

KENTUCKY BAR ASSOCIATION
Unauthorized Practice of Law Opinion KBA U-32
Issued: March 1981

Question: May a non-lawyer (including, but not limited to, an independent "employee benefit consulting firm" or an independent "financial consulting firm") either directly, or through its employees, provide services to the public relating to the establishment of pension and profit sharing plans and trusts?

Answer: No.

References: Creditors' Serv Corp v. Cummings, 190A.2 (RI 1937), Blair v. Motor Carriers Serv Bureau, 40 Pa. D.&C. 413 (1939); Korentz v. Rowlands, 46 Pa. D.&C. 461 (1942); SCR 3.020. Carter v. Brien, 309 S.W.2d 748 (Ky. 1956); Kentucky Bar Assn v. Tussey, 476 S.W.2d 177 (Ky. 1972); Frazee v. Citizens Fidelity Bank & Trust Co. 93 S.W.2d 778 (Ky. 1965); Kentucky Bar Assn v. First Federal Savings and Loan Assn of Covington, 342 S.W.2d 397 (Ky. 1960); State Bar of Arizona v. Land Title and Trust Co., 366 P.2d 1 (Ariz. 1961); 22 A.L.R.3d 1112

OPINION

This draft opinion stems from an inquiry concerning an advertisement placed in the Wall Street Journal by an independent employee benefit consulting firm seeking to employ a pension attorney for its corporate office whose duties would involve "drafting employee benefit documents and amendments followed by research related to ERISA compliance, plan design and plan administration." For reasons set forth more fully below, such services cannot be offered to the public by corporations and non-lawyers without directly violating the rules of the Bar prohibiting the unauthorized practice of law. Clearly, such constitutes giving advice calculated to influence the recipient to conduct himself in a way which would affect his legal rights and is practicing law under the definition adopted by the Kentucky Supreme Court in Rule 3.020.

However, because of the complexity and importance of establishing a set of guidelines applicable to unauthorized practice of law in the employee benefits area, this opinion must necessarily concern itself with the broad questions inherent in such a task. Therefore, this opinion is not narrowly confined to the precise facts which gave rise to this inquiry and is applicable to both corporations and non-lawyers as well. The public interest requires guidelines which are sufficiently clear so that conscientious non-lawyers practicing in the employee benefit area can confidently conduct their business in observance of such guidelines. This opinion does not necessarily describe ideals of interprofessional cooperation, nor does it sanction every activity by nonlawyers which is not specifically covered in this opinion. But it is hoped that the guidelines set forth in this opinion will serve as an aid in explaining what activities constitute the unauthorized practice of law in the employee benefit area.

Basically, the question as to whether retirement and pension-planning activities, taking this term in its broadest sense, constitute the unauthorized practice of law, is but one aspect of the broader question of what amounts to the practice of law. In recent times, instances have been

multiplying in which bar association groups or members of the bar on behalf of others similarly situated have sought to have corporations enjoined from, or punished for, the unauthorized practice of law. These efforts have, for the most part, been highly successful. The major defensive arguments which have been advanced by corporations claimed to have been engaged in the illegal practice of law serve to sharpen the focus of the issue discussed herein. First, corporations may assert that by engaging in retirement and pension-planning activities they are engaging in matters merely incidental to the practice of law, rather than being engaged primarily in law practice. Secondly, corporations may argue that the acts performed by them are merely those which they must perform to fulfill the functions of their particular profession. The rebuttal to these arguments as maintained by members of the various bar associations is clear and direct. The public interest demands that the professional services of a lawyer should not be controlled or exploited by any lay agency, whether personal or corporate, which intervenes between the client and the attorney. If corporations were permitted to offer as an inducement legal services for the public in connection with their business, the end result would be that all legal work other than the actual courtroom trial of cases would be performed by corporations. Advising the public as to the substance and validity of pension and retirement plans as well as the actual drafting of such documents are matters which demand legal training and constitute an important area of the practice of law.

The difficulty of defining precisely what constitutes the practice of law is evident from the numerous case decisions which attempt to grapple with this complex subject. As stated by the court in Creditors' Serv Corp v. Cummings 190 A.2 (RI 1937). "What constitutes the practice of law is extremely difficult, if not unwise, to even attempt to define, and so the determination of any issue that presents this question must be left to the facts in each particular case." However, it is clear that the practice of law is not confined to litigation in the courts, but includes the giving of legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are defined or secured, irrespective of whether such matters are or may be the subject of litigation. Restrictive definitions of what constitutes the practice of law which purport to confine such to actual litigation in courts have long since been rejected by the courts. Nearly every case where a definition has been attempted begins with the premise that practicing law includes much more than the mere appearance in court by counsel. In a broad sense, the determination of what services one not duly admitted to the practice of law may perform depends upon whether the services require specialized legal training, knowledge, and skill beyond that of the average man. Blair v Motor Carriers Serv Bureau. 40 Pa D&C 413 (1939). Likewise, in Kountz v. Rowlands, 46 Pa. D.&C. 461 (1942), the court said that where the application of legal knowledge and technique is required, use thereof constitutes the practice of law, regardless of what activity may be involved. "Giving advice calculated to influence the recipient to conduct himself in a way which would affect his legal rights is practicing law."

