

UNAUTHORIZED PRACTICE OF LAW OPINION 197

NONLAWYER REPRESENTATION OF PARTY TO A REAL ESTATE TRANSACTION

(Revised January 22, 2001)

You have presented a hypothetical situation in which an Attorney who is the settlement agent for a real estate transaction has received a contract with an addendum, which indicates that the settlement agent was chosen by the purchaser and that seller will have a separate attorney. The contract further states, "Fees for the preparation of the deed, that portion of the Settlement Agent's fee billed to the Seller, costs of releasing existing encumbrances, appropriate legal fees and any other proper charges assessed to the Seller shall be paid by the Seller." Subsequently, the Attorney receives a letter from a title company stating: 1) that the title company has been retained to represent the seller; 2) that the title company will prepare the seller's documents, including the deed, the Certificate of Satisfaction, etc.; and 3) that the Attorney's settlement statement should show no charges to the seller from the Attorney. The letter further states that the title company's fee to the seller should be shown on the settlement statement, payable to the title company, and that seller will sign all documents in the title company's office.

The Committee considered your inquiry at its December 14, 2000, meeting and has directed me to transmit its conclusions to you.

Under the facts you have presented, you have asked the committee to opine on the following questions:

1. Can the title company be retained to represent the seller in the real estate transaction if the title company is not the settlement agent named in the contract?
  - a. If so, does representation by a title company put the named settlement agent in the same position as if the sellers were represented by an attorney, i.e., does this representation by a title company relieve the seller of any charges by the settlement agent except those disclosed and agreed to by the seller?
  - b. If the title company can represent the seller, can the fee to the title company on the settlement statement include the preparation of the deed, or should this be itemized separately with the preparing attorney's name?

ANSWER: No. The Committee has determined that based upon your facts that since the title company is not serving as the settlement agent in this transaction under the Consumer Real Estate Settlement Protection Act (CRESPA), the Act does not apply, and the company cannot provide any escrow, settlement or closing services under the Consumer Real Estate Settlement Protection Act (CRESPA). Since the Act does not apply, the title company is not authorized to prepare any legal instruments on behalf of seller or collect a fee for doing so.<sup>1</sup> UPRs 6-101, 6-102 and 6-103. Further, the title company cannot hold itself out as authorized to undertake a legal representation of a person and is not authorized to give legal advice to the seller or prepare legal instruments because such activity constitutes the unauthorized practice of law. Va. S. Ct. R., pt. 6, § I, UPR 6-101 (A).<sup>2</sup>

In response to your subquestions, it is the opinion of the committee that the named settlement agent is placed in the position of dealing with sellers who are not represented by counsel, because the title company is not authorized by law to act as an attorney for sellers. Since the title company cannot lawfully prepare the deed on behalf of the sellers, the fee charged by the title company on the settlement statement cannot include a fee for the preparation of the deed by the title company.<sup>3</sup> If an attorney not directly employed by the title company prepared the deed, the fee charged for deed preparation should be itemized separately with the preparing attorney's name and paid to that attorney.

2. If the Attorney complies with the instructions of the title company, is the Attorney aiding the unauthorized practice of law and thus subject to disciplinary action?

ANSWER: This is an ethics question, not an unauthorized practice matter, and is beyond the purview of this committee. This issue has been referred to the Standing Committee on Legal Ethics.

3. Would the answers be different if the person representing the title company is an attorney who owns or is employed by the title company?

ANSWER: No. Your inquiry presents two scenarios, one in which a Virginia licensed attorney in private practice owns the title company and another in which the attorney is an employee of the title company. In both situations, it would appear that the attorney is representing the title company and not the seller. If the seller needs or desires legal representation, the seller cannot be represented by the attorney employed by the title company. The title company is a lay entity which is not authorized to practice law, and cannot employ its attorney to provide legal services to its customers. *Richmond Ass'n of Credit Men v. Bar Ass'n of City of Richmond*, 167 Va. 327, 189 S.E. 153 (1937); UPL Op. #60 (1985). Under both CRESPA and the UPL rules, only an attorney engaged in private practice specifically retained by the seller may undertake legal representation of the seller.

