

*Change “Notice of Hearing” to “Charge of Misconduct”*

On December 7, 2005, COLD approved a proposed amendment changing references to “Notice of Hearing” to “Charge of Misconduct” because “Notice of Hearing” is no longer a defined term in Paragraph 13 of the Rules of Court.

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

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

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H. District Committee Proceedings

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2. Hearing Procedure

a. Attendance at Hearing

District Committee Hearings, except deliberations, shall be open to the public.

b. Public Docket

The Clerk’s Office shall maintain a public docket of all matters set for hearing before a District Committee or certified to the Board. For every matter for which a Notice of Hearing before a District Committee for which a Charge of Misconduct has been mailed by the Office of Bar Counsel, the Clerk shall place it on the docket 21 days after the date of the Notice Charge of Misconduct. For every Complaint certified to the Board by a Subcommittee, the Clerk shall place it on the docket on receipt of the statement of the certified charges from the Subcommittee.

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I. Board Proceedings

1. Pre-Hearing Matters

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3. Procedure Upon Appeal of a District Committee Determination

a. Procedure

Upon receipt of notice from the Clerk of the Disciplinary System that a Respondent has filed an appeal from a District Committee Determination or that the Board has granted a petition for appeal, the Board shall place such matter on its docket for review. The Clerk of the

Disciplinary System shall notify the appellant when the entire record of the proceeding before the District Committee has been received or when the time for appeal has expired. The record shall consist of the notice of hearing Charge of Misconduct, the complete transcript of the proceeding, any exhibits received or refused by the District Committee, the District Committee Determination, and all briefs, memoranda or other papers filed with the District Committee by the Respondent or the Bar. Upon petition of the Respondent, for good cause shown, the Board may permit the record to be supplemented to prevent injustice, such supplement to be in such form as the Board may deem appropriate. Thereafter, briefs shall be filed in the office of the Clerk of the Disciplinary System, as follows.

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4. Proceedings Upon Certification for Sanction Determination:

a. Initiation of Proceeding:

Upon receipt of the Certification for Sanction Determination from a District Committee, the Clerk of the Disciplinary System shall issue a Notice of Hearing on the Certification for Sanction Determination giving Respondent the date, time and place of the proceeding and a copy of the Certification for Sanction Determination.

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N. Confidentiality of Disciplinary Records and Proceedings.

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3. Timing of Public Access to Disciplinary Information:

All records of a matter set for public hearing remain confidential until the matter is dismissed or a public sanction is imposed except:

- a. A Notice of Hearing Charge of Misconduct is public when the matter is placed on the public District Committee hearing docket; and

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Comments or questions should be submitted in writing to Thomas A. Edmonds, Executive Director, Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219, no later than **February 13, 2006**. The Virginia State Bar Council will consider the proposed amendments when it meets on March 2–3, 2006.

## Virginia State Bar Council to Review a Proposed Amendment to Rule 5.6 of the Rules of Professional Conduct

Pursuant to Part Six: Section IV, Paragraph 10(c) of the Rules of the Supreme Court of Virginia, the Virginia State Bar Council, at its meeting on March 2-3, 2006 in Richmond, Virginia, is expected to consider for approval, disapproval, or modification, a proposed amendment Rule 5.6 of the Rules of Professional Conduct.

This proposed amendment came to the Committee at the recommendation of the Boyd-Graves Conference. This group proposed to amend Rule 5.6(b), which prohibits an attorney from entering into an agreement that broadly restricts his ability to practice law. These restrictions are usually sought by a civil defense firm in a settlement agreement and specifically call for the plaintiff's firm to refrain from ever bringing similar suits again. The inclusion of "broadly" in Virginia's rule is unique. Other states, as well as the American Bar Association, prohibit any restriction on the ability to practice in this context. Based on this analysis, the Committee adopted the Boyd-Graves Conference's recommendation to eliminate "broadly" from Rule 5.6.

### Inspection and Comment

The proposed amendment 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 amendment 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 proposed amendment by filing ten copies with Thomas A. Edmonds, the Executive Director of the Virginia State Bar, not later than **February 13, 2006**.

