

KENTUCKY BAR ASSOCIATION
UNAUTHORIZED PRACTICE OF LAW OPINION U-65
ISSUED: JULY 2017

The Board of Governors of the Kentucky Bar Association originally adopted U-65 as a formal unauthorized practice opinion at its meeting in July 2017 under the provisions of Kentucky Supreme Court Rule (SCR) 3.530. U-65 was then published in the September/October issue of the Bench & Bar, as required by SCR 3.530(11). Since that publication, the Unauthorized Practice Committee of the Kentucky Bar Association became aware of a necessary amendment relating to Endnote 1. The Board adopted that amendment at its meeting on Nov. 17, 2017, and the amended version of U-65 is published below. Note that SCR 3.530 provides in part: “Both informal and formal opinions shall be advisory only.”

Question: May an insurance or claims adjuster, who is an employee of a Worker’s Compensation insurer, its third-party administrator or a self-insured employer, complete and file on behalf of the insured a Form 110-Settlement Agreement with the Department of Workers’ Claims?

Answer: No.

References: KRS 342.265(1); KRS 304.9-070; KRS 304.9-430; 806 KAR 9:030; SCR 3.020; KBA U-3; KBA U-4; KBA U-12; KBA U-15; KBA U-17; KBA U-27; KBA U-37; KBA U-45; KBA U-48; KBA U-52; KBA U-56; KBA U-57; KBA U-61; KBA U-64; *Winkenhofer v. Chaney*, Ky., 369 S.W.2d 113 (1963); *Kentucky State Bar Assn. v. Henry Vogt Machine Co.*, Ky., 416 S.W.2d 727 (1967); *Kentucky State Bar Association v. Lakes*, Ky., 443 S.W.2d 248 (1969)

OPINION

The question has been raised as to whether a non-attorney employee of a Worker’s Compensation insurer or another similarly situated entity may prepare forms required for the settlement of a Worker’s Compensation claim. There is ample authority in Kentucky jurisprudence supporting the conclusion that such an action, when engaged in by a non-attorney, constitutes the unauthorized practice of law in this jurisdiction.

I. It is well established that the representation of parties before Kentucky administrative agencies constitutes the practice of law in Kentucky.

The practice of law is defined in SCR 3.020 as follows:

[A]ny 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.

It has been well established in Kentucky that representation of parties before an administrative agency falls under the definition of SCR 3.020. This issue was specifically addressed in relation to the Kentucky Department of Workers' Claims in KBA U-64 and in KBA U-52:

The KBA, in Opinion U-52, addressed these issues in part when presented with the question of whether or not a non-lawyer may represent parties before the Kentucky Department of Workers' Claims. The opinion held that non-attorneys may not represent parties before the agency because "[r]epresentation of parties before administrative agencies is the practice of law, as it necessarily involves legal advice, counsel and advocacy."

Also, U-52, summarizing previous related opinions, stated:

Non-lawyers have been prohibited from representing corporations and individuals before the Kentucky Department of Transportation (Opinion KBA U-3); before a city civil service commission (Opinion KBA U-12); before the Kentucky Unemployment Insurance Commission (Opinion KBA U-15); before the Kentucky Board of Tax Appeals (Opinion KBA U-17) and in quasi-adjudicative proceedings before zoning boards and zoning authorities (Opinion KBA U-43) See also *Kentucky State Bar Assn. v. Henry Vogt Machine Co.*, Ky., 416 S.W.2d 727 (1967).

This position is consistent with numerous other KBA Opinions which indicate that dealing with legal claims pending before administrative bodies falls within the purview of SCR 3.020, without significant exception.¹

II. The practice of law is implicit in the initiation, preparation, and settlement of administrative claims, and can extend to the preparation of standard forms if said preparation implies the application of skills set forth in SCR 3.020.

