

VIRGINIA UPL 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 can employ salaried attorneys to prepare draft Qualified Domestic Relations Orders ("QDROs") for its members for use by their attorneys in the members' divorce proceedings. The member would pay an extra fee to the union for this service which would be used to finance the attorney's salary. You have asked the committee to opine as to whether the union would be engaging in the unauthorized practice of law in Virginia to provide this service to its members under the circumstances described.

The appropriate and controlling Virginia Unauthorized Practice Rules are:

Unauthorized Practice Rule 8. Trade Associations

UPR 8-101. Giving Legal Advice.

- (A) A trade association shall not give legal advice or provide legal services to its members, directly or through its employed or retained lawyer, except that a trade association may:
 - (3) Refer one or more of its members to its lawyer with respect to any legal matter so long as such lawyer is recognized throughout by all concerned as representing solely the interest of such member or members, free of control by or interference from the trade association.
 - 5) Provide legal advice and the services of its lawyer to one or more of its members preliminary to and in connection with any matter that may seek to:
 - (a) Further the political goals of the association;
 - (b) Obtain meaningful access to the courts; or
 - (c) Vindicate civil liberties guaranteed by the Constitutions of Virginia or the United States.

UPR 8-102. Holding Out With Regard to Legal Services.

- A) Except to the extent legal advice or services are permitted to be provided under UPR 8-101, a trade association shall not hold itself out as authorized to furnish its members legal advice or services.

UPR 8-103. Attorney-Client Relationship.

- (A) A trade association shall not:
 - (1) Disrupt the relationship of confidence and trust which must exist between a lawyer and his client.
 - (2) Prevent a lawyer from exercising independent judgment on behalf of his client by attempting to fix the employment, or attempting in any way to control or direct his actions, except that in matters of collective interest a trade association may negotiate on behalf of its members with respect to the legal fees to be charged.

- (3) Place itself between the lawyer and the member in an attempt to act as the only conduit of information between the two, since this would prevent the establishment of the fundamental relationship of trust and direct personal responsibility which ought to exist between a lawyer and his client.

Several cases decided by the United States Supreme Court address similar situations where an organization wished to provide legal services to its members. The Court found that the union's action was permitted under the First and Fourteenth Amendments and a state's attempt to limit or prohibit the union's activity was improper, even in the context of ethical 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).

In the case you have presented, an unincorporated labor union, through a wholly owned subsidiary, wishes to employ salaried attorneys to prepare draft QDROs for members' divorce attorneys, for which the member would pay a fee. The purpose of the fee, as you described, would be to help offset the cost of the attorney's salary. The union wishes to provide this service to its members because of the complicated nature of QDROs. The attorneys employed by the union were involved in the negotiation of the provisions of the retirement plans at issue in the QDROs. They would have detailed knowledge of the provisions and requirements of the various plans 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 union believes this would lower the overall cost of preparing the QDRO.

Based on the rulings of the U.S. Supreme Court in the cases cited herein and UPR 8, the Committee finds that the plan outlined by the union would be unauthorized practice of law and thus not permitted. In reaching this conclusion, the Committee considered the following.

In each of the Supreme Court decisions cited herein the union or organization seeking to provide legal services or referrals to its members was doing so in an effort to see to it that the members had access to the legal system for the purpose of redressing a societal wrong and/or pursuing political issues (*NAACP v. Buttons*) or asserting their legal rights in the context of injuries sustained in their employment. (*Trainmen v. Virginia State Bar*; *United Mine Workers v. Illinois State Bar*; *United Transportation Union v. Michigan State Bar*). Always, there was a nexus between the type of representation offered and an interest of the organization or union or the work that the member was performing for the company. The union's attorneys represented the member on the entire case and solely to protect the interests of that member. In each of these cases, the union or organization paid for the legal services, either by employing the attorney or paying him/her directly, and the member paid no additional fee. It was appropriate for these services to be provided and/or subsidized by the union or organization in each case because, for various reasons and circumstances, the individual members had been limited somehow in their access to adequate legal representation on their own.

