

1 **UNAUTHORIZED PRACTICE OF LAW OPINION 219: Non-Lawyer Entity**
2 **Representation in Practice Before State Agency**

3

4 **QUESTIONS PRESENTED**

- 5 1. Whether non-lawyer members of a lay consulting firm may represent
6 licensees and licensee applicants in hearings before the Virginia Alcohol
7 Beverage Control (“ABC”) Board?
- 8 2. Whether a lay consulting firm may provide advice, for a fee, to licensees and
9 licensee applicants regarding the legal requirements and procedures for
10 obtaining or maintaining an ABC license and prepare and file the
11 applications for the applicants?
- 12 3. Whether a lay consulting firm may retain or employ a lawyer to provide
13 legal services to its clients?

14 **ANSWERS**

15 The answer to all three questions presented is “no,” as all three scenarios
16 contemplate activities that constitute the unauthorized practice of law.

17 It is the unauthorized practice of law for non-lawyer members of a lay
18 consulting firm to represent licensees or licensee applicants before the Virginia
19 ABC Board, which has no provision in its own regulations and procedures for non-
20 lawyer representation before it, nor is there any other legal authority permitting
21 such representation.

22 It is the unauthorized practice of law for a lay consulting firm to provide
23 advice, for a fee, to licensees and licensee applicants regarding the legal
24 requirements and procedures for obtaining or maintaining an ABC license and it is
25 the unauthorized practice of law for members of this lay consulting firm to select,
26 prepare and file the applications on behalf of the applicants.

27 It is the unauthorized practice of law for a lay consulting firm to retain or
28 employ a lawyer to provide legal services to its clients.

29 **APPLICABLE RULES, OPINIONS AND STATUTES**

30 The controlling rules, opinions, and statutes are: Virginia’s Unauthorized
31 Practice of Law Rules, Part 6, § I (1), (2), (3)(D) and (R), 5(A), (C) and (D)(1), and
32 6(H) of the Rules of the Supreme Court of Virginia; Virginia Code §§ 4.1-108, 4.1-
33 103(21) and (23)-(25), and 54.1-3904; and 3 Virginia Administrative Code §§ 5-
34 10-30, 5-10-250, and 5-10-120.

35 **ANALYSIS**

36 A non-lawyer, defined as “any person, firm, association or corporation not
37 duly licensed or authorized to practice law in the Commonwealth of Virginia,”
38 shall not engage in the practice of law in Virginia or hold himself, herself, or itself
39 out as authorized to do so “except as may be authorized by rule or statute.” Va.
40 Sup. Ct. R., Pt. 6, § I (1). It is a Class 1 misdemeanor for any person or entity to

41 practice law without being licensed or otherwise authorized to do so. *Id.*, Va. Code
42 § 54.1-3904.

43 Part 6, § I (2) of the Rules of the Supreme Court of Virginia defines the
44 practice of law:

45 A person or entity engages in the practice of law when representing
46 to another, by words or conduct, that one is authorized to do any of
47 the following:

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

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

53 C. Represent another entity or person before a tribunal.

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

56 Va. S. Ct. R. Pt. 6, § I (2).

57 The Unauthorized Practice of Law Rules (“UPL Rules”) include several
58 exceptions which allow non-lawyers and/or lay entities to engage in activities that
59 would otherwise be considered the unauthorized practice of law. Of note, a non-
60 lawyer can represent a party as the party’s advocate or representative before an
61 agency or tribunal which specifically allows for such non-lawyer representation,
62 either by its own rules and procedures or by other law or statute. *Id.* at (3)(D) and
63 (R), (5)(D)(1), and (6)(H).

64 Unless there is such a specific allowance, a non-lawyer cannot represent an
65 entity or person before a tribunal. The UPL Rules include a definition of a
66 “tribunal”:

67 The term “tribunal” shall include any agency, authority, board,
68 commission or court when it determines the rights and obligations of
69 parties to proceedings before it, as opposed to promulgating rules and
70 regulations of general applicability.

71 *Id.* at (5)(A).

72 The ABC Board meets these criteria and falls within the definition of a
73 “tribunal.” It conducts hearings addressing the conduct and operation of licensees,
74 issues witness subpoenas and subpoenas duces tecum, administers oaths and takes
75 testimony under oath. It “grant[s], suspend[s], and revoke[s] licenses for the
76 manufacture, bottling, distribution, importation, and sale of alcoholic beverages”
77 and “assess[es] and collect[s] civil penalties and civil charges for violations” of the
78 ABC statutes and regulations. Va. Code § 4.1-103.

