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Addressing Ethical Challenges Presented By An Evolving Workplace

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Panelists

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Today's Topics

Featured Rules of Professional Responsibility

- Rule 1.1 – Competence
- Rule 1.3 – Diligence
- Rule 1.4 – Communication
- Rule 1.6 – Confidentiality
- Rule 1.7 – Conflict of Interest
- Rule 1.13 – Organization as Client
- Rule 3.4 – Fairness to Opposing Party and Counsel
- Rules 5.1 & 5.3 – Supervision of Subordinates
- Rule 8.4 – Misconduct

AGENDA

- Remote/Hybrid Workplace
- Questionable Conduct
- Investigations
- Discovery Issues/Social Media
- Additional Hypotheticals

Ethics, Practically Applied

What lessons can be learned from Virginia's Rules of Professional Conduct?

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Section I:

Practicing Law in Remote/Hybrid Environments

Hybrid & Remote Work

Practicing law in an environment where many colleagues are working remotely full time or on a hybrid basis raises several ongoing ethical issues.

Attorneys must be aware of how they and those that they supervise access data and prevent cybersecurity risks. They must also consider the security and confidentiality of their procedures and systems.

This obligation includes taking reasonable steps to protect computer systems and physical files and safeguarding the confidentiality of client and communications.

Hybrid & Remote Work

Common Sources of Potential Problems

- Shared/communal living spaces
- Shared printers
- Unlocked office and/or unsecured papers
- Open access WiFi
- Zoom/Video or other conference calls without the use of headphones
- Presence of Alexa or other electronic virtual assistants

Key Rules

- Rule 1.1. Competence
- Rule 1.6. Confidentiality of Information
- Rules 5.1 & 5.3 Duties to Supervise

Rule 1.1

[6] To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education in the areas of practice in which the lawyer is engaged. ***Attention should be paid to the benefits and risks associated with relevant technology.***

Confidentiality

Rule 1.6, Comment 18

Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third ***parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision.***

The unauthorized access or disclosures will not be a violation of the rule if the lawyer has made reasonable efforts to prevent the access or disclosure.

Factors determine reasonableness include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients.

Duties to Supervise

Rule 5.1(b): A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

Rule 5.1(c)(2): A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if [the lawyer] has direct supervisory authority over the other lawyer, and ***knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.***

Rule 5.3 (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.

Rule 5.3 (c)(2): A lawyer shall be responsible for conduct of [a nonlawyer] that violates the Rules if [the lawyer] has direct supervisory authority and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Evolving Ethical Landscape

The ABA , Virginia (as well as other jurisdictions) have issued several relevant opinions.

ABA Opinions

The ABA (and other jurisdictions) have issued several relevant opinions.

In **Formal Opinion 498**, the committee provides additional guidance on a virtual practice. It contains examples of special precautions that may be necessary for remote work, including using secure internet access, creating unique complex passwords and changing them periodically, and implementing firewalls.

Supervision of subordinate attorneys and staff: Because adequate supervision is more difficult via telephone or videoconference, those responsible for supervising should be doubly sure that the firm has updated and thorough policies and procedures in place and that everyone at the firm has been trained on and implements those policies.

ABA Opinions

Client Confidentiality: When working remotely, employees may share computers with others in the household, participate in calls with clients within earshot of others, or leave client files or documents in plain view. Or, they may discard sensitive items in household trash.

At times they may work in unsecure locations where lawyers can be easily heard or where the internet is not secure.

Anyone handling confidential information must take care to protect it—no matter where they are working.

Virginia Opinions

Relevant Virginia guidance:

- LEGAL ETHICS OPINION 1872. VIRTUAL LAW OFFICE AND USE OF EXECUTIVE OFFICE SUITES.
- Legal Ethics Opinion 1896, Out-of-State Lawyers Working Remotely in Virginia.

Scenario 1

Tanya (in-house counsel) is working with Sam (outside counsel) on time-sensitive motion.

Some days Sam works from her law firm office and some days she works from home. When working from home, she connects to her firm's network using a work-assigned laptop and a VPN with two-factor authentication protocols.

