

***Leadership and Ethics
For Lawyers: 2023 Update
VIRGINIA CLE***

CLE Course by Herb Rubenstein, Esquire
www.leadershipforattorneys.org

Member VA, DC and MD Bar

Introducing Herb Rubenstein

- Author, *Leadership for Lawyers* – 1st ed. NITA, 2005; 2nd ed. American Bar Association, 2008
- First person to teach a course in Virginia for CLE credit in the field of Leadership (2012 VA CLE)
- Litigator DC, MD, VA
- Washington and Lee, B.A.1974, Phi Beta Kappa
- Georgetown Law, J.D. 1982
- CLE and CPE (Accountants) Presenter – Leadership, Ethics, Professionalism, The Future of the Legal Profession, ESG
- Founding Board Member, Association of Professional Futurists
- Class A Member PGA, Golf Technology Investor
- Working on new book on the future of the legal profession and the courts
- Former Lecturer in Strategic Management, Graduate School of Business of the University of Colorado Denver and Entrepreneurism at George Mason University

Learning Objectives

- Learn how to apply two definitions of leadership to help your legal organization, your clients and the profession
- Identify ways that ethics forms the foundation of *sustainable* leadership
- Become a better leader for your clients, for the legal profession and learn how to hold people accountable and promote ethical behavior
- Learn how to promote ethics in organizations and individuals, including clients
- Learn the value of creating a code of ethics, writing articles on ethical standards, and participating in State and Federal Bar Associations' Ethics Committees which can add to your human capital (skills and knowledge) and will enhance your ability to be a recognized leader in ethics

Practical Objectives of This Course

- Assist you in learning how to use enhanced leadership skills and aptitude in order to:
 - Expanding your legal practice and your influence
 - Improve your effectiveness
 - Improve your satisfaction as a lawyer
 - Make a greater contribution to the legal profession
 - Help others become better leaders
 - Help others become more ethical

Agenda – Leaders Always Have Them

- Learning objectives- previous two slides – just an educator’s term for *AGENDA*
- It is poor leadership NOT to have a “published” agenda for a 20+ minute meeting with three or more people that will lead to an important decision or evaluation of a situation - Intel story
- If you are not the leader, and cannot influence the preparation of a written agenda for such a meeting, at least write an agenda for yourself
- Take a moment – write down your agenda for this CLE course on *Leadership and Ethics*

Opportunities for Lawyers

- Learn and demonstrate some advanced leadership skills and it will help you in the following ways:
 - Improve client relations and relations with judges, juries, on the boards where you serve, and staff where you work in the legal profession
 - Improve relations with your partners and associates
 - Improve the reputation of and respect for you and your firm/agency and possibly, the legal profession
 - Improve your social capital, relationship capital which will produce more and better clients
 - Reduce, and be able to handle, conflict more effectively

Overview and Importance of This Course

- New era of ethics – attorneys’ fees being awarded more often for frivolous filings
- More attempts to disqualify law firms/lawyers for conflicts of interest
- Anticipatory Ethics is the new paradigm – being able to predict an ethics problem also known as “Ethics Threat Assessment” per Stuart Teicher
- Social media spreads the word about how you treat clients, employees, and this information is public and impossible to remove – transparency as opposed to secrecy

Defining Leadership – Two Ways

- Leadership is the creation and fulfillment of worthwhile opportunities by honorable means
- Creation includes vision
- Fulfillment includes implementation and reporting
- Worthwhile opportunities either produce a legal benefit, an economic return, reduce harm to the environment (ESG - sustainability), create a “best practice or process” or improve the condition of humans and the global ecosystem, a “social return”

Introduction – Defining Leadership (cont.) - Definition #2

- Leaders create a significant impact by building an organization of people working together on common goals. - Brook Manville; See: [Link to Forbes Article: Stop Chasing Novelty in Your Leadership](#)
- Leaders mobilize followers to get something done
- Leadership and management overlap, often the same thing. - Mintzberg and Manville
- It is important to be able to lead yourself as that will help you immensely in leading others

