

## UNAUTHORIZED PRACTICE OF LAW OPINION 212

**WHETHER A NON-LAWYER SETTLEMENT AGENT CAN NEGOTIATE A DEBT ON BEHALF OF A DEBTOR**

You have asked the Committee to opine as to whether the conduct in the following scenario is the unauthorized practice of law: Debtor owes Creditor \$20,000.00. Creditor reduced his claim to judgment several years ago and filed a lien for this judgment in the real estate records against Debtor's property. When Debtor tried to refinance a mortgage, his non-lawyer settlement agent discovered the judgment lien. Debtor does not want to pay the full amount of the lien. Can the lay settlement agent attempt to negotiate a lower payoff for Debtor under these facts? Assuming the same facts, does it make a difference if the claim had not been reduced to judgment? Again, assuming the same facts, what if Debtor does not live in one of the parcels being financed, i.e. the property is commercial property?

The controlling authority for this inquiry is found in Part 6 § I (B) Rules of the Supreme Court of Virginia, Definition of the Practice of Law in the Commonwealth of Virginia:

**Generally**, the relation of attorney and client exists, and one is deemed to be practicing law whenever he furnishes to another advice or service under circumstances which imply his possession and use of legal knowledge or skill.

**Specifically**, the relation of attorney and client exists, and one is deemed to be practicing law whenever

- (1) One undertakes for compensation, direct or indirect, to advise another, not his regular employer, in any matter involving the application of legal principles to facts or purposes or desires.
- (2) One, other than as a regular employee acting for his employer, undertakes, with or without compensation, to prepare for another legal instruments of any character, other than notices or contracts incident to the regular course of conducting a licensed business.
- (3) One undertakes, with or without compensation, to represent the interest of another before any tribunal — judicial, administrative, or executive — otherwise than in the presentation of facts, figures, or factual conclusions, as distinguished from legal conclusions, by an employee regularly and bona fide employed on a salary basis, or by one specially employed as an expert in respect to such facts and figures when such representation by such employee or expert does not involve the examination of witnesses or preparation of pleadings.
- (4) One holds himself or herself out to another as qualified or authorized to practice law in the Commonwealth of Virginia.

The Committee does not believe that "negotiation" alone, is per se the unauthorized practice of law. The dispositive question, applying the definition of the practice of law, is whether there is an exercise of legal judgment within the context of the negotiation by a non-lawyer on behalf of another. So long as the settlement agent is only negotiating "numbers" and not offering the customer legal advice nor making a legal argument on the person's behalf to the creditor, or holding out as qualified to practice law or attempting to represent the debtor within the context of a matter before a tribunal it is not unauthorized practice.

The requestor set out three possible contexts in which this negotiation would take place: 1) when a claim had been reduced to judgment and was a lien against the property; 2) when a claim had not yet been reduced to judgment but was an outstanding debt; and 3) when there was a debt or a judgment and the property being refinanced was commercial property (i.e. debtor does not live on the property). The Committee's opinion and analysis do not change with the change of context or circumstances. The dispositive issue still will be whether there is an exercise of legal judgment or skill and will depend on the specific facts and circumstances of each case. The information presented in the inquiry does not include details as to the substance of the non-lawyer settlement agent's communication with the creditor, only that there was negotiation for a lower payment. There are no other facts upon which to make a determination as to whether there was any exercise of legal judgment or skill or holding out as authorized to practice law. Consequently the Committee's finding, that negotiation with a creditor for payment of a debt, in and of itself, does not constitute the practice of law, applies to each scenario of this inquiry.

Committee Opinion  
October 16, 2007

**VIRGINIA STATE BAR'S STANDING COMMITTEE  
ON UNAUTHORIZED PRACTICE OF LAW IS SEEKING PUBLIC  
COMMENT ON PROPOSED UPL OPINION 213**

Pursuant to Part Six: Section IV, Paragraph 10(c)(iii) of the Rules of the Supreme Court of Virginia, the Virginia State Bar's Standing Committee on Unauthorized Practice of Law ("UPL Committee") is seeking public comment on proposed Unauthorized Practice of Law Opinion 213, *Attorney on Associate Status Representing Multiple Ownership Interests in Negotiation and Drafting of Easement*.

