imposed by a Rule of professional conduct.

Competent Representation:

According to Rule 1.1 of the Virginia Rules of Professional Conduct, a lawyer shall provide competent representation to a client, which requires the legal knowledge, skill, thoroughness, and preparation that is reasonably necessary for such representation. According to comments following Rule 1.1, in determining whether an attorney has the requisite knowledge and skill for a particular matter, relevant factors would include the following: the relative complexity and specialized nature of the matter; the lawyer's general experience; the lawyer's training and experience in the particular field in question; the preparation and study that the lawyer is able to give to 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.

Anyone who practices workers' compensation law would agree that there are subtle nuances as well as specific requirements of workers' compensation law that one must be well versed in in order to successfully represent a party in a workers' compensation claim. The "dabbler" or the attorney that "takes on a case as a favor for a friend" may quickly realize that he has made a big mistake. In such a situation, it is highly recommended that one contact an attorney who has experience handling such cases to assist and/or educate you regarding the law so that a potential minefield can be avoided.

Keeping the Client Updated:

According to Rule 1.4 of the Virginia Rules of Professional Conduct, a lawyer shall keep a client reasonably informed about the status of a matter, and the attorney shall promptly comply

with reasonable requests by the client for information. This Rule states that the lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, and it is further noted that a lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

An attorney has a duty to keep her client informed as to the status of the case. This can be especially important for claimant's counsel. An injured worker, at least initially, is often at home, in pain, with no income and nothing to do but think about his claim. He has no idea how the system works or how long it will take for his claim to be resolved. Prompt communication can prevent misunderstandings and allow your client to know that action is being taken on his behalf, even if such action is being conducted "behind the scenes."

Representing Clients with Impairments:

Rule 1.14 of the Virginia Rules of Professional Conduct pertains to a client with an impairment. This Rule states that when a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or for some other reason, the attorney shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client. According to the comments below this Rule, the normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. This Rule also states that when the attorney reasonably believes that the client has diminished capacity, and is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the attorney may take reasonably necessary protective action. Such action would include consulting with individuals or entities that have the ability to take action to protect the client and, in the appropriate cases, seeking the appointment of a guardian ad litem, conservator, or guardian.

It is, unfortunately, not uncommon in the workers' compensation arena to represent claimants with brain injuries, which prevent them from making rational decisions or assisting with the prosecution of their claims. As a result, an attorney representing such a claimant should be especially cognizant of this rule.

Discovery / Evidentiary Issues:

Rule 3.4 of Virginia Rules of Professional Conduct states that a lawyer shall not:

(a) Obstruct another party's access to evidence or alter, destroy or conceal a document or other material having potential evidentiary value for the purpose of obstructing a party's access to evidence. A lawyer shall not counsel or assist another person to do any such act.

(b) Advise or cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein.

(c) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law. But a lawyer may advance, guarantee, or pay:

(1) reasonable expenses incurred by a witness in attending or testifying;

(2) reasonable compensation to a witness for lost earnings as a result of attending or testifying;

(3) a reasonable fee for the professional services of an expert witness.

(d) Knowingly disobey or advise a client to disregard a standing rule or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take steps, in good faith, to test the validity of such rule or ruling.

(e) Make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.

(f) In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

(g) Intentionally or habitually violate any established rule of procedure or of evidence, where such conduct is disruptive of the proceedings.

(h) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the information is relevant in a pending civil matter;

(2) the person in a civil matter is a relative or a current or former employee or other agent of a client; and

(3) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

(i) Present or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.

(j) File a suit, initiate criminal charges, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

In the comments to this rule, it is noted that the procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Paragraph (a) applies to evidentiary material generally, including computerized information.

With regard to paragraph (c), it is not improper to pay a witness's reasonable expenses or to pay a reasonable fee for the services of an expert witness. The common law rule is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

The legal system depends upon voluntary compliance with court rules and rulings in order to function effectively. Thus, a lawyer generally is not justified in consciously violating such rules or rulings. However, paragraph (d) allows a lawyer to take measures necessary to test the validity of a rule or ruling, including open disobedience. *See* also Rule 1.2(c).

Paragraph (h) prohibits lawyers from requesting persons other than clients to refrain from voluntarily giving relevant information. The Rule contains an exception permitting lawyers to advise current or former employees or other agents of a client to refrain from giving information to another party, because such persons may identify their interests with those of the client. The exception is limited to civil matters because of concerns with allegations of obstruction of justice

(including perceived intimidation of witnesses) that could be made in a criminal investigation and prosecution. *See* also Rule 4.2.

