

Virginia State Bar Council to Review UPL Opinion 207

RICHMOND—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 February 19, 2005 in Richmond, Virginia, will 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 207

The Standing Committee on the Unauthorized Practice of Law (“UPL Committee”) issued UPL Opinion 207 on February 18, 2004. This opinion addresses whether an attorney may train a non-attorney social worker to assist members of the general public in filling out warrants in debt, and other forms necessary for pro se representation in Small Claims Court in Virginia. The Committee relied on Virginia’s definition of the practice of law, prior UPL Opinion 73, and five of the nine existing Unauthorized Practice Rules (“UPRs”) prohibiting the preparation of legal documents by non-lawyers. Based upon this authority, the opinion states that the preparation of warrants in debt and other forms necessary for pro se representation in Small Claims Court by a non-attorney worker would be the unauthorized practice of law. In the proposed opinion, the UPL Committee notes that persons proceeding in Small Claims Court are required to represent themselves, raising a question of whether such limited assistance by a social worker, even under the direction of an attorney, is permissible. However, the opinion states that this issue is beyond the purview of the Committee.

Council considered an earlier draft of this opinion on June 17, 2004, and sent it back to the UPL Committee to consider adding a provision allowing the social worker to provide direct translation, transcription of dictation, or translation of dictation of the forms into English. However, there can be no legal advice given when the social worker assists with the completion of the form; and, by selecting the appropriate form to address the *pro se* litigant’s goals, purposes or objectives, the social worker may be engaged in the unauthorized practice of law. At the meeting of Council in June 2004, members also commented on how the UPL Committee reconciled its position taken in UPL Opinion 207 with its proposed UPR 10 allowing lay court clerks to assist *pro se* litigants with the selection and completion of court approved forms. Since that time, however, the Supreme Court of Virginia rejected the bar’s petition asking the Court to adopt UPR 10. Nevertheless, the circumstances under which UPR 10 was recommended and those presented in UPL Opinion 207 are distinguishable. In UPR 10, the court clerk would be under the direct supervision of the applicable court. In UPL Opinion 207, the facts are that the social worker would be “trained” by an attorney, but there was no indication that the attorney would monitor or supervise the social worker’s activity.

Based on the comments made at the June 2004 Council meeting, the UPL Committee issued on October 12, 2004 a revised opinion addressing the translation issue.

Inspection and Comment

The proposed unauthorized practice of law advisory opinion 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 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 page at <http://www.vsb.org>.

Any individual, business or other entity may file or submit written comments in support of, or in opposition to, the advisory opinion by filing ten copies with Thomas A. Edmonds, the Executive Director of the Virginia State Bar, not later than **January 31, 2005**.

UPL OPINION NO. 207

WHETHER IT IS THE UNAUTHORIZED PRACTICE OF LAW FOR A SOCIAL WORKER TO ASSIST PERSONS IN PREPARING PLEADINGS AND FORMS FOR SMALL CLAIMS COURT

You have requested a legal ethics opinion seeking an opinion as to whether Rule 5.5 of the Rules of Professional Conduct, prohibits an attorney training a non-attorney social worker to assist members of the general public in filling out warrants in debt, and other forms necessary for pro se representation, in Small Claims Court in Virginia. The Standing Committee on Legal Ethics referred this inquiry to the Standing Committee on the Unauthorized Practice of Law to determine whether the social worker is engaged in the unauthorized practice of law performing the activities described.

The applicable authority is found first in Virginia’s definition of the practice of law:

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.

The Committee has previously opined that non-lawyer assistance to the general public in the completion of form documents or the providing of legal advice concerning the completion of the forms by non-lawyers constitutes the unauthorized practice of law. UPL Opinion 73.¹

Finally, five of the nine existing Unauthorized Practice Rules consistently prohibit a non-lawyer from preparing legal documents. See UPR 2-104, 3-103, 4-103, 6-103(A)(5) and 9-103(B)(2) and (C) as well as UPCs 3-6, 3-7, 4-5, 4-6, 4-5 and 9-7.²

Applying this authority to your inquiry, the Committee concludes that the preparation of warrants in debt and other forms necessary for pro se representation (“legal instruments of any character”) in Small Claims Court by a non-attorney social worker would be the unauthorized practice of law if the non-attorney social worker selects the forms for the litigant or advises the litigant as to which forms are appropriate based on the litigant’s particular case; or provide any legal advice to the litigant. The social worker may assist the litigant with completion of the form document using language specifically dictated by the litigant.