Tanya must review and approve any major motion before it is filed. She is traveling. When emailing back and forth with Sam, at various times she is in her hotel room, at the airport, on a plane, and at the office of a different law firm. At times she pays for wifi access, but if not available, she uses public wi-fi.

Any ethical concerns raised by these communications?

Scenario 2

Tanya works with colleagues who work remotely several days a week. All three usually connect to their corporate network using a VPN with two-factor authentication protocol.

A junior attorney has been having network access and hardware problems. At times he forwards materials to his personal e-mail address to more easily print and/or edit at home. He has not told Tanya that he is doing this.

Scenario 3

A second junior outside counsel shares an apartment and likes to work from her couch on a laptop. This is obvious from their occasional video conferences. During Zoom meeting to discuss ongoing litigation strategy for imminent motion, Tanya sees others occasionally passing through the room.

What are Tanya's ethical obligations?

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Section II:
Questionable Conduct

Scenario 4

The New York Times

At Wells Fargo, a Quest to Increase Diversity Leads to Fake Job Interviews

Black and female candidates are sometimes interviewed after the recipient of a job is identified, current and former employees say.

Wells Fargo in Criminal Probe Over Fake Job Interviews: Report

Bill Belichick text messages to Brian Flores reveal Giants violated Rooney Rule

February 1, 2022 by Steve DelVecchio

32 Comments

Scenario 4 (cont.)

Employee makes an anonymous report to an internal ethics hotline alleging that the line of business is conducting sham interviews of diverse candidates after the hiring decision has already been made with no intention to hire them. The employee alleges this conduct has been going on for over a year, but offers no other details.

What are the risks to the company?

Risks to the Company

Reputational / Public Relations

Civil

- Claims by passed-over candidates
- Shareholder claims
- Derivative litigation

Regulatory (DOL/SEC/EEOC/other)

- CMPs and potential enforcement actions

Criminal

- Federal or state charges related to civil rights violations

Sham D&I Interviews

Employee claims that company is conducting sham job interviews with minority candidates

- How widespread is the practice?
- Does it matter how the claim was communicated?
  - Anonymous ethics line?
  - Complaints Database?
  - Social Media?
  - Direct report?

What guidance can you draw from the Rules of Professional Conduct?

Rule 8.4

Model Rule

It is professional misconduct for a lawyer to:

. . .

(g) Engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.

Virginia Rule

[3] ABA Model Rule Comment not adopted.

[This comment in the Model Rule addressed discrimination and harassment by lawyers in violation of paragraph (g).]

Key Questions

- What should the lawyer do?
- How quickly should the lawyer act?
- Who should the lawyer tell?
- What should be the focus of the investigation?
- Will the lawyer's investigation be privileged?

Rule 1.3 – Diligence

"A lawyer shall act with reasonable diligence and promptness in representing a client."

- Promptly determine whether the allegation is credible enough to warrant an investigation
- Prompt notice to client

Scenario 5

During the course of a “preliminary” internal investigation, your CEO tells you in “strictest confidence” that she has upcoming plans that you believe are detrimental to the Company and likely unlawful. You point out the potential pitfalls to the planned course of action, and she summarily dismisses your concerns and instructs you to not discuss it with anyone else.

What should you do?

Does the response change if the problematic conduct has already occurred?

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Section III:
Investigations

Rule 1.13 – Organization as Client

"(b) If a lawyer for an organization knows that [someone] is engaged in action . . . that is a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, ***then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. . . .***"

Rule 1.13(d)

“In dealing with an organization’s directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.”

Employee Interviews

Rule 1.7 requires lawyers to avoid conflicts of interest with current clients. This can be challenging when you don't know much about the facts.

Best practices:

- Provide an *Upjohn* warning to employees at the beginning that makes clear that you represent the company and that the information they provide will be shared with the company, which will decide what to do with it.
- Document this *Upjohn* warning in writing.

Upjohn Test

1. Were the communications made by employees at the direction of superior officers of the company for the purpose of obtaining legal advice?
2. Did the communications contain information necessary for counsel to render legal advice, which was not otherwise available from 'control group' management?
3. Were the matters communicated within the scope of the employee's corporate duties?
4. Did the employee know that the communications were for the purpose of the company obtaining legal advice?
5. Were the communications ordered to be kept confidential by the employee's superiors, including that the communications were considered confidential at the time, and treated accordingly?