Unauthorized Practice Rule 8 mirrors the holdings of the Supreme Court and was drafted after specific review of these

cases. This rule allows a “trade association” to provide legal services or advice only in limited circumstances. *UPR 8-101 (A)*. But for these limited circumstances, a trade association cannot hold itself out as authorized to furnish legal services or advice. *UPR 8-102*. When these services are provided, the attorney then represents solely the interests of the member. *UPR 8-101 (A)(3)*. Further the Rule contemplates, as the Supreme Court cases also suggest, that there will be some “nexus” between the legal services offered and the furtherance of an interest of the association or its work or the well-being of its members. See *UPR 8-101 (A)(1-5)*. Rule 8-103 is very clear that the lawyer must be free from any influence of the association and completely independent in his/her representation of the member. *UPR 8-103 (A)(1-3)*.

Your situation is distinguishable from the Supreme Court decisions and outside the parameters of UPR 8. Here, the union wants to provide the services of an attorney who will work directly with the member’s divorce attorney, supplying that attorney with a draft of a QDRO which will meet all federal and retirement plan requirements. There is anticipated to be little or no direct contact with the *member* unless there is a case where the member is handling his/her case *pro se*. In that event, disclaimers will likely be provided to the member explaining that the union’s attorney is *not* representing the member in any capacity for purposes of furthering the divorce action. Rather, the union lawyer is *only* providing information and a draft of a QDRO which will comply with certain specific requirements, but with *no* assurance that the QDRO is in compliance with all state laws, or that it will be appropriately filed with the appropriate court. The union attorneys here are not representing the member on an entire case, rather only providing a very limited and narrow service of preparing a draft of a QDRO. The representation is not related in any way to the furtherance of an interest of the union, or the work of the union or the company. This service is one piece of a divorce action which is not related to the work of the members as pilots; nor is this a case where the services are being offered to the members because the members are somehow limited in their ability to obtain adequate legal representation. The members will, in most cases, already be represented by a divorce attorney. Based on how you describe the relationship (or lack thereof) between the union attorney and the member, it is not clear who the union attorney is actually representing and if he/she is really representing solely the interests of the member, without any interference or control by the union, as the cases and the Rule prescribe. Indeed, it seems that these attorneys are more representing the union or the company in assuring that the QDRO complies with the plan, which these attorneys negotiated for the union or the company, and federal requirements. These attorneys in no way are protecting the overall interests of the member in preparing this QDRO as they will not be responsible for the ultimate content of the order and whether the terms are fair to the member; that remains the responsibility of the divorce attorney.

Finally, there is the issue that this service is being offered to lower the cost of producing the QDRO. It is not clear that what you have proposed will accomplish this goal. First, the member must pay an extra fee to the union for this service. This raises a question of fee-splitting between a lawyer and nonlawyer which is improper. See Rule 5.4 (a), Virginia Rules of Professional Conduct. Further, presumably the member has already paid legal fees to his divorce attorney who will be handling all other aspects of his case, including finalizing the QDRO for fil-

ing with the court. If the member does not use the service of the union attorney for the draft of the QDRO, which the member is not required to do, then the order would be drafted by the divorce attorney and sent through the company’s human resources department for review. While you indicate that this process has led to delay because of lack of expertise on the part of human resources to properly revise the QDRO, this problem could be solved simply by having the union attorneys work in conjunction with human resources to review the orders. This saves the extra cost to the member. Moreover, the provisions which the union attorney will be addressing are essentially “boilerplate,” not something that has to be completely re-created for each member’s specifications.

The Committee also considered an alternative analysis to perhaps save this proposed plan if considered in light of UPL Opinions 192, 147 and 191. UPL opinion 191 and 147 address the parameters of the services which 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 found that if a corporation provided 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, 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. In the case under consideration, if the union attorney would be providing his/her service exclusively to the divorce attorney and within the “paralegal arrangement as contemplated by these prior opinions” the service might not be the practice of law. However, the services the union attorney are providing seem to go beyond paralegal work. The document the attorney drafts is one prepared, presumably, after legal analysis and application of appropriate law and will be expected to be included in a document presented to a court of competent jurisdiction for approval, albeit subject to final review and revision by the divorce attorney. More significantly, the *member* is paying an extra fee for this service to the union, not the attorney, which is then used by the union to finance the attorney’s salary. The charging of this fee is in the nature of fee-splitting between a lawyer and nonlawyer and again puts this case back to being unauthorized practice of law by the union.

