

Virginia State Bar Council to Review UPL Opinion 209 Concerning a Foreign Attorney Representing a Client Before the Virginia Gas & Oil Board

RICHMOND—Pursuant to Part Six: Section IV, Paragraph 10(c)(iii) of the Rules of the Supreme Court of Virginia, the Virginia State Bar Council, at its meeting on October 20–21, 2005, in Charlottesville, Virginia, is expected to consider for approval, disapproval, or modification, proposed Unauthorized Practice of Law Opinion 209, *Foreign Attorney Representing Client Before Virginia Gas & Oil Board*, issued by the Standing Committee on the Unauthorized Practice of Law (“UPL Committee”) on June 14, 2005.

UPL Opinion 209 addresses the issue of whether it is the unauthorized practice of law for an attorney licensed to practice law in a jurisdiction other than in Virginia to represent a client in Virginia before the Virginia Gas and Oil Board (“the Board”). Relying upon the definition of a non-lawyer found in Part 6, § I(C) of the Rules of the Virginia Supreme Court, UPR 1-101(A) (which prohibits a non-lawyer from representing another before a tribunal) and UPC 1-1 (which defines “tribunal”) as well as UPL Opinions 158, 195 and 201 (which address the scope of practice by a foreign (non-Virginia licensed) attorney in Virginia), the UPL Committee determined that it would be the unauthorized practice of law for an attorney licensed in a jurisdiction other than Virginia to represent a client before the Virginia Gas and Oil Board.

This conclusion is based primarily upon the determination that the Virginia Gas and Oil Board is a “tribunal.” The Board was created by the Virginia Gas and Oil Act, § 45.1-361.1 *et seq.* of the Virginia Code (1950, as amended). A review of the provisions of the Act indicates that the Board does more than simply “promulgate rules and regulations of general applicability.” It does determine the rights and responsibilities of the parties before it. Further, it must conduct its hearings pursuant to the “formal litigated issues hearing provisions” of the Administrative Process Act (§ 2.2-4000 *et seq.*), which makes no allowance for appearance by a non-lawyer to represent a party in such a hearing. Without such authority, and the Board being a “tribunal,” any representation must be by a licensed Virginia attorney. Based on this authority the Committee finds that representation by a non-lawyer (which includes a lawyer licensed elsewhere than in Virginia) before the Virginia Gas and Oil Board is not appropriate and would be the unauthorized practice of law.

Inspection and Comment

The proposed unauthorized practice of law 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 a.m. and 4:30 p.m., 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 opinion by filing ten copies with Thomas A. Edmonds, the Executive Director of the Virginia State Bar, not later than **October 3, 2005**.*

UPL Opinion No. 209

Foreign Attorney Representing Client Before Virginia Gas and Oil Board

You have requested that the Committee opine as to whether it is the unauthorized practice of law for an attorney who is licensed to practice law in a jurisdiction other than Virginia to represent a client before the Virginia Gas and Oil Board (“the Board”).

Virginia Unauthorized Practice of Law Rule (“UPR”) 1-101(A) states that:

A non-lawyer, with or without compensation, shall not represent the interest of another before a tribunal, otherwise than in the presentation of facts, figures or factual conclusions, as distinguished from legal conclusions

A “non-lawyer” is defined as:

. . . any person, firm, association or corporation not duly licensed or authorized to practice law in the Commonwealth of Virginia.

Part 6, § I (C) Rules of the Supreme Court of Virginia. Virginia Unauthorized Practice of Law Consideration (“UPC”) 1-1 defines “tribunal:”

The term “tribunal” shall include, in addition to the courts and judicial officers of Virginia or of the United States of America, the State Corporation Commission of Virginia and its various divisions, the Virginia Workers’ Compensation Commission, and the Alcoholic Beverage Control Board, *or any agency, authority, board, or commission when it determines the rights and obligations of parties to proceedings before it*, as opposed to promulgating rules and regulations of general applicability. Such term does not include a tribunal established by virtue of the Constitution or laws of the United States, to the extent that the regulation of practice before such tribunal has been preempted by federal law, nor does it include a tribunal established under the Constitution or laws of Virginia before which the practice or appearance by a non-lawyer on behalf of another is authorized by statute (emphasis added).

Unauthorized Practice of Law Opinions 158, 195 and 201 address the scope of practice by a foreign (non-Virginia) attor-

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ney in Virginia. A foreign attorney, while in Virginia, may practice the law of the jurisdiction(s) in which he/she is licensed, so long as the attorney is in good standing in that jurisdiction and is competent to provide the services; federal law, to the extent the federal matter is not impacted by Virginia law and not involving Virginia law, and assuming that the attorney is properly admitted to the federal court; and federal or state agency practice, provided the attorney is properly authorized to practice before the particular agency and such agency allows practice by non-attorneys or non-Virginia attorneys. Unauthorized Practice Rule 9 specifically addresses agency practice:

UPR 9 102. Agency Practice.

