

# *Virginia State Bar Council to Review a Proposed Amendment to Rule 1.7 of the Rules of Professional Conduct*

RICHMOND, April 12, 2004—Pursuant to Part Six: Section IV, Paragraph 10(c)(iv) of the Rules of the Supreme Court of Virginia, the Virginia State Bar's Standing Committee on Legal Ethics is asking Council, at its meeting on June 16–20, 2004, in Virginia Beach, Virginia, to consider for approval, disapproval, or modification, a proposed amendment to Rule 1.7 of the Virginia Rules of Professional Conduct.

This amendment was originally part of the Legal Ethics Committee's comprehensive review of the Rules of Professional Conduct, the amendments of which were approved by the Virginia Supreme Court and went into effect on January 1, 2004. That review had two primary goals: (1) the Legal Ethics Committee reviewed the American Bar Association's Ethics 2000 initiative, which involved revising the Model Rules of Professional Conduct; and (2) the Legal Ethics Committee reviewed Virginia's current rules to determine, now that they have been in place since January 2000, whether any provisions need clarification.

## **Rule 1.7**

The Committee proposes an amendment to Rule 1.7 that replaces the rule in its entirety. The new language is from the Ethics 2000 initiative. The Committee found persuasive the ABA's contention that the current language of Rule 1.7 is ambiguous. The purpose of the proposed language is to provide a clearer test for lawyers to apply to potential conflicts of interest; nonetheless, the Committee does not believe the new language represents a substantively different test, just a clearer articulation of the current one. The Committee, in proposing this new language, chose not to include the ABA's requirement that consent be in writing as that requirement would have been a substantive departure from the current Rule. The pro-

posed amendment, however, does require that an attorney memorialize in writing that the attorney and client discussed a conflict and that the client consented to the lawyer continuing the representation. Further, the Committee proposes changes to the comments of the rule which clarify that, while any memorialization would be better than none at all, it would be best to obtain the client's consent in writing.

Additionally, the Committee took the language from Rule 2.2 (this Rule was deleted by the amendments effective January 1, 2004) and put it into the comments of Rule 1.7. The purpose of this move was concern that there could be confusion between Rule 1.7's application to joint representations and former Rule 2.2's application to the lawyer's role as intermediary. As the two contexts are indistinguishable, all such situations would now be handled in one rule, i.e., Rule 1.7.

## **Inspection and Comment**

*The proposed amendments 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 amendments can be obtained from the offices of the Virginia State Bar by contacting the Office of Ethics Counsel at (804) 775-0557, or can be found at the Virginia State Bar's Web page at <http://www.vsb.org>.*

*Any individual, business or other entity may file or submit written comments in support of, or in opposition to, the advisory opinion by filing ten copies with Thomas A. Edmonds, the Executive Director of the Virginia State Bar, not later than **June 11, 2004**.*

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# *Virginia State Bar Council to Review Proposed Amendments to Rules 7.2 and 7.5 of the Rules of Professional Conduct*

RICHMOND, April 12, 2004—Pursuant to Part Six: Section IV, Paragraph 10(c)(iv) of the Rules of the Supreme Court of Virginia, the Virginia State Bar Council, at its meeting on June 16-20, 2004, in Virginia Beach, Virginia, is expected to consider for approval, disapproval, or modification, a proposed amendments to Rules 7.1 and 7.5 by the Standing Committee on Lawyer Advertising and Solicitation.

## **Rule 7.2**

The Standing Committee on Lawyer Advertising and Solicitation is proposing two amendments to Rule 7.2. The first amendment to Rule 7.2(b) would require attorney advertisers to submit to the bar a copy of any audio or video advertising within 30 days of the date of its first airing or publication. The impetus for this revision is based on the limited ability to adequately review all lawyer advertising under the Committee's current monitoring process. The second amendment to Rule 7.2(e) would allow all attorneys who advertise to file a written statement with the Virginia State Bar identifying the lawyer responsible for all firm advertising, rather than having to

include that identifying information in each and every advertisement. This revision comes from suggestions of the practicing bar whose firms engage frequently in advertising.

