

Friday

1st

October, 2004.

On March 16, 2004 came the Virginia State Bar, by Jean P. Dahnk, its President, and Thomas A. Edmonds, its Executive Director and Chief Operating Officer, and presented to the Court a petition, approved by the Council of the Virginia State Bar, praying that Paragraph 10, Section IV, of the Rules for Integration of the Virginia State Bar, Part Six of the Rules of Court, be amended to read as follows:

PARAGRAPH 10. Promulgation of Legal Ethics, Lawyer Advertising, Solicitation and Unauthorized Practice of Law Opinions and Rules of Court.

(a) *Definitions.*

(i) “*Bar*” shall mean the Virginia State Bar.

(ii) “*Committee*” shall mean the Legal Ethics Committee, the Unauthorized Practice of Law Committee, the Committee on Lawyer Advertising and Solicitation, or all of them, as required by the context in which it is used.

(iii) “*Council*” shall mean the Council of the Virginia State Bar.

(iv) “*Court*” shall mean the Supreme Court of Virginia.

(v) “*Member*” shall mean any active member of the Virginia State Bar.

(vi) “*Executive Director*” shall mean the Executive Director of the Virginia State Bar.

(vii) “*Advisory Opinion*” shall mean a written statement of the subject involved, the question presented, the Rule of Court or other precedents relied upon, the opinion reached and the reasons therefor; if dealing with a subject of general application, an advisory opinion may be stated in the form of a proposed Rule of Court or amendment thereto.

(viii) “*Ethics Counsel*” shall mean the Ethics Counsel or an Assistant Ethics Counsel of the Virginia State Bar.

(ix) “*Rule*” and “*Rule of Court*” shall mean throughout this paragraph only those rules proposed by either the Standing Committee on Legal Ethics, the Standing Committee on

Lawyer Advertising and Solicitation, or the Standing Committee on the Unauthorized Practice of Law.

(x) *“Informal Staff Opinion”* shall mean advice and opinions provided to Members requesting same from Ethics Counsel.

(b) *Requests for Advisory Opinions.*

(i) A legal ethics, lawyer advertising, solicitation or unauthorized practice of law advisory opinion of the Bar concerning contemplated or actual conduct may be requested by any member.

(ii) All requests for advisory opinions shall be in writing, addressed to the appropriate Committee, in the hypothetical, and on a form prepared by the Committee calling for such information as the Committee may request; provided, however, that a request for an opinion as to the propriety of advertising or solicitation may include the specific advertisement or solicitation in question.

(c) *Advisory Opinions of the Committees.*

(i) Upon receipt of a request for an advisory opinion, the Ethics Counsel shall review such request to determine whether the request should be referred to the Chairman of the appropriate Committee. If the Ethics Counsel or Committee determines that the request presents a previously resolved issue, the requestor shall be so informed and the request shall be considered terminated unless the requestor states in writing that the requestor has not previously presented the issue and requests that it be reconsidered.

(ii) The Committee, upon determining that the request presents a previously unresolved issue, or presents for reconsideration an issue not previously presented by the requestor, shall issue, in response to the request, a proposed advisory opinion, with notice to the requester that the opinion remains pending during the course of the public comment period outlined in subparagraph (iii). Opinions or requests for reconsideration may be by summary affirmance of a prior opinion. The Committee may in its discretion decline to render an opinion regarding any matter which is currently the subject of any disciplinary proceeding or litigation or which presents an issue beyond its purview.

(iii) Within 45 days of the issuance of a proposed advisory opinion, the Bar shall cause to be issued a press release that shall state (A) the question presented by the request for an advisory opinion; (B) the conclusion reached by the Committee; (C) a brief synopsis of the rationale for the conclusion; (D) that the advisory opinion may be inspected at the office of the Bar; (E) that at the conclusion of the comment period, the Committee will review the

opinion in light of any comments received; (F) that any individual, business, or other entity may submit written comments in support of, or in opposition to, the proposed advisory opinion to the Executive Director, within thirty days of the date on which the press release was issued; and (G) the Committee may choose to adopt, modify, or rescind the opinion in response to the comments received.

(iv) In the case of an advisory unauthorized practice of law opinion in which the Committee concludes following the conclusion of the public comment period that the conduct in question constitutes or would constitute the unauthorized practice of law, the advisory opinion shall be sent to Council for approval, modification or disapproval.