Rule 1.13, comment 2

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6

Privilege

There is no guarantee your investigation or any subsequent report will be privileged.

1. Is it done in anticipation of litigation, or in the course of giving or receiving legal advice?
2. Some jurisdictions treat internal investigations conducted according to pre-existing policies as non-privileged business functions.
3. Some regulators require companies to share privileged information as part of the supervisory process.

North Carolina Supreme Court

"It today's business world, investigations of alleged violations of company policy, including policies prohibiting sexual harassment or discrimination, are ordinary business activities and, accordingly, the communications made in such investigations are not necessarily 'made in the course of giving or receiving legal advice for a proper purpose.'"

Where an investigation has both business and legal purposes, the focus should be on determining whether the "primary purpose" of the communication was to seek or provide legal advice.

Buckley LLP v. Series 1 of Oxford Insurance Co., 2022-NCSC-94 (Aug. 19 2022)

12 U.S.C. § 1828(x)

"The submission by any person of any information to the Bureau of Consumer Financial Protection, any Federal banking agency, State bank supervisor, or foreign banking authority for any purpose in the course of any supervisory or regulatory process of such Bureau, agency, supervisor, or authority shall not be construed as waiving, destroying, or otherwise affecting any privilege such person may claim with respect to such information under Federal or State law as to any person or entity other than such Bureau, agency, supervisor, or authority."

Rule 1.4(a) – Communication

"A lawyer shall…(3) keep the client reasonably informed about the status of the matter."

- Do you know enough to notify senior management or the Board of Directors?
- What do you need to know in order to decide whether/when to raise this?
- How should you communicate?

Reporting to the Board

- Be especially diligent when business or financial considerations intertwine with legal advice.
- Remember that courts accord lesser protection to facts than they do to attorney mental impressions and conclusions.
- Consider whether you are better off by making an oral report.

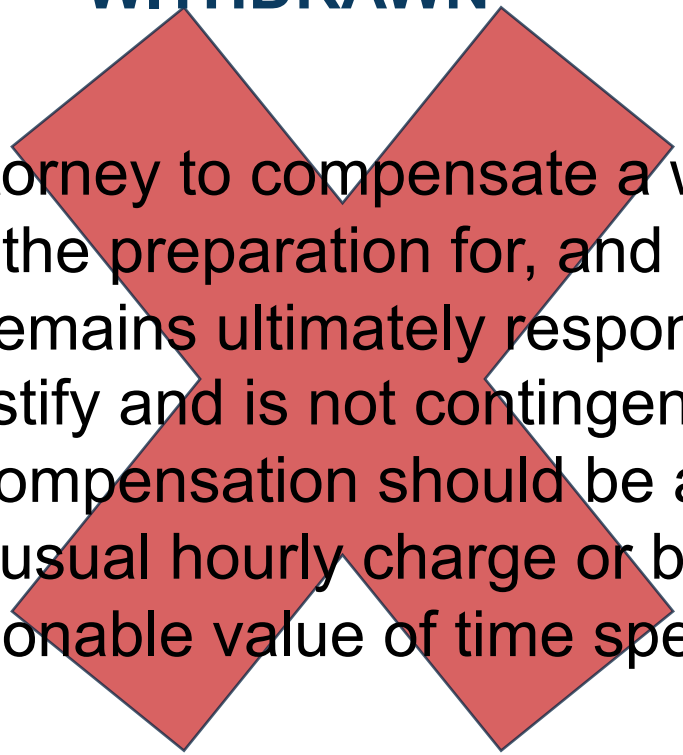
Scenario

The government launches an investigation and enforcement action against the Company, and starts contacting former employees

Can you pay former employees who agree to cooperate with the Company?

Paying Fact Witnesses

Legal Ethics Opinion 587 – WITHDRAWN



It is not improper for an attorney to compensate a witness for the reasonable value of time expended in the preparation for, and rendering of, testimony in litigation, when the client remains ultimately responsible, the compensation is not an inducement to testify and is not contingent upon the outcome of the case. The amount of the compensation should be a fair value of time expended calculated by a usual hourly charge or by some other method which determines the reasonable value of time spent.