Two Great Books on Leadership

- *The Harvard Business Review Leader's Handbook: Make an Impact, Inspire Your Organization, and Get to the Next Level* (HBR Handbooks) Kindle Edition by [Ron Ashkenas](#) (Author), [Brook Manville](#) (Author)
- [Link to Leader's Handbook \(Amazon\)](#)
- Northouse, Peter G. Leadership Theory and Practice, 8th edition, (Sage Publications)
- [Link to Leadership Theory and Practice \(Amazon\)](#)

Leadership Can Be Defined as “The Actions That Will Get Us Out of This Mess”

- How you define the goal, or even the problem to be solved, will determine, or at least influence, what strategy you will take or recommend to achieve the goal or solve the problem
- Often you will need to secure not only agreement on the goal or the definition of the problem, but you will also need to secure enthusiastic support for the goal and how you are suggesting to approach and solve the problem
- Once you know the “strategy” you as a leader want to undertake, you will need to create “tactics,” or concrete acts to implement the strategy – Never confuse “strategy and tactics”
- Others can often significantly help you in setting goals, defining problems, identifying strategies and implementing tactics to address the situation
- Leadership is focusing on the big picture while taking care of the details

Leadership Requires Delegation

- Know when and how to delegate effectively – takes many steps – 26 steps, in fact. See attached written material.
- Know to whom to delegate and make sure they have the training, skills and resources (including time) to be very successful in accomplishing the task(s) you assign them
- Cannot delegate responsibility, only effort
- It is unethical, not just poor leadership, to assign tasks and then not help the person to do the tasks successfully
- Leaders avail themselves and listen to experts
- Leaders use modern information technology to their benefit and the benefit of their clients

Essential Leadership Steps

- Be able to muster and organize resources to apply to the situation
- Be able to predict the future or create possible scenarios to guide everyone regarding how to navigate complex situations
- Have a management information system or “dashboard” to help accurately measure progress, or lack thereof, and guide all concerned to make necessary strategic and tactical changes if the problem gets worse or is not resolved quickly enough through your initial efforts
- It is often useful to cast a broad net and get input from diverse minds and people to gain perspective and insight, especially when they know history that you are not aware of that is contributing to the current problem

Path Goal Theory of Leadership

- Theory – a coherent framework of thought useful to organize information, actions, and analysis to promote successful behavior, fix current problems, and take future actions
- Path Goal Theory - has eight *Elements of Leadership* – each element is viewed as essential
 1. Identify goal and secure buy-in/ownership of goal by followers
 2. Identify all key barriers, obstacles, opposing forces to success that people will encounter in the effort and communicate them to those who will experience them
 3. Ensure proper training, resources, people, and technology to achieve the goals by the stated “deadline”
 4. Organize and direct actions of followers to achieve goals and all sub-goals and give authority to some of the followers to make significant decisions regarding how to achieve the goals, subject to ethical rules, of course

Path Goal Theory of Leadership (Cont.)

- Path Goal Theory is also known as the motivational theory of leadership
 5. Monitor closely and report accurately all key activities and interim results, and guide changes in strategy, resources, actions necessary to achieve the goals based on what has taken place through implementation of the original strategy
 6. Identify and report precisely and very broadly when the goal is achieved or shortcomings that result from the effort
 7. Acknowledge and systematically reward all contributions to achieve goals
 8. Take a little break and set new goals and repeat the process

Source: Northouse, ***Leadership Theory and Practice*** and Rubenstein, ***Leadership for Lawyers, 2nd ed.*** (ABA, 2008)