Although a lawyer is prohibited by paragraph (i) from presenting or threatening to present criminal or disciplinary charges solely to obtain an advantage in a civil matter, a lawyer may offer advice about the possibility of criminal prosecution and the client's rights and responsibilities in connection with such prosecution.

Paragraph (j) deals with conduct that could harass or maliciously injure another. Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or solely for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is tolerated by the bench and the bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay.

In the exercise of professional judgment on those decisions which are for the lawyer's determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interests of a client. However, when an action in the best interest of a client seems to the lawyer to be unjust, the lawyer may ask the client for permission to forego such action. The duty of lawyer to represent a client with zeal does not militate against his concurrent obligation to treat, with consideration, all persons involved in the legal process and to avoid the infliction of needless harm. Under this Rule, it would be improper to ask any question that the lawyer has no reasonable basis to believe is relevant to the case and that is intended to degrade any witness or other person.

In adversary proceedings, clients are litigants and though ill feeling may exist between the clients, such ill feeling should not influence a lawyer's conduct, attitude or demeanor towards opposing counsel. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system. A lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of the client. A lawyer should follow the local customs of courtesy or practice, unless the lawyer gives timely notice to opposing counsel of the intention not to do so. A lawyer should be punctual in fulfilling all professional commitments.

Communication with Injured Party and Medical Providers:

Rule 4.2 of Virginia Rules of Professional Conduct states that “[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.” It is important to note that this rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

Employers, claims representatives, defense counsel, and certified rehabilitation providers are permitted to directly contact physicians who treated or examined claimants, without consent from the injured worker, with claims before the Virginia Workers’ Compensation Commission. Counsel for the defendants are permitted to communicate with a treating physician with respect to such issues as return to work (light duty or full duty); light duty work restrictions; whether or not certain medical treatment is causally related to the claimant’s accident, and medically necessary; chain of referral issues; and other relevant matters. Depositions of physicians are provided for in Rule 1.8 (G) of the Rules of the Virginia Workers’ Compensation Commission, and such depositions may be taken without permission of the Commission.

Va. Code §65.2-607 (A) provides that “[n]o fact communicated to, or otherwise learned by, any physician or surgeon who may have attended or examined the employee, or who may have been present at any examination, shall be privileged, either in hearings provided for by this title, or any action at law brought to recover damages against any employer subject to the provisions of this title.” The physician-patient privilege for the claimant in a workers’ compensation claim is waived by this code section. Further, Va. Code §65.2-604 (A) states that , “[a]ny health care provider attending an injured employee shall, upon request of the injured employee, employer, insurer, or a certified rehabilitation provider...providing services to the injured employee, or of any representative thereof, furnish a copy of any medical report to the injured employee, employer, insurer, or a certified rehabilitation provider...providing services to the injured employee, or to any representative thereof, or to each of them upon request for such medical report.”

Responsibility to be Candid with the Commission / Court:

Rule 3.3 of Virginia Rules of Professional Conduct states that

(a) A lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal;
- (2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, subject to Rule 1.6;
- (3) fail to disclose to the tribunal controlling legal authority in the subject jurisdiction known to the lawyer to be adverse to the position of the client and not disclosed by opposing counsel; or
- (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

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

(c) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

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

Conflicts Between the Insurer and the Insured:

Rule 1.7 of the Virginia Rules of Professional Conduct provides that an attorney shall not represent a client if the representation of that client will be directly adverse to another existing client, unless the attorney reasonably believes the representation will not adversely affect the relationship with the other client, and both clients consent after consultation. This Rule also provides that an attorney shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless the attorney reasonably believes that the representation will not be adversely affected, and the client consents after consultation.

In a typical claim before the Workers' compensation commission, defense counsel represents both the employer and the insurance carrier. Both the employer and carrier are

clients. In the workers' compensation arena, defense counsel can be confronted with a situation wherein there is a conflict between the employer and the carrier. Such a conflict can occur, for example, when the employer is actually the injured worker, or is the beloved employee of a company that wants the claim paid, whether there are valid defenses or not. In such a circumstance, defense counsel must note his representation of the carrier only, and cannot represent both parties as there is a clear conflict between the interests of the employer and carrier.

Preamble: A Lawyer's Responsibilities

A lawyer is a representative of clients or a neutral third party, an officer of the legal system and a public citizen having special responsibility for the quality of justice. A lawyer may perform various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. As third party neutral, a lawyer represents neither party, but helps the parties arrive at their own solution. As evaluator, a lawyer examines a client's legal affairs and reports about them to the client or to others.

