



# COMMONWEALTH OF VIRGINIA

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September 1, 2009

The Honorable John S. Edwards  
Member, Senate of Virginia  
P.O. Box 1179  
Roanoke, Virginia 24006-1179

Dear Senator Edwards:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

## **Issue Presented**

You ask whether a Virginia non-stock corporation that is a federal tax-exempt corporation qualifies as a community-based citizen group or organization so that persons employed by it to provide pastoral counseling services are exempt from the licensure requirements under § 54.1-3501(1).<sup>1</sup>

## **Response**

It is my opinion that the General Assembly has designated the Board of Counseling as the responsible agency to interpret the licensure requirements for persons employed by community-based citizen groups or organizations.

## **Background**

You relate that an organization will be formed to provide pastoral counseling services in Southwest Virginia. The organization will be incorporated as a Virginia non-stock corporation and apply for a determination by the Internal Revenue Service that it is exempt from taxation under § 501(c)(3) of the Internal Revenue Code.

You advise that § 501(c)(3) requires that no part of the net earnings of the organization inure to the benefit of any private individual. Further, you relate that it is anticipated that the Articles of Incorporation of the organization likely will include the following provisions:

1. The corporation is to operate exclusively for such religious purposes as will qualify it as an exempt organization under Section 501(c)(3) of the Internal Revenue code of 1986, as amended, or the corresponding provision of any future United States tax code.

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<sup>1</sup>See 26 U.S.C.S. § 501(c)(3) (2009) (exempting from taxation “[c]orporations ... organized and operated exclusively for religious ... purposes”).

2. The corporation shall not take any action which would cause the corporation to be classified as a “private foundation” within the meaning of Section 509 of the Internal Revenue Code of 1986, as amended, or the corresponding provision of any future United States tax code.
3. A majority of the Board of Directors shall be comprised of persons who are not employees of the corporation or “disqualified person(s)” as that term is used in Internal Revenue Code §4958 or Treasury Regulation §53.4958-3, or the corresponding provision of any future United States tax law or regulation. No employee of the corporation who serves on the Board of Directors may vote on his or her compensation. All decision regarding compensation of employees shall be made by the Board of Directors.

You also relate that § 54.1-3501(4) contains an exemption from licensure for salaried employees of certain agencies sponsored or funded by a “community-based citizen group or organization.” You note that there does not appear to be any court authority or administrative regulation that interprets § 54.1-3501(4).

You believe that if the corporation: (a) includes the above-quoted provisions in its Articles of Incorporation; (b) receives a determination letter from the Internal Revenue Service that it is exempt from taxation under § 501(c)(3); (c) is such that its foundations status is that provided in § 509(a)(2); and (d) operates in accordance with its Articles of Incorporation and its tax determination letter, it will qualify as a “community-based citizen group or organization” within the meaning of § 54.1-3501(4). Consequently, you believe the salaried employees of the corporation will be exempt from the licensure requirements of § 54.1-3506.

### **Applicable Law and Discussion**

Chapter 35 of Title 54.1, §§ 54.1-3500 through 54.1-3515, governs the practice of counseling in the Commonwealth. Section 54.1-3506 requires that “[i]n order to engage in the practice of counseling ... it shall be necessary to hold a license” issued by the Board of Counseling.<sup>2</sup> Section 54.1-3500 defines the “practice of counseling” to mean the “rendering or offering to render to individuals, groups, organizations, or the general public any service involving the application of principles, methods or procedures of the counseling profession, which shall include appraisal, counseling, and referral activities.” The General Assembly has determined that the Board of Counseling “shall regulate the practice of counseling.”<sup>3</sup>

The word “shall” used in a statute ordinarily, but not always, implies that its provisions are mandatory.<sup>4</sup> As a general rule, however, when the word “shall” is used in connection with the actions of a

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<sup>2</sup>See VA. CODE ANN. § 54.1-3503 (2005) (establishing Board).

<sup>3</sup>*Id.*

<sup>4</sup>See, e.g., *Schmidt v. City of Richmond*, 206 Va. 211, 217-18, 142 S.E.2d 573, 578 (1965) (noting that statute using “shall” required court to summon nine disinterested freeholders in condemnation case). Compare *Ladd v. Lamb*, 195 Va. 1031, 1035-36, 81 S.E.2d 756, 758-59 (1954) (noting that statute providing that clerk of court “shall forward” copy of conviction to Commissioner of Department of Motor Vehicles within 15 days not mandatory but merely directory); see also 1986-1987 Op. Va. Att’y Gen. 210, 211 (noting use of “shall” usually is mandatory, but may be directory in specifying time in which public official is to act).