## **Rule 7.5**

The Committee is also proposing an amendment to Comment [1] of Rule 7.5 which comes as a result of Ethics Counsel realizing that language in the DRs, specifically EC 2-13, was not included in the new Rules when they were adopted in 2000. The language clarifies that a law firm could continue to use the name of a retired or deceased member in the firm's name, if the lawyer was a member of that firm, if doing so is authorized by law or by contract, and if the public is not misled.

## **Inspection and Comment**

*The proposed amendments 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 A.M.*

and 4:30 P.M., Monday through Friday. Copies of the proposed amendments can be obtained from the offices of the Virginia State Bar by contacting the Office of Ethics Counsel at 804-775-0557, or can be found at the Virginia State Bar's Web page at <http://www.vsb.org>.

Any individual, business or other entity may file or submit written comments in support of, or in opposition to, the advisory opinion by filing ten copies with Thomas A. Edmonds, the Executive Director of the Virginia State Bar, not later than **June 11, 2004**.

## *Virginia State Bar Council to Review UPL Opinion 207 Whether it is Unauthorized Practice of Law for a Social Worker to Assist Persons in Preparing Forms for Small Claims Court*

RICHMOND, April 12, 2004—Pursuant to Part Six: Section IV, Paragraph 10(c)(iv) of the Rules of the Supreme Court of Virginia, the Virginia State Bar Council, at its meeting on June 16–20, 2004 in Virginia Beach, Virginia, is expected to consider for approval, disapproval, or modification, a proposed unauthorized practice of law opinion issued by the Standing Committee on the Unauthorized Practice of Law.

### **UPL Opinion 207**

UPL Opinion 207 was issued by the Standing Committee on the Unauthorized Practice of Law on February 18, 2004. This opinion generally addresses whether an attorney may train a non-attorney social worker to assist members of the general public in filling out warrants in debt, and other forms necessary for pro se representation in Small Claims Court in Virginia. The Standing Committee on Legal Ethics referred this inquiry to the UPL Committee for a determination as to whether it is the unauthorized practice of law for a non-lawyer to assist in the activities described. The applicable authority is found in Virginia's definition of the practice of law, in a prior UPL Opinion 73, and also in five of the nine existing UPRs regarding the preparation of legal documents. Based upon this authority, the opinion finds that the preparation of warrants in debt and other forms necessary for pro se representation in Small Claims Court by a non-attorney worker would be the unauthorized practice of law. In addition, the UPL Committee notes that persons proceeding in Small Claims Court are required to represent themselves, which raises a question of whether such limited assistance by a social worker even under the direction of an attorney is permissible. However, the opinion finds that this issue is beyond the purview of the Committee.

### **Inspection and Comment**

*The proposed unauthorized practice of law advisory 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 A.M. and 4:30 P.M., Monday through Friday. Copies of the unauthorized practice of law 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 page at <http://www.vsb.org>*

*Any individual, business or other entity may file or submit written comments in support of, or in opposition to, the advisory opinion by filing ten copies with Thomas A. Edmonds, the Executive Director of the Virginia State Bar, not later than **June 11, 2004**.*

### **UPL OPINION NO. 207**

#### **WHETHER IT IS THE UNAUTHORIZED PRACTICE OF LAW FOR A SOCIAL WORKER TO ASSIST PERSONS IN PREPARING PLEADINGS AND FORMS FOR SMALL CLAIMS COURT**

This comes in response to your request for a legal ethics opinion seeking an opinion as to whether, under Rule 5.5 of the *Rules of Professional Conduct*, an attorney may train non-attorney social workers to assist members of the general public in filling out warrants in debt, and other forms necessary for pro se representation, in Small Claims Court in Virginia. The Standing Committee on Legal Ethics referred this inquiry to the Standing Committee on the Unauthorized Practice of Law for a preliminary determination as to whether it is the unauthorized practice of law, in the first instance, for a non-lawyer to assist persons in the activities described.

The applicable authority is found first in Virginia's definition of the practice of law:

Specifically, the relation of attorney and client exists, and one is deemed to be practicing law whenever—

- (1) One undertakes for compensation, direct or indirect, to advise another, not his regular employer, in any matter involving the application of legal principles to facts or purposes of desires.
- (2) One, other than as a regular employee acting for his employer, undertakes, with or without compensation, to prepare for another legal instruments of any character, other than notices or contracts incident to the regular course of conducting a licensed business.

