

Frequently Asked Questions Regarding Virginia's New Corporate Counsel Rule

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In April 2003, the Virginia State Bar's Task Force on Admission of Corporate Counsel submitted proposed Rule 1A:5 to the Virginia Supreme Court requiring the mandatory licensing of all in-house corporate counsel working in Virginia, including a provision for corporate counsel attorneys to opt out of the requirements necessary for active members of the bar. On June 4, 2003, the Supreme Court of Virginia approved proposed Rule 1A:5, which becomes effective September 1, 2003. The adoption of this new rule effectively overrules UPL Op. 178, since the rule now provides that an in-house counsel is engaged in the practice of law in Virginia when he or she provides legal services to a Virginia employer. Under Part I of the rule, a lawyer in good standing in another state may obtain a Corporate Counsel Certificate from the bar under which his or her practice is limited to the representation of one Virginia employer. A corporate counsel certificate authorizes the in-house counsel to represent his or her employer in state courts without having to meet the *pro hac vice* requirements applicable to foreign attorneys under Rule 1A:4. Lawyers obtaining a certificate under Part I must meet all the requirements for active membership in the Virginia State Bar, including the 12-hour mandatory MCLE requirement that active members must fulfill annually. Another significant change made by Part I is that the period of time a lawyer practices law under a Corporate Counsel Certificate shall be considered in determining whether the lawyer has fulfilled the requirements for admission to practice law in Virginia without examination, pursuant to Rule 1A:1. Under the current rules of admission, in-house counsel are not regarded as "practicing law" in Virginia and therefore cannot include their years in service as in-house counsel for a Virginia employer when moving for admission to the Virginia bar without examination.

Under Part II, a foreign attorney in good standing in another state who intends to work in Virginia as in-house counsel may "opt out" of the requirements for active membership in the bar. In-house counsel choosing to "opt out" must, nevertheless, register with the bar as in-house counsel and pay a registration fee and annual dues. Unlike their counterparts licensed under Part I, registrants under Part II may not represent their employer in court unless they associate with a Virginia-admitted attorney and move for admission *pro hac vice*. Also, their time in service as in-house counsel for a Virginia employer shall not be considered by the Board of Bar Examiners should such counsel seek admission to the Virginia bar without examination.

Any in-house lawyer who receives a certificate under Part I or registers under Part II becomes subject to the Virginia Rules of Professional Conduct and the jurisdiction of the

Virginia State Bar's Disciplinary System, if a disciplinary complaint is made against them while employed as in-house counsel in Virginia.

The Virginia State Bar will be prepared to register applicants as of the date this rule becomes effective and the deadline for registration is July 1, 2004.

Copies of the rule 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>.

Below are some of the most frequently asked questions concerning the new rule. Unless indicated otherwise, the answers apply to applicants under both Part I and Part II of Rule 1A:5.

1. What is a "Corporate Counsel?"

Under Rule 1A:5, a corporate counsel is defined as 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.

2. What are the requirements to serve as a Corporate Counsel in Virginia?

In order to serve as a Corporate Counsel in Virginia, one must: (i) be a regularly admitted active member of the Virginia State Bar; or (ii) be issued a Corporate Counsel Certificate as provided in Part I of Rule 1A:5 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 Rule 1A:5.

3. What is required to obtain a Corporate Counsel Certificate under Part I of Rule 1A:5?

To obtain a Corporate Counsel Certificate one must be a foreign attorney admitted to practice, active and in good standing, in another state or territory of the United States. Each applicant for a Corporate Counsel Certificate must:

- (1) File with the Virginia State Bar an application, under oath, upon a form furnished by the Virginia State Bar.
- (2) Furnish a certificate, signed by the presiding judge of the court of last resort of a jurisdiction in which the applicant is admitted to practice law, stating that the applicant is licensed to practice law and is an active member in good standing of the bar of such jurisdiction.
- (3) File an affidavit, upon a form furnished by the Virginia State Bar, from an officer of the applicant's Employer attesting to the fact that the applicant is employed as legal counsel to provide legal services exclusively to the Employer, including its subsidiaries and affiliates; that the nature of the applicant's employment conforms to the requirements of Part I of this rule; and that the Employer shall notify the Virginia State Bar immediately upon the termination of the applicant's employment.
- (4) Certify that the applicant has read and is familiar with the Virginia Rules of Professional Conduct.
- (5) Pay an application fee of \$50.