The only assistance that a social worker, or any non-lawyer, may provide to a pro se litigant to complete form legal documents is direct translation of the document (if the litigant does not speak or read English) to the litigant’s native language, direct transcription, or direct transcription and translation to English, of information necessary to complete forms as dictated by the litigant. The social worker may also provide general administrative instructions such as to how and where and when to file the forms with the appropriate court/tribunal.

In addition, the Committee notes that persons proceeding in Small Claims Court are required to represent themselves,³ which raises a question of whether such limited assistance by a social worker under the direction of an attorney is permissible. However, this is a legal issue beyond the Committee’s purview.

This opinion is based only on the facts you presented and is subject to review by Bar Council at its next regularly scheduled meeting in February 2005, 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
February 18, 2004
Committee Opinion Revised
October 12, 2004

FOOTNOTES

1 It is not the unauthorized practice of law for a non-lawyer to create legal form documents for sale to the general public but it is the unauthorized practice of law for a non-lawyer to assist the general public in the completion of such forms or provide legal advice concerning same. UPL Op. 73, January 18, 1985.

2 UPR 2-104. Preparation of Documents.

(A) A non-lawyer shall not, with or without compensation, direct or indirect, prepare or deliver legal instruments of any character except a lay adjuster may prepare a form of release or other document prepared or approved by his principal as to which the lay adjuster may fill in blanks supplying factual data.

UPR 3-103. Preparation of Documents.

(A) An agency may prepare statements of accounts and affidavits of facts relating to accounts and may file the same with personal representatives and trustees in bankruptcy.

(B) An agency shall not prepare a proof of claim or file such a claim as agent for the creditor with the bankruptcy court except to the extent it is permitted to do so by the Bankruptcy Rules.

(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.

UPR 4-103. Preparation of Documents.

(A) A non-lawyer shall not, with or without compensation, prepare or draft, or cause his own lawyer to prepare or draft, for another, legal instruments of any character, including the filling out of a form for any will or trust, except:

(1) A non-lawyer may prepare forms of wills or trust of general application.

(2) A non-lawyer, as an incident to the regular course of conducting his business, may submit to his customer’s lawyer specimen language for inclusion in a legal instrument to be prepared by such lawyer, subject to acceptance, modification or rejection by such lawyer.

(3) A non-lawyer, as an incident to the regular course of conducting his business, may furnish his customer with routine forms or contracts of generally accepted application which do not go beyond the legitimate interest of the non-lawyer and do not involve a selection by the customer as between alternatives with materially different legal results not generally understood in the community. For example, the offering by a savings institution of a joint account with right of survivorship, a simple revocable trust account or a custodial account under the Virginia Uniform Gifts to Minors Act would normally not constitute the unauthorized practice of law.

UPR 6-103. Preparation of Legal Instruments.

(5) A settlement agent authorized to provide escrow, closing or settlement services for real estate transactions under the Consumer Real Estate Settlement Protection Act (CRESPA), Va. Code §§ 6.1-2.19, *et seq.* or the Real Estate Settlement Agent Registration Act (RESARA), Va. Code §§ 6.1-2.30, *et seq.* or any other Virginia statute now existing or hereafter enacted may complete form documents and instruments selected by and in accordance with the instructions of the parties to the transaction.

UPR 9-103. Immigration Practice.