(v) In the case of any other advisory opinion, the Committee may, by majority vote, publish the opinion as an informal advisory opinion of the Committee or ask Council to review the advisory opinion in accordance with the procedures set out in paragraphs (d), (e) and (f).

(vi) Any party requesting an advisory legal ethics, lawyer advertising or solicitation, or unauthorized practice of law opinion who disagrees with the result stated in the Committee's advisory opinion issued following the conclusion of the public comment period, may appeal such opinion, as a matter of right, to Council for approval, modification or disapproval.

(vii) Any such opinion expresses the judgment of the Committee and is advisory only. It shall have no legal effect and is not binding on any judicial or administrative tribunal.

(viii) Copies of opinions rendered by the Committees will be provided upon request. All such opinions will be provided without any identifying data. However, all Committee deliberations, draft opinions, memoranda, correspondence, and the like shall be confidential and privileged from discovery and/or subpoena and as such will not be provided to anyone absent Court order entered upon a showing of good cause. Without waiving the confidentiality provision stated above, the Committees, in their discretion, may disseminate draft opinions to the Boards of Governors of Virginia State Bar Sections for written comment when those Sections have an interest in the subject matter of the proposed opinion.

(d) *Notice of Advisory Opinions to Be Considered by Council.*

(i) In any case where an advisory opinion is to be considered by Council, and no later than 45 days next preceding the date of such Council meeting at which final action with respect to such advisory opinion is to be taken, the Bar shall cause to be issued a press release which shall state (A) the question presented by the request for an advisory opinion; (B) the conclusion reached by the Committee; (C) a brief synopsis of the rationale for the conclusion; (D) that the advisory opinion may be inspected at the office of the Bar; (E) that the advisory

opinion shall be considered by the Council, which will approve, disapprove or modify the advisory opinion; (F) that any individual, business or other entity may file 10 copies of written comments in support of, or in opposition to, the advisory opinion with the Executive Director, within thirty days of the date on which the press release was issued; and (G) that the decision of Council concerning the advisory opinion may be reviewed by the Court.

(ii) The press release so issued shall also be printed in that issue of the *Virginia Lawyer Register* next preceding the Council meeting at which final action with respect to such advisory opinion will be taken.

(e) *Provisions for Comments.*

(i) Within thirty days from the date of the press release provided for in (d) (i), any individual, business or other entity may file with the Executive Director 10 copies of written comments in support of, or in opposition to, the advisory opinion.

(ii) Within thirty days from the date of the press release provided for in (d) (i), the Attorney General of Virginia shall file with the Executive Director 10 copies of written comments which analyze any restraint on competition which may result from promulgation and implementation of the advisory opinion.

(iii) Except as specifically authorized by Council, there shall be no oral argument.

(f) *Action by Council.*

(i) Upon due consideration of all materials submitted to it, including an evaluation of the competitive effects of approving or disapproving the advisory opinion, Council shall approve, modify or disapprove the advisory opinion, by a majority vote of those present and voting.

(ii) In the case of any advisory opinion which is not transmitted to the Court for review pursuant to (f) (iii) below, if such advisory opinion is disapproved by a majority of Council present and voting, such action shall be recorded in the minutes of the meeting; if such advisory opinion is approved or modified, it shall be published as an advisory opinion of the Bar.

(iii) All advisory unauthorized practice of law opinions in which Council concludes that the proposed or actual conduct constitutes the unauthorized practice of law, and all other advisory opinions which Council, by majority vote of those present and voting, desires to transmit, shall be reviewed by the Court pursuant to the notice and review procedures hereinafter set forth.

(iv) Any such opinion expresses the judgment of Council and is advisory only. It shall have no legal effect and is not binding on any judicial or administrative tribunal.

(g) *Review by the Supreme Court of Virginia.*

(i) Within thirty days after the Council meeting at which final action with respect to such advisory opinion was taken, Bar Counsel shall file with the Clerk of the Court 9 copies of a Notice of Advisory Opinion Review; the request for an advisory opinion; all materials submitted to Council by the Bar, the Attorney General, and the public; and the advisory opinion as approved by Council.

(ii) Within ten days after the filing referred to in (g) (i), the Bar shall cause to be issued a press release which shall state (A) an advisory opinion on a stated subject has been filed with the Court; (B) the advisory opinion may be inspected at the office of the Bar; (C) the advisory opinion will be considered by the Court, which shall approve, disapprove or modify the advisory opinion; and (D) any individual, business or other entity may submit written comments in support of, or in opposition to, the advisory opinion by filing 9 copies with the Clerk of the Court and three copies with the Executive Director of the Bar, within 45 days from the date of issuance of the press release.