Paying Fact Witnesses

Rule 3.4(c)

A lawyer shall not…

(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

Key Questions

What obligations does a lawyer have when civil litigation or government investigations are pending?

1. Assess the situation (Rule 1.13)
2. Preserve evidence (Rule 3.4)
3. Keep client informed (Rule 1.4)
4. Maintain confidentiality (Rule 1.6)
5. Mount a defense

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Section IV:
Technology, Social Media & Discovery Issues

Confidentiality

High-Tech Risks to Rule 1.6 Information

- Social Media – Facebook, LinkedIn, Twitter (NY Partner to Press Sec'y : "Rot in Hell")
- Automatic e-mail addresses and "Reply to All"
- Email impersonation of client (J. Kushner's lawyer)
- Is your client's email account secure?
  - Work email = no expectation of privacy
- Public Wi-Fi – use secure connection (mifi or jetpack)
- "Phishing" attacks on firm's systems, including state-sponsored hacking (Sony, DNC)
- Spoofing caller id on the phone
- Home digital assistants are recording you (Google Home, Amazon's Alexa)
- Uber and Lyft cameras are recording you
- Portable storage devices -- lost thumbdrives, stolen laptops

Confidentiality

Low-tech Risks to Rule 1.6 Information

- Trash (public trash cans, conference rooms)
- Documents left on Printers
- Mailing documents – stowaways in envelope?
- Reading over your shoulder – computer screen, documents, binder labels
- Conversations in Public Places:
  - Cocktail parties, Restaurants, Airplanes, Amtrak, Metro, Elevators

If a Claim is Threatened or Filed…

Rule 3.4 – Duty to Preserve

[1] 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.

[2] 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.

Spoliation / Adverse Inference

"Spoliation of evidence occurs when a party is aware that there is pending or probable litigation involving evidence in the party's custody or under its control, and such evidence if destroyed or otherwise not preserved will interfere with the ability of the adverse party to establish some element of its claim."

"[W]e hold that the evidence must support a finding of intentional loss or destruction of evidence in order to prevent its use in litigation before the court may permit the spoliation inference."

Emerald Point, LLC v. Hawkins, 294 Va. 544, 556, 558-59 (Va. 2017)

Investigating the Facts

Recording Conversations

- Rule 4.4: lawyer cannot "use methods of obtaining evidence that violate the legal rights of [a third] person."
- Two-party consent states
  - Maryland Code § 10-402 (5 years; $10,000 fine)
- One-party consent states
  - Virginia Code § 19.2-62
  - DC Code § 23-542
- May be inadmissible unless offered by non-recording party
- Strategy – what will jurors think about undisclosed taping?

Communicating with Persons Represented by Counsel

Rule 4.2: "[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."

- Comment 3 – Rule applies even if the represented person initiates or consents to the communication.

Rule 4.2, Comment 7

In the case of a represented organization, ***this Rule prohibits communications with a constituent of the organization who supervises, directs, or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization*** with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. ***Consent of the organization's lawyer is not required for communication with a former constituent.*** If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. *Compare* Rule 3.4(h). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. *See* Rule 4.4

Key Take-Aways

1. Low-level employees may be approached.
2. Former employees are fair game.
3. Severance agreements may be implicated (e.g., cooperation and notice provisions).
4. Do not obstruct investigations.
5. OK to pay fact witnesses objectively reasonable amounts.

Fairness to Opposing Party and Counsel

Rule 3.4(h)

A lawyer shall not…

(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.

Rule 3.4, Comment 4

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.

Scenario 6

Company issues social media post denying allegations of short-seller. Shareholders subsequently sue Company over the conduct that was the subject of the short-seller's report.

What do you do?

Preserve Evidence

Rule 3.4(a): a lawyer shall not obstruct access to or destroy evidence

- Issue prompt litigation hold notice
- Preservation obligation includes relevant social media
  - *Lester v. Allied Concrete, Co.,* Case No. CL08-150 (Va. Cir. Ct. Oct. 21, 2011) ($542,000 sanction for attorney who caused spoliation of Facebook page)

Social Media and Legal Ethics

The General Counsel's Role in Formulating a Media Policy

- ABA Rules 5.1 through 5.3 require a lawyer to take reasonable measures to ensure that any social media postings by subordinate lawyers and staff, including personal postings, conform to the Rules of Professional Conduct.
- The General Counsel's Office should help develop a social media policy and should educate employees about the policy and the consequences if it is violated, including the potential loss of confidential information and trade secrets.
- The General Counsel should periodically review company social media policies and internal controls.