4. Can an attorney acting as an owner/employee of a title company ethically perform legal services for clients of the title company, or is he considered to be the same as a nonattorney in his relationship with title company clients? Are the clients considered to be represented by their own attorney in this situation?

ANSWER: Generally it is the unauthorized practice of law for a lawyer employed by a lay corporation to provide legal services to its customers. *Richmond Ass'n of Credit Men v. Bar Ass'n of City of Richmond*, *supra*. Therefore, the committee would regard such an attorney as a non-lawyer in the circumstances you present. The committee opines that only a Virginia licensed attorney engaged in the private practice of law may undertake a legal representation of a party to a real estate closing. Thus, in the facts you present, the attorney employed by the title company is to be treated as a nonattorney for purposes of your inquiry, and the seller is not to be considered as represented by their own attorney in this situation.

This opinion is based only on the facts you presented and is subject to review by Bar Council at its next regularly scheduled meeting, 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 I: ¶10(f)(iii).

Committee Opinion  
 Issued June 26, 2000  
 Revised January 22, 2001

Endnotes

- 1 A nonlawyer settlement agent registered under CRESPA is authorized to prepare settlement statements and complete form documents and instruments selected by and in accordance with instructions of the parties to the transaction. Virginia Code § 6.1-2.20. A nonlawyer shall not, with or without compensation, prepare for another legal instrument of any character affecting the title to or use of real estate UPR 6-103 (A).
- 2 Even if the title company were serving as a registered settlement agent pursuant to the Consumer Real Estate Settlement Protection Act (CRESPA), the title company is prohibited from giving legal advice to the parties to the transaction. See, e.g., Va. Code § 6.1-2.22 (No settlement agent can provide legal advice to any party to the transaction except a settlement agent who is engaged in the private practice of law in Virginia and who has been retained or engaged by a party to the transaction for the purpose of providing legal services to that party). However, CRESPA has no application to this inquiry since the title company is not acting as settlement agent.
- 3 A nonlawyer is not entitled to collect a fee for providing legal services which they are not authorized to perform. Va. S. Ct. R., pt. 6, § I (Introduction) ("Any fees charged by a person engaged in the unauthorized practice of law are not collectible in court."); UPL Op. #112 (1990) (It is the unauthorized practice of law for a mortgage company to make a separate charge for the preparation of legal instruments affecting title to real estate in connection with a real estate closing.)

UNAUTHORIZED PRACTICE OF LAW OPINION 198

ACTIVITIES OF A BUSINESS COMPOSED OF NONLAWYERS AND OFFERING RESIDENTIAL FORECLOSURE SERVICES TO MORTGAGE LENDERS ACTING AS TRUSTEES

You have been requested by a client (the "Company") to assist in establishing a business in the Commonwealth of Virginia. Based upon your review of Virginia law, you have some concern regarding whether the proposed business constitutes unauthorized practice of law.

The principals of the Company are *nonattorneys* who are experienced in the mortgage lending industry but otherwise have no legal experience, background or qualifications to offer legal advice. The Company would offer residential foreclosure services to local, regional and national mortgage lenders and servicers (the "Lender"). The foreclosure services offered would be limited to Virginia properties. The business would be incorporated in the Commonwealth of Virginia and would operate from a sole location within the state.