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### *(July 21, 2005—Amendments as proposed by the Standing Committee on Legal Ethics)*

#### **RULE 5.6 Restrictions On Right To Practice**

**A lawyer shall not participate in offering or making:**

**(a) a partnership or employment agreement that restricts the right of a lawyer to practice after**

**termination of the relationship, except an agreement concerning benefits upon retirement; or**

**(b) an agreement in which a ~~broad~~\* restriction on the lawyer's right to practice is part of the settlement of a controversy, except where such a restriction is approved by a tribunal or a governmental entity.**

### Comment

[1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

[2] Paragraph (b) prohibits lawyers from agreeing to a ~~broad~~ restriction on their right to practice, unless approved by a tribunal (in such situations as the settlement of mass tort cases) or a governmental entity. However, the lawyer must fully disclose the extent of any restriction to any future client and refer the client to another lawyer if requested to do so.

### Virginia Code Comparison

This Rule is similar to DR 2-106, although it specifically permits a ~~broad~~ restriction if it is approved by a tribunal or a governmental entity.

### Committee Commentary

After a lengthy debate about the merits of settlements and the public policy favoring clients' unrestricted choice of legal representation, the Committee decided to generally prohibit provisions in settlement agreements that broadly restricted a lawyer's right to practice, but added an exception if a tribunal or a governmental entity approves the restriction. The Comment emphasizes that lawyers whose right to practice has been restricted by a court-approved settlement should advise all future clients of the restriction and refer them to other counsel, if necessary.

\* In the printed version of the January 2006 issue of the Virginia Lawyer Register, the word "broad" in this location was not struck.

## *Virginia State Bar Council to Review Proposed Amendments to Rules 5.5 and 8.5 of the Rules of Professional Conduct*

Pursuant to Part Six: Section IV, Paragraph 10(c) of the Rules of the Supreme Court of Virginia, the Virginia State Bar Council, at its meeting on March 2–3, 2006 in Richmond, Virginia, is expected to consider for approval, disapproval, or modification, proposed amendments to Rules 5.5 and 8.5 of the Rules of Professional Conduct.

The proposed amendments to Rules 5.5 and 8.5 are the work product of the Virginia State Bar's Task Force on Multi-Jurisdictional Practice. The Task Force was created to study foreign attorney practice in Virginia and make recommendations concerning the requirements under which non-Virginia lawyers should be permitted to practice in Virginia. One of the foremost tasks of the MJP Task Force is to develop rules that define and regulate temporary practice in Virginia by lawyers who are not members of the Virginia State Bar. The proposed amendment to Rule 5.5 addresses criteria for temporary practice and unauthorized practice of law in Virginia by foreign attorneys in Virginia. The proposed amendment to Rule 8.5 addresses the disciplinary authority and jurisdiction of the Virginia State Bar over foreign attorneys practicing in Virginia.

### **Rule 5.5—Temporary Practice by a Foreign Lawyer**

The proposed amendment to Rule 5.5 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. Under current Virginia law, unauthorized practice of law by attorneys or non-attorneys 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. Proposed Rule 5.5 makes 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 non-attorneys.

The proposed Rule 5.5 authorizes a Foreign Lawyer to provide legal services in Virginia on a "temporary and occasional basis" (similar to what is currently allowed under Part 6, § I (C), Rules of Supreme Court of Virginia) only if they are: (1) undertaken in association with a licensed Virginia lawyer who actively participates in the matter; (2) 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) 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) related to representation of a client in the foreign lawyer's licensing jurisdiction or which are 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 under the current Rule 5.5 regarding the employment of a lawyer whose license has been suspended or revoked.