79 Representation before the ABC Board would include filing documents on
80 behalf of the clients, writing briefs, appearing at hearings before the tribunal and
81 representing the clients, making opening statements, closing arguments, examining
82 witnesses, and making objections during the hearing.

83 With regard to a party’s representation in a hearing before the ABC Board,
84 Virginia Code § 4.1-108 states that a licensee or applicant has “the right to be

85 represented by counsel at any Board hearing for which he has received notice” but
86 is not required to have counsel. There is no provision in the statute for non-lawyer
87 representation. The only exception permitted (other than acting pro se) is that
88 “[a]ny officer or director of a corporation may examine, cross-examine and
89 question witnesses; present evidence on behalf of the corporation; and draw
90 conclusions and make arguments before the Board or hearing officers without
91 being in violation of the provisions of § 54.1-3904.” *See also* 3 Va. Admin. Code §
92 5-10-30 (representation at hearings before hearing officers of the ABC board: right
93 to representation by counsel, right of officer or director of corporation to represent
94 corporation before ABC board); 5-10-250 (same as 3VAC 5-10-30, but for
95 hearings before the ABC board); and 5-10-120 (defines “interested parties”:
96 applicant, licensee, persons aggrieved by decision of board).

97 Can a non-lawyer member of a lay consulting firm represent licensees and or
98 licensee applicants before the Virginia Alcohol Beverage Control Board? Or, more
99 broadly, can any non-lawyer represent an entity or person before a tribunal,
100 whether a court or agency, board or any other entity acting as a tribunal? Applying
101 the UPL rules and the statutes cited and discussed above, the answer is “no,” a
102 non-lawyer can do none of this.

103 While the request that is the basis for this opinion directed its inquiry to
104 practice before the ABC Board, the analysis and application of the UPL Rules

105 apply to practice before *any* agency, board, or other entity that acts as a tribunal. If
106 the tribunal does not have a policy, procedure, statute, or regulation that explicitly
107 allows non-lawyer representation of parties before it, then representation must be
108 by a lawyer or a party may act pro se.

109 As for the second question raised in this opinion, whether licensees or
110 licensee applicants may hire a lay consulting firm to provide advice, for a fee,
111 regarding the legal requirements and procedure for obtaining an ABC license and
112 prepare and file the applications for the applicants, the answer is “no.”

113 A non-lawyer may not “[u]ndertake for compensation, direct or indirect, to
114 give advice or counsel to an entity or person in any matter involving the
115 application of legal principles to facts.” Va. Sup. Ct. R., Pt. 6, § I (2)(A). In the
116 hypothetical presented in this inquiry, licensees and licensee applicants hire a lay
117 consulting firm, for a fee, to provide them advice and to assist the licensees or
118 applicants regarding the legal requirements and procedures specific to the facts and
119 circumstances of their situation. The consultants may also advise as to expected
120 outcomes to hearings or license reviews based on actions the licensee or applicant
121 take.

122 These consultants then select, prepare and file for the licensee or applicant
123 the appropriate forms or applications to be submitted to the ABC Board. Whether

124 for compensation or not, preparation of legal instruments for another is the
125 unauthorized practice of law. *Id.* at (2)(B). Because these forms and applications
126 impact the legal rights of an entity or person, they are legal documents within the
127 meaning of § I (2)(B).

128 The final question asks whether a lay consulting firm (or any lay entity) may
129 avoid engaging in the unauthorized practice of law by retaining or employing a
130 lawyer to provide legal services to its clients. The answer is “no.”

131 A lay entity cannot hire or retain a lawyer to provide legal services and
132 representation to the entity’s customers or clients. The UPL Rules specifically
133 prohibit such action. Va. Sup. Ct. R., Pt. 6, § I (5)(C). This is based on the decision
134 of the Supreme Court of Virginia in *Richmond Association of Credit Men v. Bar*
135 *Association of Richmond*, 167 Va. 327, 334-335 (1937):

136 [The practice of law] is not a lawful business except for members of
137 the bar who have complied with all the conditions required by statute
138 and the rules of the courts. As these conditions cannot be performed
139 by a corporation, it follows that the practice of law is not a lawful
140 business for a corporation to engage in.

141 The relation of attorney and client is that of master and servant in a
142 limited and dignified sense, and it involves the highest trust and
143 confidence. It cannot be delegated without consent, and it cannot
144 exist between an attorney employed by a corporation to practice law
145 for it, and a client of the corporation, for he would be subject to the
146 directions of the corporation, and not to the directions of the client.

147 No lay entity may hire a lawyer or hold out its own lawyer to provide legal
148 services to the entity’s customers or clients. *Id.* at (5)(C). The UPL Rules, as well
149 as case law, are clear that this is unauthorized practice of law.