- (A) A non-lawyer shall not furnish to another for compensation, direct or indirect, advice or service under circumstances which require his use of legal knowledge or skill in the application of any law, federal, state or local, or administrative regulation or ruling applicable thereto, except:
- (1) As an employee to his regular employer.
 - (2) As permitted by the rules of such agency and reasonably within the scope of his practice authorized by such agency.
- (B) A non-lawyer shall not undertake, with or without compensation, to prepare for another legal instruments of any character incident to his practice before an administrative agency, except:
- (1) As an employee for his regular employer.
 - (2) In the regular course and reasonably within the scope of his practice authorized by such agency.
- (C) As to representing the interest of another before an administrative tribunal, see Unauthorized Practice Rule 1, Practice Before Tribunals.

In the inquiry presented, the attorney is licensed to practice in a jurisdiction other than Virginia and the attorney and his firm represent a major corporation doing business in a number of states, including Virginia. The corporation/client has matters before the Virginia Gas and Oil Board on a routine basis and it would like this attorney to appear with its employee representatives before the Board. Whether this attorney, or any non-Virginia attorney, can do this will depend upon the determination of whether the Virginia Gas and Oil Board is a "tribunal."

The Board is created by the Virginia Gas and Oil Act, §45.1-361.1 et seq. of the Virginia Code (1950, as amended) ("the Act"). Section 45.1-361.14(B) provides that the Board has the power "necessary to execute and carry out all its duties specified in this chapter." Section 45.1-361.15(A) sets out additional duties and responsibilities of the Board, including safe and efficient development, conservation and production of the Commonwealth's oil and gas resources, administration of "procedures for the recognition and protection of the rights of gas or oil owners with interests in gas or oil resources contained within

a pool," and hearing and deciding appeals of the Director. Section 45.1-361.27 sets out the duties, responsibilities and authority of the Director. These include promulgating and enforcing rules, regulations and orders "necessary to ensure the safe and efficient development and production of gas and oil resources located in the Commonwealth." § 45.1-361.27(A). Additionally, under paragraph "E" of this section, the Director has specific enforcement authority against violation of provisions of the Act, which enforcement would effect rights and responsibilities of the offending party.¹ Section 45.1-361-15(B) authorizes the Board to issue "rules, regulations or orders pursuant to the provisions of the Administrative Process Act (§ 2.2-4000 et seq.)." ("the VAPA") The Board accepts applications and conducts hearings pursuant to §§ 45.1-361.20, 45.1-361.21 and 45.1-361.22. These sections address, respectively, field rules and drilling units for wells, pooling of interests in drilling units and pooling of interests for coalbed methane gas wells. Section 45.1-361.19(C) provides that the "Board shall conduct all hearings on applications made to it pursuant to *the formal litigated issues hearing provisions* of the Administrative Process Act (§ 2.2-4000 et seq.)." (emphasis added.) The Virginia Administrative Code provisions dealing with procedures before the Board allows that:

- G. All parties in any proceeding before the board are entitled to appear in person or be represented by counsel or other qualified representative, as provided for in the Administrative Process Act, § 2.2-4000 et seq. of the Code of Virginia.

4 VAC 25-160-30 (G). Section 2.2-4020(C) of the VAPA ("Formal hearings; litigated issues") provides that "the parties shall be entitled to be accompanied by and represented by counsel."

It is apparent from a review of the provisions of the Act that the Board, either by virtue of its own jurisdiction or its authority to hear appeals of decisions of the Director, does more than simply "promulgate rules and regulations of general applicability." It must conduct its hearings pursuant to the "formal litigated issues hearing provisions" of the Administrative Process Act and these hearings address, and the Board's decisions effect, the rights and obligations of the parties appearing

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- 1 E. The Director shall also have the authority to:
1. Issue, condition and revoke permits;
 2. Issue notices of violation and orders upon violations of any provision of this chapter or regulation adopted thereunder;
 3. Issue closure orders in cases of imminent danger to persons or damage to the environment or upon a history of violations;
 4. Require or forfeit bonds or other financial securities;
 5. Prescribe the nature of and form for the presentation of any information and documentation required by any provision of this article or regulation adopted thereunder;
 6. Maintain suit in the city or county where a violation has occurred or is threatened, or wherever a person who has violated or threatens to violate any provision of this chapter may be found, in order to restrain the actual or threatened violation;
 7. At reasonable times and under reasonable circumstances, enter upon any property and take such action as is necessary to administer and enforce the provisions of this chapter; and
 8. Inspect and review all properties and records thereof as are necessary to administer and enforce the provisions of this chapter.

before it. As such, it is the Committee's opinion that the Board would constitute a "tribunal" as defined by UPC 1-1.

