

Inquiry to District Committee Panel

On October 6, 2004, COLD approved a proposed amendment which would require a district committee chair to ask whether any member of the hearing panel has a personal or financial interest affecting his or her ability to be impartial in the matter to be heard. If the answer is yes, the member will be excused from sitting on the panel.

Part 6, Section IV, Paragraph 13 of the Rules of the Virginia Supreme Court

13. PROCEDURE FOR DISCIPLINING, SUSPENDING, AND DISBARRING ATTORNEYS

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H. District Committee Proceedings

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2. Hearing Procedure

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d. Preliminary Explanation

After swearing the Court Reporter, who thereafter shall administer oaths or affirmations to witnesses, the Chair shall make opening remarks in the presence of the Respondent and the Complainant, if present. The Chair shall also inquire of the members present whether any member has any personal or financial interest that may affect, or be reasonably perceived to affect, his or her ability to be impartial. Any member answering in the affirmative shall be excused from participation in the matter.

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Comments or questions about the rules should be submitted in writing to Thomas A. Edmonds, Executive Director of the Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219, no later than January 15, 2005. The Virginia State Bar Council will consider the proposed amendments when it meets on February 19, 2005, in Richmond, Virginia.



Reinstatement—Reimbursement of Receivership Costs

On October 6, 2004, COLD approved a proposed amendment which would require an attorney who seeks reinstatement of his law license after revocation to reimburse the bar for any costs incurred in connection with a receivership initiated to close out the revoked attorney's practice.

Part 6, Section IV, Paragraph 13 of the Rules of the Virginia Supreme Court

13. PROCEDURE FOR DISCIPLINING, SUSPENDING, AND DISBARRING ATTORNEYS.

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I. Board Proceedings

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8. Reinstatement Proceeding

The filing by a former Attorney of a petition for reinstatement shall constitute a waiver of all confidentiality relating to the petition, and to the Complaint or Complaints that resulted in, or were pending at the time the former Attorney resigned or his or her license was revoked.

a. After Resignation

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b. After Revocation

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(2) After a Revocation, Petitioner's License to practice law shall not be reinstated unless the Petitioner proves by clear and convincing evidence that Petitioner: within five years prior to filing the petition has attended 60 hours of continuing legal education, of which at least ten hours shall be in the area of legal ethics or professionalism; has taken the Multistate Professional Responsibility Examination and received a scaled score of 85 or higher; has reimbursed the Bar's Clients' Protection Fund for any sums of money it may have paid as a result of Petitioner's Misconduct; has paid the Bar all Costs that have been previously assessed against Petitioner, together with any interest due thereon at the judgment rate; has reimbursed the Bar for any sums of money it may have paid as a result of a receivership involving Petitioner's law practice; and is a person of honest demeanor and good moral character and possesses the requisite fitness to practice law. The Petitioner shall post with his or her petition for Reinstatement a \$3,500 cash bond for payment of Costs resulting from the Reinstatement Proceedings. At the conclusion of the Reinstatement Proceeding, the Board or the Clerk of the Disciplinary System shall determine the Costs associated with such proceeding and submit that determination to the clerk of this Court as part of the Board's findings of fact.

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- c. After Disciplinary Suspension for More than One Year

After a Suspension for more than one year, the License of the Attorney subject to the Suspension shall not be reinstated unless the Attorney demonstrates to the Board that he or she: has attended 12 hours of continuing legal education, of which at least two hours shall be in the area of legal ethics or professionalism, for every year or fraction thereof of the Suspension; has taken the Multistate Professional Responsibility Examination since imposition of discipline and received a scaled score of 85 or higher; has reimbursed the Bar's Clients' Protection Fund for any sums of money it may have paid as a result of the Attorney's Misconduct; and has paid to the Bar all Costs that have been assessed against him or her, together with any interest due thereon at the judgment rate at the time the Costs are paid; has reimbursed the Bar for any sums of money it may have paid as a result of a receivership involving Petitioner's law practice.

