(This opinion is a DRAFT Opinion and is subject to revision or withdrawal until it is finalized by the Ethics Committee – February 25, 2021)

UPL OPINION 218. Does the Uniform Power of Attorney Act Authorize a Non-Lawyer Agent/Attorney-in-Fact to Represent the Principal in Court?

QUESTION PRESENTED

Does the Uniform Power of Attorney Act, § 64.2-1600-1642 Code of Virginia, authorize a non-lawyer agent/attorney-in-fact to prepare, sign, and file pleadings with a court on behalf of the principal and then appear and represent the interests of the principal before the court, without engaging in Unauthorized Practice of Law?

APPLICABLE RULES AND OPINIONS

The applicable rules are: Virginia's Unauthorized Practice of Law Rules, Part 6, § I (1) – (2) Rules of the Supreme Court of Virginia ("Prohibition Against Unauthorized Practice of Law" and "General Definition"). The relevant UPL Opinion is UPL Opinion 194.

ANALYSIS

UPL Opinion 194, approved by the Supreme Court of Virginia on May 1, 2000, addressed the same question of the scope of authority of an agent/attorney-in-fact under a general power of attorney and concluded that:

> …a power of attorney does not authorize a non-lawyer to prepare, sign, and file a Motion for Judgment in circuit court

> on behalf of a principal…nor may the attorney-in-fact appear in court on the principal's behalf. Such activity is the unauthorized practice of law. A general power of attorney is not sufficient to confer upon a non-lawyer the legal authority to practice law on the principal's behalf. The authority to practice law is conferred by the state through the issuance of a license to practice law.

In 2010, the Virginia General Assembly adopted the Uniform Power of Attorney Act ("UPOAA"), § 64.2-1600-1642 Code of Virginia. There has been no review or revision of UPL Opinion 194 since the adoption of the UPOAA. This opinion request now seeks reconsideration of UPL Opinion 194 in light of the UPOAA to determine whether the language of the UPOAA authorizes a non-lawyer agent/attorney-in-fact under a power of attorney to engage in activities that would otherwise be considered the practice of law. In this opinion, the Committee concludes that the answer is "no" and the analysis in UPL Opinion 194 should be affirmed.

Section 54.1-3909 of the Code of Virginia establishes the authority of the Supreme Court of Virginia to "promulgate rules and regulations … defining the practice of law." Section 54.1-3922 of the Code of Virginia vests the Board of Bar Examiners with the authority to administer the bar examination, "determin[e] the qualifications of applicants, … determin[e] requirements for taking and passing examinations, and [grant] such certificates to practice law as may be authorized by the Supreme Court." Part 6, § I (1) and (2), Rules of the Supreme Court of Virginia express the prohibition against Unauthorized Practice of Law and define what constitutes the practice of law in Virginia:

1. PROHIBITION AGAINST UNAUTHORIZED PRACTICE OF LAW: No non-lawyer shall engage in the practice of law in the Commonwealth of Virginia or in any manner hold himself or herself out as authorized or qualified to practice law in the Commonwealth of Virginia except as may be authorized by rule or statute. The term "non-lawyer" means any person, firm, association or corporation not duly licensed or authorized to practice law in the Commonwealth of Virginia. Any person or entity who practices law without being licensed or otherwise authorized to practice law shall be guilty of a Class 1 misdemeanor. Va. Code § 54.1-3904.

2. GENERAL DEFINITION: A person or entity engages in the practice of law when representing to another, by words or conduct, that one is authorized to do any of the following:

A. Undertake for compensation, direct or indirect, to give advice or counsel to an entity or person in any matter involving the application of legal principles to facts.

B. Select, draft or complete legal documents or agreements which affect the legal rights of an entity or person.

C. Represent another entity or person before a tribunal.

D. Negotiate the legal rights or responsibilities on behalf of another entity or person.

Virginia Code § 54.1-3900 outlines who has authority to practice law in Virginia:

> Persons who hold a license or certificate to practice law under the laws of this Commonwealth and have paid the license tax prescribed by law may practice law in the Commonwealth.
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> Any person authorized and practicing as counsel or attorney in any state or territory of the United States, or in the District of Columbia, may for the purpose of attending to any case he may occasionally have in association with a practicing attorney of this Commonwealth practice in the courts of this Commonwealth, in which case no license fee shall be chargeable against such nonresident attorney.