Leadership Lessons Lawyers and Judges Can Learn From These Times

- Ethical failures by lawyers and judges are leadership failures
- Legal profession's reputation is in the tank – From a leader of VMI who responded to my comment – *“There are many bad lawyers”* – he responded: *“There are many lawyers who are bad people.”*
- The slow, secretive “lawyer and judicial disciplinary systems” are not helping the profession – We are not weeding out bad people like we need to. VA Senate considered bill to change judicial disciplinary system
- Fraud is increasing in the United States per the Society of Fraud Examiners and Whistleblowing is increasing as a direct result
- Covid has made the legal profession move online – where it should have moved 45 years ago
- William and Mary Law School developed online courts decades ago, so why did our courts close when the hospitals, the police stations, the farms, the grocery stores, the fire stations, the pharmacies, all did not close? Here is my answer: *Lack of leadership in our legal profession*
- What happened to the duty to be technologically competent?

Leadership Characteristics (vs. Traits)

- Per Doris Kerns Goodwin, author of ***Leadership in Turbulent Times – Key Concept - Leadership Skills Can Be Developed Including:***
- Humility but decisive with strong goals, vision
- Acknowledge errors and hold others accountable
- Remaining confident and instilling confidence to lead in others – Transformational “Leadership”
- Collaboration, team builder – Is a judge or jury part of your “team?”
- Integrity, consistency - opposite from lack of honesty
- Resilience, but not overbearing or dominating
- Connecting With All People = Low Turnover Rate
- Sustainable leadership is the goal, not heroic or episodic leadership

Ethics Leader(s) in Your Organization

- Who is the ethics leader in your legal organization?
- If you don't know who is the ethics leader, that is a good indication there is no ethics leader, or, maybe you are that leader
- And if you don't know who the ethics leader is in your organization, how can you support them, or *empower them to lead more effectively?*
- Does the term "Ethics" show up on your written agendas for your meetings?
- If not, why not?

What Do Managers Do? (Related to Leadership) Per Mintzberg's Book: Managing

- Maintain workflow
- Connect Externally
- Blend All Around
- Remote Controlling
- Fortifying the Culture
- Intervene Strategically
- Manage in the Middle/Out of the Middle
- Advising from the Side
- Mintzberg says management and leadership are very similar in many respects – have to do both well

What Sustainable Leaders and Managers Do

- Build a unifying vision by understanding the gap between where things are and the goal
- Recruit, train, organize, deploy and motivate people
- Innovate and keep up with innovation
- Gather and decide where to deploy resources
- Organize and form/build teams
- “Hold ethics” in high regard and inspire others in the organization to do the same
- Decide who is on the team and who is removed from the team
- Anticipate the response from various stakeholder groups to every action, strategy, statement and result that occurs

Leadership and Negotiation

- What is the purpose of negotiation? ***Expand Potential Value to the parties*** – Then comes the HOW – key steps
- First, know what each party values the most.
- Second, seek to expand the pie of benefits available to the parties which will become the subject of the negotiation
- Example – the tax advantaged manner of selling or buying a business – both parties get extra benefits from cooperating/negotiating
- Negotiation is a form of cooperation, not exploitation
- Third, negotiate in good faith (no lying) to allocate the pool of benefits between the parties
- Recommendation – And this is not always possible: Do not negotiate with another party who will not negotiate in good faith or negotiate in a civil manner unless you have to

Leadership and Negotiation (Con't)

- The expert on lawyers and litigation – Charles Craver – Author of 14 books, professor of negotiation – George Washington Law School - <https://www.law.gwu.edu/charles-b-craver>
- I have taught with Charlie and I have learned from him
- Read his work and you will be a better negotiator
- Ask yourself – “How do lawyers usually negotiate?” Take a moment, put some notes down – do they lead, or threaten and extort?
- To become a better negotiator, have someone in your place actually conduct the negotiation and manage that person
- Virginia’s ethics rule 1.1 requires competence in negotiation – it is an ethical rule (per the comment) in Virginia, but not in most other states – See Comment 2(a) - <https://www.vsb.org/pro-guidelines/index.php/rules/client-lawyer-relationship/rule1-1/>