In summary, based on the application of all relevant authority—Unauthorized Practice Rule 8, United States Supreme Court decisions and prior Unauthorized Practice of Law opinions—it is the finding of the Committee that it is the unauthorized practice of law for an unincorporated labor union to employ salaried attorneys to prepare draft Qualified Domestic Relations Orders for its members for use by the members’ attorneys in the members’ divorce proceedings.

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 I: ¶10(f)(iii).

Committee Opinion
September 27, 2001

VIRGINIA UPL OPINION 203

COLLECTION AGENCIES OBTAINING ASSIGNMENTS OF JUDGMENTS FROM CREDITORS AND PROCEEDING PRO SE TO DOCKET AND COLLECT ON THE JUDGMENTS AND PREPARING ALL NECESSARY PLEADINGS WITHOUT REPRESENTATION OF COUNSEL

This will respond to several inquiries requesting an Unauthorized Practice of Law Advisory Opinion regarding whether a collection agent or agency or other type of “judgment recovery” agent or agency, acting *pro se*, can docket judgments which creditors have assigned to them and proceed, also *pro se*, to execute and collect on those judgments as the original creditor could do. Three specific situations in this context were presented.

In the first situation, an individual, holding himself out as owner of a judgment recovery service, wrote to the court requesting that the clerk docket several assignments of judgment which he had obtained from judgment creditors. In his correspondence to the court, this individual advised that he had acquired the assignments of judgment by offering the creditor a “small purchase price (\$1.00-\$5.00) as due consideration plus a percentage of whatever money [he was] ultimately able to collect from the debtor.” He also included copies of the assignment contracts which he and the creditor had signed. It was this individual’s position that as “owner of the judgment,” he/his company had “the authority to file the proper forms to seize, garnish and/or lien assets—ultimately recovering funds for the benefit of both parties.”

In the second situation, another individual approached the clerk of court requesting information as to the procedure for docketing assignments of judgment; he did not present the same to the clerk for actual filing. In this instance, the clerk of the court provided the individual with information regarding Unauthorized Practice Rule 3 and statutory provisions addressing practice and procedure for assignment and execution of judgments. The individual responded in writing to the clerk addressing how the Rules and statutes did or did not apply to him. Unlike the first case, the information the individual provided to the clerk suggested that the assignments that he obtained were complete assignments, with the creditors having no further interest in the judgment. Nor did there appear initially that there was there any “contingency” fee contemplated as in the first scenario wherein the creditor would share in a portion of any recovery. However, in a later written response from this individual, he suggested that this may not be the case, stating “I believe it is within the law for me to *compensate an assignor* based on a percentage of the recovery as long as I, as the judgment creditor, enforce the judgment myself.”

In the third situation, a collection agent/agency sent correspondence to a creditor and a creditor’s attorney offering the agent/agency’s services to collect outstanding judgments. The agent offered to:

... do all investigations, asset searches, *filing, garnishment processes, service and liens*. All with the ultimate goal of collecting your judgment. Upon successfully [*sic*] collection your judgment, our company *will return a substantial percentage to you*. Again, THERE IS NO UP FRONT COST TO YOU. (Emphasis added).

The controlling Unauthorized Practice Rules are UPR 3-103 (C) and (D), Preparation of Documents:

- (C) An agency shall not prepare for others any document which requires legal training or the application of legal principles to factual situations except as authorized under these Rules.
- (D) An agency shall not use any letters or forms which threaten the institution of legal proceedings or simulate judicial process or notice of judicial process.

