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LEGAL ETHICS OPINION 1856 SCOPE OF PRACTICE FOR FOREIGN LAWYER IN VIRGINIA

Lawyers frequently find it necessary to engage in cross-border legal practice to represent their clients. Multi-jurisdictional practice is on the increase and this trend is not only inevitable, but necessary. Globalization, the explosion of technology, and the increasing complexity of law practice require lawyers to cross state borders to afford clients competent representation.[1]

This opinion explores the extent to which a lawyer not licensed in Virginia may engage in the practice of law in Virginia, both on a temporary basis and "continuously and systematically" under Rule 5.5 of the Virginia Rules of Professional Conduct. For purposes of the opinion, the foreign lawyer is licensed and in good standing in a jurisdiction other than Virginia. The importance of these issues to contemporary law practice cannot be overstated.

A hypothetical will help develop the questions presented:

> A law firm is located only in Virginia. Some of the lawyers in the law firm are active members of the Virginia State Bar and in good standing. However, several of the firm's partners and associates are licensed to practice law in other U.S. jurisdictions, but not in Virginia. These foreign lawyers are: based in the Virginia law firm; use the law firm's Virginia address in their communications with clients, third parties and the general public; and have established an office and a "systematic and continuous presence in Virginia for the practice of law." The firm and these foreign lawyers provide legal services to clients in Virginia, throughout the U.S. and abroad. Some of the foreign lawyers in the firm work on matters involving Virginia clients governed by Virginia law. Others work only on matters involving the law of their admitting jurisdiction. Still others limit their practice exclusively to matters involving areas of federal practice, international law or third country law.[2]

The initial question raised is, are the foreign lawyers practicing in this firm engaged in the unauthorized practice of law? In this hypothetical, the foreign lawyers are practicing "continuously and systematically" in a Virginia law firm. Whether they are authorized to do so is controlled by state and federal law.

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[1] Report of the American Bar Association's Multijurisdictional Practice Commission to the ABA House of Delegates (August 2002) at 12; found at http://www.abanet.org/cpr/mjp/intro-cover.pdf

[2] For purposes of this opinion, federal practice excludes bankruptcy practice but refers to practice before agencies of the United States government. Third country law means the law of a foreign nation in which the foreign lawyer is not admitted or otherwise authorized to practice. International law means practice in which international laws, treaties, compacts, conventions, etc., are applicable to a legal matter.

Later, this opinion will also discuss foreign lawyer practice in the context of a Virginia law firm hiring a contract lawyer who is not admitted to practice in Virginia, but is admitted to practice in another United States jurisdiction or a foreign nation. If this firm were to hire a contract lawyer to assist with one specific matter involving Virginia law, would the contract lawyer have to be licensed to practice law in Virginia? Does it matter how long the project / matter lasts? Finally, what if the firm hired the contract lawyer to work over a period of time on several different Virginia matters? In this part of the opinion, the Committee will discuss contract lawyers whose activity might be either "temporary and occasional practice" or a "continuous and systematic" practice.

Applicable Rules and Prior Opinions

The controlling authority for these inquiries is Rule 5.5(c) and (d)(4)(i-iv) of Virginia's Rules of Professional Conduct:

> (c) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
>
> (d) 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 or admitted under Part I of Rule 1A:5 of this Court 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.

Comment [4] to Rule 5.5 provides guidance in the application of the foregoing portions of the Rule:

> …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. (Emphasis added).

To apply these Rules and Comment [4] in this opinion, the Committee examines how Virginia law addressed foreign lawyer practice prior to their adoption.

Foreign Lawyer Practice Before Rules 5.5 and 8.5 were Amended

Before the Virginia Supreme Court amended Rule 5.5 in March 2009, Virginia's Unauthorized Practice of Law Rules regulated the practice of law in Virginia by non-Virginia lawyers.