### **Rule 8.5—Disciplinary Authority and Choice of Law**

The proposed amendment to Rule 8.5, patterned after ABA Model Rule 8.5, addresses disciplinary authority and choice of law in disciplinary cases and provides enforcement authority for proposed Rule 5.5. The proposed rule extends the Virginia State Bar's disciplinary authority over any lawyer who provides or holds out to provide legal services in Virginia, regardless of where the lawyer is licensed. Under the proposed amendment Rule 8.5 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. The choice of law to be applied in a disciplinary matter will be: (1) 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; (2) for any other conduct, the rules of the jurisdiction where conduct occurred; or (3) 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.

### **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 proposed amendments by filing ten copies with Thomas A. Edmonds, the Executive Director of the Virginia State Bar, not later than **February 13, 2006**.

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## PROPOSED RULE CHANGES

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### ***(December 14, 2005 — Amendments as proposed by the Task Force on Multijurisdictional Practice of Law)***

#### **Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law**

(a) A lawyer shall not:

~~(1) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or~~

~~(2) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.~~

(b) A lawyer, law firm or professional corporation shall not employ in any capacity a lawyer whose license has been suspended or revoked for professional misconduct, during such period of suspension or revocation, if the disciplined lawyer was associated with such lawyer, law firm or professional corporation at any time on or after the date of the acts which resulted in suspension or revocation.

(c) A lawyer, law firm or professional corporation employing a lawyer as a consultant, law clerk or legal assistant when that lawyer's license is suspended or revoked for professional misconduct shall not represent any client represented by the disciplined lawyer or by any lawyer with whom the disciplined lawyer practiced on or after the date of the acts which resulted in suspension or revocation.

(d) A lawyer shall not practice law in a jurisdiction ~~where doing so violates in violation of~~ the regulation of the legal profession in that jurisdiction; or assist another in doing so.

(e) Foreign Lawyers:

(1) "Foreign Lawyer" is a person authorized to practice law by the duly constituted and authorized governmental body of any State or Territory of the United States or the District of Columbia, or a foreign nation, but is neither licensed by the Supreme Court of Virginia or authorized under its rules to practice law generally in the Commonwealth of Virginia, nor disbarred or suspended from practice in any jurisdiction.

(2) A Foreign Lawyer shall not, except as authorized by these Rules or other law:

(i) establish an office or other systematic and continuous presence in Virginia for the practice of law, which may occur even if the Foreign Lawyer is not physically present in Virginia; or

(ii) hold out to the public or otherwise represent that the Foreign Lawyer is admitted to practice law in Virginia.

(3) A Foreign Lawyer shall inform the client and interested third parties in writing:

(i) that the lawyer is not admitted to practice law in Virginia;

(ii) the jurisdiction(s) in which the lawyer is licensed to practice; and

(iii) the lawyer's office address in the foreign jurisdiction.

(4) A Foreign Lawyer, may, after informing the client as required in 3(i)-(iii) above, provide legal services on a temporary and occasional basis in Virginia that:

(i) are undertaken in association with a lawyer who is admitted to practice without limitation in Virginia and who actively participates in the matter;

(ii) are in or reasonably related to a pending or potential proceeding before a tribunal in Virginia or another jurisdiction, if the Foreign Lawyer, or a person the Foreign Lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(iii) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in Virginia or another jurisdiction, if the services arise out of or are reasonably related to the Foreign Lawyer's practice in a jurisdiction in which the Foreign Lawyer is admitted to practice and are not services for which the forum requires *pro hac vice* admission; or

(iv) are not within paragraphs (4)(ii) or (4)(iii) and arise out of or are reasonably related to the representation of a client by the Foreign Lawyer in a jurisdiction in which the Foreign Lawyer is admitted to practice or, subject to the foregoing limitations, are governed primarily by international law or the law of a non-U.S. jurisdiction.

#### **Comment**

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (c) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person.

[2] For purposes of paragraphs (a), (b) and (c) "Lawyer," denotes a person authorized by the Supreme Court of Virginia or its

Rules to practice law in the Commonwealth of Virginia including persons admitted to practice in this state *pro hac vice*.