Also, UPR1-101 (A), 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

The Rules also recognize and affirm the right of a non-lawyer to represent himself:

The right of individuals to represent themselves is an inalienable right common to all natural persons. But no one has the right to represent another; it is a privilege to be granted and regulated by law for the protection of the public.

Va. S. Ct. R., Pt. 6, §I. Unauthorized Practice Consideration 1-2 reflects this same principle: “A non-lawyer may represent himself, but not the interest of another, before any tribunal.”

There are also statutory provisions which effect the situation you have presented, in particular, §8.01-452 Entry of assignment of judgment on judgment lien docket:

Whenever there shall be an assignment of a judgment, there may be a notation of the assignment made upon the judgment docket, where the same is recorded, by the clerk. An assignment, in order to be so noted, must be in writing, showing the date thereof, the name of the assignor and assignee, the amount of the judgment, and when and by what court granted, and either acknowledged as are deeds for recordation in the clerks’ offices of circuit courts in this Commonwealth, or signed by the assignor, attested by two witnesses; or such judgment may be assigned by notation on the margin of the judgment lien docket on the page of the book where same is docketed, by the judgment creditor or his attorney of record, and attested by the clerk. The assignment, after the same is noted upon the judgment docket as is herein provided, shall be filed by the clerk with the other papers in the case in his office. When such assignment is made and noted as herein provided further executions shall be issued in the name of the assignee as the plaintiff in the case.

Sections 8.01-466 (issuance of *feri facias* on judgment for money) and 8.01-511 (institution of garnishment proceedings) both reference an assignee of a creditor as being able to pursue these actions.

On a judgment for money, it shall be the duty of the clerk of the court in which such judgment was ren-

dered, *upon request of the judgment creditor, his assignee or his attorney*, to issue a writ of fieri facias at the expiration of twenty-one days from the date of the entry of the judgment and place the same in the hands of a proper person to be executed and take his receipts therefore.

Va. Code Ann. § 8.01-466. (Emphasis added.)

No summons shall be issued pursuant to this section at the suggestion of the *judgment creditor or his assignee* against the wages of a judgment debtor unless the *judgment creditor, his agent or attorney*, shall allege in his suggestion that . . . a good faith effort has been made by the *judgment creditor, his agent or attorney*, to secure the social security number of the judgment debtor.

Va. Code Ann. § 8.01-511. (Emphasis added.)

In Unauthorized Practice of Law Opinions 120, 150, 151 and 194, the Committee addressed the general issues of what services a collection agency can provide to a creditor to assist in collection of a debt or judgment and what actions non-attorneys can take before a court on behalf of another. UPL 120 reviewed the assignment of claims to a collection agency and the agency's engagement of counsel to pursue these claims. In this opinion, the Committee found that it was not unauthorized practice of law for the agency to hire counsel to collect the claim on the agency's behalf, if the creditor had assigned the claim to the agency for a "fixed consideration" and retained no interest in the claim. On the other hand, if the creditor assigned the claim to the agency on a contingency basis, wherein the creditor would be paid a percentage of any recovery which the agency was able to obtain on the claim, then the Committee found that the agency's engagement of counsel to pursue the claim in the name of the agency was unauthorized practice of law if the agency did not comply with Unauthorized Practice Rule 3.

In UPL opinions 150 and 151, the Committee found that it was unauthorized practice of law for a collection agency or its lay employees to: 1. refer claims to the agency's own counsel without allowing the client to choose his own attorney; 2. collect and disburse monies, including attorneys' fees, and initiate decisions to continue cases; 3. interfere with the relationship between the attorney and the creditor and act as the only conduit of information between the two; 4. to prepare warrants in debt, either under specific instructions from an attorney selected by the creditor or on their own, using information obtained from the creditor and filled in on pre-printed forms and sent to an attorney for review and filing with the court. In UPL opinion 150, the Committee specifically found that a warrant in debt could be prepared only by the creditor himself, by an attorney licensed to practice law in Virginia or by the licensed attorney's bona fide employee under his direct supervision.