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Addition of "Admonition" as an Appealable Sanction

On November 3, 2004, COLD approved a proposed amendment that includes an admonition issued by the Disciplinary Board as a disciplinary sanction that can be appealed to the Supreme Court of Virginia. The amendment further provides that issuance of an admonition is stayed during the pendency of an appeal.

Part 6, Section IV, Paragraph 13 of the Rules of the Virginia Supreme Court

13. PROCEDURE FOR DISCIPLINING, SUSPENDING, AND DISBARRING ATTORNEYS

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- J. Appeal from Board Determinations
 - 1. Right

As a matter of right any Respondent may appeal to this Court from an order of Admonition, Public Reprimand, Suspension, or Disbarment imposed by the Board. An appeal shall lie once the Memorandum Order described in this Paragraph has been served on the Respondent. No appeal shall lie from a Summary Order.

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- 6. Stay Pending Appeal

Upon the entry by the Board of either a Summary or Memorandum Order of Suspension, this Court may, upon petition of the Respondent, stay the effect of such an order of suspension prior to or during the pendency of the appeal. Any order of Admonition or Public Reprimand shall be automatically stayed prior to or during the pendency of an appeal therefrom. No stay shall be granted in cases where the Respondent's license to practice law has been revoked by either the Summary or Memorandum Order of the Board.

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Disclosure of Disciplinary Record to Disciplinary Board

On October 6, 2004, COLD approved a proposed amendment which would allow disclosure of a respondent's disciplinary record to the Disciplinary Board during a hearing regarding consent to revocation.

Part 6, Section IV, Paragraph 13 of the Rules of the Virginia Supreme Court

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- N. Confidentiality of Disciplinary Records and Proceedings:

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- 2. Timing of Disclosure of Disciplinary Record in Sanctions Proceedings

If an Attorney has a Disciplinary Record and is subsequently found by a Subcommittee, a District Committee, the Board or a three-judge Circuit Court empaneled under Va. Code § 54.1-3935 to have engaged in Misconduct, the facts and circumstances giving rise to such Disciplinary Record may be disclosed (i) to the Subcommittee, District Committee, Board or three-judge Circuit Court prior to the imposition of any sanction and (ii) by the Subcommittee, District Committee, Board or three-judge Circuit Court in its findings of fact set forth in its order. The facts and circumstances giving rise to such Disciplinary Record may also be disclosed to the Disciplinary Board during a hearing concerning whether an affidavit and consent to Revocation should be accepted.

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will consider the proposed amendments when it meets on February 19, 2005, in Richmond, Virginia.



Virginia State Bar Council To Review Proposed Foreign Legal Consultant Rule

On February 19, 2005, the Virginia State Bar Council will meet at the Omni Hotel in Richmond to consider a proposed rule that will allow a non-U.S. attorney to practice in Virginia as a Foreign Legal Consultant (FLC). The proposed rule is work product of the Virginia State Bar's Task Force on Multi-jurisdictional Practice.

In 1993, the ABA House of Delegates approved the *Model Rule for the Licensing of Legal Consultants*, which addresses the work of foreign lawyers in United States jurisdictions.¹ The Model Rule responded, in part, to the concern of foreign lawyers that, while American lawyers enjoyed a broad right of practice in other countries (or sought such a right in countries that did not afford it), foreign lawyers generally could not engage in the practice of law in the United States, even if limited to advising on the law of their own countries, without attending an accredited American law school, sitting for the bar examination and becoming a full member of the bar. The ABA identified both a need for a streamlined admissions process for foreign lawyers seeking to establish a law practice providing limited legal services and a need for greater uniformity. Twenty-four states currently have a foreign legal consultant rule.

Both the ABA and the United States Trade Representatives are asking the states to adopt Foreign Legal Consultant (FLC) rules. Experience with these FLC rules in other states has revealed few if any disciplinary problems.