public official, its meaning is usually directory or permissive unless the statute manifests a contrary intent.<sup>5</sup> ““A statute directing the mode of proceeding by public officers is to be deemed directory, and a precise compliance is not to be deemed essential to the validity of the proceedings, unless so declared by statute.””<sup>6</sup>

Section 54.1-3501 provides that the requirements for licensure are not applicable to:

1. Persons who render services that are like or similar to those falling within the scope of the classifications or categories in [Chapter 35] ..., so long as the recipients or beneficiaries of such services are not subject to any charge or fee, or any financial requirement, actual or implied, and the person rendering such service is not held out, by himself or otherwise, as a person licensed under [Chapter 35].

....

3. The activities, including marriage and family therapy, counseling, or substance abuse treatment, of rabbis, priests, ministers or clergymen of any religious denomination or sect when such activities are within the scope of the performance of their regular or specialized ministerial duties, and no separate charge is made or when such activities are performed, whether with or without charge, for or under auspices or sponsorship, individually or in conjunction with others, of an established and legally cognizable church, denomination or sect, and the person rendering service remains accountable to its established authority.

4. Persons employed as salaried employees or volunteers ... of a private, nonprofit organization or agency sponsored or funded, in whole or part, by a community-based citizen group or organization.... Any person who, in addition to the above enumerated employment, engages in an independent private practice shall not be exempt from the requirements for licensure.

The primary purpose of statutory construction “is to ascertain and give effect to legislative intent.”<sup>7</sup> The General Assembly does not define the term “community-based citizen group or organization” in the context of § 54.1-3501 or in Title 54.1. The applicable rule of statutory construction requires that when the General Assembly does not define a term, it must be given its ordinary meaning,<sup>8</sup> “unless the word is a [term] of art.”<sup>9</sup> It is my opinion that there is no ordinary meaning for “community-based citizen group or organization” because the term is not defined by any of the usual authorities. Thus, it also is my opinion that “community-based citizen group or organization,” as used by the General Assembly in § 54.1-3501, is a term of art. Consequently, the determination regarding what constitutes a

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<sup>5</sup>See *Commonwealth v. Wilks*, 260 Va. 194, 199, 530 S.E.2d 665, 667 (2000) (noting that courts consistently have held that in statute requiring action by public official, use of “shall” is directory and not mandatory unless statute manifests contrary intent).

<sup>6</sup>*Commonwealth v. Rafferty*, 241 Va. 319, 324, 402 S.E.2d 17, 20 (1991) (quoting *Nelms v. Vaughn*, 84 Va. 696, 699, 5 S.E. 704, 706 (1888)).

<sup>7</sup>*Turner v. Commonwealth*, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983).

<sup>8</sup>See *McKeon v. Commonwealth*, 211 Va. 24, 27, 175 S.E.2d 282, 284 (1970).

<sup>9</sup>*Stein v. Commonwealth*, 12 Va. App. 65, 69, 402 S.E.2d 238, 241 (1991).

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“community-based citizen group or organization” is a question of fact.<sup>10</sup> The meaning of the term must be determined by the agency the General Assembly has designated as having responsibility for the licensure of counselors, which is the Board of Counseling.<sup>11</sup>

The traditional role of this Office regarding requested opinions has been to interpret applicable statutes to the extent possible utilizing the pertinent rules of statutory construction and general application of the statutory provisions. However, Attorneys General historically have declined to render official opinions when the request: (1) requires the interpretation of a matter reserved to another entity; (2) does not involve a question of law; (3) involves a matter currently in litigation; or (4) involves a matter of purely local concern or procedure.<sup>12</sup> The General Assembly has designated the Board of Counseling as the agency responsible for the regulation of the practice of counseling. That Board must provide guidance in all matters pertaining to the licensure of counselors.

### Conclusion

Accordingly, it is my opinion that the General Assembly has designated the Board of Counseling as the responsible agency to interpret the licensure requirements for persons employed by community-based citizen groups or organizations.

Thank you for letting me be of service to you.

Sincerely,

A handwritten signature in black ink, appearing to read 'W. C. Mims', with a stylized flourish at the end.

William C. Mims

1:213; 1:941/09-034

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<sup>10</sup>See 2008 Op. Va. Att’y Gen. 141, 144 n.14 and opinions cited therein (noting that Attorneys General historically have declined to render official opinions when request involves question of fact rather than one of law).

<sup>11</sup>See § 54.1-3503.

<sup>12</sup>See, e.g., Op. Va. Att’y Gen.: 1999 at 90, 93; 1977-1978 at 31, 33.