Revenue for the Company would be generated by fees charged to the Lender for prosecuting the foreclosure action. Fees would be characterized as trustee fees rather than as legal fees. The fee would be a flat rate per the Fannie Mae and Freddie Mac residential foreclosure fee schedules. In addition, the Com-

pany would seek payment of trustee commissions where the property was sold to a third party bidder and where such commission was contemplated and allowed by the Deed of Trust. The services provided by the Company for its fee and/or commission would include all of the following:

1. Review of the referral package and loan documents to assure that the Lender had sent proper notice of default as required by applicable law.
2. Issue, as necessary, such notice on behalf of the Lender, as may be required to accelerate the balance due under the loan documents.
3. Draft instruments for execution by the Lender to appoint the company as substitute trustee under the Deed of Trust.
4. Review and file among the land records of the appropriate county, the executed substitution of trustee document.
5. Coordinate and handle requests by Debtors/Borrowers for amounts needed to reinstate and/or pay off the loan.
6. Draft forbearance agreements and coordinate execution of the same between the Lender and the borrower.
7. Draft Deed in Lieu of Foreclosure documents and coordinate execution of the same between the Lender and the borrower.
8. Order and examine title to the properties subject of foreclosure and report to the lender at to matters of record.
9. Issue notice of possible claims under title insurance policies to insurer on behalf of the parties.
10. Schedule and appear at non-judicial trustee sales on the courthouse steps of the county in which the property is located.
11. Receive any instructions in connection with a bid the lender will make at the foreclosure sale and submit the bid on behalf of the Lender at such sale.
12. Draft, issue and dispatch owner and lienholder notices required by section 55 of the Virginia Code.
13. Draft and place for publication the advertisement of sale required by section 55 of the Virginia Code.
14. Field calls from parties interested in the scheduled foreclosure sales.
15. Report the results of the foreclosure sale to the Lender.
16. Accept deposits from third party bidders at the sale and collect and disburse proceeds derived from such sales.
17. Issue notice of default to such third party bidders who may not timely complete the settlement of their purchase.
18. Draft, execute and record trustee deeds conveying ownership to purchasers of the foreclosed properties.

19. Prepare and submit commissioner reports on each completed foreclosure to the appropriate county commissioner.
20. Prepare and submit to FHA and VA final title packages per federal regulations.
21. Provide final accountings to the lender clients.

The Company would *not* do any of the following tasks, any of which would be referred to a licensed Virginia attorney (the "Attorney") for completion:

- a. Represent the Lender in connection with any contested proceedings initiated by the borrower/debtor in state or federal court.
- b. Represent the Lender in connection with any bankruptcy proceedings in United States Bankruptcy Court.
- c. Represent the Lender in connection with any eviction proceedings authorized by the Lender.
- d. Represent the Lender in connection with any suits on the note or deficiency proceedings.
- e. Draft documents required to be prepared by an Attorney under applicable Virginia law.

The committee considered your inquiry at its meeting on December 14, 2000, and asked me to communicate its conclusions to you.

The committee begins its analysis of your inquiry with the observation that it is unlawful for a person to engage in the *unauthorized* practice of law. Va. Code § 54.1-3904 (Repl. Vol. 1998); Va. S. Ct. R., pt. 6, § I (A). To determine whether a person is *illegally* engaged in the practice of law, one must examine not only the definition of the practice of law, but also any relevant Rules of Court, statutes, and opinions applying such rules or statutes. In some situations, a nonlawyer may be authorized by law to perform activities that would appear to fall within the definition of the practice of law. For example, a corporation cannot be represented by a lay person in circuit court, however, a lay employee may file a warrant in debt or motion for judgment and appear in a limited capacity on behalf of the corporate employer in general district court. UPR 1-101; UPC 1-3; Va. Code § 16.1-88.03 (Repl. Vol. 1999); UPL Op. 154 (1993). Real estate brokers, title agents, title companies and financial institutions are authorized by law in their capacity as licensed settlement agents to provide escrow, settlement and closing services on real estate. Va. Code §§ 6.1-2.19-2.29, *et seq.* (Repl. Vol. 1999). It should be noted that the statute governing trustees does not indicate a requirement that trustees be attorneys, and, in fact, they have historically not been in the Commonwealth of Virginia.

