Wednesday 24th September, 2003.

On March 21, 2003 came the Virginia State Bar, by Bernard J. DiMuro, its President, and Thomas A. Edmonds, its Executive Director and Chief Operating Officer, and presented to the Court a petition, approved by the Council of the Virginia State Bar, praying that Rules 3.5 and 5.3, Section II, of the Rules for the Integration of the Virginia State Bar, Part Six of the Rules of Court, be amended to read as follows:

**Rule 3.5. Impartiality and Decorum of the Tribunal.**

(a) A lawyer shall not:

(1) before or during the trial of a case, directly or indirectly, communicate with a juror or anyone the lawyer knows to be a member of the venire from which the jury will be selected for the trial of the case, except as permitted by law;

(2) after discharge of the jury from further consideration of a case:

(i) ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence the juror's actions in future jury service;

(ii) communicate with a member of that jury if the communication is prohibited by law or court order; or

(iii) communicate with a member of that jury if the juror has made known to the lawyer a desire not to communicate; or

(3) conduct or cause, by financial support or otherwise, another to conduct a vexatious or harassing investigation of either a juror or a member of a venire.

(b) All restrictions imposed by paragraph (a) upon a lawyer also apply to communications with or investigations of members of the immediate family or household of a juror or a member of a venire.

(c) A lawyer shall reveal promptly to the court improper conduct by a member of a venire or a juror, or by another toward a venireman or a juror or a member of the juror's family, of which the lawyer has knowledge.

(d) A lawyer shall not give or lend anything of value to a judge, official, or employee of a tribunal under circumstances which might give the appearance that the gift or loan is made to influence official action.

(e) In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except:

(1) in the course of official proceedings in the cause;

(2) in writing if the lawyer promptly delivers a copy of the writing to opposing counsel or to the adverse party who is not represented by a lawyer;

(3) orally upon adequate notice to opposing counsel or to the adverse party who is not represented by a lawyer; or

(4) as otherwise authorized by law.

(f) A lawyer shall not engage in conduct intended to disrupt a tribunal.

**COMMENT**

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

[1a] To safeguard the impartiality that is essential to the judicial process, veniremen and jurors should be protected against extraneous influences. When impartiality is present, public confidence in the judicial system is enhanced. There should be no extra-judicial communication with veniremen prior to trial or with jurors during trial by or on behalf of a lawyer connected with the case. Furthermore, a lawyer who is not connected with the case should not communicate with or cause another to communicate with a venireman or juror about the case. After the trial, communication by a lawyer with jurors is permitted so long as the lawyer refrains

from asking questions or making comments that tend to harass or embarrass the juror or to influence actions of the juror in future cases. Were a lawyer to be prohibited from communicating after trial with a juror, the lawyer could not ascertain if the verdict might be subject to legal challenge, in which event the invalidity of a verdict might go undetected. When an extra-judicial communication by a lawyer with a juror is permitted by law, it should be made considerately and with deference to the personal feelings of the juror.

[1b] All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which the judge presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party. For example, a lawyer should not communicate with a tribunal by a writing unless a copy thereof is promptly delivered to opposing counsel or to an adverse party proceeding *pro se*. Ordinarily an oral communication by a lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel, or, if there is none, to the opposing party. A lawyer should not condone or lend himself or herself to private importunities by another with a judge or hearing officer on behalf of the lawyer or the client.

[2] The advocate's function is to present evidence and arguments so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer must stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics. Rule 8.3(b) also requires a lawyer to report such conduct by a judge to the appropriate authority and with this duty and recourse there is no reason for a lawyer to reciprocate.

**VIRGINIA CODE COMPARISON**

Paragraphs (a)-(c) are substantially the same as DR 7-107(A) - 7-107(F). Paragraph (a)(2)(ii) and (iii) are new.

Paragraph (d) is identical to DR 7-109(A).

Paragraph (e) is identical to DR 7-109(B).

Paragraph (f) is new.

**COMMITTEE COMMENTARY**

The Committee believed that the adopted language of DR 7-107 and DR 7-109 provides better guidance to lawyers than that of paragraphs (a) and (b) of the *ABA Model Rule*. In paragraph (f) of this Rule, the Committee adopted the language of paragraph (d) of the *ABA Model Rule*, which prohibits "conduct intended to disrupt a tribunal," because the Committee considered the general admonition against "conduct prejudicial to the administration of justice" to be vague.

**Rule 5.3. Responsibilities Regarding Nonlawyer Assistants.**

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner or a lawyer who individually or together with other lawyers possesses managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows or should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

**COMMENT**

[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and

paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline. At the same time, however, the Rule is not intended to preclude traditionally permissible activity such as misrepresentation by a nonlawyer of one's role in a law enforcement investigation or a housing discrimination "test".

**VIRGINIA CODE COMPARISON**

Rule 5.3(a) and (b) are similar to DR 3-104(C). The *Virginia Code* also addressed a supervising lawyer's responsibilities in DR 4-101(E) and DR 7-106(B). The *Virginia Code* did not contain any explanation of a lawyer's responsibility for a nonlawyer assistant's wrongdoing, which is addressed in Rule 5.3(c).

**COMMITTEE COMMENTARY**

The Committee adopted this Rule as a parallel companion to Rule 5.1 which applies similar provisions to lawyers with supervisory authority over other lawyers. The Committee inserted the phrase "or should have known" in Rule 5.3(c)(2) to reflect a negligence standard. The Committee also deemed it appropriate to add the language in the last sentence of the Comment to cover such recognized and accepted activities as those described.

Upon consideration whereof, it is ordered that the Rules for Integration of the Virginia State Bar, Part Six of the Rules of Court, be and the same hereby are amended in accordance with the prayer of the petition aforesaid, effective January 1, 2004.

A Copy,

Teste:

Clerk