Thus, it is in accordance with the overwhelming majority of the case decisions that the Kentucky Supreme Court saw fit to adopt Rule 3.020 which offers the following broad definition of those activities which constitute the practice of law:

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 ...

To come within the exception contained in Rule 3.020 one who is not a lawyer must not only act without consideration for his services in drawing the paper but he must be a party to, or his name must appear in the instrument as one to be benefited thereby. Carter v Brien, 309 S.W.2d 748 (Ky. 1956). Significantly, the exception is expressly limited to “natural persons” and the rule has been established that a corporation clearly is not a “person” within the meaning of Rule 3.020. Thus, the Kentucky Court of Appeals held in Kentucky State Bar Assn v. Tussey 476 S.W.2d 177 (Ky. 1972), that “a corporation is an artificial person, not capable of performing any act except through the agency of others, and for that reason it cannot come within the meaning of a “person” as the word is used in Rule 2.020.” Of course, a corporation may properly employ its own attorney to render legal service for it. But a corporation may not itself engage in the practice of law. *See* 476 S.W.2d at 179. The landmark Kentucky decision in Frazee v. Citizens Fidelity Bank & Trust Co. 393 S.W.2d 778 (Ky. 1965) firmly established that a corporation may not engage in the practice of law through salaried attorneys even as an incident to its commercial business. Furthermore, the fact that a corporation combines a legal service to the public with commercial services, which it properly may render, does not constitute an excuse for the unauthorized practice of law. *See* Kentucky State Bar Assn v. First Federal Savings and Loan Assn of Covington, 342 S.W.2d 397 (Ky. 1960).

The question as to whether a corporation, or for that matter any “nonlawyer” may legitimately offer extensive retirement and pension-planning advice and services to its business clients and other members of the public without thereby engaging in the practice of law has never been specifically addressed by the Kentucky courts or by the Unauthorized Practice Committee of the Kentucky Bar Association until now. In fact, a dearth of authority exists on this precise question. Therefore, it is imperative to closely scrutinize the tenor of the multitude of case decisions dealing with the unauthorized practice of law so as to derive those broad guiding principles which must govern our analysis of the instant factual situation. Recognizing that the basic consideration in matters of this sort is the public interest, our purpose would be well served by examining in detail the nature of retirement and pension planning activities in a present-day business setting.

In modern society, pension plans and trusts have become a necessary and vital part of our economic system governed by increasingly technical and complex governmental regulation. An individual assuming an advisory position must have knowledge of how a pension or retirement plan may be designed so as to conform to ERISA requirements and still meet the best interests of the client to be served. While the actual drafting of legal documents defining or securing legal rights is an integral part of retirement and pension-planning activities (*i.e.*, contracts and trusts), the subject also encompasses numerous decisions involving tax considerations and estate planning peculiarly within the province and expertise of members of the bar. Clearly, corporations engaging in these aspects of pension and trust planning activities cannot consistently with good faith allege that these matters are merely incidental to the practice of law.

The preservation of the special relationship between lawyer and client is in harmony with the public policy embodied in the Employee Retirement Income Security Act. The goal of providing for and protecting the retirement income of this nation's working population can never

be achieved unless competent and responsible attorneys are available to provide informed and independent advice to employers, beneficiaries and plan administrators. The protection of such vital legal rights and benefits can never be relegated to mere governmental routine. Rather, it is imperative that the loyalty of lawyer to his client, unimpaired by intervening interests or obligations, be recognized as critical to our legal system.

Attempting to set forth specific guidelines in the area of employee benefit planning presents special problems. These problems were recognized by the Arizona Supreme Court when it stated that “in light of the historical development of the lawyer's functions, it is impossible to lay down an exhaustive definition of the practice of law by attempting to enumerate every conceivable act performed by lawyers in the normal course of their work...” See State Bar of Arizona v. Arizona Land Title and Trust Co., 366 P.2d 1, 8-9 (Ariz. 1961). Nevertheless, the Standing Committee on the Unauthorized Practice of Law of the American Bar Association has continued to study this area of employee benefit planning with great intensity and on May 1, 1977, issued an exhaustive thirty-four page opinion which offers a great deal of help in understanding what specific activities constitute the practice of law. The core of the ABA Committee's opinion is located on page 19-20 of the report and offers a good summation of the principles underlying our analysis of this matter. The report states as follows:

Non-lawyers should not hold themselves out as lawyers or as substitutes for lawyers by stating or suggesting in the course of solicitations that they will perform any necessary legal services, such as: legal drafting, representing clients before courts or government agencies, or interpreting statutes, regulations or rulings. Because lawyer-employees of companies offering such plans may perform legal services only on behalf of the employer and not on behalf of the employer's clients or customers, the Committee believes that references in promotional materials to legal experts or legal expertise are misleading. Similarly improper is any statement or suggestion that the non-lawyer can prepare or amend a plan. This is because the exercise of independent legal judgment on behalf of the employer is necessary in the adoption or amendment of a plan. Other forms of solicitation which tend to offer non-lawyers as substitutes for lawyers may also be misleading and improper if the solicitations emphasize the legal aspects of plan design or drafting.