- [3] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by ~~unqualified unauthorized~~ persons. Paragraph ~~(a)(2)~~ (c) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. *See* Rule 5.3. Likewise, it does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law—for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. ~~In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.~~
- [4] Other than as authorized by law or this Rule, a Foreign Lawyer violates paragraph (d)(2)(i) if the Foreign Lawyer establishes an office or other systematic and continuous presence in Virginia for the practice of law. Presence may be systematic and continuous even if the Foreign Lawyer is not physically present here. Such “non-physical” presence includes, but is not limited to, the regular interaction with residents of Virginia for delivery of legal services in Virginia through exchange of information over the Internet or other means. Such Foreign Lawyer must not hold out to the public or otherwise represent that the Foreign Lawyer is admitted to practice law in Virginia. *See also* Rules 7.1(a) and 7.5(b). Despite the foregoing general prohibition, a Foreign Lawyer may establish an office or other systematic and continuous presence in Virginia if the Foreign Lawyer’s practice is limited to areas which by state or federal law do not require admission to the Virginia State Bar. Examples of lawyers admitted in another United States jurisdiction include those lawyers whose practices are limited to federal tax practice before the IRS and Tax Court, patent law before the Patent and Trademark Office or immigration law. A Foreign Lawyer admitted to practice in a jurisdiction outside the United States may be authorized to practice under Rule 1A:7 as a foreign legal consultant and may likewise establish an office or other systematic and continued presence in Virginia.
- [5] Paragraphs (d)(4)(i), (ii) and (iii) identify circumstances in which a Foreign Lawyer may provide legal services on a temporary basis in Virginia that do not create an unreasonable risk to the interests of their clients, the public or the courts. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. Except as authorized by this rule or other law, a Foreign Lawyer may not establish an office or other systematic and continuous presence in Virginia without being admitted to practice generally here.
- [6] There is no single test to determine whether a Foreign Lawyer’s services are provided on a “temporary basis” in Virginia, and may therefore be permissible under paragraph (d)(4). Services may be “temporary” even though the Foreign Lawyer provides services in Virginia on a recurring basis, or for an extended period of time, as when the Foreign Lawyer is representing a client in a single lengthy negotiation or litigation. “Temporary” refers to the duration of the Foreign lawyer’s presence and provision of services, while “occasional” refers to the frequency with which the Foreign lawyer comes into Virginia to provide legal services.
- [7] Paragraph (d)(1) requires that the Foreign Lawyer be authorized to practice in the jurisdiction in which the Foreign Lawyer is admitted and excludes a Foreign Lawyer who while technically admitted is not authorized to practice, because, for example, the Foreign Lawyer is on inactive status.
- [8] Paragraph (d)(4)(i) recognizes that the interests of clients and the public are protected if a Foreign Lawyer associates with a lawyer licensed to practice Virginia. For this paragraph to apply, however, the lawyer admitted to practice in Virginia must actively participate in and share responsibility for the representation of the client.
- [9] Foreign Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission *pro hac vice* or pursuant to informal practice of the tribunal or agency. Under paragraph (d)(4)(ii), a Foreign Lawyer does not violate this Rule when the Foreign Lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of Virginia requires a Foreign Lawyer to obtain admission *pro hac vice* before appearing before a tribunal or administrative agency, this Rule requires the Foreign Lawyer to obtain that authority.
- [10] Paragraph (d)(4)(ii) also provides that a Foreign Lawyer rendering services in Virginia on a temporary basis does not violate this Rule when the Foreign Lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the Foreign Lawyer is authorized to practice law or in which the Foreign Lawyer reasonably expects to be admitted *pro hac vice*. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a Foreign Lawyer may engage in conduct temporarily in Virginia in connection with pending litigation in another jurisdiction in which the Foreign Lawyer is or reasonably expects to be authorized to appear, including taking depositions in Virginia.
- [11] Paragraph (d)(4)(iii) permits a Foreign Lawyer to perform services on a temporary basis in Virginia if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the Foreign Lawyer’s practice in a jurisdiction in which the Foreign Lawyer is admitted to prac-

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the Foreign Lawyer, however, must obtain admission *pro hac vice* in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

