

ADVISORY ETHICS OPINION 2003-08

SYNOPSIS:

A nonlawyer's proposed business that involves the preparation of affidavits and other Court filings, on the basis of which legal rights are secured, undertakes conduct that constitutes the unauthorized practice of law. It is permissible for a lawyer to associate with the nonlawyer in carrying out such business; provided, however, that the lawyer actually supervises the conduct of the nonlawyer and oversees the work product that is provided to the client; and further provided that lawyer takes appropriate precautions to avoid any improper fee-splitting with the nonlawyer.

FACTS:

A nonlawyer plans on establishing a business to assist *pro se* litigants who have matters pending before the Family Court Magistrate. Specifically, the nonlawyer proposes to assist parties in identifying financial documents; fill out and complete documents and accompanying attachments; fill out and complete financial affidavit forms required by the Court; organize the financial information requested by the forms; and run child-support guideline calculations. Purportedly, the nonlawyer would not assist with property distribution or the identification of financial assets; nor does the nonlawyer intend to offer advice on any of these issues. The nonlawyer's intended function would be limited to that of making certain that the forms and attaching financial documents required by the Court are complete and presentable. The individuals would appear *pro se*.

Requesting lawyer seeks an opinion as to whether the nonlawyer will be engaged in the unauthorized practice of law; and alternatively, the propriety of the requesting lawyer associating with the nonlawyer to carry out the aforesaid tasks.

QUESTIONS PRESENTED:

1. Whether the nonlawyer's business will constitute the unauthorized practice of law.
2. Whether it is proper for lawyer to associate with the nonlawyer's business to carry out these responsibilities.

DISCUSSION:

The relevant provisions of the Vermont Rules of Professional Conduct that are applicable to the questions presented include Rule 5.5(b), Rule 5.3 and Rule 5.4.

Rule 5.5(b) deals with the unauthorized practice of law and provides as follows:

A lawyer shall not:

* * *

(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

VERMONT RULES OF PROFESSIONAL CONDUCT Rule 5.5 (b).

Rule 5.3 provides in relevant part as follows:

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct ratifies, the conduct involved; or

(2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

VERMONT RULES OF PROFESSIONAL CONDUCT Rule 5.3.

Rule 5.4(a) provides that a lawyer shall not share legal fees with a nonlawyer, except in specific circumstances not relevant herein. *Id.* Rule 5.4(b) proscribes the formation of a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law. *Id.* Further, Rule 5.4(d) provides as follows:

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for profit, if:

- (1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
- (2) a nonlawyer is a corporate director or officer thereof; or
- (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

VERMONT RULES OF PROFESSIONAL CONDUCT Rule 5.4(d).

A question related to the present inquiry was addressed by this Committee in 1976. *Opinion No. 76-10*, decided under the former Vermont Code of Professional Responsibility, dealt with a request by Vermont Legal Aid in providing to *pro se* individuals a Do-It-Yourself “How To” packet of information, including forms, on the handling of one’s own divorce. The Committee stated in the context of Legal Aid’s request that the mere handing out of a “packet” of information, without more, would not constitute the unauthorized practice of law. However, *Opinion No. 76-10* holds that conduct beyond the mere distributing of the packet of information is proscribed as the unauthorized practice of law. “[A]nything further, including the determination of grounds, would involve practice of law.” *Id.* (emphasis added).

In the present case, the specific tasks and responsibilities to be assumed by the nonlawyer’s business go beyond the conduct expressly approved in *Opinion No. 76-10*. Without any apparent supervision by a licensed lawyer, the nonlawyer would advise clients in identifying and completing financial documents and Court affidavits to be filed with the Court; and calculate the child support as contemplated under the child support guidelines. Notwithstanding the nonlawyer’s characterization of the planned undertaking with respect to each *pro se* litigant as not offering advice – in other words, merely ministerial, see, e.g., *Opinion No. 1999-03* (permitting lawyer’s own paralegal to perform ministerial work in connection with real estate closings) – the nonlawyer will necessarily be rendering advice as to the efficacy of choosing how certain financial information is accounted for and presented in completing the client’s financial documents and other Court filings. The calculation of the amount of child support owed by a party is not merely a ministerial act given the variables that go into forming the calculations. If the nonlawyer fails to take into account certain information, or if alternate means may be taken in the completion of the forms, the resultant calculation may not be correct (e.g., sole and split custody vis à vis shared custody; inclusion of extraordinary medical and/or educational expenses; appropriateness of inclusion of a maintenance supplement; etc.). Thus, there may exist the need to exercise independent professional judgment in the calculation of child support and the preparation and submission of the other financial information to the Court for its consideration. The application of such judgment in the completion of the submissions to be filed with the Court militates against a finding that such work is merely ministerial in nature, and thus performed wholly without exercise of personal judgment or discretion.