Negotiation – When A Lawyer or Opposing Party is not Civil

- Charles Craver's social science, rigorous experimental research shows that lawyers or negotiators who are not civil almost achieve worse results than expected when the other lawyer/party remains civil
- Consider the other side's lack of civility as a chance to improve your client's result
- If repeated lack of civility in litigation/depositions by other side negatively impacts you or your client, consider filing a motion to wear body cam in a deposition; and in an affidavit explain exactly why you are requesting this from the court – just a suggestion

Short Break

- Before we dive into the next section - ***Ethics***

Ethics for Lawyers

- Model Rules of Professional Conduct and Virginia Rules which follow the Model Rules
- How to Think Critically About Ethics Rules and in some areas create your own, stronger ethical rules
- Definition of Ethics
- Definition of Corruption
- Become A Thought Leader in Legal Ethics
- How to Expand and Improve Your Legal Practice and Your Influence Through Legal Ethics
- Keep abreast of new federal and state laws like the new, 2022, Federal Anti-Money Laundering Statute

Operational Definition of Ethics and Corruption

- **Ethics:** A system of moral principles turned into a code of conduct or behavioral norms which represent the minimum standard of acceptable behavior for the times. (*Equal Pay 1950's vs Equal Pay 2020's*) – More than simply following written “obligations” and “prohibitions”
- **Corruption:** “the exploitation of an official position [and all features, benefits, power, decision rights, deference resulting from that position] for personal gain” – Alexei Navalny

<https://www.theguardian.com/commentisfree/2021/aug/19/action-against-corruption-russian-sanctions-oligarchs-alexei-navalny>

“Holding Ethics” - What Does This Mean?

- What does it mean to “hold ethics” from a leadership perspective -
 - Incorporate ethics into conversations/discussions and actions
 - View ethics as a high priority with unwavering commitment
 - Have systems that report breakdowns in ethics in your legal organization. Management Information Systems, Hot Lines, Reporting culture vs. Silence culture which pervades our profession, especially internally
 - Anticipatory ethics – systems that report potential future breakdowns in ethics and being able to predict future ethical problems
 - Ability to get people to enthusiastically support ethical behavior

Rule 1.1 Model Rules and Virginia

- Competence
- Critical thinking approach –
 - Substantive areas
 - Technological – not mentioned in some states
 - Virginia – Negotiation mentioned (Comment 2a)
 - What about: Cryptocurrency, Blockchain, NFT's – Are you competent in these areas?
 - What about: DEI, Bias, Discrimination, Harassment
 - Question: Is it an ethical violation to lie during negotiation, mediation? Is mediation a “court proceeding”
 - Lesson: Write your own Ethics Rules and Code of Conduct

Rule 1.6 Model Rules and Virginia

- Client confidences – collision course with duty to report other lawyers for violating ethics rules - Rule 8.3
- What if reporting other or another lawyer would cause a confidential fact to be revealed – today – In Virginia must ask client permission to report other lawyer – tremendous barrier to reporting other lawyers
- Note: most disciplinary cases are not public, but some information will leak out

Rule 1.7 Model Rules and Virginia

- Conflict of interest – know of conflict opposing counsel has – what do you do?
- May file motion to disqualify if it does not harm your client – Virginia rule
- But should we *have a duty* to file motion to disqualify if there is known conflict of interest – Do we need client consent?
- Note here: Duty to profession and duty to client conflict – Lies to tribunal, duty to profession and courts win; Clearly for accountants, their duty to their profession, “disclosure,” wins out over the duty to legal client where confidentiality often prevails

Third Party Neutrals

- Not included in many other States' Ethics Rules
- Includes mediators
- Virginia Rule 2.10 and 2.11
- Excellent guides
- Why can't mediators charge a contingent or hybrid hourly/contingent fee? Looks like micromanagement, but otherwise if you serve as a mediator, use these great rules and follow that one as well, but consider trying to change it

