

**VIRGINIA STATE BAR  
STUDY COMMITTEE PROPOSED REWRITE OF  
UNAUTHORIZED PRACTICE OF LAW RULES**

**May 2018**

**PART SIX, SECTION ONE: THE PRACTICE OF LAW IN THE COMMONWEALTH OF VIRGINIA AND THE UNAUTHORIZED PRACTICE OF LAW**

**1. PROHIBITION AGAINST UNAUTHORIZED PRACTICE OF LAW:** No non-lawyer shall engage in the practice of law in the Commonwealth of Virginia or in any manner hold himself out as authorized or qualified to practice law in the Commonwealth of Virginia except as may be authorized by rule or statute. The term “non-lawyer” means any person, firm, association or corporation not duly licensed or authorized to practice law in the Commonwealth of Virginia. Any person or entity who practices law without being licensed or otherwise authorized to practice law shall be guilty of a Class 1 misdemeanor. Va. Code §54.1-3904.

**2. GENERAL DEFINITION:** A person or entity engages in the practice of law when representing to another, by words or conduct, that one is authorized to do any of the following:

- A. Undertake for compensation, direct or indirect, to give advice or counsel to an entity or person in any matter involving the application of legal principles to facts.
- B. Select, draft or complete legal documents or agreements which affect the legal rights of an entity or person.
- C. Represent another entity or person before a tribunal.
- D. Negotiate the legal rights or responsibilities on behalf of another entity or person.

**3. EXCEPTIONS:** Non-lawyers and/or Foreign Lawyers (as defined by Part 6, §II, Rule 5.5, Rules of Supreme Court of Virginia) may engage in any of the following actions, even though they may constitute the practice of law:

- A. Providing legal services as permitted by Va. Code §54.1-3900 (military legal assistance attorneys; third year law students or persons in the last year of study in the law reader program practicing under the supervision of a practicing attorney; employees of state agencies in the course of employment representing the agency; non-lawyer employees of the Department of Social Services preparing and signing form petitions for the establishment, modification or enforcement of support in juvenile and domestic relations district courts) and Va. Code § 54.1-3916 (legal aid societies licensed by the Virginia State Bar).
- B. Providing legal services as a foreign attorney as authorized by Part IA of the Rules of Supreme Court of Virginia to include attorneys admitted *pro hac vice*, corporate counsel, registered military assistance attorneys, foreign legal consultants and military spouse provisional admittees.
- C. Providing legal services as a Foreign Lawyer pursuant to Part 6, §II, Rule 5.5 of the Rules of Supreme Court of Virginia (Virginia Rules of Professional Conduct).
- D. Acting as a lay representative authorized by law to appear before administrative agencies or tribunals.
- E. Appearing and filing certain pleadings as authorized under Va. Code § 16.1-88.03 and § 16.1-81.1 (employees or officers of certain business entities).
- F. Acting as a real estate settlement agent authorized by law to provide escrow, closing or settlement services for real estate transactions in the purchase or financing of real estate in the Commonwealth of Virginia. Va. Code, Title 55, Chapters 27.2 and 27.3.
- G. Preparing legal documents as an employee of an entity that are incidental to the entity's business and in connection with a transaction in which the entity has a direct or primary interest.
- H. Performing the tasks as a trustee pursuant to Va. Code §64.2-778.
- I. Discharging the duties and exercising the powers of a trustee on a deed of trust pursuant to Va. Code §55-59.4.