The Vermont Supreme Court has held that “a person is deemed to be practicing law whenever he furnishes advice or service under circumstances which imply the possession and use of legal knowledge and skill.” *In Re Welch*, 123 Vt. 180 (1962) (involving a surveyor drafting deeds). The Court went on to state that the practice of law includes all advice to clients and all actions taken for them in matters connected with the law. *Id.*, 123 Vt. at 182 quoting *In re Pilini*, 122 Vt. 385, 391 (1961) and citing *In re Flint*, 110 Vt. 38, 41 (1938).

Practice of law includes the giving of legal advice and counsel, **and the preparation of legal instruments and contracts of which legal rights are secured**. *In re Pilini, supra*, page 390, and cases cited. Where the rendering of services for another involves the use of legal knowledge or skill on his behalf – where legal advice is required and is availed of or rendered in connection with such services – these services necessarily constitute or include the practice of law.

* * *

We cannot over-emphasize the necessity of legal training in the proper drafting of legal documents and advice relating thereto. The absence of such training may result in legal instruments faulty in form and content, and also lead to a failure of purpose, litigation, and expense. The respondent's conduct, as a layman, in giving the legal advice and preparation of the deeds referred to in this opinion constitutes practicing law.

In re Welch, 123 Vt. at 182 (emphasis added).

In summary, the conduct of the nonlawyer herein involves the preparation of affidavits and other Court filings on the basis of which legal rights are secured. See, e.g., *In re Welch, supra*. The Committee is of the view, therefore, that the nonlawyer's business as described herein constitutes the unauthorized practice of law proscribed by the Rules.

The next question presented is whether the requesting lawyer may associate with the nonlawyer's business to provide the services outlined. "Rule 5.3 recognizes the expanding role of nonlawyers in the legal field." See VERMONT RULES OF PROFESSIONAL CONDUCT Rule 5.3, Reporter's Notes. There is no direct counterpart to Rule 5.3 in the former Vermont Code of Professional Responsibility. *Id.*

Moreover, in the context of the evolution of the practice of real estate law, this Committee has recognized that paralegals now serve a vital role and provide a very valuable service. See *Opinion No. 1999-03*; see also *Opinion No. 1995-10* (paralegals employed by legal services clinic may gather information and prepare such documents as pleadings and affidavits, provided they are subject to lawyer's supervision). Nevertheless, this Committee has also acknowledged the potential for unreasonable delegation and over reliance upon a lawyer's own paralegal.

A supervising attorney should never delegate duties which require an attorney's professional judgment, except to another attorney. A supervising attorney should never allow a paralegal to offer legal advice to a client. Steps should be taken to insure that clients know when they are dealing with a paralegal rather than a lawyer and in cases such as this where the paralegal is handling a closing, the client must be informed of the paralegal's role.

Opinion No. 1999-03.

A distinction may be made, therefore, between a nonlawyer performing legal work directly for a client, and providing a licensed attorney with legal consultation and advice.

See *Opinion No. 1990-02* (an unlicensed lawyer, providing consultation to a licensed Vermont attorney who in turn advises client, not engaged in the unauthorized practice of law under Code). For example, in the case where an unlicensed attorney provides consultation and other legal services to a licensed attorney, the licensed attorney remains ultimately responsible for the final work product that is given to the client. *Id.*

Such an arrangement is analogous to the situation in which an attorney delegates research and writing work to law clerks and paralegals. In both situations, the licensed attorney is ultimately responsible for the work that is given to the client, whether it consists of advice, written materials or advocacy.

Opinion No. 1990-02.

Hence, if requesting lawyer were to associate with the nonlawyer's business, the lawyer would be ultimately responsible for the work product that is provided to the clients. The requesting lawyer would need to take appropriate steps to ensure that the nonlawyer was adequately supervised at all times so as to comply with the Rules of Professional Conduct. Precautions need also be taken to avoid any question of improper fee-splitting with a nonlawyer. VERMONT RULES OF PROFESSIONAL CONDUCT Rule 5.4(a); see also *Opinion No. 1995-15* (lawyer provides service and bills client directly).

Consequently, for the reasons set forth above, the Committee believes that it is permissible for requesting lawyer to associate with the nonlawyer in carrying out the business as aforesaid; provided, however, that requesting lawyer actually supervise the conduct of the nonlawyer and oversee the work product that is provided to the client. Moreover, requesting lawyer must take appropriate precautions to avoid any improper fee-splitting with the nonlawyer by any appropriate means, such as dealing and billing directly with the client.

CONCLUSION:

In summary, the nonlawyer's proposed business involving the preparation of affidavits and other Court filings, on the basis of which legal rights are secured, constitutes the unauthorized practice of law. Nevertheless, it is permissible for requesting lawyer to associate with the nonlawyer in carrying out such business; provided, however, that the lawyer actually supervises the conduct of the nonlawyer and oversees the work product that is provided to the client; and further provided that lawyer takes appropriate precautions to avoid any improper fee-splitting with the nonlawyer.