

Council to Review Proposed Amendments to Rules of Virginia Supreme Court Part 6, Section IV, Paragraph 10—Regarding Promulgation of Advisory Opinions

The Virginia State Bar Council, at its meeting June 18–22, 2003, in Virginia Beach, Virginia, is expected to consider for approval, disapproval, or modification, proposed amendments to Paragraph 10 of the Rules of Virginia Supreme Court, Part 6, Section IV, regarding the promulgation of legal ethics, lawyer advertising and solicitation, and unauthorized practice of law opinions.

Part 6, Section IV, Paragraph 10

Due to significant controversy and even litigation created by some of the advisory opinions issued by the Standing Committees of the Virginia State Bar, the Office of Ethics Counsel has recently proposed amendments to Part 6, Section IV, Paragraph 10 of the Rules of the Virginia Supreme Court with the hope of stimulating more bar and public comment about opinions prior to them becoming final. The current rules governing the process for issuing advisory opinions do not provide for notice and public comment before the opinions are issued by a Standing Committee. The proposed amendments to Paragraph 10 would require the Standing Committees to issue “draft” or “proposed” opinions which would be published for comment while the opinions are still pending before the com-

mittee. Moreover, the proposed amendments would give any member of the bar the right to appeal to Council an opinion after it has been issued by the advisory committee and after the notice and comment period has passed.

Inspection and Comment

The proposed amendments to Rule of Virginia Supreme Court, Part 6, Section IV, Paragraph 10 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 a.m. and 4:30 p.m., Monday through Friday. Copies of the proposed amendment 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 page 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 amendments by filing ten copies with Thomas A. Edmonds, the Executive Director of the Virginia State Bar, not later than May 30, 2003.

RULES OF THE SUPREME COURT OF VIRGINIA PART 6 INTEGRATION OF THE STATE BAR SECTION 4 ORGANIZATION AND GOVERNMENT

10. Promulgation of Legal Ethics, Lawyer Advertising, Solicitation and Unauthorized Practice of Law Opinions and Rules of Court.

(a) Definitions—

- (i) “Bar” shall mean the Virginia State Bar.
- (ii) “Committee” shall mean the Legal Ethics Committee, the Unauthorized Practice of Law Committee, the Committee on Lawyer Advertising and Solicitation, or all of them, as required by the context in which it is used.
- (iii) “Council” shall mean the Council of the Virginia State Bar.
- (iv) “Court” shall mean the Supreme Court of Virginia.
- (v) “Member” shall mean any active member of the Virginia State Bar.
- (vi) “Executive Director” shall mean the Executive Director of the Virginia State Bar.
- (vii) “Advisory Opinion” shall mean 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 therefor; if dealing with a subject of general application, an advisory opinion may be stated in the form of a proposed Rule of Court or amendment thereto.

(viii) “Ethics Counsel” shall mean the Ethics Counsel or an Assistant Ethics Counsel of the Virginia State Bar.

(b) Requests for Advisory Opinion—

- (i) A legal ethics, lawyer advertising, solicitation or unauthorized practice of law advisory opinion of the Bar concerning contemplated or actual conduct may be requested by any member.
- (ii) All requests for advisory opinions shall be in writing, addressed to the appropriate Committee, in the hypothetical, and on a form prepared by the Committee calling for such information as the Committee may request; provided, however, that a request for an opinion as to the propriety of advertising or solicitation may include the specific advertisement or solicitation in question.

(c) Advisory Opinions of the Committees—

- (i) Upon receipt of a request for an advisory opinion, the Ethics Counsel shall review such request to determine whether the request should be referred to the Chairman of the appropriate Committee. If the Ethics Counsel or Committee determines that the request presents a previously resolved issue, the requestor shall be so informed and the request shall be considered terminated unless the requestor states in writing that the requestor has not previously presented the issue and requests that it be reconsidered.
- (ii) The Committee, upon determining that the request presents a previously unresolved issue, or presents for reconsideration an issue not pre-

viously presented by the requestor, shall issue, in response to the request, ~~an a proposed~~ advisory opinion, with notice to the requester that the opinion remains pending during the course of the public comment period outlined in subparagraph (iii). Opinions or requests for reconsideration may be by summary affirmance of a prior opinion. The Committee may in its discretion decline to render an opinion regarding any matter which is currently the subject of any disciplinary proceeding or litigation or which presents an issue beyond its purview.

