

MAR 22 2010

VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the*  
*City of Richmond on* Friday *the* 19th *day of* March, 2010.

On October 28, 2009 came the Virginia State Bar, by Jon D. Huddleston, its President, and Karen A. Gould, 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 Paragraph 10, Section IV, of the Rules for Integration of the Virginia State Bar, Part Six of the Rules of Court, be amended to read as follows:

10. Promulgation of Legal Ethics, Unauthorized Practice of Law Opinions, and Rules of Court; Informal Staff Opinions of Ethics Counsel; and Complaints of Unauthorized Practice of Law.

## 10-1. DEFINITIONS

As used in this Paragraph, the following terms shall have the meaning herein stated unless the context clearly requires otherwise:

"Advisory Opinion" means a written statement of the subject involved, the question presented, the Rule of Court or other precedents relied upon, the opinion reached, and the reasons therefore.

"Bar" means the Virginia State Bar.

"Committee" means the Standing Committee on Legal Ethics or the Standing Committee on Unauthorized Practice of Law.

"Council" means the Council of the Virginia State Bar.

"Court" means the Supreme Court of Virginia.

"Ethics Counsel" means the Ethics Counsel or an assistant ethics counsel of the Virginia State Bar.

"Member" means any active member of the Virginia State Bar or a Foreign Lawyer as defined under Rule 5.5(d)(1) of the *Rules of Professional Conduct*.

"Notice" means publishing in the *Virginia Lawyer Register* and at a minimum posting on the Virginia State Bar's website for at least 30 calendar days.

"Rule" means any proposed new Rule of Court or any modification, amendment, or proposed repeal of any existing Rule of Court promulgated by either the Standing Committee on Legal Ethics or the Standing Committee on Unauthorized Practice of Law.

#### 10-2. ADVISORY OPINIONS OR RULES.

A. Request for Advisory Opinion. Any Member may request a legal ethics opinion or unauthorized practice of law opinion. The request shall be submitted as a hypothetical on a form approved by the Committee. A request for an Advisory Opinion will be reviewed by Ethics Counsel and forwarded to the appropriate Committee for consideration. In its discretion, the Committee may decline to render an Advisory Opinion regarding a previously resolved issue, or any matter that is currently the subject of any disciplinary proceeding or litigation.

B. Rules. The Committee may propose a new Rule or propose amendments, modifications, or repeal of existing Rules at its discretion. For rule changes that declare conduct as the unauthorized practice of law, the Bar shall seek comment from the Attorney General's office analyzing any restraint on competition that might result from the adoption of the proposed change.

C. Notice and Comments. The Committee shall provide Notice

and opportunity for public comment on proposed Advisory Opinions or proposed Rules. Public comments shall be directed to the Executive Director of the Virginia State Bar. For proposed Advisory Opinions, the Committee will consider any comments received and either publish the opinion as an Advisory Opinion or ask for Council review in accordance with section 10-3. Advisory Opinions express the judgment of the Committee and are not binding on any judicial or administrative tribunal. In the case of a Rule, the Committee will consider any comments received and then submit the Rule to Council for consideration in accordance with section 10-3.

D. Appeal. After the comment period, any party requesting an Advisory Opinion who disagrees with the result may appeal the opinion to Council for approval, modification, or disapproval.

E. Unauthorized Practice of Law Advisory Opinions. An unauthorized practice of law Advisory Opinion in which the Committee concludes that the conduct in question constitutes or would constitute the unauthorized practice of law shall be sent to Council in accordance with section 10-3. For these Advisory Opinions, the Bar shall seek comment from the Attorney General's office analyzing any restraint on competition that might result from the promulgation and implementation of the opinion.

F. Confidentiality. All Committee deliberations, memoranda, correspondence, and work product shall be confidential and privileged from discovery or subpoena and will not be provided to anyone absent a court order.

10-3: ADVISORY OPINION OR RULE CONSIDERATION BY COUNCIL.

A. Review. After considering all materials and written comments, Council may approve, modify, or disapprove any Advisory Opinion or Rule by a majority vote of those present and voting. If Council approves or modifies an Advisory Opinion it may be published as an Advisory Opinion of the Bar and have the same legal effect as a Committee-issued opinion. Council may determine to submit the Advisory Opinion or Rule to the Court for review along with copies of all public comments.