The practice of law is not limited to the actual appearance of a party at the formal litigation of claims (or e.g., the deposition of witnesses, the filing of petitions and motions before adjudicative bodies), but may extend into preparation, negotiation, evaluation, and extrajudicial

¹ KBA U-3 ("[A] layman may not represent persons or entities before quasi-judicial bodies." In relation to representation before the Kentucky Department of Motor Transportation.); KBA U-15 (A layman may not represent a claimant at a hearing before a referee of the Unemployment Insurance Commission without constituting the unauthorized practice of law.); KBA U-17 ("Appearances by non-lawyers representing corporations or individuals before administrative agencies is the practice of law in that it necessarily involves advice and procedures affecting the legal rights and obligations of such parties."); KBA U-27 ("There can be no doubt that a person who represents a client before the Department of Insurance of the Commonwealth of Kentucky is engaged in the practice of law."); KBA U-52 (Non-lawyers may not represent parties before the Kentucky Department of Workers' Claims.); KBA U-56 (The appearance of an individual, not licensed as an attorney, before the Kentucky Natural Resources and Environmental Protection Cabinet on behalf of a third person, corporation or another entity, at a penalty assessment conference, constitutes the unauthorized practice of law.). See also *Kentucky State Bar Assn v. Henry Vogt Machine Co.*, 416 S.W.2d 727 (Ky. 1967), where the Kentucky Supreme Court enjoined non-attorneys from making legal objections and examining witnesses in hearings before the Unemployment Insurance Commission.

settlement of legal issues (even if those functions appear to be perfunctory or ministerial) if carrying out those functions requires “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.” See SCR 3.020.

It may sometimes be assumed that filling out a form as part of an administrative process might not fall under this definition. Many administrative functions employed today do depend on the promulgation of standard forms as well as the perfunctory collection and reporting of information. Many such set forms and standard processes have been put into place in order to assist with the efficient administration of justice and to speed up the processing of recurrent matters that are handled in a more or less predictable fashion.

It is tempting for lay-persons to assume that only a layman’s understanding of the legal principles at play may be necessary to fulfill some of the more ministerial tasks associated with such administration. However, it is well recognized that while the promulgation of set and accepted forms and standard procedures increases efficiency and permits more uniform administration of justice, they do not, in and of themselves, supplant the need for a trained legal understanding of the legal implications inherent within those processes. Such an understanding is essential, and the legal implications of information submitted in this manner cannot be dismissed.²

² There is ample support for this understanding to be found in past KBA opinions and Kentucky jurisprudence in relation to other similar standardized processes that fit into a similar mold. In KBA U-37 it was determined, with the guidance of the Kentucky Supreme Court, that an individual non-attorney, could not properly prepare and file Petitions, Orders and various documents in District Court on behalf of an estate, without the assistance of an attorney:

The central rule of the *Carter* case was that preparing and filing petitions for probate of wills, appointment of personal representative and final settlements is unauthorized practice of law when done voluntarily by persons without a beneficial interest in the estate. See also *Winkenhof v. Chaney*, Ky., 369 S.W.2d 113 (1963). Fiduciaries are in no different position, with respect to the practice of law, than the County Court Clerk in the *Carter* case.

Moreover, in KBA U-57 it was determined, with guidance from the Kentucky Supreme Court, that a lay individual licensed in Kentucky as a “public adjuster” under KRS 304.9-430, and 806 KAR 9:030, who is not a licensed attorney, could not represent claimants in the handling and processing of claims against tortfeasors and/or their insurers at any stage of the process:

The public adjuster must initially consult with the claimant regarding who[m] to pursue, which requires an analysis of legal liability. Garnering proof of damages requires knowledge of confidentiality, evidentiary matters and remedies. The entire matter must be handled with an acute awareness of statutes of limitations. The effect of admissions against interest, contractual rights, and waiver of claims for consortium, issues of third party liability, product liability, and commercial and consumer protection matters all must be examined.

It is clear that the attempt by a layperson licensed as “public adjuster” to represent claimants in tort cases is the unauthorized practice of law. See KBA U-45; See *Kentucky State Bar Association v. Lakes*, Ky., 443 S.W.2d 248 (1969).