This proposed opinion generally addresses whether a retired member of the Virginia State Bar who is on Associate membership status and who owns an undivided interest in a tract of land can verify the ownership of other undivided interests, negotiate and prepare an easement deed acting, not only for himself, but on behalf of the entirety, representing all interests, and reimburse expenses out of the sale of tax credits.

Pursuant to UPR 6-103 (A)(1), a non-lawyer can act for him/herself *pro se* and draft legal instruments related to a real estate transaction as long as he/she is the owner of the property or a party to the transaction involving the property but he/she cannot act not for anyone else. The language "affecting his property" in UPC 6-5 would allow the landowner to draft a legal instrument (such as an easement) which affects the piece of property he actually owns and to represent himself and his own interests in such a transaction but it does not authorize a non-lawyer to act on behalf of another landowner and affecting another landowner's property, even if the various pieces of property are all part of a whole. This language cannot be construed to broaden the scope of what a non-lawyer can do for another. This would be inconsistent with Rule 6 itself as well as with the Definition of the Practice of Law generally and would be considered the unauthorized practice of law.

**Inspection and Comment**

The proposed opinion may be inspected at the office of the Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219-2800, between the hours of 9:00 AM and 4:30 PM, Monday through Friday. Copies of the proposed opinion can be obtained from the offices of the Virginia State Bar by contacting the Office of Ethics Counsel at (804) 775-0557, or can be found at the Virginia State Bar's Web site at <http://www.vsb.org>

Any individual, business or other entity may file or submit written comments in support of, or in opposition to, the proposed opinion by filing ten copies with Karen A. Gould, the Executive Director of the Virginia State Bar, not later than **February 29, 2008**.

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(DRAFT — October 16, 2007)

**UNAUTHORIZED PRACTICE OF LAW OPINION 213  
ATTORNEY ON ASSOCIATE STATUS REPRESENTING  
MULTIPLE OWNERSHIP INTERESTS IN NEGOTIATION AND  
DRAFTING OF EASEMENT**

You have asked the Committee to opine as to whether the following activity is the unauthorized practice of law: A member of the Virginia State Bar ("VSB") is retired from practice and on Associate membership status.<sup>1</sup> He is the owner of an undivided interest in a tract of land and wants to proceed *pro se* to protect the tract under a conservation easement. In doing this he wants to verify ownership of other undivided interests, negotiate and prepare an easement deed on behalf of the entirety, representing all interests, and reimburse expenses out of the sale of tax credits.

Acting *pro se*, landowner/Associate member can do whatever he believes necessary to protect his *own* interests. His proposed action to be taken on behalf of any other owner's interests would be unauthorized practice of law. The controlling authority on this issue is Part 6, § I, Introduction, (B)(Definition of the Practice of Law in Virginia) and (C) (Definition of "Non-lawyer")Rules of the Virginia Supreme Court; Unauthorized Practice Rule ("UPR") 6-103 (A); Unauthorized Practice Consideration ("UPC") 6-5; Part 6, § IV, Para. 3(b) Rules of the Supreme Court of Virginia (Classes of Membership—Associate Members).

The language in the Introduction to Virginia's Unauthorized Practice of Law Rules and Considerations is clear:

The right of individuals to *represent themselves* is an inalienable right common to all natural persons. *But no one has the right to represent another*; it is a privilege to be granted and regulated by law for the protection of the public. (Emphasis added.)

The Definition of the Practice of Law in the Commonwealth of Virginia states:

Generally, the relation of attorney and client exists, and one is deemed to be practicing law whenever he furnishes to another advice or service under circumstances which imply his possession and use of legal knowledge or skill.