The need for Virginia to adopt a FLC rule is apparent. In this global economy, business transactions increasingly require the involvement of U.S. and non-U.S. lawyers. All but five states annually export billions of dollars of merchandise; even the five smallest exporters ship hundreds of millions of dollars of merchandise to other countries. (See http://ita.doc.gov/td/industry/otea/state/state_dollar_value_03.html for a state-by-state listing of exports over the last five years.) To appreciate the magnitude of these exports, Illinois, which ranked 7th highest in exports, exports \$26 billion dollars annually. Rhode Island, which is ranked 45th in the country, exports over \$1 billion annually. Virginia is ranked 21st, with a total of nearly \$11 billion annually. In addition to these exports, every state in the country has significant foreign investment or imports. Clients who are engaged in this inbound and outbound trade undoubtedly want to (and probably do) rely on the expertise of both U.S. and non-U.S. lawyers.

Furthermore, because of its location on the Atlantic seaboard and its proximity to Washington, D.C., Virginia has become an attractive location for international business. Many companies with either parents or divisions overseas have established sales and service offices or headquarters in Virginia. In fact, more Fortune 500 companies are located in Virginia than in each of 40 other states.

See *Fifty Years of the Fortune 500* (April 5, 2004). According to the Virginia Economic Development Partnership, 775 Virginia corporations have overseas operations,² and thus have potential need for the expertise of foreign lawyers. Of these, 102 corporations have headquarters in Virginia, increasing the likelihood that they would need or use the services of a non-U.S. lawyer.

Authorizing foreign lawyers to be regulated as FLCs (and allowing U.S. lawyers to hire and partner these FLCs) can also benefit residents of Virginia who were born in another country. Every U.S. jurisdiction has a significant number of residents who were born in other countries, many of whom probably still have connections in their country of origin. Based on the 2000 census, Virginia increased its foreign-born population by 83% between 1999 and 2000 and is ranked 11 out of the 50 states and the District of Columbia. See *Migration Information Source* at <http://www.migrationinformation.org/USFocus/statemap.cfm#>.

The proposed FLC rule is in the best interests of clients because it provides access to foreign law expertise with accountability; FLCs will be subject to the ethics rules and discipline system in Virginia. Many of the clients in Virginia that are engaged in import or export activities will need advice about foreign law. The proposed FLC rule serves the interests of clients because it makes it more likely that these clients could remain in the U.S. and find foreign law expertise. In addition, the foreign-born residents in Virginia will be better served if they have access not just to U.S. lawyers who can advise on domestic law, but FLC's who can advise them on the law of a foreign country. Without the proposed FLC rule, foreign-born citizens and clients needing professional advice on the law of a foreign country would have to look for FLCs in another state where they are authorized to practice. This translates to lost revenue and business opportunities for Virginia.

The public, as well as individual clients, benefit by having foreign lawyers accessible and accountable. The proposed FLC rule acknowledges and addresses the economic realities, in which there is significant inbound and outbound foreign trade (and foreign lawyers who work on that trade). Without foreign lawyer participation, much of this economic reality could not occur. The proposed FLC rule therefore facilitates the participation of regulated, accountable foreign lawyers.

Adoption of the FLC rule will help Virginia lawyers as well. Experience has shown that in a global economy, when jurisdictions close their borders to foreign lawyers, global businesses move to another jurisdiction where foreign lawyers are available. By recognizing the rights of foreign lawyers to practice in a limited fashion in the U.S. temporarily and with accountability, the proposed FLC rule makes it more likely that multinational clients

will continue to rely on Virginia lawyers (rather than UK or Canadian lawyers) for their legal work. While a solo practitioner or small firm is less likely to represent multinational corporations, chances are good that many of their clients will in the future have legal issues involving foreign law.