In addition, § 54.1-3900 carves out a list of specific groups of nonlawyers who are permitted to engage in certain limited actions that would be considered the practice of law. Part 6, § I (3), Rules of the Supreme Court of Virginia lists these and the activities of several other non-lawyer positions as exceptions to the prohibition against Unauthorized Practice of Law. Part 6, § I (4), Rules of the Supreme Court of Virginia, titled "Exclusions," lists actions that do not constitute the practice of law.[1] None of these lists include non-lawyer agents/attorneys-in-fact acting under a power of attorney.

[1] **EXCLUSIONS**: The following actions do not constitute the practice of law:

A. Providing translation services.
B. Selling legal forms.
C. *Pro se* representation.
D. Serving as a mediator, arbitrator, conciliator, or facilitator.
E. Serving as a fiduciary.
F. Acting as a lobbyist.
G. Teaching law or providing legal information.
H. Negotiating settlements and preparing releases in the course of employment as an adjuster or agent for an insurer.
I. Preparing tax returns to the extent authorized by the Internal Revenue Service or other state law.

Of note, too, are Virginia Code § 16.1-88.03 and § 16.1-81.1 that, respectively, allow designated nonlawyers to prepare, sign, and file pleadings on behalf of certain business entities and allow certain corporate entities to be represented by non-lawyer officers before a court. These exceptions are also recognized in Part 6, § I (3), Rules of the Supreme Court of Virginia. A nonlawyer/attorney-in-fact acting under a power of attorney is not included in these statutes.

Section 64.2-1633 of the Code of Virginia is part of the Uniform Power of Attorney Act and states:

> Unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to claims and litigation authorizes the agent to:
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> 1. Assert and maintain before a court or administrative agency a claim, claim for relief, cause of action, counterclaim, offset, recoupment, or defense, including an action to recover property or other thing of value, recover damages sustained by the principal, eliminate or modify tax liability, or seek an injunction, specific performance, or other relief;
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> 2. Bring an action to determine adverse claims or intervene or otherwise participate in litigation;

The argument made based on this statute is that the language “assert and maintain” and “bring an action” translates into allowing a non-lawyer agent/attorney-in-fact to prepare, sign, and file pleadings or other legal instruments in the name of the principal and appear before a court or tribunal, on behalf of the principal, without representation from a lawyer. In

other words, goes the argument, the language of the statute allows a nonlawyer/attorney-in-fact under a general power of attorney to act *pro se* as though he/she was the principal.

Research has failed to uncover any judicial decision from Virginia state courts, before or after the adoption of this statute, that supports this argument or squarely addresses at all the issue of whether a non-lawyer agent/attorney-in-fact can engage in activity on behalf of a principal that would otherwise be Unauthorized Practice of Law. There is a decision from the U.S. District Court for the Western District of Virginia which does address the application of Virginia's UPOAA, finding that it does *not* authorize a nonlawyer/attorney-in-fact to appear and act on behalf of another before a court.

> …the right to litigate on one's own behalf does not create a right to litigate on behalf of another person…absent certain narrow exceptions, an individual seeking to litigate someone else's claims is without standing and cannot bring a lawsuit.
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> Manship argues that he has standing pursuant to Virginia's Uniform Power of Attorney Act, Va. Code Ann. § 26-72 (2000)…Manship misinterprets the Virginia statute. A power of attorney does not grant an individual the power to act as an attorney. The practice of law is limited to *pro se* litigants seeking to vindicate their own rights and licensed attorneys admitted to practice before the court. *See Pridgen v. Andresen*, 113 F.3d 391, 393 (2d Cir. 1997). Manship is neither.

Manship v. Thomson, Case No. 5:11CV00030 (W.D. Va. Apr. 19, 2011).