Specifically, the relation of attorney and client exists, and one is deemed to be practicing law whenever

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- (2) One, other than as a regular employee acting for his employer, undertakes, with or without compensation, *to prepare for another* legal instruments *of any character*, other than notices or contracts incident to the regular course of conducting a licensed business.

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**FOOTNOTES**

<sup>1</sup> Part 6, § IV, para. 3(b) Rules of the Supreme Court of Virginia:

Associate Members — Those persons who have heretofore or may hereafter be admitted to practice law in the courts of this state but who are not presently so engaged and all persons on the law faculties of any law schools of this state that have been approved by the American Bar Association may be come associate members of the Virginia State Bar upon application to the secretary and payment of the required dues. Associate members shall be entitled to all the privileges of active members except that they may not practice law, vote or hold office (other than as members of committees) in the Virginia State Bar.

While the individual described in the present inquiry is a member of the Virginia State Bar, these provisions (and restrictions) of the Rules apply to him because he holds only Associate membership status. See footnote 1 *supra*. Associate members “may not practice law” in any manner. For purposes of the practice of law, Associate members are essentially “non-lawyers,” i.e. “any person... not duly licensed *or authorized* to practice law in the Commonwealth of Virginia.” Part 6, § I (C) Rules of the Supreme Court of Virginia. In the inquiry presented, this individual is trying to organize all of the various ownership interests in a certain tract of land and negotiate and prepare on behalf of all of the interests a conservation easement to protect the land in its entirety. To do this would necessarily require at some point discussing with the other landowners what their respective legal rights were and explaining to them the need for and consequences of securing this easement, all of which constitutes legal advice. However, Part 6, § I (B)(1) of the Rules of the Supreme Court of Virginia states that such advice is deemed to be the practice of law only if it is provided *for compensation*. In this case, the landowner/Associate bar member would not be paid by these other landowners for his services so providing this advice would not, by itself, be unauthorized practice. Drafting the easement, however, would be preparing a legal instrument for another(s) and if the landowner/Associate member did that on behalf of all of the landowners he would be engaging in unauthorized practice whether he was paid for the service or not. Part 6, § I (B)(2) Rules of the Supreme Court of Virginia.

As to the drafting of the easement, the inquiry requests an interpretation and application of UPC 6-5, which is a comment to UPR 6-103 (A)(1). UPC 6-5 states:

An individual, if he chooses to do so, may draw or attempt to draw legal instruments for himself *or affecting his property*. (Emphasis added.)

UPR 6-103 (A)(1) states:

Unless a party to the transaction, a non-lawyer shall not, with or without compensation, prepare for another legal instruments of any character affecting the title to or use of real estate.

- (1) A non-lawyer may prepare a deed for any real estate *owned by him*. A non-lawyer may prepare a deed of trust or deed of trust note for any real estate owned by him or in connection with any transaction to which he is party involving its purchase, sale, transfer or encumbrance. (Emphasis added.)

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The key to this rule provision and the consideration is that the non-lawyer acting *pro se* must be the owner of the property or he/she must be a party to the transaction involving a piece of real estate and he/she can only act for him/herself, not for anyone else. The language “affecting his property” in UPC 6-5 would allow the landowner to draft a legal instrument (such as an easement) which affects the piece of property he actually owns and to represent himself and his own interests in such a transaction but it does not authorize a non-lawyer to act on behalf of another landowner and affecting another landowner’s property, even if the various pieces of property are all part of a whole. This language cannot be construed to broaden the scope of what a non-lawyer can do for another. This would be inconsistent with Rule 6 itself as well as with the Definition of the Practice of Law generally.

This opinion is based only on the facts you presented and is subject to review by Bar Council at its next regularly scheduled meeting in June 2008, after the requisite period for public comment, in accordance with Part Six: Section IV: Paragraph 10 (c)(iv) of the Rules of the Virginia Supreme Court. Should Council approve the Opinion, it will then be reviewed by the Supreme Court pursuant to Part Six: Section IV Paragraph 10 (f)(iii).