The committee believes that Virginia law authorizes, if not requires, the Company to undertake most of those tasks described in your inquiry. Typically, a purchase money deed of trust is given concurrently with a conveyance of real estate by the grantor/borrower to secure the balance of the unpaid purchase price. The trustee is a party to the instrument. 13A Mich. Jur. *Mortgages and Deeds of Trust* § 6 (1991). Legal title to the subject property conveyed by the deed of trust is vested in the

trustee or trustees named therein. [*Larchmont Homes, Inc., v. Annandale Water Co.*, 201 Va. 178, 110 S.E.2d 249 (1959).] In the event of a default by the grantor/borrower, the trustee can act only in a manner authorized by the expressed or implied terms of the trust,<sup>1</sup> or in a manner expressly authorized by statute. Virginia Code Sections 55-59 through 55-59.4 create specific duties, rights and obligations for the trustee. Significantly, Virginia law does not require that a lawyer serve as the trustee on a deed of trust, and a nonlawyer appears authorized to serve in this capacity. Virginia Code Section 55-58.1 (2) requires only that a *person* named as trustee be a Virginia resident:

No *person* not a resident of this Commonwealth may be named or act, in person or by agent or attorney, as the trustee of a security trust,<sup>2</sup> either individually or as one of several trustees, the other or others of which are residents of this Commonwealth.

Virginia Code § 55-58.1 (Cum. Supp. 1999) (emphasis added). A party secured by a deed of trust has the right and power to appoint a substitute trustee. Va. Code §55-59 (9). Virginia Code Section 26-55, addressing the rights, duties and responsibilities of substituted trustees states:

Any *person* appointed trustee by virtue of this chapter shall be substituted to all the rights, powers, duties, and responsibilities of the trustee named in such will, deed, or other writing. Any such substituted trustee may, in like manner, be removed or required to give bond with sureties, or give a new bond when one has already been given and be proceeded against in every respect as an original trustee.

Virginia Code § 26-55 (Repl. Vol. 1997) (emphasis added). The trustee under a deed of trust is a fiduciary for both the borrower and noteholder and must act impartially between them. [*Whitlow v. Mountain Trust Bank*, 215 Va. 149, 152, 207 S.E.2d 837 (1974).] Indeed, the trustee's noncompliance with particular statutory obligations may have adverse legal consequences. *Deep v. Rose*, 234 Va. 631, 364 S.E.2d 228 (1988) (trustee's failure to comply with advertising requirement of Va. Code § 55-59.2 renders foreclosure sale void). However, merely because the trustee's failure to discharge his statutory obligations may have legal consequences does not mean that a nonlawyer is not authorized to serve in this capacity.

Assuming then, as we must, that a nonlawyer is authorized by law to serve as a trustee on a deed of trust, we next turn to the appropriate provisions in the Virginia Code to examine what powers, duties, rights and responsibilities are conferred by law on the trustee. The trustee's primary duty is set forth in Virginia Code Section 55-59 (7):

In the event of default in the payment of the debt secured, or any part thereof, at maturity, or in the payment of interest when due, or of the breach of any of the covenants entered into or imposed upon the grantor, then at the request of any beneficiary the trustee shall forthwith declare all the debts and obligations secured by the deed of trust at once due and payable and may take possession of the property and proceed to sell the same at auction at the premises or in the front of the circuit court building or at such

other place in the city or county in which the property or the greater part thereof lies, or in the corporate limits of any city surrounded by or contiguous to such county, or in the case of annexed land, in the county of which the land was formerly a part, as the trustee may select upon such terms and conditions as the trustee may deem best.

