

UPL Opinion 219

UNAUTHORIZED PRACTICE OF LAW OPINION 219: NON-LAWYER ENTITY REPRESENTATION IN PRACTICE BEFORE STATE AGENCY

QUESTIONS PRESENTED

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

ANSWERS

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

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

It is the unauthorized practice of law for a lay consulting firm to provide advice, for a fee, to licensees and licensee applicants regarding the legal requirements and procedures for obtaining or maintaining an ABC license and it is the unauthorized practice of law for members of this lay consulting firm to select, prepare and file the applications on behalf of the applicants. It is not unauthorized practice of law merely to assist with completion of a form document selected by the licensee or applicant and using language dictated by the licensee or applicant.

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

APPLICABLE RULES, OPINIONS AND STATUTES

The controlling rules, opinions, and statutes are: Virginia’s Unauthorized Practice of Law Rules, Part 6, § I (1), (2), (3)(D) and (R), 5(A), (C) and (D)(1), and 6(H) of the Rules of the Supreme Court of Virginia; Virginia Code §§ 4.1-108, 4.1- 103(21) and (23)-(25), and 54.1-3904; 3 Virginia Administrative Code §§ 5-10-30, 5-10-250, and 5-10-120; and UPL Opinion 207.

ANALYSIS

A non-lawyer, defined as “any person, firm, association or corporation not duly licensed or authorized to practice law in the Commonwealth of Virginia,” shall not engage in the practice of law in Virginia or hold himself, herself, or itself out as authorized to do so “except as may be authorized by rule or statute.” Va. Sup. Ct. R., Pt. 6, § I (1). It is a Class 1 misdemeanor for any person or entity to practice law without being licensed or otherwise authorized to do so. *Id.*, Va. Code § 54.1-3904.

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

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.

Va. S. Ct. R. Pt. 6, § I (2).

The Unauthorized Practice of Law Rules (“UPL Rules”) include several exceptions which allow non-lawyers and/or lay entities to engage in activities that would otherwise be considered the unauthorized practice of law. Of note, a non-lawyer can represent a party as the party’s advocate or representative before an agency or tribunal which specifically allows for such

non-lawyer representation, either by its own rules and procedures or by other law or statute. *Id.* at (3)(D) and (R), (5)(D)(1), and (6)(H).

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

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

Id. at (5)(A).

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

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

With regard to a party’s representation in a hearing before the ABC Board, Virginia Code § 4.1-108 states that a licensee or applicant has “the right to be represented by counsel at any Board hearing for which he has received notice” but is not required to have counsel. There is no provision in the statute for non-lawyer representation. The only exception permitted (other than acting pro se) is that “[a]ny officer or director of a corporation may examine, cross-examine and question witnesses; present evidence on behalf of the corporation; and draw conclusions and make arguments before the Board or hearing officers without being in violation of the provisions of § 54.1-3904.” *See also* 3 Va. Admin. Code § 5-10-30 (representation at hearings before hearing officers of the ABC board: right to representation by counsel, right of officer or director of corporation to represent corporation before ABC board); 5-10-250 (same as 3VAC 5-10-30,

but for hearings before the ABC board); and 5-10-120 (defines “interested parties”: applicant, licensee, persons aggrieved by decision of board).

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

While the request that is the basis for this opinion directed its inquiry to practice before the ABC Board, the analysis and application of the UPL Rules apply to practice before *any* agency, board, or other entity that acts as a tribunal. If the tribunal does not have a policy, procedure, statute, or regulation that explicitly allows non-lawyer representation of parties before it, then representation must be by a lawyer or a party may act pro se.

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

A non-lawyer may not “[u]ndertake 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.” Va. Sup. Ct. R., Pt. 6, § I (2)(A). In the hypothetical presented in this inquiry, licensees and licensee applicants hire a lay consulting firm, for a fee, to provide them advice and to assist the licensees or applicants regarding the legal requirements and procedures specific to the facts and circumstances of their situation. The consultants may also advise as to expected outcomes to hearings or license reviews based on actions the licensee or applicant take.

These consultants then select, prepare and file for the licensee or applicant the appropriate forms or applications to be submitted to the ABC Board. Whether for compensation or not, preparation of legal instruments for another is the unauthorized practice of law. *Id.* at (2)(B). Because these forms and applications impact the legal rights of an entity or person, they are legal documents within the meaning of § I (2)(B).

Supreme Court Approved
September 29, 2023

A non-lawyer may assist a licensee or applicant with completion of forms using language specifically dictated by the licensee or applicant but may not select the forms for the licensee or applicant, advise the licensee or applicant on which forms are appropriate in a particular case, or provide any other legal advice on the completion of the forms. *See* UPL Opinion 207 (Approved by Supreme Court of Virginia August 26, 2005).

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

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

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

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

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

Supreme Court Approved
September 29, 2023