**VIRGINIA STATE BAR’S STANDING COMMITTEE ON UNAUTHORIZED PRACTICE OF LAW IS SEEKING PUBLIC COMMENT ON PROPOSED UPL OPINION 214**

Pursuant to Part Six: Section IV, Paragraph 10(c)(iii) of the Rules of the Supreme Court of Virginia, the Virginia State Bar’s Standing Committee on Unauthorized Practice of Law (“UPL Committee”) is seeking public comment on proposed Unauthorized Practice of Law Opinion 214, Non-Lawyer Representation, for Compensation, of a Party to Arbitration. This proposed opinion generally addresses whether it is the unauthorized practice of law for a non-lawyer Certified Public Accountant (“CPA”) to represent a claimant in an arbitration proceeding before the National Association of Securities Dealers, Inc. (“NASD”) against the Claimant’s former brokerage firm and former stock broker. The CPA is not a licensed attorney in any jurisdiction and is not, and never has been an employee of the claimant.

In this proposed opinion, the UPL Committee concluded that the CPA is not a licensed attorney in any jurisdiction nor is he nor has he ever been an employee of the Claimant. He is independently offering to provide to

customers from the public, services related to arbitration, including representation, and charging a fee for those services and representation. Among the services he is providing are counseling the client regarding potential legal claims against the brokerage company, drafting a statement of claim, drafting discovery requests and then representation at the hearing where he will introduce exhibits, conduct examination of witnesses, including expert witnesses, objecting to exhibits and making legal argument. Based on the Definition of the Practice of Law in the Commonwealth of Virginia, Part 6, § I of the Rules of the Virginia Supreme Court and the decisions of the Committee in UPL Opinions 92, 200 and 206, the conduct of this CPA is the unauthorized practice of law.

**Inspection and Comment**

The proposed opinion may be inspected at the office of the Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219-2800, between the hours of 9:00 AM and 4:30 PM, Monday through Friday. Copies of the proposed opinion can be obtained from the offices of the Virginia State Bar by contacting the Office of Ethics Counsel at

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## UNAUTHORIZED PRACTICE OF LAW OPINIONS

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(804) 775-0557, or can be found at the Virginia State Bar's Web site at <http://www.vsb.org>

Any individual, business or other entity may file or submit written comments in support of, or in opposition to, the proposed opinion by filing ten copies with Karen A. Gould, the Executive Director of the Virginia State Bar, not later than **February 29, 2008**.

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**(DRAFT — October 16, 2007)**

### **UNAUTHORIZED PRACTICE OF LAW OPINION 214 NON-LAWYER REPRESENTATION, FOR COMPENSATION, OF A PARTY TO ARBITRATION**

You have asked the Committee to opine as to whether it is the unauthorized practice of law for a Certified Public Accountant ("CPA"), who is not a licensed attorney in any jurisdiction, to represent a Claimant in an arbitration proceeding against the Claimant's former brokerage firm and former stock broker. The CPA is not, and never has been, an employee of Claimant. Among the services the CPA is providing to the Claimant are: counseling to the Claimant regarding potential legal claims against the brokerage company, drafting a statement of claim asserting the causes of action identified, drafting discovery requests, responding to discovery requests and objecting to discovery requests as appropriate. During representation at the hearing the CPA will introduce exhibits, conduct examination of witnesses, including expert witnesses, object to exhibits and make legal argument on behalf of the Claimant. The CPA is receiving compensation from the Claimant for his representation of Claimant in the arbitration proceeding. This arbitration proceeding is before the National Association of Securities Dealers, Inc. ("NASD").