UPL Opinions 195 and 201 addressed foreign lawyers practicing in a Virginia law firm. In UPL Opinion 195, the Committee observed that although Part 6, §I (C) would authorize some temporary transactional work by a foreign lawyer in Virginia,[3] it did not allow the foreign lawyer to establish a regular practice in Virginia of advising clients on matters involving Virginia law. The Committee opined that if a foreign lawyer was employed in a law office in Virginia, the foreign lawyer's practice must be limited to advising clients on matters involving the law of the jurisdiction where the lawyer is admitted. If the foreign lawyer provides legal services to clients on matters involving Virginia law, the foreign lawyer may do so only under the direct supervision of a Virginia licensed lawyer before any of the foreign lawyer's work product is delivered to the client.

In UPL Opinion 201, the Committee addressed the issue of a foreign lawyer maintaining an office in Virginia, i.e., practicing in the Virginia office of a multi-jurisdictional law firm and found that this would *not* be unauthorized practice if: 1) the lawyer advised clients on matters involving the law of the jurisdiction in which he/she was admitted to practice; or 2) the lawyer advised and prepared legal documents for a client concerning matters involving federal law for cases before a federal court or agency to the extent the federal matter did not impact Virginia law and to the extent Virginia legal issues were not involved; and provided "any law firm letterhead stationery or other public communications identifying the lawyer as practicing in the Virginia firm [denoted] the limitations on that lawyer's practice," i.e. where the lawyer is licensed to practice. UPL Op. 201 (2001). Outside of the limits of these specific exceptions, "a non-Virginia licensed lawyer practicing in the Virginia office of a multi-jurisdictional law firm cannot meet with clients in Virginia to give legal advice involving the application of the law of a jurisdiction in which the lawyer is not admitted to practice." *Id.*

Foreign Lawyer Practice in Virginia Under Rules 5.5 and 8.5

Rule 5.5 recognizes a similar scope of permissible practice; however neither the rule nor its comments address specifically whether the prohibition against establishing an office or continuous, systematic presence in Virginia applies when a lawyer is practicing only the law of the jurisdiction in which he/she is licensed. Comment [4] to Rule 5.5 provides that a foreign lawyer can maintain/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*." (Emphasis added). The italicized language invites the Committee to consider the state law that had authorized a foreign lawyer to practice in Virginia before the adoption of the amendments to Rules 5.5 and 8.5. The cited prior opinions of the UPL Committee were approved and

[3] "However the term 'non-lawyer' shall not include foreign lawyers who provide legal services in Virginia to clients under the following restrictions and circumstances: (1) such foreign lawyer must be admitted to practice and in good standing in any state in the United States; (2) the services must be on an occasional basis only and incidental to representation of a client whom the lawyer represents elsewhere; and (3) the client must be informed that the lawyer is not admitted in Virginia." *See* order entered September 18, 1996, by the Supreme Court of Virginia.

adopted by the Supreme Court of Virginia and, therefore, represent the state law in effect at the time the Virginia State Bar's Multijurisdictional Task Force drafted the amendments to Rules 5.5 and 8.5.

The Committee concludes that the foreign lawyers who are licensed to practice in other U.S. jurisdictions and based in the multi-jurisdictional law firm in Virginia would not be engaging in unauthorized practice of law in violation of Rule 5.5 so long as they limited their practice to the law of the jurisdiction/s where they are licensed, to federal law not involving Virginia law, or to temporary and occasional practice as authorized by Rule 5.5(d)(4)(i)-(iii). The UPL opinions cited herein, approved by the Virginia Supreme Court, defined the scope or permissible foreign lawyer practice and the Multijurisdictional Task Force's proposal to amend Rule 5.5 did not overrule, but rather embraced, the Virginia law that was in effect at that time.

A foreign lawyer may also maintain an office in Virginia to practice the law of a foreign nation in which the lawyer is admitted if the foreign lawyer is certified to practice as a "Foreign Legal Consultant" under Rule 1A:7 of the Supreme Court of Virginia. The Foreign Legal Consultant may also engage in practice in Virginia to the extent authorized by Rule 5.5(d)(4)(i)-(iv). As Comment [13] to Rule 5.5 explains, the general safe-harbor provision found in Rule 5.5(d)(4)(iv) applies to foreign lawyers who are admitted to practice only in a foreign nation.