Rule 3.3 and 4.4 Model Rules and VA

- Cannot knowingly present false evidence
- Related to due diligence requirements inherent in preparing pleadings and making arguments
- *Simple new rule: Lawyers have a duty to know what they are talking about and be accurate*
- **Accuracy** is a high standard, and should be the minimum standard when you write your own and your law firm/legal organization's own Code of Conduct and file any pleading or put anything in writing or say anything as part of legal representation

Rule 5.4 – Prohibited - Non-Lawyer Ownership of Law Firm

- Changed in DC (1991); Now changing in Utah and Arizona; Expect CA and FL soon to change then tidal wave will change this flawed rule
- Terrible consequences due to prohibition
- Anti-free market, anti-capitalist, clearly has racist and sexist (promoting whites, harming minorities and females) implications
- ABA is a trade association – of course, it supports this restriction on the flow of capital
- This is the “lawyers keep all the money rule” plain and simple. See the growing literature on this topic. Trend is clear and unstoppable.
- <https://www.thomsonreuters.com/en-us/posts/legal/practice-innovations-april-2022-non-lawyer-ownership/>
- ABA, NY State Bar Association and other Bars dig in their heels as any industry trade association would:
<https://news.bloomberglaw.com/us-law-week/why-lawyers-reject-non-attorney-firm-ownership>

Rule 5.4 – Prohibited - Non-Lawyer Ownership of Law Firm (Con't)

- Law firm alternative using outside capital: Axiom used by General Counsel Offices as outsourced legal help, now will offer direct legal support to companies that do not have a General Counsel Office per ABA Newsletter January 25, 2023 – Arizona allows for non-lawyers to invest in “Alternative Business Structure” based on Arizona Supreme Court’s approval of firms that receive outside capital – to be called Axiom Advice and Counsel, a separate subsidiary of Axiom Global. Permian Private Equity Capital owns a majority interest in Axiom Global
- https://www.abajournal.com/news/article/legal-services-company-axiom-opens-reimagined-law-firm-to-directly-serve-clients-thanks-to-arizona-approval?utm_medium=email&utm_source=salesforce_621822&sc_sid=01422020&utm_campaign=weekly_email&promo=&utm_content=&additional4=&additional5=&sfmc_j=621822&sfmc_s=51575043&sfmc_l=1527&sfmc_jb=18009&sfmc_mid=100027443&sfmc_u=18425711
- Arizona Supreme Court ruled that allowing non-lawyers to have an “economic interest in law firms” will improve access to justice and innovation in the legal profession. Utah came to the same conclusion and allows nonlawyer investment.

Rule 5.4 – Prohibited - Non-Lawyer Ownership of Law Firm (Con't)

- I argued the same thing in 1991 in DC and carried the day in that jurisdiction. Simple conservative, free market economic argument.
- Coming to a theatre near you in the next decade or few years as this movement is growing nationwide and Northern Virginia is an ideal location for such firms.
- PWC has a law firm in DC.
- See also regarding “Multi-Disciplinary Practice in Virginia” - <https://www.vsb.org/site/regulation/legal-services-multidisciplinary-practices> - Somewhat different issue but federal government allows non-lawyers to represent clients before federal agencies and the Uniform Practice of Law (UPL) rules as stated by the Virginia Supreme Court defer to federal agencies on this matter.

