

UPL OPINION NO. 206

WHETHER A NON-ATTORNEY CORPORATE OFFICER 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.

This is a revised opinion from that issued in May 2002. The Standing Committee on the Unauthorized Practice of Law reviewed the issues presented in light of commentary received following publication of the initial opinion. That initial opinion is now withdrawn and the Committee finds as follows.

The applicable authority is Virginia Unauthorized Practice of Law Rules UPR 1-101 (A) and (B), Unauthorized Practice Considerations 1-1 and 1-3 and the definition of the practice of law in Virginia:

UPR 1-101. Representation Before Tribunals

- (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 1-1. 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.

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 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.

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Specifically, the relation of attorney and client exists, and one is deemed to be practicing law whenever—

- (1) One undertakes for compensation, direct or indirect, to advise another, not his regular employer, in any matter involving the application of legal principles to facts or purposes or desires.
- (2) One, other than as a regular employee acting for his employer, undertakes, with or without compensation, to prepare for another legal instruments of any character, other than notices or contracts incident to the regular course of conducting a licensed business.
- (3) One undertakes, with or without compensation, to represent the interest of another before any tribunal—judicial, administrative, or executive—otherwise than in the presentation of facts, figures, or factual conclusions, as distinguished from legal conclusions, by an employee regularly and bona fide employed on a salary basis, or by one specially employed as an expert in respect to such facts and figures when such representation by such employee or expert does not involve the examination of witnesses or preparation of pleadings.
- (4) One holds himself or herself out to another as qualified or authorized to practice law in the Commonwealth of Virginia.

Part 6, § 1, Rules of the Supreme Court of Virginia

Based on this authority the Committee is of the opinion, in response to your first question, that it would not 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. The definition of the practice of law allows “a regular employee acting for his employer” to provide legal advice and prepare legal documents for this employer. While the definition and Rule 1-101 prohibit a non-lawyer from representing the interests of or appearing on behalf of his employer or a corporation before “a tribunal,” the definition of “tribunal” in UPC 1-1 does not include an arbitration proceeding. It follows, therefore, that a non-attorney officer of a corporation can represent that corporation and provide legal advice to the corporation/employer within the context of an arbitration proceeding.

Whether Virginia attorneys or the AAA would be subject to sanction for participating in an arbitration where the corporation was represented by a non-lawyer officer are questions beyond the purview of the UPL Committee but they become moot points in light of the Committee’s opinion regarding the representation itself.

Finally, addressing your third question, 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. While the Committee acknowledges that AAA rules allow for non-attorneys to represent parties, including corporations, in arbitration proceedings, the Committee's finding herein as to the permissibility of a non-attorney officer of a corporation to do so was based solely on the Virginia Unauthorized Practice Rules and Virginia's definition of the practice of law. The AAA rule did not factor into this finding. 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 organization offering services which parties can choose voluntarily to use or not. Based on this authority resting in the Bar, had the Committee made a finding that the activity herein was the unauthorized practice of law, that decision would supercede the AAA's rule allowing the activity.

Committee Opinion
February 10, 2004

UPL OPINION NO. 208

WHETHER A LAY ADJUSTER MAY PROPERLY ADVISE, COUNSEL AND REPRESENT THE LEGAL INTERESTS OF AN INSURED

You have asked the Committee to opine as to whether it is the unauthorized practice of law for a non-lawyer insurance adjuster to represent, counsel and assist an insured in pursuing a first-party insurance claim against the insured's own adjuster as a result of a fire loss. The controlling authority is found in Unauthorized Practice of Law Rule 2.

In the inquiry presented the insured suffered damage to his home as a result of a fire. The insured's carrier contacted an emergency services restoration company which provided services to the insured pursuant to the policy. Because of the extent of the damage, the insured became concerned about the policy's limits and coverage for the damage and so contacted a private adjusting firm to represent their (the insured's) interests with the carrier and with the restoration company through its counsel. The concern in the inquiry is that this private adjusting firm has "taken over the 'representation' of the insured in correspondence, meetings and negotiations" with the restoration company and the carrier with regard to resolution of the insured's fire claim. In correspondence, the adjuster has made statements such as "I am not inclined to advise insured to pay for" certain services.

The Committee considered all of the information presented in the inquiry and, applying UPR 2, it is the opinion of the Committee that the conduct of the private adjusting firm/private adjuster is not the unauthorized practice of law. UPR 2-105 (A) provides that a lay adjuster is permitted to engage in all of the activities authorized under all of the other provisions of UPR 2, including investigation, negotiation of settlement and preparation of certain documents, if performed on behalf of a principal "which is making a claim against its own insurance carrier." The same activities, if performed on behalf of a principal against a third party or against a carrier providing coverage for third party liability to a principal, would be prohibited by UPR 2-105(B). UPR 2-101(B)(3) defines "principal" as "any insured individual . . . asserting a right to payment under an insurance policy or insurance contract issued to such individual . . .

arising out of the occurrence of the contingency or loss covered by the policy or contract." UPR 2-101(A) defines "lay adjuster" as:

- (A) . . . a non-lawyer retained by a principal as an employee, independent contractor, or employee of an independent contractor, for the purposes of
 - (1) investigating facts and circumstances related of a personal injury and/or property claim;
 - (2) reporting such facts to his principal; or
 - (3) assisting his principal in the handling, negotiation and settlement of such claim.

In the situation presented in this inquiry, the insured is the "principal" as defined by UPR 2-101(B)(3). The adjuster fits the definition of "lay adjuster" found in UPR 2-101(A) (1-3). The activities that the lay adjuster in this matter was involved in would be permitted under the UPL Op. 208 provisions of UPR 2-102-2-104. The adjuster was negotiating with the carrier and the restoration company regarding payment of the services of the restoration company and the claim generally, which services would be "subject to a claim which may be paid by [the principal's] insurance carrier" under UPR 2-105(A)(2). In this negotiation, it appears that the adjuster gathered factual information, discussed settlements, and expressed his opinion on the extent of the damage and its value. See UPR 2-103(A)(1). UPC 2-1 provides:

UPC 2-1. For example, the activities of a lay adjuster in claims may consist of acting on behalf of his principal in identifying the facts and parties, securing witness statements, estimating the costs of repair, and compiling other information about the claim. Statements are given by the lay adjuster to his principal from whom he receives instructions as to the disposition of the claim. The lay adjuster then may attempt to settle the claim at the monetary value his principal is willing to pay or accept.

UPR 2-103 (A)(2) allows that a lay adjuster may make statements to "others" in the course of settlement negotiations as to the principal's liability or the law governing the facts so long as the provisions of sections (2)(a-c) are satisfied. In this case, the adjuster was clear in his communications to the carrier and the restoration company as to who he was and that his "principal" might be adversarial. It also appears clear from the correspondence that the carrier and the restoration company recognized the lay adjuster as a possible adversary. Finally, there is nothing to indicate that either the carrier or the restoration company were not competent to handle their affairs. Thus, it appears that, on the face of the correspondence included with this complaint, the adjuster's conduct fell within the scope of what UPR 2-103(A)(2) allows.

Based on all of the foregoing it is the Committee's opinion that it is not the unauthorized practice of law for a lay adjuster to represent the interests of a principal, in this case the insured, in negotiation, settlement or investigation of a claim to be paid under the principal's own insurance policy or contract.

Committee Opinion
February 18, 2004