However, foreign lawyers who are based in Virginia may not practice Virginia law on a "systematic and continuous" basis. Rule 5.5(d)(2)(i). Such activity would be conduct in violation of the rules regulating the practice of law in Virginia. Rule 5.5(c). The foreign lawyer would also be subject to the disciplinary authority of the Virginia State Bar as provided in Rule 8.5.

Foreign Lawyers Whose Practice is Limited to Matters Involving Federal Law

Foreign lawyers who practice exclusively federal law need not be licensed in Virginia to maintain an office in Virginia. In *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379 (1963), the U.S. Supreme Court addressed the question of whether a non-lawyer practitioner duly registered and authorized to practice before the United States Patent and Trademark Office, but not licensed as an attorney in any jurisdiction, could engage in a patent practice in a jurisdiction other than the jurisdiction in which the Patent Office is located, even though the conduct could be considered the practice of law in the other jurisdiction. The Court's answer was a clear "yes," based on the authority granted in the Supremacy Clause of the U.S. Constitution and the authority granted to the Commissioner of Patents, in 35 U.S.C. §31, to "prescribe regulations governing the recognition and conduct of agents, attorneys, or other persons representing applicants or other parties before the Patent Office." The Court recognized that pursuant to the Supremacy Clause of the U.S. Constitution:

> A State may not enforce licensing requirements which, though valid in the absence of federal regulation, give "the State's licensing board a virtual power of review over the federal determination" that a person or agency is qualified and entitled to perform certain functions, or which impose upon the performance of activity sanctioned by federal license additional conditions not contemplated by Congress. "No State law can hinder or obstruct the free use of a license granted under an act of Congress." *Pennsylvania v. Wheeling & B. Bridge Co.*, 13 How. 518, 566.

Id. at 385. Virginia has applied the federal supremacy doctrine in its UPL Opinions and Unauthorized Practice Rules. *See, e.g.*, UPL Op. 210 (2006) and UPR 9 ("Administrative Agency Practice").[4] In UPL Opinion 210, the requestor asked whether it is the unauthorized practice of law for a foreign lawyer who is a member of a Virginia law firm, to render U.S. patent advice and render patent law opinions in Virginia to clients who may be located anywhere in the world. The Committee responded "no," this conduct would not be the unauthorized practice of law, citing the *Sperry* decision:

> Based on this authority, an attorney who is licensed other than in Virginia, who is registered and authorized to practice before the U.S. Patent Office and who is a member of a Virginia law firm can provide all legal services and representation related to a patent law practice to all clients needing such services and representation regardless of where the clients are located. These services and representation may include rendering legal advice and/or written opinions for clients on issues such as patent infringement, patent claim construction, patent validity, or enforceability of a patent. The patent attorney may provide such advice and opinions to a client whether related to a matter the patent attorney is actually handling for the client before the USPTO or not. The patent attorney can conduct this practice and provide these services while physically in Virginia and without the supervision or association of a Virginia licensed attorney, so long as the patent attorney limits his/her activity to the practice of patent law and is not in any manner attempting to practice Virginia law. Provided the patent attorney's practice is limited as described herein, he or she may also maintain an office in Virginia to conduct that limited practice. If the patent attorney is a member of a law firm with offices in Virginia and elsewhere, the extent to which the patent attorney can conduct his/her practice outside of Virginia will depend upon the unauthorized practice rules and/or rules of professional conduct in those other jurisdictions. If the patent attorney provides advice and counsel regarding patent law to a Virginia client from a location outside of Virginia, this would not be the unauthorized practice of law in Virginia because the attorney is not

[4] Code of Virginia, Vol. 11, Va. S. Ct. R., pt. 6, §I (Unauthorized Practice Rules) (2010)

physically in Virginia and because he/she is otherwise authorized to practice patent law.