In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession's ideals of public service.

A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these Rules, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every

lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

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.

Rule 1.9: Conflict of Interest: Former Client

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless both the present and former client consent after consultation
- (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
- 1) Whose interests are materially adverse to that person; and
 - 2) About whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless both the present and former client consent after consultation.
- (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
- a. Use information related to or gained in the course of the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or
 - b. Reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

Julie Farr v. Lincoln Property Co., Jurisdiction Claim No. VA0200002128 (Jan. 9, 2015)

- Commission entered an award in which there was a related third party tort civil action
- A settlement was reached in the third party case and the Commission amended the award consistent with Virginia Code Section 65.2-313 wherein the claimant was entitled to a reimbursement of attorney fees and expenses against future benefits
- Counsel for claimant also entered his appearance on behalf of medical provider and asserted a claim on behalf of the claimant and medical provider for unpaid medical expenses

- The deputy commissioner directed counsel to respond to address the Commission’s concern over a possible conflict of interest between the claimant and the medical provider arising from the parties’ dispute over the effect of the Commission’s reimbursement award
- Counsel responded that the carrier took the position that the need for treatment did not arise from the accident
 - However, he represented that the medical provider is not making a claim against the claimant or seeking any contribution from the claimant
 - He also obtained written consent from both clients to the dual representation
- The deputy commissioner ordered counsel removed as counsel for the medical provider and counsel sought review by the full Commission
- The full Commission affirmed the ruling of the deputy commissioner finding that because the settlement proceeds have not been exhausted, the medical provider’s claim is a claim against the interests of the claimant as medical expenses. Section 65.2-313 “inexorably ties the employer’s obligation to reimburse an employee to those injury-related bills the employee actually pays.” Further, “[t]he employee’s interests are in inherent conflict with the healthcare provider, whose interest is to receive payment in full.”

Darren Fetty v. City of Chesapeake Virginia, Jurisdiction Claim No. VA0000688079 (Sept. 20, 2016)

- The Commission entered an agreed award in favor of the claimant
- Later, counsel entered his appearance on behalf of the claimant
- Almost a year later, counsel for the claimant also entered his appearance on behalf of the claimant’s medical provider and filed a claim on behalf of the provider seeking payment in full for services
- The deputy commissioner expressed concerns of conflict of interests between the claimant and the medical provider and ordered counsel to disclose all cases where he represented claimants who were receiving and had received treatment from the same medical provider. Also, the deputy commissioner directed counsel to present arguments why he should be allowed to continue in the concurrent representations and address the concerns regarding the impact of the Virginia Rules of Professional Conduct and public policy concerns
- Counsel requested reconsideration and/or request for review of the order stating the deputy commissioner erred by finding concurrent representation created an unwaivable conflict of interest. He also requested the deputy commissioner recuse himself from the case
- On review, the full Commission affirmed the duty of the deputy commissioner to determine if there was an actual conflict of interests and if that conflict adversely affected the interests of the attorney’s clients. The Commission drew a distinction between an actual conflict and a potential conflict. It found there was no indication of an actual conflict present at the time of the order. Finally, the full Commission denied the request for a writ of prohibition against the deputy commissioner in further cases involving counsel

Michael Jones v. Alpha Corporation, Jurisdiction Claim No. VA0000788357 (Dec. 12, 2016)

- Counsel for claimant first entered appearance on behalf of claimant
- Later, counsel filed a claim on behalf of the medical provider seeking payment at usual and customary amounts
- The deputy commissioner requested counsel for the medical provider and claimant advise the Commission as to the impact of Rules 1.7 and 1.10 of the Rules of Professional Conduct regarding conflict of interest in the dual representation