- (iii) ~~In the case of (A) any advisory legal ethics or lawyer advertising or solicitation opinion, and (B) any advisory unauthorized practice of law opinion in which the Committee concludes that the conduct in question is not the unauthorized practice of law, it shall decide, by a vote of the majority of the Committee as in its discretion it may deem appropriate, either to publish the advisory opinion as an informal advisory opinion, or to transmit the advisory opinion to Council for approval, modification or disapproval as a formal advisory opinion. Within 45 days of the issuance of a proposed advisory opinion, the Bar shall cause to be issued a press release that shall state (A) the question presented by the request for an advisory opinion; (B) the conclusion reached by the Committee; (C) a brief synopsis of the rationale for the conclusion; (D) that the advisory opinion may be inspected at the office of the Bar; (E) that at the conclusion of the comment period, the Committee will review the opinion in light of any comments received; (F) that any individual, business, or other entity may submit written comments in support of, or in opposition to, the advisory opinion to the Executive Director, within thirty days of the date on which the press release was issued; and (G) the Committee may choose to adopt, modify, or rescind the opinion in response to the comments received.~~
- (iv) In the case of an advisory unauthorized practice of law opinion in which the Committee concludes following the conclusion of the public comment period that the conduct in question constitutes or would constitute the unauthorized practice of law, the advisory opinion shall be sent to Council for approval, modification or disapproval.
- (v) In the case of any other advisory opinion, the Committee may, by majority vote, publish the opinion as an informal opinion, or ask Council to review the advisory opinion in accordance with the procedures set out in paragraphs (d), (e) and (f).
- (~~vi~~) (vi) Any party requesting an advisory legal ethics, lawyer advertising or solicitation, or unauthorized practice of law opinion member of the Bar who disagrees with the result stated in the Committee's advisory opinion issued following the conclusion of the public comment period, may appeal such opinion, as a matter of right, to Council for approval, modification or disapproval.
- (~~vii~~) (vii) Any such opinion expresses the judgment of the Committee and is advisory only. It shall have no legal effect and is not binding on any judicial or administrative tribunal.
- (~~viii~~) (viii) Copies of opinions rendered by the Committees will be provided upon request. All such opinions will be provided without any identifying data. However, all Committee deliberations, draft opinions, memoranda, correspondence, and the like shall be confidential and privileged from discovery and/or subpoena and as such will not be provided to anyone absent Court order entered upon a showing of good cause. Without waiving the confidentiality provision stated above, the Committees, in their discretion, may disseminate draft opinions to the Boards of Governors of Virginia State Bar Sections for written comment when those Sections have an interest in the subject matter of the proposed opinion.
- (d) Notice of Advisory Opinions to Be Considered by Council—
- (i) In any case where an advisory opinion is to be considered by Council, and no later than 45 days next preceding the date of such Council meeting at which final action with respect to such advisory opinion is to be taken, the Bar shall cause to be issued a press release which shall state (A) the question presented by the request for an advisory opinion; (B) the conclusion reached by the Committee; (C) a brief synopsis of the rationale for the conclusion; (D) that the advisory opinion may be inspected at the office of the Bar; (E) that the advisory opinion shall be considered by the Council, which will approve, disapprove or modify the advisory opinion; (F) that any individual, business or other entity may file 10 copies of written comments in support of, or in opposition to, the advisory opinion with the Executive Director, within thirty days of the date on which the press release was issued; and (G) that the decision of Council concerning the advisory opinion may be reviewed by the Court.
- (ii) The press release so issued shall also be printed in that issue of the *Virginia Lawyer Register* next preceding the Council meeting at which final action with respect to such advisory opinion will be taken.
- (e) Provisions for Comment.—
- (i) Within thirty days from the date of the press release provided for in (d)(i), any individual, business or other entity may file with the Executive Director 10 copies of written comments in support of, or in opposition to, the advisory opinion.
- (ii) Within thirty days from the date of the press release provided for in (d)(i), the Attorney General shall file with the Executive Director 10 copies of written comments which analyze any restraint on competition which may result from promulgation and implementation of the advisory opinion.
- (iii) Except as specifically authorized by Council, there shall be no oral argument.

(f) Action by Council—

- (i) Upon due consideration of all material submitted to it, including an evaluation of the competitive effects of approving or disapproving the advisory opinion, Council shall approve, modify or disapprove the advisory opinion, by a majority vote of those present and voting.
- (ii) In the case of any advisory opinion which is not transmitted to the Court for review pursuant to (f)(iii) below, if such advisory opinion is disapproved by a majority of Council present and voting, such action shall be recorded in the minutes of the meeting; if such advisory opinion is approved or modified, it shall be published as an advisory opinion of the Bar.
- (iii) All advisory unauthorized practice of law opinions in which Council concludes that the proposed or actual conduct constitutes the unauthorized practice of law, and all other advisory opinions which Council, by majority vote of those present and voting, desires to transmit, shall be reviewed by the Court pursuant to the notice and review procedures hereinafter set forth.
- (iv) Any such opinion expresses the judgment of Council and is advisory only. It shall have no legal effect and is not binding on any judicial or administrative tribunal.