(iii) Except as specifically requested or ordered by the Court, there shall be no oral argument.

(iv) Upon due consideration of all material submitted to it, including an evaluation of the competitive effects of approving or disapproving the advisory opinion, the Court shall approve, modify or disapprove the advisory opinion, with or without a written opinion by the Court. Upon modification or approval of the opinion, it shall become a decision of the Court.

(h) *Complaints of Unauthorized Practice of Law.*

(i) Any written complaint of the unauthorized practice of law addressed to the Bar or to the Committee shall be investigated by the Ethics Counsel or his staff.

(ii) Upon completion of an investigation, and not later than 180 days after the filing of the complaint, the Ethics Counsel shall report to the Committee the status of the investigation.

(iii) Upon review of all materials submitted to it, by a majority vote of those present, the Committee may

1. Dismiss the complaint due to insufficient evidence or other good cause; or

2. Dismiss the complaint with cautionary language.

(iv) After considering the evidence before it, if a majority of the Committee present finds there exists probable cause to believe the person, firm, or corporation is engaged in the unauthorized practice of law the Committee may

1. Dismiss the complaint with a letter agreement in which the Respondent agrees to cease the activity which is the subject of the complaint; or

2. Refer the complaint to the Attorney General of Virginia, a Commonwealth's Attorney or other appropriate agency for such action as authorized by law.

(i) *Subpoena Power.*

(i) Upon receiving a complaint alleging facts indicating that a person, firm or corporation is or may be unlawfully practicing law and provided that the issuance of a summons or subpoena is necessary for the investigation of such alleged practice, the Ethics Counsel may issue a summons or subpoena in the name of the Commonwealth for the attendance of any person and production of books and records at the place and time designated in the summons or subpoena. The Committee or an investigator to whom a complaint is assigned may use a summons to examine witnesses or obtain statements from persons having knowledge of the subject matter of the complaint.

(ii) Every circuit court shall have power to enforce any summons or subpoena issued by the Ethics Counsel and to adjudge disobedience thereof as contempt.

(j) *Committee Hearing.*

(i) Within 45 days after receipt of the Ethics Counsel's report, the Committee may meet to consider the matter submitted and hear any evidence or witnesses subpoenaed by the Committee.

(ii) After considering the evidence before it, if a majority of the Committee present finds there exists probable cause to believe the person, firm, or corporation is engaged in the unauthorized practice of law, the Committee may direct the Ethics Counsel to forward the results of the Bar's investigation, copies of any records, and a summary of the Committee's findings to the Attorney General of Virginia with a request that the conduct be enjoined and/or that any other remedy available under the Code of Virginia be pursued.

(k) *Modification, Amendment or Repeal of a Rule.*

(i) The Court, upon petition by the Bar, may modify, amend, or repeal any Rule first promulgated pursuant to the procedures of this paragraph.

(ii) Such a petition may be filed only pursuant to a majority vote at a Council meeting, by members there present and voting.

(l) *Informal Staff Opinions of Ethics Counsel.*

(i) Ethics Counsel shall provide informal advice and opinion to Members requesting same, based on the specific facts which Members provide to Ethics Counsel.

(ii) In no case shall Ethics Counsel be compelled to testify, via subpoena or otherwise, in any judicial or adjudicative proceeding, except on behalf of a respondent in disciplinary proceedings of the Virginia State Bar, regarding any advice and/or opinion provided to that attorney. In no case shall Ethics Counsel be subject to subpoena or otherwise compelled to testify in any judicial or adjudicative proceeding as an expert witness regarding legal ethics and/or the practice of law. Rather, in all such instances, testimony of Ethics Counsel shall be limited to the substance of any communications by and between Ethics Counsel and the Member, where such communications are an issue in the proceeding.

(iii) All communications between Ethics Counsel and any Member requesting advice or opinion shall be confidential and Ethics Counsel shall not disclose the content of any such discussion without the express written consent of the Member to whom Ethics Counsel provided such advice or opinion.

Upon consideration whereof, it is ordered that the Rules for Integration of the Virginia State Bar, Part Six of the Rules of Court, be and the same hereby are amended in accordance with the prayer of the petition aforesaid, effective January 1, 2005.

A Copy,

Teste:

Clerk