- [12] Paragraph (d)(4)(iv) permits a Foreign Lawyer to provide certain legal services on a temporary basis in Virginia that arise out of or are reasonably related to that lawyer's practice in a jurisdiction in which the Foreign Lawyer is admitted but are not within paragraphs (d)(4)(ii) or (d)(4)(iii). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers. Paragraph (d)(4)(iv) applies to a Foreign Lawyer admitted to practice only in a foreign nation.
- [13] Paragraphs (d)(4)(ii), (d)(4)(iii) and (d)(4)(iv) require that the services arise out of or be reasonably related to the Foreign Lawyer's practice in a jurisdiction in which the Foreign Lawyer is admitted to practice. A variety of factors evidence such a relationship. The Foreign Lawyer's client may have been previously represented by the Foreign Lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the Foreign Lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the Foreign Lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their Foreign Lawyer in assessing the relative merits of each. In addition, the services may draw on the Foreign Lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law.
- [14] Paragraph (d)(4)(iv) recognizes that a Foreign Lawyer may provide legal services when the services provided are governed by international law or the law of a foreign jurisdiction.
- [15] A Foreign Lawyer who practices law in Virginia pursuant to this Rule is subject to the disciplinary authority of Virginia. See Rule 8.5(a).
- [16] Paragraph (d)(4) does not authorize communications advertising legal services to prospective clients in Virginia by Foreign Lawyers who are admitted to practice in other jurisdictions. Whether and how Foreign Lawyers may communicate the availability of their services to prospective clients in Virginia is governed by Rules 7.1 to 7.5.

### Virginia Code Prior Rule Comparison

Paragraph (a)(1) had no direct counterpart in the Virginia Code. EC 3-9 stated: "Authority to engage in the practice of law conferred in any jurisdiction is not *per se* a grant of the right to practice elsewhere, and it is improper for a lawyer to engage in

practice where he is not permitted by law or by court order to do so."

Paragraph (a)(2) is substantially similar to DR 3-101(A) which provided that "[a] lawyer shall not aid a non-lawyer in the unauthorized practice of law."

Paragraph (b) is identical to DR 3-101(B).

Paragraph (c) is identical to DR 3-101(C).

Neither former Rule 5.5 nor any other of the Virginia Rules of Professional Conduct provided any criteria for practice in Virginia by a foreign lawyer (non-Virginia or non-U.S.). Such practice was controlled by Part 6, § I (C) of the Rules of the Virginia Supreme Court which defined "non-lawyer" and set out the parameters for temporary practice in Virginia by a "foreign lawyer," defined only as admitted to practice and in good standing in any state in the U.S. There was no provision for practice by a foreign, non-U.S. lawyer. Enforcement of Part 6, § I (C) fell within the authority of the Virginia State Bar's Standing Committee on the Unauthorized Practice of Law. Rule 5.5 allows for temporary and occasional practice in Virginia by both non-Virginia and non-U.S. lawyers and places enforcement within the Virginia State Bar's disciplinary system.

### Committee Commentary

The Committee adopted this Rule because while paragraph (a)(2) closely parallels DR 3-101(A), paragraph (a)(1) prohibits practicing law illegally in another jurisdiction, something not specifically prohibited by any Disciplinary Rule.

The Committee decided to continue the specific rules (found in paragraphs (b) and (c)) that govern lawyers whose licenses have been suspended or revoked.

The Committee adopted this Rule in light of the recommendation of the American Bar Association (ABA) that the states adopt more specific rules governing multi-jurisdictional practice. This rule adopts language similar to ABA Model Rule 5.5 allowing for circumstances of temporary and occasional practice by lawyers licensed in other U.S. jurisdictions, but expands such practice to include lawyers licensed in non-U.S. jurisdictions. Paragraphs (a) and (b) are identical to paragraphs (b) and (c) in former Virginia Rule 5.5.