Scenario 7

You have a written corporate policy that no employee is to engage in business activities using personal cell phone or communication devices. The policy specifically warns against exchanging text messages with colleagues about work matters.

Notwithstanding this written policy, it is generally known that many people ignore it.

In the course of gathering materials for discovery, you learn that a manager involved in the key events at issue has wiped his phone of all data. You believe, but cannot confirm, that the deleted data included otherwise discoverable texts and voicemail messages.

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Additional Hypotheticals

Scenario 8

A VP of Marketing contacts you to alert you that he believes two of his sales reps are about to sue the company. When you ask for the source of this information, he discloses:

In his ongoing efforts to make sure that his employees are actually productive and complying with company policies, he periodically reviews network emails and materials stored in folders on the network.

Scenario 8 (cont.)

He finds a subfolder in one employee's personal folder labeled "Harassment Proof." Inside the folder, he finds copies of emails with other employees and supervisors. He also finds emails between the employee and her counsel contemplating suit.

Through additional investigation he learns that the attorney emails were sent using a personal Gmail account, but through company servers on the company laptop, during "working hours."

Scenario 8 (cont.)

He decides to dig deeper and begins monitoring employee slack channels. He discovers that several employees have been complaining about harassment, discrimination and workplace bullying. Two employees appear to be rounding up support for a potential class action.

He confronts one of the alleged bullies during a Zoom conference. Although he does not record the conference via the Zoom platform, he has separate software on his computer that records the audio portion of the exchange. He does not inform the alleged bully that he is being recorded.

Scenario 4

Issues & Concerns?

Scenario 9

The Company is cutting jobs and has implemented a voluntary severance program for executives at certain tenure levels.

One of the executives eligible for the program has been a good friend for 10 years, and you frequently workout together or have lunch or coffee.

Your friend has decided to resign and has asked for your opinion with respect to her separation agreement and for suggestions on how to get the best deal.

Scenario 7

Issues & Concerns?

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Speakers

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Grey serves as Senior Litigation Group Counsel at Johnson Controls, which offers the world's largest portfolio of building products, technologies, software, and services to make buildings "smarter." Prior to joining Johnson Controls in 2020, Grey was a litigator at Williams & Connolly for seven years. She is a graduate of Harvard Law School and earned her undergraduate degree from the University of Virginia.

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Elaine serves as Co-Chair of both the Williams & Connolly's Employment Litigation practice group and the Employment Counseling practice group. Elaine advises a wide range of companies across multiple industries in litigation and arbitration matters involving internal investigations, anti-discrimination and harassment claims, as well as matters involving FMLA, contract claims and administrative proceedings. Her employment practice also includes counseling clients on corporate and nonprofit employment policies and pandemic-related employment issues. In 2020 and 2021, Elaine was recognized as a "Labor and Employment Star" by *Benchmark Litigation.*

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Ryan chairs the firm's D&O Liability Practice Group. Ryan frequently defends financial institutions, law firms, corporations, and their directors and officers who are under investigation or find themselves facing litigation from government authorities, regulators, consumers, shareholders, and competitors. His cases often involve whistleblowers and disgruntled former employees. Ryan is ranked by Benchmark Litigation and Chambers and has been recognized by The Legal 500, which describes him as an "[o]utstanding attorney and strategic thinker" and praises him for his "calming approach."

Speakers

Lakshmi Williams

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Lakshmi has responsibility for managing all legal work related to Transurban's operating assets, development efforts and M&A. In addition, she oversees the risk and compliance functions for the North American business and has responsibility for all litigation. Lakshmi plays a key role in structuring, negotiating and financing new project developments from project inception, proposal development and financing through delivery, launch and operations. She supervises all aspects of IP portfolio and strategy as well as streamlining U.S. and Canadian corporate legal entities to optimize tax outcomes and support future development efforts. She has managerial and Board responsibilities for Transurban's North American assets.

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