

KENTUCKY BAR ASSOCIATION
Unauthorized Practice of Law Opinion KBA U-23
Issued: July 1978

Question: Where a bank or other financial institution employs a “legal department” which is staffed with salaried attorneys who act on behalf of the bank in telephone calls, conferences, filing papers in court, and appearing at depositions, is the bank, as a corporation, engaged in the unauthorized practice of law?

Answer: No.

References: ABA Opinion 198 (1939), SCR 3.020 Kentucky State Bar Assn v. First Federal Savings & Loan Assn of Covington, 342 S.W.2d 397 (Ky. 1961); Federal Intermediate Credit Bank of Louisville v. Kentucky Bar Assn, 540 S.W.2d 14 (Ky. 1976); Frazee v Citizens Fidelity Bank & Trust Co, 393 S.W.2d 778 (Ky. 1965); Hobson v Kentucky Trust Co of Louisville, 303 Ky 493, 197 S.W.2d 454 (1946)

OPINION

The question of what constitutes the unauthorized practice of law in a particular jurisdiction is a matter for determination by the courts of that jurisdiction. ABA Opinion 198 (1939). SCR 3.020 defines the practice of law as follows:

The practice of law is any service rendered involving legal knowledge or legal advice, whether of representation, counsel or advocacy in or out of court, rendered in respect to the rights, duties, obligations, liabilities, or business relations of one requiring the services. But nothing herein shall prevent any natural person not holding himself out as a practicing attorney from drawing any instrument to which he is a party without consideration unto himself therefor.

In analyzing any question concerning the unauthorized practice of law by a corporation, three recent court opinions must be considered.

Kentucky State Bar Assn v. First Federal Savings & Loan Assn of Covington, 342 S.W.2d 397 (Ky 1961) held that although a corporation may properly employ its own licensed attorney to render legal services *wholly for itself*; it cannot sell to the public a service that includes legal services performed by its salaried attorney. First Federal, *supra*, reaffirmed the dictum set forth in Hobson v. Kentucky Trust Co of Louisville, 303 Ky. 493, 197 S.W.2d 454 (1946) partially overruled Frazee v. Citizens Fidelity Bank & Trust Co, 393 S.W.2d 778 (Ky. 1965) which states:

Other matters of legal nature which are held to be an illegal practice of law by a corporation include the maintenance of a legal department to give free legal advice, the furnishing of legal services for members of a protective association, and the maintenance of a collection agency , but not the mere fact of paying the expenses of a particular litigation or the retainer of an attorney on an annual salary basis to attend to and conduct a corporation's own legal business.

Frazee v. Citizens Fidelity Bank & Trust, *supra*, held that a bank or trust company cannot, through either salaried attorneys or lay employees, prepare deeds or mortgages for other persons. In this case, the court set forth certain guidelines to inform banks and trust companies exactly when they would be engaging in the unauthorized practice of law (p. 784).

The following services shall not be performed by a bank or trust company, either through salaried attorneys or lay employees:

1. Drafting wills or trusts instruments.
2. Offering wills for probate.
3. Handling formal court proceedings.
4. Drafting papers or giving advice concerning revocation of wills.
5. Resolving questions of domicile and residence.
6. Handling proceeds involving allowance of widows, children or wards.
7. Drafting deeds and mortgages.
8. Preparation or filing of assignments of rent.
9. Drafting any formal legal documents to be used in the discharge of a corporate fiduciary's duty.
10. Giving legal advice or legal counsel, orally or written, to any person, firm or corporation.
11. In estate and inheritance taxes, and federal and state income tax matters:
 - a. Executing waivers of statute of limitations, without the advice of the attorney for the estate, trust or guardianship and/or a specialized outside tax attorney.
 - b. Preparing and filing protests or claims for refund, except requests for a refund based on mathematical or clerical errors in tax returns ruled by it as a fiduciary .
 - c. Conferring with tax authorities regarding protests or claims for refund, except those based on mathematical or clerical errors in tax returns ruled by it as a fiduciary.
 - d. Handling petitions to the Tax Court.
12. Securing appropriate court orders for the prompt sale or disposition of such assets of the estate as may be subject to depreciation, deterioration or loss.
13. Preparing contracts or court orders as may be required to conserve the estate or operate the business of the decedent during the course of administration.
14. Terminating any pending litigation in which decedent had an interest.
15. Instituting or defending on behalf of the executor, administrator or trustee any litigation.

Federal Intermediate Credit Bank of Louisville v. Kentucky Bar Assn. 540 S.W.2d 14, 16 (Ky. 1976) held that, "when a lending agency presents to the borrower for execution a real estate mortgage that has been completed on a form prepared by one lawyer, with information such as the property description and payment schedule (copied by a lay person from a loan application and a title certificate furnished by another attorney, neither of the respective attorneys having examined the instrument in its final form prior to execution by the borrower, the lending agency is practicing law without a license."

However, in Federal Intermediate, *supra*, the court went on to say that "a lending institution certainly may have its mortgages drafted by its own counsel, so long as it collects for itself no charge against the borrower for that service..."

By looking at the above cases, one may abstract the following test, which may be used in determining whether a corporation is practicing law through a salaried attorney:

Are the legal services rendered by the attorney wholly for the corporation itself, *or* for the public, to which the bank is making a charge for such services.

Here the bank collects no charge against the borrower, etc. for the services of the salaried attorneys. Instead, the attorneys are doing work wholly for the corporation itself and it is clear that the bank is not engaged in the unauthorized practice of law.

Note to Reader

This unauthorized practice opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). Note that the Rule provides in part: "Both informal and formal opinions shall be advisory only."