

**MULTIJURISDICTIONAL PRACTICE TASK FORCE**

*Marni E. Byrum, chair*

In August 2004, the Virginia State Bar formed a Multijurisdictional Practice Task Force to develop new rules and revise existing rules to better accommodate limited practice in Virginia by lawyers licensed only in other U.S. jurisdictions or in foreign countries. The impetus for this task force came from recommendations issued in 2002 in the final report of the American Bar Association Commission on Multijurisdictional Practice and recommendations from another ABA panel tracking the General Agreement on Trade in Services (GATS).

The VSB task force considered the recommendations of the ABA MJP Commission and the ABA GATS Task Force. Representatives from the VSB MJP Task Force and officers of the Virginia State Bar met in Atlanta in August 2004 to discuss these recommendations with leaders from other state bars, leaders of the European Union Bar Association (CCBE), representatives of International Bar Association, the ABA GATS Task Force and the ABA International Law Section. In November 2004, many of these same representatives met again in Washington, D.C., with representatives of the United States Trade Representative, including the chief U.S. negotiator on legal services, Christopher Melly. The VSB MJP Task Force revised rules, as well as developed rules to accommodate the recommendations. Since August 2004, the task force created a Foreign Legal Consultant Rule (FLC Rule)—approved by the Virginia State Bar Council in February 2005 and at this writing pending with the Supreme Court of Virginia—for review and approval. The task force has drafted revisions to Virginia Rules of Professional Conduct 5.5 and 8.5 and an entirely new *pro hac vice* rule. The proposed revisions to Rules 5.5 and 8.5 will likely be presented to the VSB Council for approval in February 2006. The *pro hac vice* rule is under revision and review.

The proposed FLC Rule regulates non-U.S. attorneys who seek to establish a systematic and continuous foreign consultancy practice in Virginia. Rule 5.5 regulates temporary practice by both non-U.S. and U.S. lawyers not admitted in Virginia. Rule 8.5 creates disciplinary authority over both non-U.S. and U.S. attorneys not admitted in Virginia. It also develops choice of law provisions when multiple jurisdictions' rules apply. Though not identical, the proposed rules are similar to and consistent with the ABA recommendations and recommendations from the U.S. Trade Representative.

**The Proposed Foreign Legal Consultant Rule**

The Foreign Legal Consultant Rule allows Virginia clients access to foreign law expertise with accountability; foreign legal consultants (FLCs) will be subject to Virginia's ethics rules and the Virginia State Bar's disciplinary system. Under this rule, the FLC's practice will be limited to the law of his/her admitting country, other foreign countries where the FLC has expertise, and public and private international law. The FLC cannot appear as counsel or prepare pleadings for another before a Virginia court; cannot prepare legal instruments effecting transfer of real estate in the U.S.; cannot prepare will or trust instruments or any instrument relating to administration of a decedent's estate in the U.S.; cannot prepare any legal instrument relating to marital or parental relations in the U.S. or custody or care of children of a U.S. resident; cannot hold out as being a member of the Virginia State Bar; and cannot render advice on the law of Virginia, the District of Columbia, or any other state or territory of the U.S. without association of a licensed lawyer duly qualified to render such advice (other than by virtue of an FLC rule admission).

The FLC can be a member, partner or shareholder in a Virginia law firm. He/she must have a Virginia office and provide to the Virginia State Bar a Virginia address of record for service of disciplinary process.

**Revisions to Rule 5.5**

Rule 5.5, as revised, is patterned after ABA Model Rule 5.5. It regulates unauthorized practice of law in Virginia by non-Virginia licensed attorneys—both those from other U.S. jurisdictions and those licensed in foreign countries. In contrast, ABA Model Rule 5.5 does not cover attorneys licensed in foreign countries. Instead, the ABA has a separate model rule addressing temporary practice in the U.S. by non-U.S. attorneys. The ABA Model Rules are similar, but not identical, to Virginia's proposed Rule 5.5. Under current law, unauthorized practice of law by attorneys or nonattorneys is regulated and monitored by the Virginia State Bar's Standing Committee on the Unauthorized Practice of Law (the UPL Committee) and governed by Virginia's Unauthorized Practice of Law Rules, the Definition of the Practice of Law in Virginia, and Part 6, § I (C), Rules of Supreme Court of Virginia. If adopted, proposed Rule 5.5 would make practice by non-Virginia licensed lawyers, other than as authorized by the rule, a disciplinary matter—Part 6, § I (C), Rules of Supreme Court of Virginia, would be eliminated and the UPL Committee would deal only with unauthorized practice of law by nonattorneys.

