

Virginia State Bar Council to Review Unauthorized Practice of Law Opinion 206

Pursuant to Part Six: Section IV, Paragraph 10(c)(iv) of the Rules of the Supreme Court of Virginia, the Virginia State Bar Council, at its meeting on October 17 and 18, 2002 in Roanoke, Virginia, is expected to consider for approval, disapproval, or modification, a proposed unauthorized practice of law opinion issued by the Standing Committee on the Unauthorized Practice of Law.

UPL Opinion 206

Opinion 206 was issued by the Standing Committee on the Unauthorized Practice of Law on May 30, 2002. This opinion generally addresses whether a lay corporate officer may represent the corporation in an arbitration conducted in Virginia under the Rules of the American Arbitration Association ("AAA").

In this opinion, the Committee concluded that it would be unauthorized practice of law for a lay corporate officer to represent his/her corporation in an arbitration proceeding and that Virginia's unauthorized practice rules and opinions would take precedence over AAA's rules in an arbitration proceeding.

Inspection and Comment

The proposed Unauthorized Practice of Law Advisory Opinion 206 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 site at <http://www.vsb.org>.

Any individual, business or other entity may file or submit written comments in support of, or in opposition to, Advisory Opinion 206 by filing ten copies with Thomas A. Edmonds, the Executive Director of the Virginia State Bar, not later than September 20, 2002.

VIRGINIA UPL OPINION 206

WHETHER A NON-ATTORNEY CORPORATE OFFICE MAY REPRESENT THE CORPORATION IN AN ARBITRATION CONDUCTED IN VIRGINIA UNDER THE RULES OF THE AAA.

You have asked the committee to opine as to whether: (1) it is the unauthorized practice of law for a non-attorney officer of a corporation to represent that corporation at an arbitration conducted in Virginia under the rules of the American Arbitration Association ("AAA"); (2) Virginia attorneys and or the AAA may be subject to sanctions for aiding and assisting in the unauthorized practice of law by participating in an arbitration where a corporate party is represented by a non-attorney officer; and (3) AAA rules control over Virginia's rules regarding the unauthorized practice of law.

While at first blush the applicable Virginia Unauthorized Practice Rules appear to be UPR 1-101 (A) and (B) and Unauthorized Practice Consideration 1-3,¹ the Committee has previously opined in Unauthorized Practice of Law Opinion 200 that:

. . . although a foreign attorney who represents a party in an arbitration proceeding in Virginia is not representing a party before a "tribunal", such an attorney is certainly "practicing law" in Virginia. (Footnote omitted).

Based on this authority, in response to your first question, the Committee is of the opinion that it would be the unauthorized practice of law for an officer of a corporation who is not a lawyer to represent the corporation in an arbitration proceeding in Virginia. In UPL Opinion 200, the foreign attorney was found

to not be engaged in unauthorized practice but only because his actions were authorized under a limited exception allowed for foreign attorneys who represent clients elsewhere and are providing legal services in Virginia on an occasional basis only. Rules of the Supreme Court of Virginia, Part 6, §I (C). The conduct itself, however, was found to be the practice of law even though the proceeding was not practice before a "tribunal."² If representation of a corporation in an arbitration proceeding is the practice of law, then a lay person cannot engage in such representation.

With regard to your second question, whether Virginia attorneys would be subject to sanction for participating in an arbitration where the corporation was represented by a non-lawyer officer, it is the Committee's opinion that this is an ethical issue, more appropriately addressed by the Standing Committee on Ethics and thus beyond the purview of this Committee. With regard to whether the AAA would be subject to any sanction for participation in such an arbitration, it is the Committee's opinion that this also is an issue beyond the Committee's purview and perhaps is more properly a legal question.

Finally addressing your third question, while the rules of the AAA may allow for a corporation's officer who is not a lawyer to represent the corporation, it is the Committee's opinion that the Virginia Unauthorized Practice of Law rules and findings in its opinions take precedence over the rules of the AAA with regard to arbitration proceedings in Virginia. The authority to define the practice of law and enforce violations of that definition rests with the Virginia State Bar ("the Bar") and this Committee. The Bar is the regulatory agency of attorneys in Virginia and membership in the Bar is mandatory. The AAA, on the other hand, is an organi-

zation offering services which parties can choose voluntarily to use or not. Based on this authority resting in the Bar, the Committee's finding herein that this activity is the unauthorized practice of law would supercede the AAA's rule allowing the activity.

This opinion is based only on the facts you presented and is subject to review by Bar Council at its next regularly scheduled meeting, after the requisite period for public comment, in accordance with Part Six: Section IV: ¶ 10 (c)(iv) of the Rules of the Virginia Supreme Court. Should Council approve the Opinion, it will then be reviewed by the Supreme Court pursuant to Part Six: Section IV ¶ 10 (f)(iii).

Committee Opinion
May 30, 2002

Endnotes:

- 1 (A) A non-lawyer, with or without compensation, shall not represent the interest of another before a tribunal, otherwise than in the presentation of facts, figures or factual conclusions, as distinguished from legal conclusions
- (B) A non-lawyer regularly employed on a salary basis by a corporation appearing on behalf of his employer before a tribunal shall not engage in activities involving the examination of witnesses, the preparation and filing of briefs or pleadings or the presenting of legal conclusions.

* * * * *

UPC 1-3 A corporation (other than a duly registered law corporation) does not have the same right of appearance before a tribunal as an individual and may not be represented before a tribunal by its officers, employees or agents who are not duly authorized or licensed to practice law in Virginia. A corporation can be represented only by a lawyer before a tribunal, with respect to matters involving legal conclusions, examinations of witnesses or preparation of briefs or pleadings.