- Counsel responded that there was no potential of adverse effect on the claimant regardless of the medical provider claim and that there was no conflict of interest and no conflict could foreseeably arise
- The deputy commissioner responded with concern that a conflict of interest could arise if there was a finding that any of the treatment provided by the medical provider was found unreasonable, unnecessary or not causally related to the compensable injury
 - “There is no evidence that the claimant or the medical care provider are aware of the potential for a conflict of interest between them nor is there evidence that consent, if any, has been memorialized in writing. However, based on the examples above, it appears that there is a significant risk that the representation of one client in this case will be materially limited by the lawyer’s responsibilities to the other client which, coupled with the statutory requirements of Va. Code Section 65.2-701(A), overrides the clients’ ability to agree to concurrent representation. Accordingly [counsel] cannot continue to concurrently represent the claimant and the medical care provider in this case.”
- Counsel requested reconsideration and/or request for review of the deputy commissioner’s ruling to the full Commission and requested she recuse herself from further matters in claims involving his firm relating to or involving any healthcare provider’s claims
- The deputy commissioner issued an amended order clarifying that while there was no current finding that a concurrent conflict of interest was present, the co-representation created a “significant risk that the representation of one or more clients will be materially limited by the lawyer’s representation to another client, a former client, or a third person or by a personal interest of the lawyer.” She refused to recuse herself from pending matters until a ruling was issued by the full Commission
- After the case was consolidated with *Fetty v. City of Chesapeake*, VA0000688079 (Sept. 20, 2016), counsel withdrew from representation of the claimant
- Twenty-one days later, counsel informed the Commission that the insurer and medical provider reached a settlement agreement
- The Commission ruled that the dispute and review was moot as the medical provider application had resolved after counsel’s withdrawal of representation from the claimant. As such, there was no longer a case or controversy before the Commission that was affected by the deputy commissioner’s order. The full Commission declined to issue an improper advisory opinion

Barry White v. Huntington Ingalls Inc., Jurisdiction Claim No. VA00000585903 (July 9, 2018)

- The Commission consolidated multiple cases involving claims by Bon Secours Surgery Center at Harbour View (Surgery Center) into the *White* case
- In two of the cases consolidated, Surgery Center filed an application against the employers Maryview Medical Center and DePaul Medical Center for payment of medical services
 - *Richardson v. Maryview Medical Center*, Jurisdiction Claim Number VA01002422994
 - *Swartz v. DePaul Medical Center*, Jurisdiction Claim No. VA00001162671
- Counsel for the Surgery Center was also counsel for other medical providers in the *Richardson* (Wardell Orthopaedics) and *White* (Neurosurgical Associates) cases
- The Commission questioned whether “the employers in both cases [*Richardson* and *White*] are, like Bon Secours Surgery Center at Harbour View (Surgery Center), divisions of Bon Secours Health System, Inc. and that [counsel’s] concurrent representation of Bon Secours Health System, Inc. and parties adverse to Bon Secours Health System, Inc., creates an impermissible conflict of interest.” It asked counsel to advise the Commission regarding its concerns of conflict

of interests in representing employer members of the Bon Secours Health System, Inc and the medical providers

- Likely of most importance, counsel responded to the Commission's inquiry that Maryview Medical Center is part of Bon Secours Health Systems and holds 40% interest in the Surgery Center. Counsel also responded to the Commission that he intended to withdraw from his representation of Surgery Center in the *Richardson* case. He denied ever representing Maryview Medical Center or DePaul Medical Center (both part of Bon Secours Health Systems) and that he ever acquired any information from the stockholder Maryview Medical Center which would invoke a conflict under Rule 1.9
- The Commission noted that counsel, on behalf of a claimant, had issued a subpoena *duces tecum* to Bon Secours DePaul Medical Center seeking copies of billing statements and/or billed documents related to his client's care. When in response DePaul Medical Center denied providing services to the claimant, he sought a Show Cause Order, representing to the Commission, "I deal with Bon Secours Hospitals on nearly a daily basis and I know with certainty that the Hospitals, while they may not keep medical records beyond a certain period of time, they retain billing statements and/or billed charges and/or documents related to patient billing indefinitely."
- The Commission noted the information provided in counsel's response highlighted the Commission's "grave concerns....about potential violations of the Virginia Rules of Professional Conduct." *Portions omitted.* The Commission expressed concern upon counsel's maintained representation of parties seemingly adverse to, or invoking a conflict of interest with Bon Secours Health Systems. Counsel's successful prosecution of Surgery Center's claim would financially benefit Maryview Medical Center and Bon Secours Health Systems. This would be adverse to the interests of other parties that counsel also represented, namely the claimant and other medical provider, Wardell Orthopaedics. Similarly, counsel's successful prosecution of Wardell Orthopaedics' claim "would, potentially, harm the financial interests of Maryview Medical Center, and by their affiliation, the interests of Bon Secours Health Systems." The Commission concluded, "[t]he Commission believes that the inherent dangers of simultaneously representing and attacking the same client are present despite counsel's insistence that the two entities are entirely distinct from each other in both management and business."
- "In some instances, notwithstanding dissimilarity of the subject matter, simultaneous representation of adverse clients creates a presumption of adverse effect on the lawyer's absolute duty of loyalty, unless both clients consent to the multiple representation." The Commission noted there was no indication that the concerned parties represented by counsel had waived or consented to the multiple representation