4. What does "active and in good standing" mean?

The terms "active and in good standing" means that the applicant is authorized to practice law in another state or territory where they are admitted or have a law license. Lawyers who are licensed in another state or territory but whose license has been suspended or revoked, or whose license classification does not permit them to practice law, or who have permitted their license to lapse into an inactive status are not "active and in good standing" and therefore cannot apply under Rule 1A:5.

5. May an applicant serve as in-house or corporate counsel for a Virginia employer while his or her application under Rule 1A:5 is pending?

Yes. During the period in which an application for a Corporate Counsel Certificate is pending with the Virginia State Bar and until the applicant is notified that either (i) his or her application is rejected; or (ii) he or she is eligible to practice pursuant to Part I of the rule, the applicant may be employed in Virginia as legal counsel on a provisional basis, provided that his or her Employer has furnished the affidavit required by the rule.

Upon a finding by the Virginia State Bar that the applicant has complied with the requirements, the Virginia State Bar shall notify the applicant that he or she is eligible to be issued a Corporate Counsel Certificate. After the applicant has taken and subscribed to the oath required of attorneys at law, the applicant shall be issued a Corporate Counsel Certificate, which shall permit the applicant to practice law in Virginia, only as provided in Part I(f) of the rule.

6. What other requirements are necessary to maintain the Corporate Counsel Certificate under Part I of the rule?

A lawyer issued a Corporate Counsel Certificate under Part I of the rule will be deemed an active member of the Virginia State Bar and, therefore, must meet all the requirements for active membership, including payment of the annual dues of \$250, completion of the Mandatory Professionalism Course and completion of a minimum of twelve (12) hours of Mandatory Continuing Legal Education (MCLE) that must include 2.0 hours of Legal Ethics. In addition, the Corporate Counsel must maintain an address of record with the Virginia State Bar, which shall be the address of the Employer.

7. What is a Corporate Counsel authorized to do under Part I of the rule?

Under Part I of the rule, a Corporate Counsel may provide legal services to his or her Employer in Virginia. Legal services are: giving legal advice to the Employer; preparing legal instruments on behalf of the Employer and representing the Employer in court or before an administrative agency or tribunal. A Corporate Counsel licensed under Part I of the rule shall be limited to practice exclusively for the Employer and cannot provide legal services to anyone other than the Employer.

8. Who is an "Employer" under Rule 1A:5?

An Employer is any entity in Virginia that is 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. Thus, a corporate counsel is authorized to provide legal services to a corporate subsidiary or affiliate of the entity that hired him or her.

9. What is the Employer required to do under Rule 1A:5?

The Employer must file an affidavit, upon a form furnished by the Virginia State Bar, from an officer of the Employer attesting to the fact that the prospective corporate counsel/applicant is employed as legal counsel to provide legal services exclusively to the Employer, including its subsidiaries and affiliates; that the nature of the applicant's employment conforms to the requirements of Part I or Part II of the rule; and that the Employer shall notify the Virginia State Bar immediately upon the termination of the applicant's employment.

10. What if the Employer terminates the Corporate Counsel's employment?

Both the Employer and the Corporate Counsel must notify the Virginia State Bar of any change in the employment from that described in the affidavit filed by the Employer. If the Employer terminates the Corporate Counsel, the Virginia State Bar will automatically suspend the certificate or registration issued under Parts I or II.