The Definition of the Practice of Law in the Commonwealth of Virginia, Part 6, § I (B) states that "one is deemed to be practicing law whenever":

- (1) One undertakes for compensation, direct or indirect, to advise another, not his regular employer, in any matter involving the application of legal principles to facts or purposes or desires.
- (2) One, other than as a regular employee acting for his employer, undertakes, with or without compensation, to prepare for another legal instruments of any character, other than notices or contracts incident to the regular course of conducting a licensed business.
- (3) One undertakes, with or without compensation, to represent the interest of another before any tribunal — judicial, administrative, or executive — otherwise than in the presentation of facts, figures, or factual conclusions, as distinguished from legal conclusions, by an employee regularly and bona fide employed on a salary basis, or by one specially employed as an expert in respect to such facts and figures when such representation by such employee or expert does not involve the examination of witnesses or preparation of pleadings.

- (4) One holds himself or herself out to another as qualified or authorized to practice law in the Commonwealth of Virginia.

The Committee has issued three opinions addressing the issue of a "non-lawyer" representing a party in an arbitration proceeding. In UPL Opinion 92, the Committee found that:

It is not the unauthorized practice of law for a non-Virginia-licensed attorney to present evidence and argue matters of law before an arbitration panel of the American Arbitration Association in Virginia in order to represent a client from the attorney's jurisdiction in a franchise contract dispute.

In UPL Opinion 200, the Committee addressed the issue of whether a non-Virginia/foreign attorney, licensed to practice law in Maryland, could represent a corporation in an arbitration proceeding held in Virginia. The Committee found that the foreign attorney could proceed with such representation and that it would not be unauthorized practice. The corporate client was an existing client, which the attorney represented elsewhere. An arbitration proceeding involving this client was set to take place in Virginia. The Committee determined that an attorney is "practicing law" in Virginia when representing a party in an arbitration proceeding but that an arbitration proceeding is not practice before a "tribunal." The Committee then applied the factors under Pt. 6, § I (C)(1)-(3) Rules of the Virginia Supreme Court, allowing for certain "temporary practice" by a foreign attorney:

1. Such foreign attorney must be admitted to practice and in good standing in any state in the United States; and
2. The services provided must be on an occasional basis only and incidental to representation of a client whom the attorney represents elsewhere; and
3. The client must be informed that the attorney is not admitted in Virginia.

The Committee concluded that the attorney satisfied these requirements and it would not be unauthorized practice of law for the foreign attorney to represent his client in the arbitration proceeding in Virginia.

In UPL Opinion 206 the Committee addressed the issue of whether it was the unauthorized practice of law for a non-attorney corporate officer to represent the corporation at an arbitration conducted in Virginia and determined that this would not be unauthorized practice.

The definition of the practice of law allows "a regular employee acting for his employer" to provide legal advice and prepare legal documents for this employer. While the definition and Rule 1-101 prohibit a non-lawyer from representing the interests of or appearing on behalf of his employer or a corporation before "a tribunal," the definition of "tribunal" in UPC 1-1 does not include an arbitration proceeding. It follows, therefore, that a non-attorney officer of a corporation can represent that corporation and provide legal advice to the

corporation/employer within the context of an arbitration proceeding.

UPL Op. 206 (Feb. 10, 2004).

The individual in the present inquiry is neither an attorney licensed in another jurisdiction coming into Virginia to handle a matter for a client the attorney represents elsewhere nor is the person or entity who is a party to the arbitration the regular employer of this individual. Rather, this individual is a CPA, in Virginia, not a licensed attorney in any jurisdiction, who appears to be independently offering to provide to customers from the public, services related to arbitration, including representation, and charging a fee for those services and representation. Based on the Definition of the Practice of Law in the Commonwealth of Virginia, in particular, subsection (1), and the decisions of the Committee in UPL Opinions 92, 200 and 206, the conduct of this CPA is the unauthorized practice of law.