There is no provision within the Act or the VAPA which specifically authorizes representation of a party by a non-attorney. In Unauthorized Practice of Law Opinion 113, the Committee determined that a non-lawyer could represent a party in an *informal* fact-finding conference before the Virginia State Health Department. In reaching this determination, the Committee noted that the provisions of the VAPA applicable to an informal fact-finding conference specifically authorized non-attorney representation.² The provisions of the VAPA applicable to the hearing process before the Board do not include a similar authorization.³ The Virginia Administrative Code does provide that parties before the Board may be represented by "other qualified representative" but only "as provided for" in the VAPA. Virginia Code Section 2.2-4020 (C) (the formal litigated issues hearing provisions) provides only that parties are entitled to be represented by counsel.⁴ Based on this authority the Committee finds that representation by a non-lawyer (which includes a lawyer licensed elsewhere than in Virginia) before the Virginia Gas and Oil Board is not appropriate and would be the unauthorized practice of law.

Unauthorized Practice Rule 1-101 (A) cited above provides that a non-lawyer can only represent another before a tribunal in the presentation of "facts, figures or factual conclusions, as distinguished from legal conclusions." The question arises, then, whether the non-lawyer identified in this request could represent the major corporation before the Board only presenting facts, figures or factual conclusions. The request suggests that this is possible, and indeed, would be the only information necessary to present to the Board. If that is the case, and indeed only "facts, figures or factual conclusions" were presented, this would be permissible under Rule 1-101 (A). However, given the scope of authority of the Board, and the matters that can be brought before it, there is certainly the possibility that there would be instances when legal argument would be necessary and in those instances the non-lawyer/lawyer licensed other than in Virginia, could not do so on behalf of a party before the Board.

The request also states that:

Issues before the Board do not involve the application of legal principles to facts or desires. Rather, the Board makes procedural and factual determinations under the statutes regarding the pooling of various interests and considers appeals of decisions made by its Director.

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2 Va. Code § 2.2-4019 (formerly Va. Code § 9-6.14:11), "*Informal fact-finding*," of the APA provides that parties to administrative informal fact-finding proceedings have the right to appear in person or by counsel or *other qualified representative* for the purpose of informally presenting factual data, argument or proof in connection with any case. UPL Op. 113 (1988).

3 Va. Code § 2.2-4020(C): In all such formal proceedings the parties shall be entitled to be accompanied by and represented by counsel, to submit oral and documentary evidence and rebuttal proofs, to conduct such cross-examination as may elicit a full and fair disclosure of the facts, and to have the proceedings completed and a decision made with dispatch.

4 *Id.*

The Board does not " . . . determine the rights and obligations of parties before it . . ." as in a contested case. We submit, therefore, that the Board is not a "tribunal," as that word is defined by the Supreme Court of Virginia and is generally understood by practitioners. This view, we submit, is bolstered by Virginia Code § 45.1-361.9 (A), which legislates that appeals from the Board to a circuit court are heard *de novo*. Consequently nothing in a Board decision precludes a fully litigated claim of the same issues in circuit court.

Given the provisions of the Act cited herein which set out the duties, responsibilities and authority of the Board and its Director, these statements, while perhaps accurate some of the time, do not accurately encompass the full scope of the Board's reach and authority. Nothing in the rules or the statutes mandate that the matter be "contested" in order for the body hearing the matter to determine rights and obligations of the parties and for that body to be considered a tribunal.⁵ The fact that appeals are heard *de novo* before the circuit court also does not per se establish that the Board does not determine the rights and responsibilities of parties before it and that it is not a tribunal. A *de novo* hearing simply means that the matter is heard "anew," "afresh," "as if it had never been heard before."⁶ It has no bearing on the status of the body hearing the matter below.

In this opinion request, several Unauthorized Practice of Law Opinions have been cited in support of the requestor's position. Specifically, the requestor cites UPL Opinions 200 and 92 (a foreign attorney may appear before an arbitration panel in Virginia); UPL Opinion 89 (it is not unauthorized practice for a non-Virginia attorney to represent a party before a military court on a military reservation); and UPL Opinion 78 (a non-lawyer may represent another at a faculty tenure hearing). These opinions are distinguishable from the present case. In UPL Opinions 200 and 92, the Committee found that while representation before an arbitration panel would be the practice of law, an arbitration panel was not a "tribunal" as defined under UPC 1-1. In UPL Opinions 89 and 78, the non-attorney was otherwise authorized to appear before the particular body. In the present case, the Committee has determined that the Board is a tribunal and that the rules of practice before the Board do not otherwise authorize a non-attorney to represent a party before it. Therefore these opinions are not dispositive.

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 2005, 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).

Committee Opinion
June 14, 2005

FOOTNOTES —————

5 See UPC 1-1.

6 *Black's Law Dictionary*, 5th Edition (1979)