### RULE 8.5 Disciplinary Authority; Choice Of Law

- (a) Disciplinary Authority. A lawyer admitted to practice in ~~this jurisdiction~~ Virginia is subject to the disciplinary authority of ~~this jurisdiction~~ Virginia, regardless of where the lawyer's conduct occurs. A lawyer not admitted in Virginia is also subject to the disciplinary authority of Virginia if the lawyer provides, holds himself out as providing or offers to provide legal services in Virginia. By doing so, such lawyer consents to the appointment (insert here an official designated by the Supreme Court of Virginia) as his agent for purposes of

notices of any disciplinary action by the Virginia State Bar. A lawyer may be subject for the same conduct to the disciplinary authority of ~~both this jurisdiction~~ Virginia and ~~any another jurisdiction~~ where the lawyer is admitted ~~for the same conduct~~.

(b) Choice of Law. In any exercise of the disciplinary authority of ~~this jurisdiction~~ Virginia, the ~~R~~rules of ~~P~~professional ~~C~~conduct to be applied shall be as follows:

(1) for conduct in connection with a proceeding in a court, ~~agency or other tribunal~~ before which a lawyer ~~has been admitted to practice (either generally or for purposes of that proceeding)~~ appears, the rules to be applied shall be the rules of the jurisdiction in which the court, ~~agency or other tribunal~~ sits, unless the rules of the court, ~~agency or other tribunal~~ provide otherwise;

~~(2) for any other conduct,~~

~~(i) if the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction, and~~

~~(ii) if the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.~~

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred; and

(3) notwithstanding subparagraphs (b)(1) and (b)(2), for conduct in the course of providing, holding out as providing or offering to provide legal services in Virginia, the Virginia Rules of Professional Conduct shall apply.

### Comment

#### Disciplinary Authority

[1] In the past, a jurisdiction's authority to discipline a lawyer has been based upon whether the lawyer is admitted in that jurisdiction. Subparagraph (a) is a significant change in that a lawyer not admitted in Virginia is nonetheless subject to the disciplinary authority of Virginia for conduct occurring in the course of providing, holding himself out as providing or offering to provide legal services in Virginia. Subparagraph (a) adopts the scope of jurisdiction recommended by the ABA Model Rules for Lawyer Disciplinary Enforcement, as amended in 1996, by extending Virginia's disciplinary authority to any lawyer who commits misconduct within Virginia.

It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to pro-

vide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints (insert here an official to be designated by the Supreme Court of Virginia) to receive service of process in this jurisdiction

#### Choice of Law

[2] Subparagraph (b) seeks to resolve conflicts that may arise when a lawyer is subject to the rules of more than one jurisdiction. The rules of one jurisdiction may prohibit the questioned conduct while the rules of another jurisdiction may permit it. A lawyer admitted in only one jurisdiction may also be subject to the rules of another jurisdiction in which he is not admitted to practice for conduct occurring in the course of providing, holding himself out as providing or offering to provide legal services in the non-admitting jurisdiction. Also, a lawyer admitted in one jurisdiction may be subject to the rules of another jurisdiction if he appears before a court, agency or other tribunal in that jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, and (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions.

[3] If the lawyer appears before a court, agency or other tribunal in another jurisdiction, subparagraph (b)(1) applies the law of the jurisdiction in which the court, agency or other tribunal sits. In some instances, the court, agency or other tribunal may have its own lawyer conduct rules and disciplinary authority. For example, the United States Patent and Trademark Office ("PTO"), through the Office of Enrollment and Discipline, enforces its own rules of conduct and disciplines practitioners under its own procedures. A lawyer admitted in Virginia who engages in misconduct in connection with practice before the PTO is subject to the PTO rules, and in the event of a conflict between the rules of Virginia and the PTO rules with respect to the questioned conduct, the latter would control.