- 2 "Tribunal" is a defined term in the Unauthorized Practice Rules:

The term "tribunal" shall include, in addition to the courts and judicial officers of Virginia or of the United States of America, the State Corporation Commission of Virginia and its various divisions, the Virginia Workers' Compensation Commission, and the Alcoholic Beverage Control Board, or any agency, authority, board, or commission when it determines the rights and obligations of parties to proceedings before it, as opposed to promulgating rules and regulations of general applicability. Such term does not include a tribunal established by virtue of the Constitution or laws of the United States, to the extent that the regulation of practice before such tribunal has been preempted by federal law, nor does it include a tribunal established under the Constitution or laws of Virginia before which the practice or appearance by a non-lawyer on behalf of another is authorized by statute.

VIRGINIA UNAUTHORIZED PRACTICE OF LAW OPINION 202

UNINCORPORATED LABOR UNION EMPLOYING SALARIED ATTORNEYS TO PREPARE DRAFT QUALIFIED DOMESTIC RELATIONS ORDERS FOR MEMBERS' DIVORCE ATTORNEYS

Your inquiry concerns whether an unincorporated labor union, through a wholly-owned subsidiary, can employ salaried attorneys to prepare draft Qualified Domestic Relations Orders ("QDROs") for use by a union member's private attorney in the member's divorce proceedings. The union wishes to provide this service to its members because of the complicated nature of QDROs. The attorneys employed by the union would have been involved in the negotiation and have detailed knowledge of the provisions of the retirement plans at issue in the QDROs and would be able to prepare a draft of the QDRO consistent with federal law and tailored to the specific requirements of the member's retirement plan. The intention is that this will be an exchange of information between the union attorneys and the private divorce attorneys; the service will be to the private divorce attorneys and there will be no direct service to or contact with the union member. The service will be supplied only in the context of the union member being otherwise represented by private counsel. The member's attorney would pay a fee for this service to the union subsidiary which would use the fee to subsidize the union attorneys' salaries. You have asked the committee to opine as to whether the union would be engaging in the unauthorized practice of law in Virginia were it to provide this service to its members under the circumstances described.

In support of your inquiry you cite several cases decided by the United States Supreme Court in which an organization or union wished to provide legal services to its members. The Court found in those cases that the organization's or union's action was permitted as protecting rights of free speech and association under the First and Fourteenth Amendments. A state's attempt to limit or prohibit the union's activity was found unconstitutional, even in the context of professional regulation of the bar. See *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576 (1971); *United Mine Workers of America v. Illinois State Bar Assoc.*, 389 U.S. 217 (1967); *Brotherhood of Railroad Trainmen v. Virginia State Bar*, 377 U.S. 1 (1964); *NAACP v. Button*, 371 U.S. 415 (1963). You also rely upon and cite Unauthorized Practice Rule 8-101 and UPC 8-3, which were adopted by the Bar in view of these cases, allowing "trade associations" to provide members legal services or refer them to same. You also cite UPR 8-103(A)(3) and (A)(5) which prohibit a trade association from interfering in any way with an attorney-client relationship between a member and his/her attorney. In support, specifically, of your position that the union subsidiary can collect the fees for the services provided by the union attorneys, you cite these same authorities along with Virginia Rules of Professional Conduct 5.4 and 5.5.

The Committee has reviewed the case presented in the context of the application of the authorities cited in your inquiry as well as the Unauthorized Practice Rules ("UPRs") generally and Unauthorized Practice of Law opinions ("UPL opinions"). The Committee finds that the plan outlined by the union would not be the unauthorized practice of law. To reach this conclusion,

the Committee determined it was not necessary to apply the rulings of the U.S. Supreme Court in the cases cited. The Committee considered the following:

As to the union attorneys preparing a draft QDRO for the union member's private divorce attorney, Unauthorized Practice of Law opinions 191, 192 and 147 are instructive. UPL opinions 191 and 147 outline the permissible activities and services that a paralegal can perform for an attorney. UPL Opinion 192 addresses what services an entity can provide, and for whom, when the entity is not a law firm but whose employees are all attorneys licensed elsewhere than in Virginia. In UPL 192, the Committee dealt with a corporation providing consulting services, including analytical legal services; recommendations for revision of domestic and international law to support client positions; drafting legal opinions and legal summaries of statutes and treaties; and serving as technical legal advisors in criminal and civil trials—exclusively to legal counsel of federal agencies. The Committee concluded that if such services were provided exclusively to licensed attorneys authorized to act on behalf of their clients, all within the parameters set out in UPL opinions 147 and 191 as well as DR3-104, (now RPC 5.3), the corporation would not be practicing law.

Applying the Committee's findings in UPL 192 to the case under consideration, if the union attorney would be providing his/her service exclusively and directly to the private divorce attorney, and **not** directly to the union member and within the parameters set out in UPL 102 and the opinions cited therein, it is the Committee's opinion that the service would not be the practice of law. The draft QDRO that the union attorney prepares will be subject to final review and revision by the private, Virginia-licensed divorce attorney prior to inclusion in a document presented to a court of competent jurisdiction for approval, making this attorney ultimately responsible for the document's content. The "delegated work" of the union attorney would thus merge into the divorce attorney's completed work product.

With regard to the payment for these services, the Committee finds that such fee can be analogized to the payment of a fee for an expert or consultant used by an attorney in the course of representation. This fee is considered a "cost" to the client rather than a fee for legal services and, as such, payment made directly to the union subsidiary would not be improper.

In conclusion, the services of the union attorneys in drafting the QDRO and providing it directly to the private attorney, who will review, revise and have ultimate responsibility for its content prior to filing with a court of competent jurisdiction is not the unauthorized practice of law nor is the payment and collection of the fee for this service directly to and by the union.

Committee Opinion
June 18, 2002