- J. Preparing Advanced Medical Directives pursuant to Va. Code §§54.1-2984, 54.1-2988, 54.1-2988.1 and 54.1-2993.1.
- K. Practicing before the Internal Revenue Service and the United States Tax Court as authorized by law.
- L. Participating in labor negotiations, arbitrations or conciliations arising under collective bargaining rights or agreements.
- M. Preparing a memorandum of understanding or agreement resulting from an alternative dispute resolution proceeding, to include when necessary completion of a child support guidelines worksheet.
- N. Working as a paralegal or other administrative support under the direct supervision of a licensed attorney.
- O. Providing assistance as a court clerk to litigants in completing for filing, forms prescribed by the Supreme Court of Virginia or other tribunal; information shall be limited to description of forms, instructions for use, and required sections to complete. Court clerks shall not engage in providing legal advice, recommendations or opinions as part of the court clerk's assistance.
- P. Serving as a registered patent agent.
- Q. Providing other legal services as authorized by state, federal or other law.

**4. EXCLUSIONS:** The following actions do not constitute the practice of law:

- A. Providing translation services.
- B. Selling legal forms.
- C. Pro se representation.
- D. Serving as a mediator, arbitrator, conciliator, or facilitator.
- E. Serving as a fiduciary.
- F. Acting as a lobbyist.
- G. Teaching law or providing legal information.
- H. Negotiating settlements and preparing releases in the course of employment as an adjuster or agent for an insurer.

- I. Preparing tax returns to the extent authorized by the Internal Revenue Service or other state law.

**5. COMMENTS:**

- A. Definition of “tribunal”: The term “tribunal” shall include any agency, authority, board, commission or court when it determines the rights and obligations of parties to proceedings before it, as opposed to promulgating rules and regulations of general applicability.
- B. Real Estate Settlement Agents. A non-lawyer licensed real estate agent may, pursuant to Va. Code §54.1-2101.1, prepare contracts incident to the regular course of conducting a licensed real estate business. Paragraph 3(F) of this rule allows attorneys licensed by the Virginia State Bar, a title insurance company licensed by the State Corporation Commission, a title agency or title agent licensed by the State Corporation Commission, or a real estate broker licensed by the Virginia Real Estate Board to serve as a “settlement agent” and provide “escrow, closing or settlement services” to close a transaction involving any real estate located within the Commonwealth, subject to the requirements of Chapters 27.2 and 27.3 of Title 55 of the Code of Virginia. No other person may lawfully act or hold himself or herself out as a settlement agent. *See* Virginia Code §§ 55-525.19(2)-(3), 55-525.18(B)(1).
  1. In connection with a real estate closing, the following tasks may be performed by a non-lawyer settlement agent or a non-lawyer employed by such settlement agent, and do not involve the practice of law:
    - a) ordering a survey, termite or other inspection(s), casualty insurance or certificates of insurance, lien payoff figures, loan checks or title insurance;
    - b) creating or preparing a title abstract;
    - c) determining the status of utility services and assisting in their transfer;

- d) making mathematical calculations involving the proration of taxes, insurance, rent, interest and the like in accordance with the contract or local custom;
  - e) completing form documents selected by and in accordance with the instructions of the parties to the transaction, but not drafting or selecting such documents;
  - f) obtaining lien waivers from mechanics or materialmen in a form acceptable to the parties in interest, but not drafting such waivers or giving advice as to the legal sufficiency thereof;
  - g) preparing settlement statements;
  - h) receiving and disbursing settlement funds;
  - i) drafting receipts and certificates of satisfaction, but not deeds, deeds of trust, deed of trust notes, or deeds of release;
  - j) completing other forms such as the Owner's/Seller's Affidavit, Notice of Availability, and tax reporting forms.
2. A non-lawyer settlement agent cannot provide any legal representation or give legal advice to any party to a transaction. Examples of legal advice which, if provided by a Settlement Agent would be the unauthorized practice of law, include:
- a) explaining the legal obligations of the parties under the real estate sales contract;
  - b) explaining the meaning of legal terms used in taking title to property or advising the parties to the transaction which way to take title to the property;
  - c) explaining the legal obligations of the parties under the loan documents;
  - d) explaining the legal effect of an item reported as an exception in a title commitment;
  - e) explaining the legal effect of a document in the chain of title;
  - f) drafting legal instruments for a party to the transaction, other than completing form documents selected by and in accordance with the instructions of the parties to the transaction;

- g) selecting a legal instrument for a party if to do so requires the exercise of legal judgment;
- h) instructing or assisting a party in the completion of a legal document if to do so requires the exercise of legal judgment;
- i) providing legal opinions in response to the following types of questions:
  - (1) "What should I do?"
  - (2) "What are my rights or obligations under this document?"
  - (3) "What are the lender's rights or obligations under this document?"