Of note, in September 2006, the NASD, (n/k/a Financial Industry Regulatory Authority, Inc. ("FINRA")) filed with the Securities and Exchange Commission ("SEC") a proposed rule amendment relating to representation of parties in arbitration and mediation.<sup>1</sup> On September 26, 2007, the SEC entered an order approving the proposed rule amendment.<sup>2</sup> This rule amendment came about in light of decisions from two jurisdictions, Florida and California,<sup>3</sup> addressing the issues of

#### FOOTNOTES

- 1 <http://www.sec.gov/rules/sro/nasd.shtml>: Notice: Rel. No. 34-55604
- 2 *Id.*, Order Approving Proposed Rule Change as modified by Amendment Nos. 1 and 2 Thereto Relating to Representation of Parties in Arbitration and Mediation
- 3 *Florida Bar v. Rapoport*, 845 So. 2d 874 (Fla. 2003); *Florida Bar Re: Advisory Opinion on Nonlawyer Representation in Securities Arbitration*, 696 So. 2d 1178 (Fla. 1997); *Birbower, Montalbano, Condo & Frank v. Superior Court*, 949 P. 2d 1 (Cal. 1998).

#### VIRGINIA STATE BAR'S STANDING COMMITTEE ON UNAUTHORIZED PRACTICE OF LAW IS SEEKING PUBLIC COMMENT ON PROPOSED UPL OPINION 215

Pursuant to Part Six: Section IV, Paragraph 10(c)(iii) of the Rules of the Supreme Court of Virginia, the Virginia State Bar's Standing Committee on Unauthorized Practice of Law ("UPL Committee") is seeking public comment on proposed Unauthorized Practice of Law Opinion 215, *In-house Counsel Based Outside Virginia Providing Legal Advice to Employer in Virginia*.

This proposed opinion generally addresses whether lawyers who are members of the legal department of a financial institution which is chartered under the laws of a state other than Virginia and who are based in offices outside Virginia and who are licensed in jurisdictions other than Virginia are (1) subject to required registration as corporate counsel under Rule 1A:5 of the Rules of the Virginia Supreme Court; and (2) engaging in unauthorized practice of law if they advise Virginia offices of the financial institution on Virginia law either from the lawyers' offices outside of Virginia or when they visit the Virginia offices in person.

In this proposed opinion, the UPL Committee concluded that a non-Virginia-licensed attorney does not have to apply for certificate or registration pursuant to Rule 1A:5 of the Rules of the Virginia Supreme

out-of-state lawyer and non-lawyer representation of parties in arbitration and the expanding multi-jurisdictional practice of law in jurisdictions throughout the country generally. The changes in the rule (1) codified the current practice by explicitly stating that parties may represent themselves in arbitration; (2) codified current practice permitting multijurisdictional practice by attorneys in NASD Dispute Resolution to the extent permitted by state law and required that the attorney must be licensed to practice and in good standing in a U.S. jurisdiction; (3) allowed that parties may be represented by a person who is not an attorney unless applicable law prohibits such representation or the person is currently suspended or barred from the securities industry in any capacity or is currently suspended or disbarred from the practice of law; and (4) allowed an attorney to represent a client in NASD arbitration or mediation held in any U.S. location, regardless of where the attorney is licensed, the representation being subject to the applicable law of the particular jurisdiction.

While it is beyond the purview of the Committee to apply or interpret the rules of the NASD, it appears that the Committee's conclusion in this matter is consistent with the NASD's rule as amended regarding representation in NASD arbitration and mediation.

This opinion is based only on the facts you presented and is subject to review by Bar Council at its next regularly scheduled meeting in June 2008, after the requisite period for public comment, in accordance with Part Six: Section IV, ¶ 10 (c)(iv) of the Rules of the Virginia Supreme Court. Should Council approve the Opinion, it will then be reviewed by the Supreme Court pursuant to Part Six: Section IV, ¶ 10 (f)(iii).

Court, if that attorney is not located physically in Virginia as his/her base for employment as in-house counsel, corporate counsel, general counsel, etc. The UPL Committee also concluded that these lawyers are not engaged in the unauthorized practice of law, pursuant to Part 6, § I (B)(1) of the Rules of the Virginia Supreme Court, when they provide advice and counsel to their *regular employer* regarding Virginia law, even when the branch of the financial institution is located in Virginia. Should these lawyers have to prepare documents in either situation, again, they are providing this legal service only to their regular employer which is permitted under Part 6, § I (B)(2). Furthermore, these lawyers fall within the scope of the temporary practice provisions of Part 6, § I (C), and are therefore not engaged in the unauthorized practice of law.