Finally, the FLC rule is in the best interest of Virginia and other U.S. lawyers who practice overseas. U.S. foreign lawyers are among the most active participants in the globalized world economy. According to the *National Law Journal*, the number of lawyers working in foreign offices jumped from 800 in 1982 to 10,493 in 2004.³ U. S. lawyers have responded to clients' needs by opening offices in more than 30 foreign countries, with an estimated 1,000 lawyers. In addition, probably tens of thousands of U.S. lawyers regularly travel abroad to perform services on a temporary basis in foreign countries, assisting their U.S. clients with their foreign interests or representing foreign companies doing business with U.S. firms and individuals. Commerce Department statistics indicate that U.S. lawyers have earned well in excess of \$3 billion in the last calendar year through their "export" of legal services. The actual figures may be substantially greater. Adoption of this rule will facilitate the work of U.S. lawyers engaged in international work because it will make it clear that foreign lawyers can receive a license to practice their Home State law and can work with U.S. lawyers and law firms. In addition, if the U.S. offers foreign lawyers the opportunity to practice their own law in the U.S., it will make it easier for the U.S. to negotiate in the GATS concerning U.S. lawyers who are outbound from the U.S. (For more information about the GATS, see http://www.abanet.org/cpr/gats/gats_home.html.)

The proposed FLC rule carves out a rather limited role for the foreign legal consultant. A FLC will not be permitted to render any legal services based on the application or interpretation of Virginia law or the law of another U.S. jurisdiction. They cannot appear before a tribunal nor prepare any pleadings on behalf of another. The proposed rule prohibits the FLC from preparing any legal instruments effecting the transfer or registration of title to real estate located in the United States. A FLC cannot prepare any will or trust instrument effecting the disposition on death of any property located in the United States and owned by a resident of Virginia, nor can he or she prepare any instrument relating to the administration of a decedent's estate in the United States. The proposed rule also prohibits a FLC from preparing any instrument relating to the marital or parental relations, rights or duties of a resident of the United States, or the custody or care of the children of such a resident. Finally, a FLC cannot hold him/herself out as a member of the Virginia State Bar.

Inspection and Comment

The proposed rule 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 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>.

Any individual, business or other entity may file or submit written comments in support of, or in opposition to, the advisory opinion

by filing ten copies with Thomas A. Edmonds, the Executive Director of the Virginia State Bar, not later than **February 16, 2004**.

Endnotes:

- 1 See generally Carol A. Needham, *The Licensing of Foreign Legal Consultants in the United States*, 21 *FORDHAM INT'L L.J.* 1126 (1998).
- 2 Virginia Economic Development Partnership, *Virginia Firms with Foreign Affiliations* (2004).
- 3 David Hechler, *As Economy Slows, So Does Firms' Global Reach*, *THE NATIONAL LAW JOURNAL* (November 15, 2004) at S10.

Rule 1A:7. Licensing of Foreign Legal Consultants

(a) General Requirements. A person admitted to practice law by the duly constituted and authorized professional body or governmental authority of any foreign nation may apply to the Board of Bar Examiners for a certificate as a foreign legal consultant, provided the applicant:

- (1) is a member in good standing of a recognized legal profession in a foreign country, the members of which are admitted to practice as attorneys or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a governmental authority;
- (2) for at least five of the seven years immediately preceding his or her application has been a member in good standing of such legal profession and has actually been engaged in the practice of law in the said foreign country, or elsewhere, substantially involving or relating to the rendering of advice or the provision of legal services concerning the law of the said foreign country;
- (3) possesses the good moral character and general fitness requisite for a member of the bar of this Commonwealth;
- (4) is at least twenty-six years of age; and
- (5) intends to practice as a foreign legal consultant in this Commonwealth and maintain an office in this Commonwealth for that purpose.

(b) Proof Required. An applicant under this rule shall file with the secretary of the Virginia Board of Bar Examiners:

- (1) an application for a foreign legal consultant certificate, on a form furnished by the Board,
- (2) a certificate, for each foreign country in which the applicant is admitted to practice, from the professional body or governmental authority in such foreign country having final jurisdiction over professional discipline, certifying as to the applicant's admission to practice and the date thereof, and as to his or her good standing as an attorney or counselor at law or the equivalent;
- (3) a letter of recommendation, for each foreign country in which the applicant is admitted to practice, from one of the members of the executive body of such professional

body or governmental authority or from one of the judges of the highest law court or court of original jurisdiction of such foreign country;