The scope of practice allowed under proposed Rule 5.5 would be on a “temporary and occasional basis” only (similar to Part 6, § I (C), Rules of Supreme Court of Virginia) and: (1) in association with a licensed Virginia lawyer who actively participates in the matter; (2) services related to a pending or potential proceeding in Virginia or another jurisdiction if the lawyer is authorized to appear or expects to be so authorized; (3) services related to mediation or arbitration in Virginia or another jurisdiction if such services are related to the lawyer’s practice in his/her licensing jurisdiction and do not require *pro hac vice* admission; or (4) services related to representation of a client in the foreign lawyer’s licensing jurisdiction or services governed by international law or law of a non-U.S. jurisdiction.

The proposed rule prohibits a lawyer from establishing an office or other systematic presence in Virginia except as authorized by other Rules of Professional Conduct or other law. The proposed rule retains the long-standing restrictions regarding the employment of a lawyer whose license has been suspended or revoked.

**Disciplinary Authority and Choice of Law Under Proposed Revisions to Rule 8.5**

Proposed Rule 8.5 addresses disciplinary authority and choice of law in disciplinary cases and provides enforcement authority for Rule 5.5. It expands the Virginia State Bar’s disciplinary authority to include any lawyer who provides or holds out to provide legal services in Virginia, regardless of where the lawyer is licensed. Under this rule a lawyer not admitted in Virginia, who provides or holds out to provide legal services in Virginia, shall consent to appointment of the secretary of the commonwealth as his/her agent for disciplinary service of process. Under proposed Rule 8.5, the choice of law to be applied in a disciplinary matter will be: the rules of the court, agency or tribunal if the conduct in question occurred in connection with a matter before such court, agency or tribunal, for any other conduct, the rules of the jurisdiction where conduct occurred; or the Virginia Rules of Professional Conduct, if the lawyer provides or holds out to provide legal services in Virginia. The ABA Model Rule provides for a choice of law where the conduct had its “predominant effect”; however, the task force chose not to include this in the Virginia rule revision because it believed that where the conduct occurred provided a brighter line for enforcement than the predominant effect test.

Nine states have adopted ABA Model Rules 5.5 and 8.5 in whole or in part, and fifteen others have endorsed and submitted proposed revisions consistent with ABA recommendations to their highest courts.

**Proposed Revisions to Rule 1A:4 Regarding *Pro Hac Vice* Practice**

Revisions to Virginia’s *Pro Hac Vice* Rule (Rule 1A:4, Rules of the Supreme Court of Virginia) are currently under consideration by the task force. Proposed revisions to the rule seek to clarify the procedure for admittance *pro hac vice* of non-Virginia lawyers. Included in these proposed revisions is a recommendation that a limit be placed on the number of times an attorney licensed in another U.S. jurisdiction can appear *pro hac vice* in Virginia courts (the current recommendation is five cases within the year preceding current application). It is envisioned that the Office of the Executive Secretary of the Supreme Court of Virginia, in cooperation with the clerks of the trial courts of the commonwealth, would maintain a central repository of information about *pro hac vice* admissions and make the information available electronically to trial judges who will be ruling on motions for *pro hac vice* admission. Also, there is a recommendation to impose a fee for each *pro hac vice* application. There is ongoing discussion about the use to which the funds generated by the fees would be put. The proposed revisions would require a written motion for admission *pro hac vice* and would set out specific admission standards. The proposed rule would not permit foreign country lawyers to appear *pro hac vice*.

The task force believes adoption of these new rules and proposed revisions to existing rules will address the recommendations of the ABA task force, as well as respond to the exigencies of the U.S. Trade Representative for proposals to GATS. In addition, the proposed rules and revisions are necessary, as a practical matter, to keep up with reality that the practice of law has become globalized and multijurisdictional.

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