Finally, in UPL opinion 194 the Committee addressed the authority of a power of attorney to file a Motion for Judgment on behalf of another. The Committee found that the authority granted in a power of attorney does not extend to allowing a non-attorney to prepare, sign, file pleadings and appear in court on behalf of another. A general power of attorney does not confer the legal authority to practice law on behalf of another.

After reviewing the cases presented in the inquiries and applying the authority cited herein to the cases, the Committee opines as follows:

1. In all three cases presented, the Committee finds that actions by the agent/agency to docket and collect on the judgment through available enforcement proceedings, are the unauthorized practice of law. In all cases the original creditor still has an interest in the collection of the judgment since he/she will share in any recovery. The agent/agency is not representing itself alone, but also the interests of the original creditor. Under UPR 3-103 (C) and (D), UPR 1-101(A) and the decisions in UPL opinions 120, 150 and 151, such action by the agent/agency is the unauthorized practice of law. The agent/agency is a non-lawyer attempting to prepare, sign and file pleadings and appear before a court on behalf, not only of him/itself, but also on behalf of the original creditor. This is improper. The distinction between assignment of a cause of action and an assignment of a judgment makes no difference. In pursuing a recovery of a judgment, the methods available, i.e., debtors' interrogatories, garnishments, writ of *feri facias*, all require the preparing, filing and signing of pleadings or petitions which constitute the practice of law, and when done *on behalf of another*, can only be done by a lawyer.

In all three situations, the judgment recovery agency procures what it describes as an assignment from the original creditor for the purpose of filing enforcement actions in the agency's own name. However, in each situation, the contingent fee relationship remains the same. The collection agency cannot carry on the business of practicing law by the device of taking assignments from judgment creditors and proceeding in its own name. *See, e.g., State ex rel. Norvell v. Credit Bureau of Albuquerque*, 85 N.M. 521, 529, 514 P.2d 40, 48 (1973) (assignments taken by collection agency were not in truth assignments acquiring title and ownership but rather to facilitate furnishing legal services for consideration); *J.H. Marshall & Assoc. v. Burlison*, 313 A.2d 587, 596 (1974) (taking of assignment from creditor does not change the basis fact that collection agency is providing legal advice and services to another for profit on a contingent fee basis).

2. With regard to a situation where the collection agent actually has the judgment assigned to him completely, with no further involvement by the creditor, and no sharing of any funds recovered, the Committee finds that actions brought before the court by such an agent to docket and collect on the judgment is not the unauthorized practice of law.

Section 8.01-452 allows for the assignment of a judgment and the docketing of that judgment. The assignment and the docketing, in and of themselves, is not the unauthorized practice of law as the statute itself allows that the judgment creditor can make the assignment and docket such assignment him/herself, with no requirement that an attorney perform this task. As to execution on the judgment, the statute provides that "further executions *shall be issued in the name of the assignee as the plaintiff in the case.*" If the assignee has a complete assignment, he/she is now "the" creditor and can proceed to collect on the judgment in the same manner as the original creditor could proceed, including filing necessary pleadings and appearing before the court *pro se*. This is supported by the language in the *feri facias* and garnishment statutes. There is no unauthorized practice of law because, with a complete assign-

ment, the assignee is not preparing legal documents for, or appearing before a court on behalf of, another; the assignee is performing these tasks for him/herself only. The original creditor no longer has any interest in the judgment, nor is he/she going to share in any recovery which the assignee obtains.

The decisions in UPL opinions 120, 150, 151 and 194 do not dictate a contrary conclusion than that which the Committee has reached herein. These opinions found unauthorized practice of law to exist when a non-attorney or non-legal entity was attempting to assert an action, file legal documents and appear in court *on behalf of another*. In the case of a collection agent/agency which has a complete assignment of a judgment, it is not proceeding on behalf of anyone; it is proceeding to

enforce its own claim to a judgment. As assignee, they have a right to pursue collection as if they were the original creditor, with or without counsel.

This opinion is based only on the facts 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 I: ¶10(f)(iii).

Committee Opinion
September 27, 2001