Comment [4] to Rule 5.5 explains that 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 include those lawyers with practices limited to immigration or military law or who practice before the Internal Revenue Service, the United States Tax Court, or the United States Patent and Trademark Office. See also *Augustine v. Dep't of Veterans Affairs*, 429 F.3d 1334 (Fed. Cir. 2005) (federal law controls whether a lawyer not licensed in state may represent claimant and recover statutory fees in federal administrative proceeding).[5]

Therefore, the foreign lawyers in the Virginia law firm may engage in their limited scope practice on a "continuous and systematic" basis, and may engage in temporary and occasional practice as permitted by Rule 5.5(d)(4)(i)-(iv), as applicable. Within the scope of their limited practice, these foreign lawyers may advise clients and render legal opinions to clients located in other states or countries without violating Virginia's prohibition against the unauthorized practice of law.

Note, however, that a "federal practice" does not in itself exempt foreign lawyers from the reach of state disciplinary authorities or unauthorized practice laws. For example, the Ninth Circuit made clear in *Gadda v. Ashcroft*, 377 F.3d 934 (9th Cir. 2004), that federal law did not preempt a state from disbarring a foreign lawyer over conduct that occurred in the lawyer's federal immigration practice. Rejecting the foreign lawyer's preemption argument, the court pointed out that the Board of Immigration Appeals' regulations not only "leave room" for supplementary state regulations, but in fact condition a lawyer's ability to practice in immigration court on the lawyer's continued good standing as a member of a state bar. To be sure, Rule 8.5 of the Virginia Rules of Professional Conduct states that "[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."

In addition, not all types of practices that a lawyer might characterize as a federal practice fit entirely within the *Sperry*[6] "federal practice" exemption. For example, a bankruptcy practice may involve the application of Virginia law to resolve particular legal issues, i.e., such as the debtor's homestead exemption and status or priority of claims or liens. In addition, the local rules of the bankruptcy courts sitting in Virginia

[5] See generally *Restatement (Third) of the Law Governing Lawyers* §3(2) (2000) (lawyer may represent client before federal tribunal or agency in another jurisdiction in accordance with requirements of tribunal or agency).
[6] *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379 (1963).

require a lawyer to be admitted to the Virginia State Bar to practice regularly in that court.[7]

Although a foreign lawyer is not required to be admitted to practice in Virginia to practice before the United States Patent and Trademark Office, not all issues regarding patents fall within the *Sperry* exemption. For example, the assignment of the patent to a third party or the organization of a corporate entity to market or franchise the invention may be subject to the law of Virginia. This could also be the case regarding contracts with investors in the subject patent. If the legal work related to the patent is outside the scope of practice before the Patent Office, the lawyer must either be admitted in Virginia to perform that work or associate with an active member of the Virginia State Bar.

Similarly, a federal procurement practice may involve contractual agreements with third parties governed by state rather than federal law. Thus, a federal procurement practitioner may need to be admitted to practice in Virginia to perform this work on a "continuous and systematic" basis.

Foreign Lawyers Practicing the Law of a Jurisdiction in which They Are Not Admitted

The facts in the hypothetical state that "the firm and these lawyers provide legal services to clients throughout the U.S. and abroad." UPL Opinions 158, 195 and 201 would hold that the foreign lawyers could not advise clients on a "systematic and continuous" basis with respect to matters governed by the law of a jurisdiction in which the lawyer is *not* admitted to practice. Applying the cited UPL Opinions, a Maryland-licensed lawyer working in this Virginia firm could not practice "continuously and systematically" in Virginia advising clients on matters those clients have pending in New York that are governed by New York law.

The Committee believes that the conclusion reached in the prior UPL Opinions is overruled by the adoption of Rule 5.5 in at least this respect: whether a foreign lawyer violates Rule 5.5(c), by advising clients on matters involving the law of a jurisdiction where the foreign lawyer is not authorized to practice, should be determined by examining the host jurisdiction's rules and regulations instead of Virginia law or the law of the jurisdiction where the foreign lawyer is admitted. Rule 5.5 (c) states:

> A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in *that* jurisdiction, or assist another in doing so. (Emphasis added).