Authority is also found in a prior opinion of the Committee in which the Committee found specifically that non-lawyer assistance to the general public in the completion of form documents or the providing of legal advice concerning the completion of the forms by non-lawyers constitutes the unauthorized practice of law. UPL Opinion 73.<sup>1</sup>

Finally, there are consistent provisions found in five of the nine existing Unauthorized Practice Rules regarding preparation of legal documents. UPR 2-104, 3-103, 4-103, 6-103(A)(5) and 9-103(B)(2) and (C) as well as UPCs 3-6, 3-7, 4-5, 4-6, 4-5 and 9-7 all contain prohibitions against non-lawyers preparing legal documents, including form legal documents.<sup>2</sup>

Based on this authority, it is the opinion of the Committee that the preparation of warrants in debt and other forms necessary for *pro se* representation (“legal instruments of any character”) in Small Claims Court by a non-attorney social worker would be the unauthorized practice of law.

In addition, the Committee notes that persons proceeding in Small Claims Court are required to represent themselves,<sup>3</sup> which raises a question of whether such limited assistance by a social worker under the direction of an attorney is permissible. However, this is a legal issue beyond the committee’s purview.

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 2004, 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  
February 18, 2004

## ENDNOTES

- 1 It is not the unauthorized practice of law for a non-lawyer to create legal form documents for sale to the general public but it is the unauthorized practice of law for a non-lawyer to assist the general public in the completion of such forms or provide legal advice concerning same. UPL Op. 73, January 18, 1985.
- 2 UPR 2-104. Preparation of Documents.
  - (A) A non-lawyer shall not, with or without compensation, direct or indirect, prepare or deliver legal instruments of any character except a lay adjuster may prepare a form of release or other document prepared or approved by his principal as to which the lay adjuster may fill in blanks supplying factual data.
- UPR 3-103. Preparation of Documents.
  - (A) An agency may prepare statements of accounts and affidavits of facts relating to accounts and may file the same with personal representatives and trustees in bankruptcy.
  - (B) An agency shall not prepare a proof of claim or file such a claim as agent for the creditor with the bankruptcy court except to the extent it is permitted to do so by the Bankruptcy Rules.
  - (C) An agency shall not prepare for others any document which requires legal training or the application of legal principles to factual situations except as authorized under these Rules.
  - (D) An agency shall not use any letters or forms which threaten the institution of legal proceedings or simulate judicial process or notice of judicial process.
- UPR 4-103. Preparation of Documents.
  - (A) A non-lawyer shall not, with or without compensation, prepare or draft, or cause his own lawyer to prepare or draft, for another, legal instruments of any character, including the filling out of a form for any will or trust, except:
    - (1) A non-lawyer may prepare forms of wills or trust of general application.
    - (2) A non-lawyer, as an incident to the regular course of conducting his business, may submit to his customer’s lawyer specimen language for inclusion in a legal instrument to be prepared by such lawyer, subject to acceptance, modification or rejection by such lawyer.
    - (3) A non-lawyer, as an incident to the regular course of conducting his business, may furnish his customer with routine forms or contracts of generally accepted application which do not go beyond the legitimate interest of the non-lawyer and do not involve a selection by the customer as

between alternatives with materially different legal results not generally understood in the community. For example, the offering by a savings institution of a joint account with right of survivorship, a simple revocable trust account or a custodial account under the Virginia Uniform Gifts to Minors Act would normally not constitute the unauthorized practice of law.

## UPR 6-103. Preparation of Legal Instruments.

- (5) A settlement agent authorized to provide escrow, closing or settlement services for real estate transactions under the Consumer Real Estate Settlement Protection Act (CRESPA), Va. Code §§ 6.1-2.19, et seq. or the Real Estate Settlement Agent Registration Act (RESARA), Va. Code §§ 6.1-2.30, et seq. or any other Virginia statute now existing or hereafter enacted may complete form documents and instruments selected by and in accordance with the instructions of the parties to the transaction.