C. It is now well settled that a lay corporation may not ordinarily employ an attorney to provide legal services to customers or clients of the corporation. *See, e.g. Richmond Ass'n of Credit Men v. Bar Ass'n of Richmond*, 167 Va. 327, 189 S.E. 153 (1937). The underlying basis of this rule was explained by the Virginia Supreme Court in *Richmond Association of Credit Men* as follows:

[The practice of law] is not a lawful business except for members of the Bar who have complied with all the conditions required by statute and the rules of the Courts. As these conditions cannot be performed by a corporation, it follows that the practice of law is not a lawful business for a corporation to engage in.

The relation of attorney and client is that of master and servant in a limited and dignified sense, and it involves the highest trust and confidence. It cannot be delegated without consent, and it cannot exist between an attorney employed by a corporation to practice law for it, and a client of the corporation, for he would be subject to the directions of the corporation, and not to the directions of the client.

Independent of statute, it is contrary to public policy for a corporation to practice law, directly or indirectly.

UPL Opinion 60 (1985).

- D. The following are examples of activity that fall within the scope of paragraph 3(Q) (“Providing other legal services as authorized by state, federal or other law”):
1. Serving as a legal representative or lay advocate for a party in a state or federal administrative proceeding as permitted by, and subject to, the rules of that agency. (For example, the Social Security Administration and the Virginia Employment Commission.)
  2. Serving as lay advocate for parents in IDEA cases and parents litigating their own child’s IDEA claim.
  3. A non-lawyer entity, such as an insurance company, that employs staff lawyers or captive law firms to provide legal services to its insureds so long as the lawyer employed is able to comply with the Virginia Rules of Professional Conduct. *See* UPL Op. 60.
  4. Any non-profit entity that employs a licensed staff lawyer to assist its consumers and provide pro bono or nominal fee legal services. Provided, however:
    - a) the staff lawyer shall exercise independent professional judgement on behalf of each client;
    - b) the board or management, if composed of non-lawyers, shall not direct or control the lawyer’s independent professional judgement on behalf of any client;
    - c) the initial screening or interview of prospective clients must be done by a lawyer or a non-lawyer under the direct supervisory authority of a staff lawyer; and
    - d) access to confidential information of clients served by the organization shall be restricted to a lawyer or non-lawyers under their direct supervisory authority.

5. Non-lawyers making any disclosures or advisements required by state or federal law, e.g. police officer explaining Miranda rights to an arrestee.
  6. When Congress grants authority to an agency to prescribe regulations governing the recognition and conduct of a person representing the interest of another before such agency, the State is preempted from enforcing its own rules of practice while such person is acting reasonably within the scope of the practice authorized by the agency. *Sperry v. Florida ex rel. Florida Bar* 373 U.S. 379 (1963) (Florida may not prohibit non-lawyer patent agent from performing within Florida tasks which are incident to the preparation and prosecution of patent applications before the Patent Office).
- E. Paragraph 4(B) (“Sale of legal forms”) permits the sale of legal forms provided no legal advice is provided to complete the forms.
- F. The following are examples of activity which fall within the scope of paragraph 4(G) (“Teaching law or providing legal information”):
1. A law professor instructing a class in the application of law to a particular real situation is not engaged in the practice of law because she is not undertaking to provide advice or services for one or more clients as to their legal interests.
  2. Non-lawyer employees of an entity or organization providing legal information or education about law, regulations, legal procedures or compliance issues for the purpose of training other employees or members of the entity or organization. For example, a human resource manager or FOIA officer is not engaged in the practice of law when advising the employer as to what the employer must do to comply with state or federal laws.
  3. Non-lawyer providing information about the application of the law to a product or service that the non-lawyer is otherwise authorized to provide to the public. For example:
    - a) Lender explaining right of rescission to borrower in a refinancing of real estate.
    - b) Preparation of privacy notices for customers by credit card companies.