(g) Review by the Supreme Court of Virginia—

- (i) Within thirty days after the Council meeting at which final action with respect to such advisory opinion was taken, Bar Counsel shall file with the Clerk of the Court 9 copies of a Notice of Advisory Opinion Review; the request for an advisory opinion; all materials submitted to Council by the Bar, the Attorney General, and the public; and the advisory opinion as approved by Council.
- (ii) Within ten days after the filing referred to in (g)(i), the Bar shall cause to be issued a press release which shall state (A) an advisory opinion on a stated subject has been filed with the Court; (B) the advisory opinion may be inspected at the office of the Bar; (C) the advisory opinion will be considered by the Court, which shall approve, disapprove or modify the advisory opinion; and (D) any individual, business, or other entity may submit written comments in support of, or in opposition to, the advisory opinion by filing 9 copies with the Clerk of the Court and 3 copies with the Executive Director of the Bar within 45 days from the date of issuance of the press release.
- (iii) Except as specifically requested or ordered by the Court, there shall be no oral argument.
- (iv) Upon due consideration of all material submitted to it, including an evaluation of the competitive effects of approving or disapproving the advisory opinion, the Court shall approve, modify or disapprove the advisory opinion, with or without a written opinion by the Court. Upon modification or approval of the opinion, it shall become a decision of the Court.

(h) Complaints of Unauthorized Practice of Law—

- (i) Any written complaint of the unauthorized practice of law addressed to the Bar or to the Committee shall be investigated by the Ethics Counsel or his staff.
- (ii) Upon completion of an investigation, and not later than 180 days after the filing of the complaint, the Ethics Counsel shall report to the committee the status of the investigation.
- (iii) Upon review of all materials submitted to it, by a majority vote of those present, the Committee may
 1. Dismiss the complaint due to insufficient evidence or other good cause; or
 2. Dismiss the complaint with cautionary language.
- (iv) After considering the evidence before it, if a majority of the Committee present finds there exists probable cause to believe the person, firm, or corporation is engaged in the unauthorized practice of law the Committee may
 1. Dismiss the complaint with a letter agreement in which the Respondent agrees to cease the activity which is the subject of the complaint; or
 2. Refer the complaint to the Attorney General of Virginia, a Commonwealth's Attorney or other appropriate agency for such action as authorized by law.

(i) Subpoena Power—

- (i) Upon receiving a complaint alleging facts indicating that a person, firm or corporation is or may be unlawfully practicing law and provided that the issuance of a summons or subpoena is necessary for the investigation of such alleged practice, the Ethics Counsel may issue a summons or subpoena in the name of the Commonwealth for the attendance of any person and production of books and records at the place and time designated in the summons or subpoena. The Committee or an investigator to whom a complaint is assigned may use a summons to examine witnesses or obtain statements from persons having knowledge of the subject matter of the complaint.
- (ii) Every circuit court shall have power to enforce any summons or subpoena issued by the Ethics Counsel and to adjudge disobedience thereof as contempt.

(j) Committee Hearing—

- (i) Within 45 days after receipt of the Ethics Counsel's report, the Committee may meet to consider the matter submitted and hear any evidence or witnesses subpoenaed by the Committee.
- (ii) After considering the evidence before it, if a majority of the Committee present finds there exists

probable cause to believe the person, firm, or corporation is engaged in the unauthorized practice of law, the Committee may direct the Ethics Counsel to forward all investigation, copies of any records, and a summary of the Committee's findings to the Attorney General of Virginia with a request that the conduct be enjoined and/or that any other remedy available under the Code of Virginia be pursued.

(k) Modification, Amendment or Repeal of a Rule—

- (i) The Court, upon petition by the Bar, may modify, amend, or repeal any Rule first promulgated pursuant to the procedures of this paragraph.
- (ii) Such a petition may be filed only pursuant to a majority vote at a Council meeting, by members there present and voting.

Promulgation of Legal Ethics, Lawyer Advertising, Solicitation and Unauthorized Practice of Law Opinions and Rules of Court, Para. 10 (2001). 