Rule 8.3 Model Rules and Virginia

- This is the duty to report attorney violation, but actually, it is so watered down it actually seems to support not reporting violations by other attorneys, especially those in your own legal organization
- Virginia and Louisiana – Rules strongly suggest that a lawyer not report a violation during litigation unless absolutely necessary –
- Everywhere in the rule language like:
 - *reliable information* (Is this an evidentiary test? – no, how about “the preponderance of the evidence test”)
 - Raises a “substantial question” about “honesty, trustworthiness or fitness to practice law” – All words are *constraints to reporting violations*
- What about: Report a fellow lawyer when you have personal knowledge of, or receipt of a preponderance of evidence, which suggests another lawyer has violated an ethical rule
- Increasing number of federal agencies have disciplinary proceedings SEC, USPTO, and someday there may federal agency to handle complaints against all lawyers as States often do not do their job in disciplining lawyers in either a timely or responsible manner. – Virginia is better than most other States regarding disciplining lawyers based on my research

Helping Clients and Other Lawyers Be More Ethical

- Duty to report per: Rule 8.3
- Take this very seriously
- No reporting – no ethics – no disciplinary proceedings – public trust falls even lower – lawyer’s right to self regulate will be challenged
- Question – Would you ever file a bar complaint against a lawyer in your own firm/legal organization? Against opposing counsel? Would you be willing to represent person in file a disciplinary proceeding against their former lawyer?
- And, what is your reaction to this recent statement by a Virginia lawyer to his client. Background: His client was very unhappy with the quality, timeliness and communication surrounding the legal services he was providing, and she complained directly to him. He responded to her complaints by saying: *“If you file an ethics complaint against me, you will have more problems than you think.”* Is stating this threat to a client a *per se* violation of the Virginia State Bar Rules of Professional Conduct? How do we analyze this threat by the lawyer? From the point of view of the client? What was he threatening? Harm to the client...? Her case? What?

Helping Clients and Other Lawyers Be More Ethical (Con't)

- Help create office of Chief Ethics Officer or VP for Ethics or Corporate Director for Ethics for clients and in your own legal organization, even in-house or in government attorneys' office
- Help create "Ethics" as a specific duty/subcommittee of the management committee or however your legal organization is run
- Help create and write contracts for clients for *Ethics Hotlines run by independent third parties* including reporting, analysis, and action requirements when data reveal problem (Could also include sexual harassment hotlines, workplace safety violation hotlines, racial or gender bias hotlines, regulatory noncompliance hotlines by phone, email, text, and protecting, where appropriate, the anonymity of information provider)
- Do a conflicts of interest check of board members for your clients

Helping Clients and Other Lawyers Be More Ethical (Con't)

- Conduct regulatory, ethics *compliance legal audits*
- Help clients write a code of conduct (so you better have one for your own firm before you try to do this)
- Help clients create “an adjudicatory system” for when a person associated with client is alleged to have committed an ethics violation
- Help clients/your own legal organization conduct ethics related risk assessment via surveys, interviews, etc.
- Help develop long and medium term regulatory risk profiles in terms of potential future liabilities, social media response, potential negative outcomes

Helping Clients and Other Lawyers Be More Ethical (Con't)

- Help your clients have good internal controls to assure the accuracy of their Environment, Social and Governance (ESG) reporting
- Conduct a human capital and workplace compliance legal audit to assure equal pay across genders, no systematic racial bias in pay, promotion or workplace treatment, including harassment
- Flag, in writing, ethical issues you see in your own legal organization and with clients, and discuss the matter in a meeting with agenda and minutes – Yes, covered by the attorney client privilege

Reporting Other Lawyers

- The Gerardi Case – stealing from clients and other lawyers “knew” or should have known in the Judge’s eyes – Finally indicted on January 31, 2023 by a Chicago Grand Jury – What took so long?
- Now Judges in cases are holding the “active bystanders,” the lawyers who knew or should have known the law firm was not disbursing funds to the client in cases before the court, are possibly being held in contempt – by the court in a state (California) where there is NO DUTY TO REPORT other lawyers who violate ethics rules – Similar development to legal treatment of “active bystanders” in police situations

Reporting Other Lawyers (Con't)

- Will it take your time? Yes
- Will it take your energy? Yes
- Could it lead to negative repercussions for you? Yes, but it could lead to positive repercussions for you and the profession
- Is this a moment in the culture shift where changes in the police culture to SPEAK UP, be the whistleblower on your fellow police officers, spills over into the actions of lawyers?

