

To: Bench and Bar of Virginia

From: Advisory Committee on Rules

Date: September 22, 2009

## **Filing Documents by Counsel Not Currently Licensed To Practice Law in Virginia**

**BACKGROUND:** In 2008 the Boyd-Graves Conference on Virginia Practice and Procedure studied the issues raised in the rulings by the Supreme Court of Virginia in *Neary v. Adu-Gyamfi*, 270 Va. 28, 613 S.E. 2d 429 (2005) and *Jones v. Jones*, 49 Va. App. 31, 635 S.E. 2d 694 (2006). In the first case the Supreme Court invalidated a judgment obtained by the plaintiff in a suit for injuries sustained in an automobile accident. The plaintiff had previously filed suit and that suit had been nonsuited. The nonsuit had been entered in a case in which their then attorney had filed the motion for judgment when his license to practice law had been administratively suspended. The Court found the filing a nullity since the attorney was not validly licensed when filing the motion for judgment. In *Jones v. Jones* the Court considered an appeal on behalf of a party who filed a notice of appeal by her attorney who's license was suspended at the time the notice was filed and the Court dismissed the appeal because the notice was a nullity.

A member of the Supreme Court of Virginia in dissent to one of these cases pointed out that the "nullity rule" is not embodied in any statute or Rule of Court and produces harsh consequences in these circumstances. The suggestion was made that while intent to protect the public from the unauthorized practice of law is a valid purpose, the doctrine applied results in damage to the public and does not foster confidence in the legal system, the Judiciary or the Bar.

At the outset the Boyd-Graves Conference committee considered many similar cases which include a filing by a pro-se personal representative of a wrongful death case and other similar cases. Other states and the Federal Rules permit a relation back to the original date of filing after the transgression is cured by amendment. The committee however, decided to narrow the focus to when an attorney (or one who purports to be an attorney) files a pleading which is deemed a nullity as a result of the attorney not having a valid active license at the time. The remaining issues may be a subject for further review at another date but are not specifically addressed in the charge to our subcommittee.

In short the Boyd-Graves Conference committee believed that the results of the foregoing cases were harsh and unfairly leaves innocent members of the public as victims. Further, it was noted from the facts of these cases that no prejudice had occurred to the opposing parties and that the parties were innocent themselves, but faced with the harsh result in any event.

The Boyd-Graves Conference proposal suggested that when a pleading is filed by one who purports to be an active licensed member of the Virginia Bar -- and it turns out that there was no such valid license -- the Court may in its sound discretion relate back the pleading to the date the pleading was actually filed when the issue is cured by the entry of appearance of a validly licensed attorney or by the reinstatement of the license of the attorney originally filing the otherwise defective pleading. There is no statute which deals with this issue (the nullity rule) and certainly, as was evident in *Jones*, a provision that deals only with the statute of limitations and the filing of complaints would not resolve problems that arise from the filing of other items, such as a notice of appeal.

The Advisory Committee has discussed the issues raised by filings by attorneys not authorized to practice at the time, at several of its meetings. It has resolved to seek input from the Bench and Bar about possible means of protecting the public as well as the adversaries of the party on whose behalf the unauthorized attorney purports to act.

The Advisory Committee has not adopted any Rule language. Set forth below are three provisions under discussion. These are published in the hope that members of the Judiciary and the practicing Bar will provide suggestions concerning means of dealing with these issues, and both how and whether amendments should be undertaken to address the problems. Specific comments on the three pending proposals (which are alternatives) are sought, as well as amendment or substitute language.

The *first form for a rule proposal* to address these issues emphasizes the sound discretion of the trial court.

#### **VERSION "A"**

##### **Rule 1:5A Filing by a Lawyer Not Authorized to Practice Law**

Wherever a pleading is filed by an attorney who is not authorized to practice law in Virginia, the court may, in its sound discretion, permit a later pleading that is properly filed to relate back to the date of the filing of the original pleading.

The *second form for a rule proposal* on these matters takes no position on the dismissal of the pleading (a matter discussed in the case law discussed at the outset of this report) and concentrates on the consistent treatment of pending actions for statute of limitations purposes under the Rules of Court (by which a case filed is officially pending) and the Code of Virginia (which in Code § 8.01-299 provides that while an action is pending in court the statute of limitations is tolled for the claims made therein):

## VERSION "B"

### **Rule 1:5A Filing of a Pleading or Notice of Appeal by a Lawyer Not Authorized to Practice Law**

(a) *Relation Back*. If a pleading is filed by an attorney who is not authorized to practice law in Virginia, a later pleading that is properly filed in the same proceeding on behalf of the same party or parties and that asserts claims or defenses relating to the same conduct, transaction or occurrence, shall relate back to the date of filing of the original pleading.

(b) *Statute of Limitations*. If a complaint commencing a civil action is dismissed because it was filed by an attorney who is not authorized to practice law in Virginia, the statute of limitations for refiling of any claim therein asserted shall be computed in light of the time the action was pending before dismissal as provided in Rule 3:2(a) and Virginia Code § 8.01-229(E)(1).

(c) *Notices of Appeal*. If a notice of appeal is filed by an attorney who is not authorized to practice law in Virginia, a later notice of appeal in the same proceeding that is properly filed on behalf of the same party or parties shall relate back to the date of filing of the original notice of appeal.

The final, and longest rule proposal under consideration recognizes that some clients may be aware that the person acting on their behalf is not validly licensed, while others will be completely unaware of counsel's status. The longer proposal creates express mechanisms for substituting a pleading by a properly licensed attorney, for striking of pleadings filed only by an unlicensed attorney, and for the statute of limitations effect of the pending action:

## VERSION "C"

### **Rule 1:5A -- Validity and Effect of the Filing by a Lawyer Not Authorized to Practice Law of a Pleading on Behalf of Clients Unaware of that Status**

If any pleading is filed by an attorney who is not currently authorized to practice law in Virginia, including a filing by an attorney not admitted to practice in the Commonwealth and any filing by a Virginia attorney who is, at the time of such filing subject to a suspension of the license to practice law, the following provisions apply:

(A) **Knowing Clients**. If a represented party was aware of the attorney's lack of authorization to practice law at the time of the filing, or in the exercise of due care should have been aware of that status, the pleading filed on that party's behalf is void and of no legal effect.

(B) **Unaware Clients**. If the represented party was not aware of the attorney's lack of authorization to practice law at the time of the filing, and would not in the exercise of due care have become aware of that status, the pleading is validly filed but subject to being stricken as follows:

(i) the pleading shall remain valid and is deemed filed as of the original filing date if, prior to the entry of an order striking the pleading so filed, as provided in subdivision (B)(ii) of this Rule,

(a) the represented party obtains an order from the court, in its discretion, permitting the case to go forward by the party in propria persona with the pleading conformed accordingly to that style, or

(b) an attorney properly licensed to practice law in Virginia appears as provided in Rule 1:5 as counsel for the party on whose behalf the pleading was filed;

(ii) if no order is entered permitting the party to proceed in propria persona, and no properly licensed counsel of record enters an appearance in accord with Rule 1:5 and subdivisions (B)(i)(a) or (b) of this Rule, such pleading may be stricken from the court's docket upon motion of any party or on the court's own motion.

(iii) If a complaint or petition which commences an action is stricken under this Rule and the civil action is dismissed, the statute of limitations for any claim therein asserted shall be computed in light of the time the action was pending before dismissal as provided in Rule 3:2(a) and Virginia Code § 8.01-229(E)(1).

Comments on any or all of the foregoing should be sent by April 15, 2010 to:

Advisory Committee on Rules of Court  
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Office of the Executive Secretary  
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