There are two decisions from the U.S. District Court for the Eastern District of Virginia which also address the issue, but do not involve application of the UPOAA. In *Banks v. Gates Hudson & Assoc,.* Civil Action No. 1:19-cv-1259 (E.D. Va. Jun. 23, 2020) the court stated:

> Plaintiffs argue that because Britton has provided Banks with a power of attorney Britton is properly represented by Banks. This is incorrect; Britton may not be represented by Banks. Banks concedes that he is proceeding *pro per*, but as the Fourth Circuit has held, "[t]he right to litigate *for oneself*, . . . does not create a coordinate right to litigate for *others*." *Myers v. Loudoun Cnty. Pub. Schs.*, 418 F.3d 395, 400 (4th Cir. 2005). And this is so even where there is a power of attorney for courts have uniformly recognized that a "power of attorney may confer[] certain decision-making rights under state law, but it does not allow him to litigate *pro se* on behalf of his [girlfriend] in federal court." *In re Radogna*, 331 F.App'x 962, 964 (3d Cir. 2009). Banks' inability to represent Britton *pro se* provides a basis to dismiss all of the claims brought by Britton. See *McHam v. Wells Fargo Bank*, No., 2014 WL 7186924, at *3 (M.D.N.C. Dec. 17, 2014) (dismissing claims brought by *pro se* power of attorney on behalf of plaintiff).

The court in *Brown v. Ortho Diagnostic Systems, Inc*., 868 F.Supp. 168, 171-172 (E.D. Va. 1994) offered this analysis:

> The near uniform proscription on non-lawyers representing others in court is soundly based on two separate, but

complementary policy considerations. First, there is a strong and compelling state interest in regulating the practice of law. (Footnotes omitted).

Regulation that excludes non-lawyers from representing others reflects that the conduct of litigation by a nonlawyer creates unusual burdens not only for the party he represents, but also for his adversaries and the court. The lay litigant frequently files pleadings that are awkwardly drafted, motions that are inarticulately presented, proceedings that are needlessly multiplicative. In addition to lacking the professional skills of a lawyer, the lay litigant lacks many of the attorney's ethical responsibilities, including, importantly, the duty to avoid litigating unfounded or vexations claims. *See Lindstrom*, 632 F.Supp. at 1538 (quoting *Jones v. Niagara Frontier Transp. Auth*., 722 F.2d 20, 22 (2d Cir.1983)).

The second reason unlicensed laymen are not typically permitted to represent others in court concerns the importance of what is at stake for the litigant, and the final nature of the adjudication of the rights in question. Thus, a party may be bound, or its rights waived, by its legal representative. When that representative is a licensed attorney there are grounds to believe that the representative's character, knowledge and training are equal to the responsibility. (Footnote omitted). In addition, remedies and sanctions are available against the lawyer that are not available against nonlawyers, including ethical misconduct sanctions and malpractice suits. In sum,

> litigation is akin to navigating hazardous waters; federal courts are willing to allow individuals to steer their own boats, and perhaps founder or run aground; but federal courts are not willing to permit individuals to risk the safety of others' boats.

See also: Rumph v. City of New York, 18-CV-8862 (CM)(S.D. N.Y. 2019); *Gunter v. Smelser*, Civil Action No. 11-cv-00699-BNB (D. Colo. May. 19, 2011).

As of 2020, twenty-eight jurisdictions have adopted the UPOAA.[2] Research of those jurisdictions, as well as the jurisdictions that have not adopted this act, reveal that courts have consistently held, without exception, that a non-lawyer agent/attorney-in-fact cannot prepare, sign and file pleadings with a court on behalf of a principal, nor appear before a court to represent the interests of a principal, or in any other manner act as a lawyer for the principal based on a power of attorney. A power of attorney is not a license to practice law.[3]

In *Village of Hales Corners v. Hendricks*, No. 03-1287 (Wis. App. 2/17/2004) (Wis. App. 2004), the court agreed with the plaintiff's argument that it was improper for defendant's father to represent the defendant before the court under a power of attorney:

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[2] *See* www.uniformlaws.org, "Power of Attorney Act": Kentucky, South Dakota, Georgia, Texas, Wyoming, New Hampshire, North Carolina, Utah, Washington, South Carolina, Connecticut, Pennsylvania, Hawaii, Iowa, West Virginia, Nebraska, Ohio, Montana, Alabama, Arkansas, Wisconsin, Virginia, Maryland, Colorado, Maine, Nevada, Idaho, New Mexico.