## UPR 9-103. Immigration Practice.

- (B) For purposes of UPR 9-103(A):
  - (2) “Represent” means to engage in “practice” or “preparation” as those terms are defined, respectively, in 8 CFR “1.1(i) and (k), to wit: “practice” means the act or acts of any person appearing in any case, either in person or through the preparation or filing of any brief or other document, paper, application, or petition on behalf of another person or client before or with the Service . . . ; “preparation” means the study of the facts of a case and the applicable laws, coupled with the giving of advice and auxiliary activities, including the incidental preparation of papers, but does not include the lawful functions of a notary public or service consisting solely of assistance in the completion of blank spaces on printed Service forms by one whose remuneration, if any, is nominal and who does not hold himself out as qualified in legal matters or in immigration and naturalization procedure or as 8 CFR Part 292 may be amended from time to time.
- (C) The provisions of (A) and (B) above are not intended to prohibit an unauthorized non-lawyer from assisting an individual in the completion of forms which had been personally selected by the individual, to the extent that such assistance involves only the taking and transcription of dictation or the translation of such dictation into English. However, the referenced provisions are intended to prohibit such an unauthorized non-lawyer from selecting specific forms for completion or from advising the individual as to which forms are appropriate for completion and submission to the Service provided such activities require the use of legal knowledge and skill.

## UPR 3-6. Statements of account and affidavits of facts relating to accounts and other matters are not legal instruments, and the preparation of the same by an agency is not the unauthorized practice of law. Such preparation does not require legal training or the application of legal principles; nor is the mere filing of such accounts or affidavits with personal representatives, trustees in bankruptcy and the like representing the interest of another before a tribunal.

## UPR 3-7. A non-lawyer may properly act as a trustee in bankruptcy but may not prepare pleadings in the bankruptcy court except as authorized by the Bankruptcy Rules.

UPR 4-5. The preparation of legal instruments such as wills, codicils and trusts by a non-lawyer for another, with or without compensation, goes beyond the area of permitted advice incident to the regular course of a non-lawyer’s business. There is nothing improper, however, in the submission of suggested forms for various types of wills or trusts to lawyers for present or prospective customers of a non-lawyer. Distributing forms of separate administrative or dispositive provisions setting forth the proper name of a fiduciary, a charity or the like is not improper.

UPR 4-6. Selecting or filling out a form of will or trust for another is an exercise in legal judgment. As an aid to a customer’s lawyer, a non-lawyer may submit to such lawyer, and only to him, specimen language for technical provisions to be included in his client’s will, codicil or trust; but such non-lawyer is not entitled to hold himself out as the responsible draftsman of such provisions.

UPR 4-7. Advice by a non-lawyer as to the use of his “standard form trust,” “plain English trust,” “mini-trust,” or the like constitutes the unauthorized practice of law when the provisions of such instrument go beyond the legitimate interest of the non-lawyer therein, seek to do more than the normal agency or deposit contract, or affect the legal rights of persons not parties to the contract. For example, the furnishing by a non-lawyer to his customer of a power of attorney which extends the authority of the

attorney-in-fact to deal on behalf of his principal with all his principal's assets or accounts, whether or not maintained by that particular non-lawyer, goes beyond the area of that non-lawyer's legitimate interest.

UPC 9-7. The Virginia State Bar recognizes that certain non-lawyers may be authorized to practice before a federal immigration agency. However, non-lawyers who are not so authorized are limited to providing assistance to an alien resident for such limited services as translation of documents, and assistance in the transcription of documents or answers provided by the alien, for a fee commensurate with such limited services. However, the selection of appropriate immigration forms, the assistance to the alien in the information to be provided on such forms, and other related services by an unauthorized non-lawyer may constitute the unauthorized practice of law.

3 § 16.1-122.4. Representation and removal; rights of parties —

- A. All parties shall be represented by themselves in actions before the small claims court except as follows:
  - 1. A corporate or partnership plaintiff or defendant may be represented by an owner, a general partner, an officer or an employee of that corporation or partnership who shall have all the rights and privileges given an individual to represent, plead and try a case without an attorney. An attorney may serve in this capacity if he is appearing pro se, but he may not serve in a representative capacity.
  - 2. A plaintiff or defendant who, in the judge's opinion, is unable to understand or participate on his own behalf in the hearing may be represented by a friend or relative if the representative is familiar with the facts of the case and is not an attorney.