- (4) a duly authenticated English translation of each certificate and letter if, in either case, it is not in English;
- (5) a copy or summary of the law, regulations, and customs of the foreign country that describes the opportunity afforded to a member of the Virginia State Bar to establish an office to provide legal services to clients in such foreign country, together with an authenticated English translation if it is not in English;
- (6) the requisite documentation establishing the applicant's compliance with the immigration laws of the United States; and
- (7) such other evidence as to the applicant's educational and professional qualifications, good moral character and general fitness, and compliance with the requirements of paragraph (a) of this rule as the Board may require.

(c) Reciprocal Treatment of Members of the Bar of this Commonwealth. In considering whether to certify an applicant to practice as a foreign legal consultant, the Board may in its discretion take into account whether a member of the Virginia State Bar would have a reasonable and practical opportunity to establish an office and give legal advice to clients in the applicant's country of admission. Any member of the Virginia State Bar who is seeking or has sought to establish an office or give advice in that country may request the Board to consider the matter, or the Board may do so *sua sponte*.

(d) Scope of Practice. A person certified to practice as a foreign legal consultant under this Rule may render legal services in the Commonwealth of Virginia subject, however, to the limitations that he or she shall not:

- (1) appear or prepare pleadings for a person, other than himself or herself, as an attorney in any court, or before any magistrate or other judicial officer, in the Commonwealth of Virginia;
- (2) prepare any instrument effecting the transfer or registration of title to real estate located in the United States of America;
- (3) prepare:
 - (i) any will or trust instrument effecting the disposition on death of any property located in the United States of America and owned by a resident thereof, or
 - (ii) any instrument relating to the administration of a decedent's estate in the United States of America;
- (4) prepare any instrument in respect of the marital or parental relations, rights or duties of a resident of the

United States of America, or the custody or care of the children of such a resident;

- (5) render legal advice (whether rendered incident to the preparation of legal instruments or otherwise) on the law of the Commonwealth of Virginia, the District of Columbia, or of any other state or territory of the United States of America except on the basis of lawful association with a person duly qualified and entitled (otherwise than by virtue of having been licensed under this rule) to render such professional legal advice in the Commonwealth of Virginia;
- (6) be, or in any way hold himself or herself out as, a member of the Virginia State Bar; or
- (7) carry on his or her practice under, or utilize in connection with such practice, any name, title or designation other than one or more of the following:
 - (i) his or her own name;
 - (ii) the name of the law firm with which he or she is affiliated;
 - (iii) his or her authorized title in the foreign country of his or her admission to practice, which may be used in conjunction with the name of such country; and
 - (iv) the title "foreign legal consultant," which may be used in conjunction with the words "admitted to the practice of law in [name of the foreign country of his or her admission to practice]."

(e) Rights and Obligations. Subject to the scope of practice limitations set forth in paragraph (d) of this rule, a person certified as a foreign legal consultant under this rule shall be entitled and subject to:

- (1) the rights and obligations contained in the Virginia Rules of Professional Conduct as set forth in Part 6, Section II of the Rules of the Supreme Court of Virginia; and the procedure for disciplining attorneys as set forth in Part 6, Section IV, Paragraph 13 of the Rules of the Supreme Court of Virginia
- (2) the rights and obligations of a member of the Virginia State Bar with respect to:
 - (i) affiliation in the same law firm with one or more members of the bar of this Commonwealth, including by:
 - (A) employing one or more members of the Virginia State Bar;
 - (B) being employed by one or more members of the Virginia State Bar or by any partnership or other limited liability entity authorized to practice law pursuant to Part 6, Section IV,

Paragraph 14 of the Rules of the Supreme Court of Virginia, which such entity includes an active member of the Virginia State Bar or which maintains an office in this Commonwealth; or by any employer in the Commonwealth of Virginia as in-house counsel, provided, however, such person meets the requirements under Part II of Rule 1A:5 of the Rules of the Supreme Court of Virginia, including the limitations on the scope of practice; and

(C) being a director, partner, member, manager or shareholder in any partnership or other professional limited liability entity authorized by Part 6, Section IV, Paragraph 14 to practice law in this Commonwealth which includes an active member of the Virginia State Bar or which maintains an office in this Commonwealth; and

(ii) attorney-client privilege, work-product privilege and similar professional privileges.