[3] *Baldwin v. Mollette*, 527 S.W.3d 830 (Ky. Ct. App. 2017); *Fallarino v. Fallarino*, 56 N.Y.S.3d 414, 2017 N.Y. Slip Op. 27186 (2nd Dept., Appellate Term, 2017); *KeyBank Nat'l Ass'n v. Sarameh*, 2013 Ohio 2576 (Ohio App. 2013*); In Re: Conservatorship of Riebel*, 625 N.W.2d 480 (Minn. 2001); *Haynes v. Jackson*, 2000 ME 11, 744 A.2d 1050 (Me. 2000; *Disciplinary Counsel v. Coleman*, 88 Ohio St.3d 155, 158, 724 N.E.2d 402 (2000).

> As the County points out, only attorneys admitted to the State Bar of Wisconsin are allowed to practice law in this state. While Hendricks could represent himself, he could not designate another person to represent him in court. To permit Hendricks' father to represent him in court would be tantamount to conferring attorney status on anyone named in a power of attorney.

The decision from the court in *Haynes v. Jackson*, 2000 ME 11, 744 A.2d 1050, 1054 (Me. 2000) offers an analysis that could be similarly applied with Virginia's Unauthorized Practice of Law rules and statutes addressing the practice of law:

> We must determine whether state statutes and the rules promulgated by the Supreme Judicial Court allow [the attorney-in-fact under a power of attorney] to proceed with this appeal in the circumstances of this case. We conclude that she is unable to do so. Our power of attorney statute permits a grantor to delegate a broad range of powers. *See* 18-A M.R.S.A. § 5-508(e) (Supp.1999) ("the generality powers of an attorney-in-fact in a power of attorney ... is not limited by the inclusion in the power of attorney of a list of the specific powers granted to the attorney-in-fact"). Section 5-508 does not contain any language that limits the scope of a power of attorney only to those areas in which the principal could act through an agent. *See* 18-A M.R.S.A. § 5-508 (Supp. 1999). Standing alone, then, § 5-508 does not prevent a principal

> from granting his attorney-in-fact the power to appear pro se on the principal's behalf.
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> The statute prohibiting the unauthorized practice of law, however, limits the scope of § 5-508. It is a Class E crime to practice law in Maine without first obtaining admission to the bar. See 4 M.R.S.A. § 807(1) & (2) (Supp.1999). Section 807(3) does contain more than ten exceptions to the general prohibition, allowing, for example, officers or employees of businesses or government agencies to appear in court for special purposes, but it does not provide an exception authorizing an attorney-in-fact to appear pro se on behalf of her principal. See 4 M.R.S.A. § 807(3) (Supp.1999).
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> …The subsequent enactment of the broad power of attorney statute does not change the strict limitations on the unauthorized practice of law.

Similarly, the court in *In Re Conservatorship Of Riebel*, 625 N.W.2d 480 (Minn. 2001) found:

> We do not construe the [statutory] authorizations…for an attorney-in-fact to assert and prosecute claims to empower the attorney-in-fact to appear as the attorney-at-law in asserting and prosecuting those claims. So construed, the power of attorney statute would allow anyone to authorize another person, regardless of their qualifications, to practice law on their behalf, providing a very easy means of circumventing the prohibition against the unauthorized practice of law...We will

> not construe a statute in a way that creates such an absurd result…More importantly, even if intended by the legislature, such a construction of the statute would undermine this court's exclusive authority to regulate the practice of law and would violate the doctrine of separation of powers.
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> The more reasonable interpretation of the statutory language is that a power of attorney authorizes the attorney-in-fact to act on behalf of the principal as the client in an attorney-client relationship.

Accord, Kohlman v. Western Pennsylvania Hosp., 652 A.2d 849, 438 Pa.Super. 352 (Pa. Super. Ct. 1994); *Christiansen v. Melinda,* 857 P.2d 345 (Alaska 1993).

CONCLUSION

The Committee's research reveals no authority that Virginia's adoption of the UPOAA expanded the powers of a nonlawyer holding a power of attorney to represent the principal in court or prepare and sign pleadings on the principal's behalf. Such activity is not a *pro se* representation but an attempt by the non-lawyer/attorney-in-fact to represent the legal interests of another and therefore the Unauthorized Practice of Law. This conclusion is in accord with existing UPL Opinion 194. The Committee agrees with this conclusion and affirms UPL Opinion 194. A non-lawyer agent/attorney-in-fact, acting under a power of attorney, who prepares, signs and files pleadings and appears before a Virginia tribunal to represent a principal is engaged in the Unauthorized Practice of Law.