#### Inspection and Comment

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(DRAFT — October 16, 2007)

### UNAUTHORIZED PRACTICE OF LAW OPINION 215 IN-HOUSE COUNSEL BASED OUTSIDE VIRGINIA PROVIDING LEGAL ADVICE TO EMPLOYER IN VIRGINIA

The Committee has been asked to opine as to whether lawyers who are members of the legal department of a financial institution which is chartered under the laws of a state other than Virginia and who are based in offices outside Virginia and who are licensed in jurisdictions other than Virginia are (1) subject to required registration as corporate counsel under Rule 1A:5 of the Rules of the Virginia Supreme Court; and (2) engaging in unauthorized practice of law if they advise Virginia offices of the financial institution on Virginia law either from the lawyers' offices outside of Virginia or when they visit the Virginia offices in person.

The controlling authority is Rule 1A:5, Rules of the Virginia Supreme Court and the Practice of Law in the Commonwealth of Virginia, Part 6 § I, (B) and (C), Rules of the Supreme Court of Virginia.

Rule 1A:5 of the Rules of the Virginia Supreme Court, Virginia Corporate Counsel & Corporate Counsel Registrants provides:

Notwithstanding any rule of this Court to the contrary, after July 1, 2004, any person employed in Virginia as a lawyer exclusively for a for-profit or a non-profit corporation, association, or other business entity, including its subsidiaries and affiliates, that is not a government entity, and the business of which consists solely of lawful activities other than the practice of law or the provisions of legal services ("Employer"), for the primary purpose of providing legal services to such Employer, including one who holds himself or herself out as "in-house counsel," "corporate counsel," "general counsel," or other similar title indicating that he or she is serving as legal counsel to such Employer, shall either (i) be a regularly admitted active member of the Virginia State Bar; (ii) be issued a Corporate Counsel Certificate as provided in Part I of this rule and thereby become an active member of the Virginia State Bar with his or her practice limited as provided therein; or (iii) register with the Virginia State Bar as provided in Part II of this rule; provided, however, no person who is or has been a member of the Virginia State Bar, and whose Virginia License, at the time of application, is revoked or suspended, shall be issued a Corporate Counsel Certificate or permitted to register under this Rule.

Part I and Part II of this rule set out the certification and registration requirements for lawyers admitted to practice in U.S. jurisdictions *other than Virginia* or in a country other than the United States (Part II only):

#### Part I: Virginia Corporate Counsel

- (a) A lawyer admitted to the practice of law in a state (other than Virginia), or territory of the United States, or the District of Columbia may apply to the Virginia State Bar for a certificate as a Virginia Corporate Counsel ("Corporate Counsel Certificate") to practice law as in-house counsel in this state when he or she is employed by an Employer in Virginia.

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#### Part II: Corporate Counsel Registrants

- (a) Notwithstanding the requirements of Part I of this rule, any lawyer as defined in the Introduction and Part I(a) of this rule may register with the Virginia State Bar as a "Corporate Counsel Registrant." A person admitted to the practice of law only in a country other than the United States, and who is a member in good standing of a recognized legal profession in that country, the members of which are admitted to practice law as lawyers, counselors at law, or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or public authority, may also register under Part II of this rule.

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A Virginia-licensed attorney does not have to apply for certificate or registration pursuant to this rule nor does a non-Virginia-licensed attorney if that attorney is not located physically in Virginia as his/her base for employment as in-house counsel, corporate counsel, general counsel, etc.