(3) No time spent practicing as a foreign legal consultant shall be considered in determining eligibility for admission to the Virginia bar without examination.

(f) Disciplinary Provisions. A person certified to practice as a foreign legal consultant under this Rule shall be subject to professional discipline in the same manner and to the same extent as any member of the Virginia State Bar and to this end:

(1) Every person certified to practice as a foreign legal consultant under these Rules:

(i) shall be subject to regulation by the Virginia State Bar and to admonition, reprimand, suspension, removal or revocation of his or her certificate to practice in accordance with the rules of procedure for disciplinary proceedings set forth in Part 6, Section IV, Paragraph 13 of the Rules of the Supreme Court of Virginia; and

(ii) shall execute and file with the Virginia State Bar, in such form and manner as the Virginia State Bar may prescribe:

(A) his or her commitment to observe the Virginia Rules of Professional Conduct and any other rules of court governing members of the bar to the extent they may be applicable to the legal services authorized under paragraph (d) of this Rule;

(B) a written undertaking to notify the Virginia State Bar of any change in such person's good standing as a member of any foreign legal profession referred to in paragraph (a)(1) of this rule and of any final action of any professional body or governmental authority referred to in paragraph (b)(2) of this rule imposing any dis-

ciplinary censure, suspension, or other sanction upon such person; and

(C) a duly acknowledged instrument, in writing, setting forth his or her address in this Commonwealth which shall be both his or her address of record with the Virginia State Bar and such person's actual place of business for rendering services authorized by this rule. Such address shall be one where process can be served and the foreign legal consultant shall have a duty to promptly notify the Membership Department of the Virginia State Bar in writing of any changes in his or her address of record.

(g) Application and Renewal Fees. An applicant for a certificate as a foreign legal consultant under this rule shall pay the application fee fixed by the Board. A person certified as a foreign legal consultant shall pay an annual fee which shall be equal to the dues required to be paid by a member of the Virginia State Bar for renewal of his or her license to engage in the practice of law in the Commonwealth. A person certified as a foreign legal consultant who fails to complete and file the renewal form supplied by the Virginia State Bar or pay the annual fee shall have his or her certificate as a foreign legal consultant administratively suspended in accordance with the procedures set out in Part 6, Section IV, Paragraph 19 of the Rules of the Supreme Court of Virginia.

(h) Revocation of License for Non-Compliance. In the event that the Virginia State Bar Disciplinary Board determines that a person certified as a foreign legal consultant under this rule no longer meets the requirements under this rule, it shall revoke the certificate granted to such person hereunder.

(i) Reinstatement. Any foreign legal consultant whose authority to practice is suspended shall be reinstated upon evidence satisfactory to the Virginia State Bar that such person is in full compliance with this rule; however, a reinstatement of a foreign legal consultant's certificate following a suspension for non-compliance with paragraph (g) of this rule shall be governed by Part 6, Section IV, Paragraph 19 of the Rules of the Supreme Court of Virginia; and reinstatement of a foreign legal consultant's certificate following a disciplinary suspension or revocation shall be governed by Part Six, Section IV, Paragraph 13 of the Rules of the Supreme Court of Virginia.

(j) Admission to Bar. In the event that a person certified as a foreign legal consultant under this rule is subsequently admitted as a member of the Virginia State Bar under the provisions of the rules governing such admission, the certificate granted to such person hereunder shall be deemed superseded by the admission of such person to the Virginia State Bar.

(k) Regulations. The Virginia State Bar or the Board of Bar Examiners may adopt regulations as needed to implement their respective responsibilities under this rule.

(m) Effective Date. This rule shall become effective on January 1, 2006. ■