Virginia Code § 55-59 (7) (Repl. Vol. 1995). Before the trustee can sell the property, the trustee has tasks to perform and judgments to make, some of which undoubtedly require the exercise of legal knowledge, judgment and skill. For example, Virginia Code Section 55-59.1 requires notice of foreclosure to junior lienholders. The trustee must determine the priority of all liens, encumbrances, and taxes and the balances due thereon. This is necessary because the Virginia Code requires the trustee to advertise the foreclosure sale setting forth all liens and encumbrances (including leases, if any) having priority over the trust being foreclosed.<sup>3</sup> In addition, the trustee must comply with federal law regarding notice of sale to discharge the foreclosed property from a federal tax lien, if one exists.<sup>4</sup> If a FHA or VA loan is involved, the trustee must comply with applicable regulations of those agencies.<sup>5</sup> The trustee is authorized by statute to deliver the trustee's deed to the purchaser following the foreclosure sale. Va. Code § 55-59 (8). Since the trustee is a party to the deed, the trustee is authorized to prepare this legal instrument. *See, e.g.*, UPL Op. 183 (app'd by the Supreme Court, September 25, 1998, to be effective July 1, 2000). The trustee must also be aware that unpaid real estate tax, water and sewer liens on the subject property have priority over the deed of trust and the trustee is to pay these charges out of the foreclosure sale proceeds.<sup>6</sup>

The trustee must be aware of all encumbrances on the property in order to exercise properly his statutory discretion as to whether a fair sale can be held and to disburse properly the proceeds of sale.<sup>7</sup> *Residential Real Estate Transactions in Virginia*, ¶ 4.705 (5th Ed. 1995). Where there are disputed liens or possible mechanics' liens that could take priority or place a cloud on the title, the trustee has the responsibility of determining how to advertise the property for sale in light of such circumstances. *Id.*

Also, the trustee must be mindful of the legal requirements should the lender exercise the right to accelerate the entire indebtedness. These requirements are set forth in two Virginia Supreme Court decisions.<sup>8</sup>

In view of the trustee's obligations and responsibilities under the terms of the deed of trust and the law, along with the oversight provided by the Commissioner of Accounts and the fiduciary responsibilities under common law, the committee concludes that all but two drafting Forbearance Agreements (Item 6) and drafting Deeds in Lieu of Foreclosure (Item 7), of the twenty-one (21) enumerated tasks are within the scope of the Company's authority as trustee. Moreover, the Company has the right to draft any legal instruments in which it is a necessary party and does not need to hire an attorney to prepare these documents. UPL Op. 183, *supra*. This would include drafting instruments for execution by the Lender to appoint the company as substitute trustee under the Deed of Trust (Item 3) but not the Deed in Lieu of Foreclosure (Item 7). However, the Company cannot charge a separate fee to Lender for preparation of legal documents. *See, e.g.*, UPR 6-103 (A) (4); UPL Op. 112 (1990). (Lender may prepare deed of trust to secure its

own loan but must do so without imposing separate charge for preparation.)

The committee does not believe, however, that Virginia law authorizes the trustee to prepare forbearance agreements executed by the Lender and Borrower (Item 6) or the Deed in Lieu of Foreclosure (Item 7). Such activity involves the preparation of a legal document to which the Company is not a party. The parties to such legal instruments can prepare them, or an attorney must do so.

With regard to your final inquiries concerning billing and invoices, the committee opines:

1. Charging the Attorney for an administrative fee for "packaging the matter" does not raise any unauthorized practice of law issue. Therefore, since the matter is beyond the committee's purview, the committee cannot advise you on that matter.
2. The committee believes the Company may not invoice the Lender for legal services performed by the Attorney. Since the Company is not authorized to perform such legal services, the Company should not undertake to charge or collect fees for such services. UPL Op. 141 (1990) (fees for closing services by lay settlement company cannot include fees for preparation of legal instruments such as deed, deed of trust, etc.). In the five situations you describe, the Attorney would be representing the Lender, not the Company. Any billing arrangements should, therefore, be between the Attorney and Lender.

This opinion is based only on the facts you presented and is subject to review by Bar Council at its next regularly scheduled meeting, 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 I: ¶10(f)(iii).