- c) Preparation of authorization to share patient's medical information under HIPAA.
  - d) Tax accountants, real estate agents, title company attorneys, securities advisors, pension consultants, and the like, who do not indicate they are providing legal advice or services based on competence and standing in the law are not engaged in the practice of law, because their relationship with the customer is not based on the reasonable expectation that learned and authorized professional legal advice is being given.
4. Non-lawyer employees and supervised volunteers of nonprofit entities whose primary purpose is assisting domestic violence and sexual assault victims, may explain to victims how to seek legal recourse, accompany victims throughout all stages of court proceedings, and respond to inquiries by the court. However, they shall not examine witnesses, make arguments to the court, or otherwise act in a representative capacity for the victims.
  5. A lay trustee on a deed of trust may prepare the legal instruments necessary to sell or encumber real estate to which he holds the legal title e.g. contracts, deeds, deeds of trust, etc.
- G. *Pro se* representation. Every jurisdiction recognizes the right of an individual to proceed *pro se* by providing his or her own representation in any matter, whether or not the person is a lawyer. Because the appearance is personal only, it does not involve an issue of unauthorized practice. The right extends to self-preparation of legal documents and other kinds of out-of-court legal work as well as to in-court representation.

## 6. ANNOTATIONS:

- A. **Preparation of legal instruments incident to the ordinary course of conducting a licensed business is not the unauthorized practice of law:** A non-lawyer may prepare legal instruments incident to the ordinary course of conducting a licensed business. For example, a real estate broker or agent may prepare and have the buyer and seller execute a contract for the sale of real

estate which the agent or broker participated. *Commonwealth v. Jones & Robins, Inc.*, 186 Va. 30, 41 S.E.2d 720 (1947). It is not the unauthorized practice of law for a pension plan administrator to offer the legal services of preparing, amending and submitting pension plans to the IRS where such activities arise in association with the administrator's primary business of administering individually-tailored plans. UPL Op. 77(1985).

- B. Preparation/completion of Advance Medical Directive by non-lawyer:** Ministerial assistance to another in completing and executing an advanced medical directive in the form prescribed by Va. Code §54.1-2984 is not unauthorized practice of law. Va. Code §54.1-2988.1. Ministerial assistance does not include expressing an opinion about the legal effect of the alternative choices or offering legal advice. *Id.*
- C. A non-lawyer may serve as an arbitrator or mediator since neither activity is the practice of law.** The Supreme Court of Virginia allows certification of non-lawyers as well as lawyers as mediators. *See Guidelines for the Training & Certification of Court-Referred Mediators*, Judicial Council of Virginia, November 1, 2017. Whether certified or not, a lawyer or non-lawyer serving as a mediator or arbitrator shall not give the parties legal advice. *See Virginia Code §8.01-581.26(3)*(requiring mediator to inform parties at the outset of the mediation process that the mediator does not give legal advice). *See also* Pt. 6, §II, Rule 2.10 (Third Party Neutral), cmt.[3] and Rule 2.11 (Mediator) cmt.[7](prohibiting a lawyer serving as a third party neutral or mediator from offering any of the parties legal advice as distinct from legal information or neutral evaluation); and *Standards of Ethics and Professional Responsibility for Certified Mediators*, Standard D.2(1), adopted by Judicial Council of Virginia effective July 1, 2011.
- D. Non-lawyer advocates in Social Security matters:** The Social Security Act permits a non-lawyer to represent a third person in pursuing a Social Security claim. 42 U.S.C. § 406(a)(1) ("The Commissioner of Social Security may prescribe rules and regulations governing the recognition of agents or other persons, other than attorneys as hereinafter provided, representing claimants

before the Commissioner of Social Security, and may require of such agents or other persons, before being recognized as representatives of claimants that they shall show that they are of good character and in good repute, possessed of the necessary qualifications to enable them to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the presentation of their cases.")