11. What other circumstances may cause the suspension of the Corporate Counsel's authority to practice in Virginia?

In addition to the Employer's termination of the Corporate Counsel's employment, the Virginia State Bar may also suspend the Corporate Counsel's authority to practice in Virginia if (a) the lawyer fails to comply with any provision of Part I or Part II of the rule or (b) when the lawyer is suspended or disbarred for disciplinary reasons in any state, territory of the United States or the District of Columbia or by any federal court or agency before which the lawyer has been admitted to practice.

12. If a Corporate Counsel has been disciplined in another state where he or she is licensed, must he or she self-report such a matter to the Virginia State Bar?

Yes. Rule 1A:5 explicitly requires a Corporate Counsel to report any change in bar membership status in any state, territory of the United States or the District of Columbia in which the lawyer has been admitted to the practice of law, or the imposition of any disciplinary sanction in a state, territory of the United States or the District of Columbia or by any federal court or agency before which the lawyer has been admitted to practice. If a lawyer fails to self-report that he or she has been disciplined in another jurisdiction, this is not only a violation of Rule 1A, but also a violation of Rule 8.3 (e)(1) of the Virginia Rules of Professional Conduct.

13. If a Corporate Counsel engages in professional misconduct, which jurisdiction's rules apply?

Any lawyer licensed by the Virginia State Bar under Rule 1A: 5 stipulates that the Virginia Rules of Professional Conduct shall apply in determining whether he or she has engaged in misconduct while serving as Corporate Counsel for a Virginia Employer. In addition, the rules governing the procedure for disciplining, suspending and disbarring attorneys (Va. S. Ct. R., pt.VI, § IV, ¶ 13) shall apply to any disciplinary proceedings commenced by the Virginia State Bar against a Corporate Counsel. Other states where a Corporate Counsel is admitted to practice may also initiate reciprocal or non-reciprocal disciplinary proceedings pursuant to their rules.

14. May a lawyer seek reinstatement of his or her authority to practice under Rule 1A:5?

Yes. Any lawyer whose authority to practice is suspended due to termination by the Employer shall be reinstated upon evidence satisfactory to the Virginia State Bar that the lawyer is in full compliance with the requirements of the rule, which shall include an affidavit furnished by the lawyer's new Employer. Any lawyer whose authority to practice is suspended for non-compliance with any of the specific requirements of Rule 1A:5 may be reinstated by compliance with applicable provisions of Part VI, Section IV, Paragraph 19 of the Rules of the Supreme Court of Virginia. Any lawyer whose authority to practice is suspended or terminated through the disciplinary system shall petition for reinstatement pursuant to Part 6, Section IV, Paragraph 13 I.7. of the Rules of the Supreme Court of Virginia.

15. May a lawyer practicing under Part One of Rule 1A:5 seek admission as a regular active member of the Virginia State Bar without taking the bar exam?

Yes—assuming all other relevant admission requirements are met for admission on motion without examination. The period of time a lawyer practices law as permitted by a Corporate Counsel Certificate issued pursuant to Part I shall be considered in determining whether the lawyer has fulfilled the requirements for admission to practice law in Virginia without examination pursuant to Rule 1A:1 and any guidelines approved by the Supreme Court of Virginia for review of applications for admission without examination.

16. What are the material differences between a Corporate Counsel licensed under Part I and Part II of Rule 1A: 5?

As stated in the introduction, a lawyer who is licensed by the Virginia State Bar under Part I is an active member of the Virginia State Bar whose practice is limited to the representation of only one client, the Employer. The rendition of legal services under Part I is considered the "practice of law." A lawyer licensed under Part I must meet all the conditions required of any other active member of the Virginia State Bar. Unlike their Part II counterparts, lawyers licensed under Part I may represent their Employer in the state courts in Virginia without associating local Virginia counsel and moving for admission *pro hac vice* as required of foreign attorneys seeking to appear in a Virginia court. In addition, unlike their Part II counterparts, lawyers practicing under Part I receive credit for the years they practice in Virginia as Corporate Counsel when applying for regular membership to the Virginia State Bar on motion (without examination).