Committee Opinion  
January 22, 2001

#### Endnotes

- 1 *Powell v. Adams*, 179 Va. 170, 18 S.E.2d 261 (1942).
- 2 The term "security trust" is a defined term in the statute which includes a deed of trust.
- 3 Va. Code §§ 55-59, 55-59.1 to -59.4, 55-62 and -63.
- 4 I.R.C. § 7425, *et seq.*
- 5 24 C.F.R. § 203.600 *et seq.* (FHA requirements); *Residential Real Estate Transactions in Virginia*, ¶ 4.712 (5th Ed. 1995).
- 6 Va. Code §§ 55-59.4 and 58.1-3340.
- 7 The trustee shall receive a receipt for the proceeds of sale, no purchaser being required to see to the application of the proceeds, account for the same to the commissioner of accounts pursuant to § 26-15 and apply the same, first, to discharge the expenses of executing the trust, including a reasonable commission to the trustee; secondly, to discharge all taxes, levies, and assessment, with costs and interest if they have priority over the lien of the deed of trust, including the due pro rata thereof for the current year; thirdly, to discharge in the order of their priority, if any, the remaining debts and obligations secured by the deed, and any liens of record inferior to the deed of trust under which sale is made, with lawful interest; and, fourthly, the residue of the proceeds shall be paid to the grantor or his

assigns; provided, however, that the trustee as to such residue shall not be bound by any inheritance, devise, conveyance, assignment or lien of or upon the grantor's equity, without actual notice thereof prior to distribution; provided further that such order of priorities shall not be changed or varied by the deed of trust. The trustee's deed shall show the trustee's mailing address. Virginia Code § 55-59.4.

- 8 *Florance v. Friedlander*, 209 Va. 520, 165 S.E.2d 388 (1969) (written notice must reach the maker to be effective); *Sharpe v. Talley*, 215 Va. 615, 212 S.E.2d 273 (1975) (lender cannot rely solely on acceleration provisions in deed of trust and some further affirmative action is required; notice of acceleration must be unconditional).

**UNAUTHORIZED PRACTICE OF LAW OPINION 200**

**FOREIGN ATTORNEY REPRESENTING CORPORATION AT ARBITRATION HEARINGS IN VIRGINIA**

Your inquiry involves an attorney who is not licensed to practice law in Virginia, but who is licensed to practice law in Maryland and is also admitted in the Federal Court for the District of Maryland, the United States Court of Appeals for the Fourth Circuit, and the United States Supreme Court. The attorney represents an entity which is incorporated in Michigan, with regional offices in Pennsylvania, and is registered to do business in Maryland and Virginia. The current contract calls for interpretation under the laws of Pennsylvania and contains a mandatory arbitration agreement. Typically, these particular arbitrations do not utilize the common law of any state, but are commercial cases in which the Uniform Commercial Code is applied.

Under the facts you have presented, you have asked the committee to opine as to whether the foreign attorney can represent the corporation at arbitration hearings held in Virginia.

The Committee considered your inquiry at its December 14 meeting and has directed me to transmit its conclusions to you.

The committee is of the opinion that the foreign attorney is authorized to represent his client in an arbitration proceeding in Virginia if it would be incidental to the foreign attorney's representation of the client whom the attorney represents elsewhere as permitted by Va. S. Ct. R. pt. 6, § I (C).

The Committee is of the opinion that, although a foreign attorney who represents a party in an arbitration proceeding in Virginia is not representing a party before a "tribunal,"<sup>1</sup> such an attorney is certainly "practicing law" in Virginia. Further, a foreign attorney, i.e., a non-Virginia licensed attorney, is treated as a "nonlawyer" for purposes of the Unauthorized Practice Rules. Va. S. Ct. R., pt. 6, § I (C):

The term "nonlawyer" means any person, firm, association or corporation not duly licensed or authorized to practice law in the Commonwealth of Virginia. However, the term "nonlawyer" shall not include foreign attorneys who provide legal advice or services in Virginia to clients under the following restrictions and qualifications:

1. Such foreign attorney must be admitted to practice and be in good standing in any state in the United States; and
2. The services provided must be on an occasional basis only and incidental to representation of a client whom the attorney represents elsewhere; and

3. The client must be informed that the attorney is not admitted in Virginia.

A lawyer who provides services not authorized under this rule must associate with an attorney authorized to practice in Virginia.