E. **Non-lawyer employees of a business or company:** A non-lawyer employee of a corporation may permissibly draft legal documents, negotiate complex transactions, and perform other tasks for the employing organization, even if the task is typically performed by lawyers for the organization. Restatement (Third) of Law Governing Lawyers § 4 cmt. e (2000). By statute, lay employees may prepare certain pleadings and appear on behalf of their employer in a limited role in General District Court. Va. Code §16.1-88.03. Small businesses may appear *pro se* in General District Court through one of its owners or officers if the claim does not exceed \$2500. Va. Code §16.1-81.1. A non-lawyer officer or designated employee may represent their employer's interests in dispute resolution processes such as mediation or arbitration. UPL Op. 206 (2004). It is not the unauthorized practice of law for bank personnel to prepare deeds of trust with the bank as sole beneficiary. UPL Op. 49 (1980); UPL Op. 109 (1988). In Small Claims Court, an owner, a general partner, an officer or an employee of a corporate or partnership plaintiff or defendant may represent that corporation or partnership and shall have all the rights and privileges given an individual to represent, plead and try a case without an attorney. Va. Code §16.1-122.4.

F. **Serving as lay advocate for parents and pro se representation in IDEA cases:** Parents may represent their child in due process hearings and in federal court under the IDEA. *Winkelman v. Parma City School Dist.*, 550 U.S. 516 (2007) (IDEA allows parents to litigate their child's claim *pro se*). UPL Op. 187 (1996) (34 C.F.R. § 300.58 permits the aggrieved parents in IDEA hearings to be represented by counsel or a lay advocate, provided the lay advocate is a person having special knowledge or training concerning the problems of

children with disabilities. Under the Virginia IDEA statutes, specifically § 22.1-214(C), a party may be “represented by legal counsel or other representative before such hearing officer without being in violation of the provisions of § 54.1-3904 [prohibition against unauthorized practice of law].” Virginia Department of Education regulations permit a party to be “accompanied and advised” by an advocate “without [a] violation of the provisions of § 54.1-3904 of the Code of Virginia as amended.”)

**G. Trustee in a foreclosure sale—statutory duties.**

Virginia law does not require that a lawyer serve as the trustee on a deed of trust and a non-lawyer is authorized to serve in this capacity. Virginia Code Section 55-58.1 requires only that a person named as trustee be a Virginia resident. Incident to the sale of property under a deed of trust, Virginia Code §55-59.4 requires the trustee to perform tasks and make judgments which undoubtedly require the exercise of legal knowledge, judgment and skill. Since the trustee is a party to the deed, the trustee is authorized to prepare this legal instrument. 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. *See*, Va. Code §55-59.4 (Powers and duties of trustee in event of sale under or satisfaction of deed of trust.). *See* UPL Opinion 193 (1999) and UPL Op. 198 (2006)(activities of a business composed of non-lawyers and offering residential foreclosure services to mortgage lenders acting as trustees).

**H. Representation of others before state and federal administrative agencies**

Representing another before an administrative agency normally constitutes the practice of law. Regulation of the practice of law before administrative agencies is the responsibility of Congress or the Virginia General Assembly. Also, an agency’s own rules or regulations may authorize a non-lawyer or foreign lawyer to represent a party before that agency. *See also*, UPL Op. 113 (1988) (on behalf of their employer a non-lawyer may participate in informal fact-finding hearing before state agencies as permitted by Virginia Administrative Procedures Act); UPL Op. 74 (1984) (Virginia Code §60.1-

124.1 authorizes the appearance of a non-lawyer on behalf of another before the Virginia Employment Commission).