[4] Paragraph (b) provides that as to a lawyer's conduct relating to a proceeding in a court or agency before which the lawyer is admitted to practice (either generally or *pro hac vice*), the lawyer shall be subject only to the rules of professional conduct of that court or agency. As to all other conduct, paragraph (b) provides that a lawyer licensed to practice only in this jurisdiction shall be subject to the rules of professional conduct of this jurisdiction, and that a lawyer licensed in mul-

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~~multiple jurisdictions shall be subject only to the rules of the jurisdiction where the lawyer (as an individual, not the firm) principally practices, but with one exception: if particular conduct clearly has its predominant effect in another admitting jurisdiction, then only the rules of that jurisdiction shall apply. The intention is for the latter exception to be a narrow one. It would be appropriately applied, for example, to a situation in which a lawyer admitted in, and principally practicing in, State A, but also admitted in State B, handled an acquisition by a company whose headquarters and operations were in State B of another, similar such company. The exception would not appropriately be applied, on the other hand, if the lawyer handled an acquisition by a company whose headquarters and operations were in State A of a company whose headquarters and main operations were in State A, but which also had some operations in State B.~~

~~[4] As to other conduct, if jurisdictions have conflicting rules regarding the questioned conduct, subparagraph (b)(2) resolves the conflict by choosing the rules of the jurisdiction where the conduct occurred. The physical presence of the lawyer is not dispositive in determining where the questioned conduct occurred. Determining where the lawyer's conduct occurred in the context of transactional work, may require the appropriate disciplinary tribunal to consider other factors including the residence and place of business of any client, third person or public institution such as a court, tribunal, public body or administrative agency the interests of which are materially affected by the lawyer's actions.~~

~~[5] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.~~

~~[6] The choice of law provision is not intended to apply to transnational practice. Choice of law in this context should be the subject of agreements between jurisdictions or of appropriate international law.~~

### **Virginia Code Comparison**

With respect to paragraph (a), DR 1-102(B) stated: "A lawyer admitted to practice in this jurisdiction is subject to these Disciplinary Rules although engaged in practice elsewhere, unless Disciplinary Rules of the foreign jurisdiction permit the activity." Paragraph (a) removes the "safe harbor" provision of the *Virginia Code*, and makes it clear that Virginia's lawyers are obligated to comply with these Rules regardless of where they practice (subject to Paragraph (b)).

Paragraph (b) had no counterpart in the *Virginia Code*.

### **Virginia Code Prior Rule Comparison**

Virginia Rule 8.5 made no provision for disciplinary authority over a lawyer not admitted to practice in Virginia. Rather, a non-lawyer who committed misconduct in Virginia was subject to Virginia's unauthorized practice of law rules and the authority of the Virginia State Bar's Standing Committee on the Unauthorized Practice of Law.

Under former Rule 8.5 (b)(2) if a lawyer was subject to the rules of more than one jurisdiction, the rules of the jurisdiction in which the lawyer principally practiced applied unless the conduct had its predominant effect in another jurisdiction in which the lawyer was admitted to practice. The former rule, however, did not provide clear guidance if the lawyer's conduct occurred in a jurisdiction where the lawyer was not admitted.

### **Committee Commentary**

The Committee adopted this Rule because it provides, in an era in which attorneys often engage in legal activities in multiple jurisdictions, more specific guidance than the *Virginia Code* regarding controlling ethical rules.

The Committee adopted this Rule in light of the ABA recommendation that the states adopt more specific rules governing multi-jurisdictional practice. Like *ABA Model Rule 8.5 (a)*, this rule states that for conduct occurring in the course of providing, holding oneself out as providing or offering to provide legal services in Virginia the Virginia State Bar may exercise disciplinary authority over a lawyer not admitted in Virginia. Consistent with *ABA Model Rule 8.5*, the Virginia rule adopts choice of law rules for circumstances in which the lawyer is subject to the professional conduct rules of more than one jurisdiction and they conflict. The Virginia rule adopts verbatim *ABA Model Rule 8.5 (b)(1)*, applying the rules of the jurisdiction in which the court, agency or other tribunal sits. The Committee, however, did not adopt the "predominant effect" test used in *ABA Model Rule 8.5 (b)(2)*, favoring instead the application of the rules of the jurisdiction in which the lawyer's conduct occurred. Virginia Rule 8.5 (b)(3) is new. The Committee did not adopt *ABA Model Rule Comments 1-7*.