(B) For purposes of UPR 9-103(A):

(2) “Represent” means to engage in “practice” or “preparation” as those terms are defined, respectively, in 8 CFR “1.1(i) and (k), to wit: “practice” means the act or acts of any person appearing in any case, either in person or through the preparation or filing of any brief or other document, paper, application, or petition on behalf of another person or client before or with the Service . . . ; “preparation” means the study of the facts of a case and the applicable laws, coupled with the giving of advice and auxiliary activities, including the incidental preparation of papers, but does not include the lawful functions of a notary public or service consisting solely of assistance in the completion of blank spaces on printed Service forms by one whose remuneration, if any, is nominal and who does not hold himself out as qualified in legal matters or in immigration and naturalization procedure or as 8 CFR Part 292 may be amended from time to time.

(C) The provisions of (A) and (B) above are not intended to prohibit an unauthorized non-lawyer from assisting an individual in the completion of forms which had been personally selected by the individual, to the extent that such assistance involves only the taking and transcription of dictation or the translation of such dictation into English. However, the referenced provisions are intended to prohibit such an unauthorized non-lawyer from selecting specific forms for completion or from advising the individual as to which forms are appropriate for completion and submission to the Service provided such activities require the use of legal knowledge and skill.

- UPC 3-6. Statements of account and affidavits of facts relating to accounts and other matters are not legal instruments, and the preparation of the same by an agency is not the unauthorized practice of law. Such preparation does not require legal training or the application of legal principles; nor is the mere filing of such accounts or affidavits with personal representatives, trustees in bankruptcy and the like representing the interest of another before a tribunal.
- UPC 3-7. A non-lawyer may properly act as a trustee in bankruptcy but may not prepare pleadings in the bankruptcy court except as authorized by the Bankruptcy Rules.
- UPC 4-5. The preparation of legal instruments such as wills, codicils and trusts by a non-lawyer for another, with or without compensation, goes beyond the area of permitted advice incident to the regular course of a non-lawyer's business. There is nothing improper, however, in the submission of suggested forms for various types of wills or trusts to lawyers for present or prospective customers of a non-lawyer. Distributing forms of separate administrative or dispositive provisions setting forth the proper name of a fiduciary, a charity or the like is not improper.
- UPC 4-6. Selecting or filling out a form of will or trust for another is an exercise in legal judgment. As an aid to a customer's lawyer, a non-lawyer may submit to such lawyer, and only to him, specimen language for technical provisions to be included in his client's will, codicil or trust; but such non-lawyer is not entitled to hold himself out as the responsible draftsman of such provisions.
- UPC 4-7. Advice by a non-lawyer as to the use of his "standard form trust," "plain English trust," "mini-trust," or the like constitutes the unauthorized practice of law when the provisions of such instrument go beyond the legitimate interest of the non-lawyer therein, seek to do more than the normal agency or deposit contract, or affect the legal rights of persons not parties to the contract. For example, the

furnishing by a non-lawyer to his customer of a power of attorney which extends the authority of the attorney-in-fact to deal on behalf of his principal with all his principal's assets or accounts, whether or not maintained by that particular non-lawyer, goes beyond the area of that non-lawyer's legitimate interest.

- UPC 9-7. The Virginia State Bar recognizes that certain non-lawyers may be authorized to practice before a federal immigration agency. However, non-lawyers who are not so authorized are limited to providing assistance to an alien resident for such limited services as translation of documents, and assistance in the transcription of documents or answers provided by the alien, for a fee commensurate with such limited services. However, the selection of appropriate immigration forms, the assistance to the alien in the information to be provided on such forms, and other related services by an unauthorized non-lawyer may constitute the unauthorized practice of law.

3 § 16.1-122.4. Representation and removal; rights of parties.—

- A. All parties shall be represented by themselves in actions before the small claims court except as follows:
1. A corporate or partnership plaintiff or defendant may be represented by an owner, a general partner, an officer or an employee of that corporation or partnership who shall have all the rights and privileges given an individual to represent, plead and try a case without an attorney. An attorney may serve in this capacity if he is appearing pro se, but he may not serve in a representative capacity.
 2. A plaintiff or defendant who, in the judge's opinion, is unable to understand or participate on his own behalf in the hearing may be represented by a friend or relative if the representative is familiar with the facts of the case and is not an attorney.