Nothing herein shall be deemed to overrule or contradict the requirements of Rules of this Court regarding foreign attorneys admitted to practice in the courts of the Commonwealth of Virginia including the association of counsel admitted to practice before the courts of this Commonwealth.

A lawyer who provides services as authorized under this rule, or who is admitted *pro hac vice* under Rule 1A:4 shall, with regard to such services or admission, be bound by the disciplinary rules set forth in the Virginia Code of Professional Responsibility.

Failure of the foreign attorney to comply with the requirements of these provisions shall render the activity by the attorney in Virginia to be the unauthorized practice of law.

The committee has previously opined that it is not the unauthorized practice of law for a non-Virginia licensed attorney to present evidence and argue matters before of law before an arbitration panel of the American Arbitration Association in Virginia in order to represent a client from the attorney's jurisdiction in a franchise contract dispute. UPL Op. 92 (1986).

Therefore, the committee is of the opinion that the foreign attorney is authorized to represent his client in an arbitration proceeding in Virginia if it would be incidental to the foreign attorney's representation of the client whom the attorney represents elsewhere as permitted by Va. S. Ct. R. pt. 6, § I (C).

Committee Opinion  
January 22, 2001

**Endnotes** -----

- 1 "Tribunal" is a defined term in the Unauthorized Practice Rules:  
  
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 nonlawyer on behalf of another is authorized by statute.

**UNAUTHORIZED PRACTICE OF LAW OPINION 201**

**ACTIVITIES OF ATTORNEYS NOT LICENSED TO PRACTICE LAW IN VIRGINIA AND WORKING IN THE VIRGINIA OFFICE OF A MULTIJURISDICTIONAL LAW FIRM**

Your inquiry concerns a multi-jurisdictional law firm and whether attorneys practicing in the firm's Virginia office, who

are not licensed to practice law in Virginia, are permitted to perform certain activities.

You have asked the committee to opine as to whether it would be the unauthorized practice of law in Virginia for those non-Virginia attorneys to:

1. Engage in the practice of law when the matter concerns the law of the jurisdiction where the attorney is licensed to practice.
2. Provide legal representation in matters involving federal law.
3. Meet with and advise clients, who are not Virginia residents, in matters which do not concern Virginia law.
4. Provide legal services concerning Virginia law when in association or supervised by a Virginia-licensed attorney.

The Committee considered your inquiry at its December 14 meeting and has directed me to transmit its conclusions to you.

In regard to your first inquiry, the committee has recently opined that a foreign attorney (i.e., a licensed attorney not admitted in Virginia) may advise a client in Virginia on matters involving the law of the jurisdiction in which the foreign attorney is admitted to practice. UPL Op. 195 (2000). Prior opinions concluding that such activity is unauthorized practice have been overruled.<sup>1</sup> However, any law firm stationery or other public communications identifying the lawyer with the Virginia office must indicate that the lawyer is either not admitted in Virginia or that the lawyer is admitted only in those states where he or she is admitted to practice. UPL Op. 196 (2000).

As to your second inquiry concerning matters involving federal law, a foreign attorney may advise and prepare legal documents for a Virginia client in Virginia on such matters, assuming that the foreign attorney is admitted to practice before that federal court.<sup>2</sup> Such advice and document preparation may be provided only to the extent that the federal matter is not impacted by Virginia law and if Virginia legal issues are not involved. UPL Op. 158 (1996). A non-Virginia licensed attorney may also be authorized by federal law to represent persons before a federal administrative agency and may therefore give advice to and prepare legal instruments for such clients in the regular course and within the scope of practice authorized by such federal agency. UPR 9-102. The committee has previously opined that it is not the unauthorized practice of law for an attorney not licensed in the Commonwealth of Virginia to maintain an office in Virginia for a practice limited exclusively to matters before the United States Immigration and Naturalization Service. UPL Op. 55 (1983). However, such attorneys must indicate on their letterhead stationery and other public communications that their practice is limited exclusively to practice before that agency. *Id.* See also UPL Op. 196 (2000). Therefore, an attorney in your multi-jurisdictional law firm need not be admitted to the Virginia State Bar to represent clients in Virginia on matters involving federal law as described above. However, any law firm letterhead stationery or other public communications identifying such lawyer as practicing in the Virginia office must denote the limitation on that lawyer's practice. UPL Op. 196 (2000).