Part II lawyers serving as Corporate Counsel may not represent their employers in court without associating a member of the Virginia State Bar and moving for admission *pro hac vice*. Also, the time spent practicing in Virginia under Part II shall not be considered the "practice of law in Virginia" and therefore shall not be considered as meeting the threshold practice requirements for admission to the Virginia State Bar on motion. Part II lawyers are not required to attend any MCLE seminars or attend the Professionalism Course. Like Part I lawyers, Part II lawyers are subject to the Virginia Rules of Professional Conduct and the disciplinary process under Paragraph 13.

17. When may a lawyer apply to the Virginia State Bar for authority to practice under Rule 1A:5, and what is the deadline for all attorneys to apply under the rule?

Rule 1A:5 goes into effect September 1, 2003. At that time, any lawyer who qualifies to practice under the rule may begin the application process. The Membership Department of the Virginia State Bar will provide the necessary forms to apply, oversee the application process, issue the certificates and registrations to the qualified applicants and maintain the necessary records and databases for lawyers practicing under the rule. On or after July 1, 2004, any lawyer who is not a member of the Virginia State Bar and who is employed by any employer in Virginia to serve as corporate counsel or in-house counsel must hold a certificate or registration pursuant to Rule 1A:5 issued by the Virginia State Bar or have an application for authority to practice under Rule 1A:5 pending with the Virginia State Bar.

18. What are the current requirements for persons serving as corporate or in-house counsel in Virginia?

Until July 1, 2004, there are no requirements for any person who serves as corporate counsel or in-house counsel in Virginia. Under the current rules and opinions defining the practice of law, the activity of corporate counsel in Virginia is not treated as the “practice of law.” Consequently, until July 1, 2004, such persons are not subject to the professional regulations of the Virginia State Bar and the Virginia Supreme Court. The new Rule 1A:5 represents a dramatic change in the law.

19. Why is there a two-tiered (Part I and Part II) system under Rule 1A:5?

During the development of Rule 1A:5, the Virginia State Bar and the Virginia Supreme Court were informed that some corporate counsel in Virginia wanted the ability to “opt out” of the requirements of becoming an active member of the Virginia State Bar. These lawyers felt that the MCLE and Professionalism Course requirements were burdensome and therefore sought a process under which those requirements would be unnecessary for them to continue serving as in-house counsel in Virginia. Accordingly, the Virginia State Bar revised Rule 1A:5 and the Supreme Court of Virginia adopted Part II as an alternative route for in-house counsel.

20. Must a regular active member of the Virginia State Bar apply under Rule 1A:5 to serve as in-house or corporate counsel for a Virginia employer?

No. In fact, the rule explicitly precludes regularly admitted members of the Virginia State Bar from applying. An active member of the Virginia State Bar may serve as corporate counsel without applying under Rule 1A:5.

21. May a lay employee, as permitted under existing law, give advice to and prepare legal documents for his or her regular employer?

Yes. Under current law, an employee who gives legal advice to and prepares legal instruments for his or her regular employer is not “practicing law” in Virginia. In addition, a lay employee may continue to appear on behalf of his or her employer in General District Court as authorized by law. Rule 1A:5 simply requires that any person who is hired primarily for the purpose of serving as legal counsel to a Virginia employer must be a lawyer admitted to the Virginia State Bar or be authorized to practice under Rule 1A:5 if they are admitted to practice in another state but not in Virginia. A lay employee who does not hold himself out as corporate counsel and who is employed primarily for purposes other than providing legal services may occasionally give advice to or prepare legal documents for his or her regular employer.

22. Is the application process for registration under Part II different from Part I?

No. The requirements for applying for registration under Part II are identical to the requirements for applying for a Corporate Counsel Certificate under Part I. *See* FAQ No. 3, *supra* 