Virginia's rules are not dispositive of whether the foreign lawyer is engaged in the unauthorized practice of law in another jurisdiction. The Committee believes that this language looks to the law of the host state or country to determine if the foreign lawyer is

[7] E.D. Va. Local Bankruptcy Rule 2090-1(B) (eff. 12/10/10); W.D. Va. Local Bankruptcy Rule 2090-1(B) (2010).

practicing in violation of the regulation of the legal profession in *that* jurisdiction. For example, New York law should govern whether a foreign lawyer not authorized to practice in New York may advise New York clients on matters involving New York law. The foreign lawyer's physical presence in Virginia may not be a sufficient basis to apply Virginia's rules over New York's rules governing foreign lawyer practice. Similarly, whether the Maryland lawyer could advise and counsel a client on a matter pending in New York on a "temporary or occasional" basis would be up to the rules and regulations of the legal profession in New York governing temporary practice by foreign lawyers.

Temporary Practice for Contract Lawyers

The scope of practice permitted of a contract lawyer who is not admitted in Virginia is subject to the foregoing analysis. If a Virginia law firm hires a contract lawyer to work on a matter involving Virginia law, the contract lawyer either must be licensed in Virginia or work in association with a Virginia licensed lawyer in the firm on a temporary basis as permitted under Rule 5.5(d)(4)(i), for transactional work; or Rule 5.5(d)(4)(ii) for pre-litigation activity in a matter in which the contract lawyer reasonably expects to be admitted *pro hac vice*. Rules 5.5(d)(4)(iii) and (iv)[8] are generally not applicable to contract lawyers. If the foreign contract lawyer is hired to work only on matters involving federal law or the law of the jurisdiction in which the foreign contract lawyer is admitted, the foreign lawyer does not need to be licensed to practice in Virginia.

How do the rules define "temporary and occasional practice?" Comment [6] to Rule 5.5 states:

> 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

[8] Subparagraph (d)(4)(iv) does provide a "safe harbor" which allows a foreign lawyer who is admitted to practice only in a foreign nation to engage in any nonlitigation practice on a temporary basis when that activity arises out of or is "reasonably related" to the foreign lawyer's current practice. The rule does not define "reasonably related," but suggests in the comments that a matter is reasonably related if: (1) there is an ongoing relationship with a client; (2) the client has "substantial contacts" with the jurisdiction where the foreign lawyer is admitted; or (3) the foreign lawyer has developed a recognized expertise in matters involving a particular body of federal, foreign, or otherwise nationally uniform law. As stated in the text of this opinion a foreign contract lawyer hired by a law firm from a temporary placement agency would not likely be able to invoke this "safe harbor."

> with which the Foreign lawyer comes into Virginia to provide legal services.

For example, if a firm hires a contract lawyer who is not licensed in Virginia to work solely on one specific Virginia matter/case in association with a Virginia-licensed lawyer, this should be considered "temporary and occasional practice" and allowed under Rule 5.5(d)(4)(i). If a firm hires a foreign contract lawyer to work on several and various Virginia matters/cases over a period of time, then the foreign lawyer's practice could be regarded as "continuous and systematic," and beyond the scope of temporary practice contemplated by Rule 5.5 (d)(4), thus requiring this contract lawyer to obtain a Virginia license.

Conclusion

Foreign lawyers, i.e., non-Virginia lawyers admitted to practice in the United States or a foreign nation, may practice in a Virginia law firm or may establish an office or other systematic and continuous presence in Virginia if authorized by Virginia or federal law. A lawyer admitted to practice in a foreign nation may establish an office or practice in a law firm in Virginia only if the foreign lawyer is certified as "Foreign Legal Consultant" pursuant to Rule 1A:7 of the Supreme Court of Virginia. Foreign lawyers practicing in a Virginia law firm may not advise clients on matters involving Virginia law except as permitted by Rule 5.5(d)(4). Foreign lawyers who limit their practice exclusively to federal practices in which admission to the Virginia State Bar is not required may maintain an office or practice systematically and continuously in Virginia. Likewise, if their practice is limited to matters involving the law of the state or country in which they are admitted to practice, foreign lawyers may practice in Virginia on a systematic and continuous basis. Contract lawyers not licensed to practice in Virginia who are hired by a Virginia law firm on a temporary basis may practice to the extent permitted by Rule 5.5(d)(4), or on a continuous and systematic basis if Virginia or federal law does not require their admission to the Virginia State Bar.

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