The Definition of the Practice of Law in the Commonwealth of Virginia states:

Specifically, the relation of attorney and client exists, and one is deemed to be practicing law whenever

- (1) One undertakes for compensation, direct or indirect, to advise another, *not his regular employer*, in any matter involving the application of legal principles to facts or purposes or desires.
- (2) One, *other than as a regular employee acting for his employer*, undertakes, with or without compensation, to prepare for another legal instruments of any character, other than notices or contracts incident to the regular course of conducting a licensed business. (Emphasis added).

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Part 6, § I (B) Rules of the Supreme Court of Virginia. Paragraph (C) of Part 6, § I defines a "non-lawyer" and sets out the limits of temporary practice by a non-Virginia lawyer in Virginia:

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(C) Definition of “Non-lawyer.” The term “non-lawyer” means any person, firm, association or corporation not duly licensed or authorized to practice law in the Commonwealth of Virginia. However, the term “non-lawyer” shall not include foreign attorneys who provide legal advice or services in Virginia to clients under the following restrictions and qualifications:

- (1) Such foreign attorney must be admitted to practice and in good standing in any state in the United States; and
- (2) The services provided must be on an occasional basis only and incidental to representation of a client whom the attorney represents elsewhere; and
- (3) The client must be informed that the attorney is not admitted in Virginia.

A lawyer who provides services not authorized under this rule must associate with an attorney authorized to practice in Virginia.

Nothing herein shall be deemed to overrule or contradict the requirements of Rules of this Court regarding foreign attorneys admitted to practice in the courts of the Commonwealth of Virginia including the association of counsel admitted to practice before the courts of this Commonwealth.

A lawyer who provides services as authorized under this rule, or who is admitted *pro hac vice* under Rule 1A:4 shall, with regard to such services or admission, be bound by the disciplinary rules set forth in the Virginia Code of Professional Responsibility.

Failure of the foreign attorney to comply with the requirements of these provisions shall render the activity by the attorney in Virginia to be the unauthorized practice of law.

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In the inquiry presented, the lawyers involved are members of a financial institution’s legal department and are all based in offices outside of Virginia and are licensed to practice law in other U.S. jurisdictions other than Virginia, in particular, the jurisdictions where their offices are located. In this posture, they are not subject to the requirements of Rule 1A:5. The certificate and registration requirements of this rule apply only to lawyers not licensed in Virginia who are working *in Virginia* as corporate counsel, in-house counsel, general counsel, etc.

When these lawyers provide advice and counsel regarding Virginia law to employees of the financial institution employer located in branches in Virginia, they are not engaged in unauthorized practice. When they are providing the advice either from their offices outside of Virginia or when they visit the branches in-person in Virginia, this constitutes advising their *regular employer* which is permitted under Part 6, § I (B)(1) of the Rules of the Virginia Supreme Court. Should they have to prepare documents in either situation, again, these lawyers are providing this legal service only to their regular employer which is permitted under Part 6, § I (B)(2). These lawyers also fall within the scope of the temporary practice provisions of Part 6, § I (C). They represent the employer elsewhere and have occasion to have to come into Virginia in relation to that representation. This occurs only on a temporary or occasional basis. Nothing in this inquiry suggested that these lawyers were attempting to appear before any tribunal in Virginia on behalf of the employer, which would require association with Virginia-licensed counsel.

Finally, two earlier opinions from the Committee, UPL Opinions 93 and 99 are also instructive on the issues presented in this inquiry. In these opinions the Committee found that it was not the unauthorized practice of law for a non-Virginia-licensed attorney to prepare legal documents for a Virginia client relating to a Virginia matter when the attorney did so from his/her office in the jurisdiction where he/she was licensed. Similarly, if an attorney is providing legal advice to or on behalf of a Virginia client while located in his/her licensing jurisdiction, this will not be the unauthorized practice of law in Virginia. The Committee cautions that an attorney licensed other than in Virginia must also be aware of any applicable rules and/or limitations of his/her licensing jurisdiction and/or the jurisdiction where he/she is practicing regarding the practice of another jurisdiction’s law where the attorney is not licensed.