It is well recognized in Kentucky that the practice of law may be assumed to have taken place through the application of legal analysis and advice implied in what might otherwise be considered purely ministerial aspects of claim adjudication and extrajudicial resolution.³

KBA U-61 specifically applied this principle with regard to insurance adjustor involvement in the settlement of claims which are properly before an adjudicative body at a court ordered mediation:

“Court ordered Mediation” is more than settlement negotiations. The process involves assessment of the strength of legal claims and defenses, damage calculations, proof problems, procedural compliance, evidentiary considerations, knowledge of venue specific issues and other matters which require legal skill and knowledge. Certainly those appearing on behalf of third parties at mediation are “representing” them. As such this activity falls within the definition of “the practice of law” and may be conducted only by licensed attorneys.

Certainly, the same factors at play in the settlement contemplated in KBA U-61 are equally at play in other settlements as well. The same set of skills and the same considerations must be applied to effectively assist a party contemplating such a resolution.

Therefore, it must be concluded that fulfillment of ministerial functions relating to settlement of claims and other administrative and procedural matters meets the standard set forth in SCR 3.020 if those functions require the application of “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.”

III. Filing out a form seeking approval of the settlement of administrative claims constitutes the practice of law under SCR 3.020 because it requires a legal analysis of claims and procedures.

It is evident from a cursory examination of “Form 110–Agreement as to Compensation” that completing and filing such a form extends well beyond the mere ministerial act of providing basic information to the court relating to the claimant-respondent (name, date of birth, nature of injury), and that completing and submitting this form implies a somewhat sophisticated and detailed knowledge as to the legal implications inherent in the various parties’ claims and defenses. It would be impossible to properly complete and submit this form without making a legal analysis of the claim at hand (specifically, a rather detailed and involved analysis).

For example, properly filling out the date and nature of the injury presupposes a knowledge of the statute of limitations inherent in the claims to be settled, as well as a knowledge as to the appropriateness of the forum for addressing those claims and understanding the implication that,

³ KBA U-4 (Procuring, analyzing and evaluating claims history for an employer by a non-attorney is the unauthorized practice of law.); KBA U-48 (An insurance adjuster, claiming authority under KRS 304.9-070 and KRS 304.9-430, may not represent a member of the public, and accept compensation, in negotiating for an effecting the settlement of a claim for loss or damage.); KBA U-64 (A non-lawyer cannot request that a board or agency initiate an administrative action and grant a hearing or file an answer on behalf of an otherwise unrepresented corporation or other artificial entity in an administrative hearing.).

by so doing, other avenues of recovery are most likely going to be waived without further recourse.

The question of whether any injuries arising outside the scope of the Worker's Compensation adjudication process exist, and a decision as to whether those claims should be addressed in tort litigation is presupposed. Moreover, questions as to whether there are any claims or defenses being waived by the parties at issue in this settlement, and whether the injuries reflected in the settlement are fairly accounted for under the scheme of recovery employed therein, are also apparent.

The fact that issues of waiver of claims are specifically dealt with on the face of the form, in and of itself presupposes a legal analysis inherent in this process, as well as consultation with the parties involved in the claim and the adjudication thereof.

There is, frankly, no way that this form could be properly completed without making a substantial legal analysis of the applicant's claims, the value of those claims, the applicant's entitlement to recovery, and the opposing parties' defenses as to said claims, much less the appropriateness of the forum and other technical legal questions that would require the assistance of an attorney with significant experience in this area of practice to evaluate properly.

Accordingly, the preparation and filing of "Form 110–Agreement as to Compensation" constitutes the practice of law under SCR 3.020.

CONCLUSION

Where a non-attorney insurance or claims adjuster, who is an employee of a Worker's Compensation insurer, its third-party administrator or a self-insured employer, completes and files on behalf of the insured a Form 110–Settlement Agreement with the Department of Workers' Claims, said individual has 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."