As to your third inquiry, the committee has previously opined that it would constitute the unauthorized practice of law for a foreign attorney to advise any client in Virginia on matters that involve law which is neither federal law nor the law of a jurisdiction in which the foreign attorney is authorized to practice law. UPL Op. 158 (1996). Therefore, a non-Virginia licensed attorney practicing in the Virginia office of a multi-jurisdictional law firm cannot meet with clients in Virginia to give legal advice involving the application of the law of a jurisdiction in which the attorney is not admitted to practice.

Finally, in response to your fourth inquiry, A foreign attorney is regarded as a "nonlawyer" for purposes of the unauthorized practice of law rules. Va. S. Ct. R., pt. 6, § I (C). Except as permitted under the cited rule,<sup>4</sup> a foreign attorney, although admitted to and in good standing in the bar of his home jurisdiction, may not advise or prepare legal documents for a Virginia client in Virginia on matters involving Virginia law. The foreign attorney may give advice to and prepare legal instruments for a Virginia lawyer who may then decide whether such work product is acceptable for the client. UPL Op. 107 (1987). Therefore, a non-Virginia licensed attorney may provide legal services concerning Virginia law when directly supervised by a Virginia-licensed attorney if the attorney-client relationship remains between the Virginia attorney and the client.

This opinion is based only on the facts you presented and is subject to review by Bar Council at its next regularly scheduled meeting, 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 I: ¶10(f)(iii).

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#### Endnotes

- 1 UPL Op. 100 prohibited a D.C. attorney, who desired to move his practice to Virginia, from conducting a practice involving federal legislative, governmental and advisory matters, none of which involved the application of Virginia law. UPL Op. 107 declared that it is the unauthorized practice of law for a non-Virginia attorney to render legal advice in Virginia *even on the law of his home jurisdiction*. Both opinions were overruled by UPL Op. 158 (1996). See also UPL Op. 195 (2000).
- 2 A foreign attorney must be careful, however, to observe the local rules of the federal courts sitting in Virginia, which require that an attorney either be a member of the Virginia State Bar, or be admitted on motion, *pro hac vice*, in association with an attorney admitted to practice in the Virginia federal courts. See Local Rule 83.1 of the United States District Court for Eastern District of Virginia; Local Rule 3 of the United States District Court for the Western District of Virginia. Not all federal courts require attorneys to be admitted to practice in the state in which they sit. Therefore, it is possible for a foreign attorney in Virginia to advise a Virginia client on matters pending in a federal court outside of Virginia, if the foreign attorney is admitted to practice in that federal court.
- 3 The term "nonlawyer" means any person, firm, association or corporation not duly licensed or authorized to practice law in the Commonwealth of Virginia. However, the term "nonlawyer" shall not include foreign attorneys who provide legal advice or services in Virginia to clients under the following restrictions and qualifications:
  - a. Such foreign attorney must be admitted to practice and in good standing in any state in the United States; and

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- b. The services provided must be on an occasional basis only and incidental to representation of a client whom the attorney represents elsewhere; and
- c. The client must be informed that the attorney is not admitted in Virginia.

A lawyer who provides services not authorized under this rule must associate with an attorney authorized to practice in Virginia.

Nothing herein shall be deemed to overrule or contradict the requirements of Rules of this Court regarding foreign attorneys admitted to practice in the courts of the Commonwealth of Virginia including the association of counsel admitted to practice before the courts of this Commonwealth.

- 4 The limited “transactional lawyer” exception for foreign attorneys in Va. S. Ct. R., pt. 6, § I (C) does not apply to the facts in this opinion because the foreign attorney is practicing regularly in a Virginia law office and not “incidentally” and “occasionally” as contemplated by the cited rule.