B. Unauthorized Practice of Law Advisory Opinions. If Council concurs by a majority vote of those present and voting that the proposed conduct in any unauthorized practice of law Advisory Opinion constitutes the unauthorized practice of law, the Advisory Opinion shall be sent to the Court for review along with copies of all public comments.

10-4. ADVISORY OPINION OR RULE REVIEW BY THE SUPREME COURT OF VIRGINIA.

A. Review. After considering all materials submitted to it, the Court shall approve, modify, or disapprove any Advisory Opinion or Rule.

10-5. INFORMAL STAFF OPINIONS OF ETHICS COUNSEL.

A. Informal Advice. At the request of a Member, Ethics Counsel shall provide informal advice or opinion based on the facts provided.

B. Protection. Ethics Counsel shall not be compelled to testify, via subpoena or otherwise, in any judicial or adjudicative proceeding, except on behalf of a respondent in disciplinary proceedings of the Virginia State Bar, regarding any advice or

proceedings of the Virginia State Bar, regarding any advice or opinion provided to that attorney. Except as stated herein, Ethics Counsel shall not be subject to subpoena or otherwise compelled to testify or to produce any documents in any judicial or adjudicative proceeding or to testify as an expert witness regarding legal ethics or the practice of law. In a disciplinary proceeding, testimony of Ethics Counsel shall be limited to the substance of any communications by and between Ethics and the Member, where such communications are an issue in the proceeding.

C. Confidentiality. All communications between Ethics Counsel and any Member requesting advice or opinion shall be confidential. Ethics Counsel shall not disclose the content of any such discussion without the express written consent of the Member to whom Ethics Counsel provided such advice or opinion. No Member shall withhold consent if the Member is claiming, in the course of a disciplinary investigation or hearing, that the Member relied on the advice of Ethics Counsel.

D. Use of Informal Advice in Collateral Litigation. Informal advice of Ethics Counsel is advisory only and expresses the judgment of the Ethics Counsel and is not binding on the Court, Council, Committee or any judicial or administrative tribunal. Except as provided herein in connection with attorney disciplinary proceedings, informal advice of Ethics Counsel shall not be used, admitted, introduced, argued or cited in any litigation or before any judicial or administrative tribunal for the purpose of seeking disqualification of a lawyer or law firm.

10-6. COMPLAINTS OF UNAUTHORIZED PRACTICE OF LAW.

A. Review of Complaints. Any written complaint alleging the unauthorized practice of law shall be reviewed by Ethics Counsel and either dismissed or referred for investigation with full report to the Committee. After reviewing a report of investigation, the Committee may conduct a hearing to take testimony from witnesses and review evidence. By majority vote the Committee may dismiss the complaint due to insufficient evidence or other good cause, dismiss the complaint with cautionary language, or enter a finding of probable cause to believe there is unauthorized practice of law.

B. Referral. If a majority of the Committee finds probable cause to believe there is unauthorized practice of law, the Committee may dismiss the complaint by letter agreement in which the party against whom the complaint is pending agrees to cease the activity; or refer the complaint to the Attorney General, a Commonwealth's Attorney, or other appropriate agency for action.

C. Summons or Subpoena. If a summons or subpoena is necessary for investigation of a matter outlined in section 10-6.A., Ethics Counsel may issue such a summons or subpoena in the name of the Commonwealth. The Committee or a Virginia State Bar investigator may use a summons to examine a witness or to obtain statements from persons having knowledge about the subject of the complaint.

D. Enforcement of Summons or Subpoena. Every Circuit Court shall have power to enforce a summons or subpoena issued by the Ethics Counsel and to adjudge disobedience thereof as contempt.

Upon consideration whereof, it is ordered that the Rules for Integration of the Virginia State Bar, Part Six, Section IV, of the

Rules of Court, be and the same hereby are amended in accordance with the prayer of the petition aforesaid, effective immediately.

A Copy,

Teste:

*Pat Haniffa*

Clerk