However, non-lawyers do not engage in unauthorized practice when they merely promote the sale of services or merchandise in connection with employee benefit planning. To the extent permitted by other laws and ethical standards of their professions, non-lawyers may properly advertise with respect to the sale of master plans or announce their availability to perform actuarial, accounting, banking, insurance, employee relations, investment consulting and other non-legal services in connection with plan design and administration.

The ABA report asserts that only a lawyer in the course of a lawyer-client relationship with an employer should advise an employer with respect to the fiduciary obligations created by a pension, retirement or employee benefit plan; offer an opinion on or interpretation of existing trust instruments, contracts or other agreements; advise the employer with respect to the form of

corporate documents and actions necessary to effectuate a plan; advise the employer on the specific legal consequences of financial transactions, forms of property ownership, etc.; and offer an opinion that an existing or proposed plan is in compliance with ERISA or any other law, is or will qualify for special tax treatment, or is in any other respect legally sufficient.

To a great extent, the same considerations involved in the question at hand have already been met and dealt with in a similar manner in the area of estate planning. As set forth in the Frazee decision and discussed more fully in an annotation entitled “Drafting of Wills or Other Estate-Planning Activities as the Illegal Practice of Law,” *see* 22 A.L.R.3d 1112, the courts have set forth specific guidelines in the area of estate planning which serve to set the tone for the present discussion. Advice related to the many legal considerations involved in estate planning bear a strong semblance to advising a client as to the validity and effect of a particular pension plan and trust.

Although the following should not be considered to necessarily constitute an exhaustive list of all activities which may be deemed the unauthorized practice of law when engaged in by laymen or corporations, it may serve as an aid in gauging the type of activities which the courts feel demand special expertise and training. The courts have generally held that laymen or corporations may not perform the following types of services in the estate-planning area.

1. Drafting wills or trust instruments or supervising their execution.
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 proceedings 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 protest or claims for refund, except requests for a refund based on mathematical or clerical errors in tax returns filed 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 filed 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.

The activities listed above are those clearly deemed by the courts to demand the special skill and training of an attorney. They cannot be properly viewed as mere ministerial or administrative functions. Likewise, to characterize pension and retirement plans and trusts as merely filling out forms and adding figures belies the fact that what may appear simple to the untrained may be highly complex and determinative in its effect upon the legal rights and obligations of those involved. As stated in the ABA report,

the preparation and drafting of legal documents, such as trust instruments, contracts, and corporate documents, for execution or use by others is the practice of law. Therefore, non-lawyers engage in the unauthorized practice of the law when they prepare, draft or assist other nonlawyers in the preparation or drafting of such legal documents.

Clearly, the preparation and drafting of the legal documents effectuating the adoption or amendment of employee benefit plans do not constitute an exception to this well-established rule. To the contrary, the importance and complexity of the legal rights established by the preparation and adoption of employee benefit documents serves to reemphasize the vital necessity of competent legal knowledge by the draftsman.

Thus, it must be reiterated that corporations and non-lawyers are not permitted to prepare or draft any legal documents effectuating the adoption or amendment of an employee benefit plan. This includes the preparation and drafting of trust instruments, contracts and corporate documents. However, this does not include reports, returns, schedules, etc., required by governmental agencies to be prepared by specified non-lawyer professionals. The fact that in some circumstances the adoption of a master or prototype plan may be the only economically feasible method of providing pension benefits for employees does not alter the fact that such plans are merely substitutes for custom designed and drafted plans. Significant legal obligations and responsibilities are still involved. Therefore, as stated in the ABA report, "the non-lawyer sponsor of such plans should not lead an employer to believe it is safe to accept the sponsor's legal advice and skills as a substitute for the independent professional judgment of the employer's lawyer."

In the landmark Frazee decision, the Kentucky Supreme Court held that trust institutions were prohibited from performing services which constituted the practice of law. The court specifically directed that a trust department could not draw wills or other legal documents or perform services in the administration of estates and trusts where such acts by law are considered the practice of law. *See* 393 S.W.2d at 783. In like manner, corporations or any non-lawyer may not perform services which constitute the practice of law. They shall not draft pension or retirement plans and trusts or perform services in pension or employee benefit plan design and administration where such acts by law are considered the practice of law. It would be thought

pure actuarial services, sales of life insurance and annuities, and providing administrative services for the managing of a retirement plan are examples of services that would not involve the 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.”