Reporting Other Lawyers (Con't)

- Georgetown University is offering a program for police departments to end the “blue wall of silence” when police officers who are “active bystanders” do not report violations by their fellow police officers – 216 Police Departments have signed up for the course
- Is it “leadership” to report fellow lawyers for violating our ethics rules?
- Is it ethical? How many more “yes” answers do you need to start doing this?

Reporting Other Lawyers (Con't)

- Reporting during litigation? Why is there such a high bar in Virginia and Louisiana to reporting ethical violations during litigation?
- Exactly like reporting a conflict of interest on the other side that you are aware of – Should be mandatory to file a motion to disqualify as it should be mandatory to report a lawyer for ethical violations immediately upon obtaining substantial evidence of an ethical violation

Reporting Other Lawyers (Con't)

- If we lawyers are going to self-regulate, self-govern, then we must be our own cops, our own investigators, and we must do our work not only years or even months after the lawyer has violated the ethics rule, but when we reasonably believe the lawyer has violated the rule or is planning to violate the rule –this is already the prevent substantial injury standard.
- Anticipatory ethics; anticipatory reporting of expected or planned ethics violations – The Georgetown program will focus on identifying “situations,” where “active bystanders,” fellow police officers, take action to prevent and stop the unethical actions by fellow police officers before the violation is completed or immediately upon receiving information the violation has occurred

The George Floyd Impact

- Fellow officers sentenced for “standing around”
- Gerardi fellow lawyers will be disciplined for “standing around”
- Ostrich defense will not be allowed – *“If they’re not doing CPR, I assume he’s still breathing and fine,”* Officer Thao said watching George Floyd by killed by a fellow police officer
- New evidentiary standard/question for the “active bystander” – “Why didn’t you do something?” Will be asked of lawyers going forward

Will Legal Self-Regulation Disappear?

- Just the way “police self-regulation” is disappearing
 - Complaints against police (and lawyers) are being “published” and they will be published against lawyers as well as the secrecy in the disciplinary tribunals are broken
 - Public reaction against the police has already spread, and public reaction to the legal profession is spreading
 - Federal agencies now active in legal disciplinary matters – this will increase as lawlessness, by lawyers or anyone, is a void that lawful people will always want to eliminate
 - “Active bystanders” – lawyers who do not report when they know or should have known of ethical violations of fellow lawyers – expect your reputation to be tarnished like the fellow Girardi colleagues

Ethics Regarding Starting and Ending Client Relationships

- All lawyer/client relationships (retention agreements) should be in writing (though some state bars do not require it)
- Virginia Rule 1.5 - Contingent Fee agreements must be in writing – recommendation for you taking this course - expand this rule to all client relationships, including putting in writing any “change orders” in the scope of the representation
- All “terminations” or declining representation should be in writing, and in litigation, approved by the court – Rule 1.16
- Be aggressive in firing clients when they are unethical
- Be careful about any disclosures regarding fired clients
- Do not respond to negative “social media ratings” unless they are false, defamatory, and legally actionable, and then never disclose client confidential information.

Technological and Substantive Competence

- To Meet Model Rule 1.1 business and other lawyers must know about:
 - Artificial intelligence (which will be used to help deciding cases in the future and is currently used to help decipher and learn from e-discovery)
 - Cryptocurrency – what will be the future rules on law firms accepting this currency and whether your clients should accept this currency
 - Blockchain technology – will use of this be required of your client – already is by Walmart of its entire supply chain
 - US government will begin to offer US backed digital currency and your clients will use it

Technological and Substantive Competence (Con't)

Other areas Lawyers need to be very aware of include:

- Cybersecurity – Every law firm must have a cybersecurity consulting expert today. Data stolen from your law firm, not just a bad business situation, also an ethics situation, especially if law firm was negligent, failed to meet the standard of care of protecting client confidences.
- Ransomware, Privacy and Cybersecurity Insurance – Does your law firm need it and is it malpractice for you not to recommend it to your clients?
- Electronic courtrooms – here to stay; become a master at video presentations, video communications with clients and beware of cybersecurity issues here
- NFT – Non-fungible tokens

Trends in Ethics

- Model Rule 3.1 Meritorious Claims and Contention - More judges sanctioning lawyers for filing lawsuits that are not supported by law or fact
- Judges need to be even better at being the gatekeepers to the courts and lawyers must use self-discipline not to file lawsuits that are not supported by law or fact in violation of Rule 3.1 which states: *A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.*

How To Expand Your Legal Business Through Leadership and Ethics Related Services

- There are many great business opportunities for lawyers if you know current trends in the profession and increase your focus on ethics
- The key is to demonstrate to the world at large that you are making leadership development and ethics a key component of your practice and your legal organization
- You are responsible for your reputation in the legal profession as well as the reputation of your legal organization in the eyes of the public and potential clients
- Develop a written and spoken record demonstrating knowledge of how to lead and what the ethical rules require today, and should require tomorrow, in the future

How To Expand Your Legal Business Through Leadership and Ethics Related Services (Con't)

- Excellent business strategy to use “ethics” as an intentional springboard to new business
- If “advertised” or “shared” via websites, social media, speeches, etc. this increased “social presence” should promote getting more and better clients
- Don’t take a case unless you want three like it because when you do a brilliant job for Client A, others will hear about it and you will get more work in this area
- OK to be in a general practice, but there must be some area of the law where you excel and can demonstrate it

How To Expand Your Legal Business Through Ethics Related Services (Con't)

- Join non-profit boards or do *pro bono* work for a nonprofit – beware of politically divisive work and how your *pro bono* work can cause conflicts of interest
- Hire a social media or website expert to help you present your “ethics brand” and expertise as clearly as possible
- Testify on legislative matters, comment on regulatory matters as they are being drafted and post your testimony or comments, including an “Executive Summary” broadly on social media and your website
- Keep updating what you write on leadership and ethics using current examples

More Ways to Expand Your Practice and Influence

- Write articles and send to clients, post on your website and allow others to post your article on their websites
- Give speeches to Rotary, Kiwanis, Optimist, Ruritan and never sell, just educate
- Give guest lectures in law schools, undergraduate schools and community colleges
- Improve your logo, your “colors,” that convey strong leadership skills and ethics
- Conduct internal ethics and leadership training in your legal organization
- Reach out to a more diverse audience and more fellow lawyers than you have in the past – expand your network

Conclusion

- Virginia's ethics rules, like all other legal ethics rules have some gaps, some wiggle room
- Fill in these holes with your own law firm code of conduct – you can find examples on the web, including videos by two firms about how they developed their own code of conduct
- Use the rules to help promote your business
- Be technologically competent including understanding blockchain, cryptocurrency, modern information technology

Conclusion (Con't)

- Put “ethics” on the agenda in writing in meetings and enforce ethics rules in your organization
- Speak and write about ethics and be willing to report other lawyers for ethical violations
- Recommend new ethics rules to the State Bar
- Expand your reputation (social capital) in the ethics arena
- Constantly seek to be a better leader and help others become better leaders and more ethical

Conclusion (Con't)

- Leadership development and ethics take time and take serious investments, but they are worthwhile costs of doing business as a lawyer or judge
- Push hard for quicker, better disciplinary enforcement in Virginia and everywhere you are licensed
- Be an “ethics leader” and help others do so
- Apply your critical thinking skills to ethics situations and look for opportunities to expand the ethics related work that you and your legal organization perform

Thank You and Contact Information

- Feel free to share these slides with anyone
- Keep me posted on your efforts in the area of ethics by reaching out to me at:
- Herb Rubenstein
- 303.910.7961
- herb@herbrubenstein.com
- www.herbrubenstein.com