

**STATE OF TENNESSEE**

OFFICE OF THE  
**ATTORNEY GENERAL**  
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November 10, 2004

Opinion No. 04-160

Nonlawyer Corporate Representation Before Department of State Contested Case Hearings

**QUESTIONS**

1. In light of Tennessee Attorney General Opinion No. 97-164 and the ruling in *Old Hickory Eng'g & Mach. Co. v. Henry*, 937 S.W.2d 782 (Tenn. 1996), to what extent may a corporate representative participate on behalf of a corporation that is not represented by counsel?

2. If it is permissible for an unrepresented corporation to participate in a contested case hearing through a duly authorized representative, may the corporation initiate a contested case hearing by filing an initial pleading such as an appeal or a petition for declaratory order through this nonlawyer representative?

**OPINIONS**

1. Even though Administrative Law Judges have already limited nonlawyer corporate representatives to giving an oral statement on the record, the nonlawyer representative of a corporation should exercise caution when providing an oral statement as this practice would appear to present the potential for the unauthorized practice of law that could only be resolved on a case-by-case basis.

2. No. A nonlawyer representative may not initiate a contested case hearing on behalf of a corporation because the acts of drafting and filing pleadings are considered the "practice of law" when performed in a representative capacity.

**ANALYSIS**

Under the Tennessee Administrative Rules and Procedures Act concerning contested case hearings, Tenn. Code Ann. § 4-5-305(a) states that "[a]ny party may participate in the hearing in person or, if the party is a corporation or other artificial person, by a duly authorized representative." The Rules of Tennessee Department of State Administrative Procedures Division also state that "[a]ny party to a contested case may represent himself or herself or, in the case of a corporation or other artificial person, may participate through a duly authorized representative such as an officer, director or appropriate employee." Rule 1360-4-1-.08(2). Administrative Law Judges in the Administrative Procedures Division of the Department of State have generally interpreted the provisions of Tenn. Code Ann. § 4-5-305(a) and Rule 1360-4-1-.08(2) to permit a corporation that

is not represented by an attorney to participate in a contested case hearing through a duly authorized representative, with such participation being limited to giving an oral statement on the record.

The “practice of law” has been codified by the Tennessee Legislature as:

the appearance as an advocate in a representative capacity or the drawing of papers, pleadings or documents or the performance of any act in such capacity in connection with proceedings pending or prospective before any court, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies, or the soliciting of clients directly or indirectly to provide such services.

Tenn. Code Ann. § 23-3-101(2). Although “oral statement” is not defined, for purposes of this Opinion, it is being treated as an opportunity for the corporation to summarize relevant facts. This practice of providing an oral statement would appear to present the potential for the unauthorized practice of law that could only be resolved on a case-by-case basis. Consequently, it is this Office’s opinion that nonattorney corporate representatives making oral statements in this setting should exercise caution and, as much as possible, should make the oral statement serve as a factual summary of what corporate officials would say if called to testify on direct examination.

The Attorney General has previously opined on a similar matter concerning nonlawyer representation of employees before civil service commissions. Tenn. Op. Att’y Gen. No. 97-164. The Attorney General’s Opinion stated that Tenn. Code Ann. § 7-3-104, which authorized nonlawyers to represent employees appearing before civil service commission hearings, unconstitutionally infringed upon the Tennessee Supreme Court’s authority to regulate the practice of law when such representation required the exercise of professional legal judgment. Administrative Law Judges conduct these civil service commission hearings, which are formal, adversarial proceedings governed by the Uniform Administrative Procedures Act, Tenn. Code Ann. title 4, chapter 5. *Id.* The previous opinion distinguished the civil service commission hearings from Board of Equalization hearings at which the nonlawyer representation is so limited that it does not require the “professional judgment of a lawyer.” *Id.* (citing *In re Petition of Burson*, 909 S.W.2d 768, 771 (Tenn. 1995)). As previously opined, “[e]ffective advocacy in such a hearing would, therefore, seem to require some legal training, skill and judgment.” *Id.* The civil service commission hearings are similar in nature and proceedings to Department of State contested case hearings as Administrative Law Judges preside over both. Any assistance by a nonlawyer corporate representative would be prohibited as it amounts to the “practice of law” if any aspect of the undertaking or conduct requires the exercise of professional legal judgment.<sup>1</sup>

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<sup>1</sup>The phrase “professional judgment of a lawyer” was adopted by the Tennessee Supreme Court in *Burson* in 1995 from Ethical Consideration 3-5 of Tennessee Supreme Court Rule 8. *Burson*, 909 S.W.2d at 776. As of the date of this Opinion, no court has addressed what impact that developments, such as the adoption of the model Rules of Professional Conduct in 2003, may have on the “professional judgment of a lawyer” standard.

The Tennessee Supreme Court has discussed the issue of nonlawyer corporate representatives in court proceedings. In *Old Hickory Eng'g & Mach. Co. v. Henry*, 937 S.W.2d 782 (Tenn. 1996), the nonlawyer president of a corporation signed and filed a negligence complaint on behalf of the corporation. The Supreme Court stated that “[s]ince a corporation is an entity separate and distinct from its officers and shareholders, the provision of Tenn. Code Ann. § 23-1-109 (1994), that ‘[a]ny person may conduct and manage the person’s own case in any court of this state,’ is not applicable to corporations, even when the person undertaking to act for the corporation is an officer or a shareholder.” *Old Hickory Eng'g & Mach. Co. v. Henry*, 937 S.W.2d 782, 785 (Tenn. 1996). The Supreme Court looked to the Supreme Court of Minnesota, which explained the underlying rationale of the rule prohibiting nonlawyer corporate agents from appearing in court as follows:

A non-attorney agent of a corporation is not subject to the ethical standards of the bar and is not subject to court supervision or discipline. The agent knows but one master, the corporation, and owes no duty to the courts. In addition, a corporation is an artificial entity which can only act through agents. To permit a lay individual to appear on behalf of a corporation would be to permit that individual to practice law without a license.

*Id.* (quoting *Nicollet Restoration, Inc. v. Turnham*, 486 N.W.2d 753, 754 (Minn. 1992)). As the contested case hearings at issue are conducted by Administrative Law Judges and constitute “proceedings . . . before . . . [a] body . . . constituted by law or having authority to settle controversies,” Tenn. Code Ann. § 23-3-101(2), we think the same rationale would prohibit a nonlawyer agent or officer acting on behalf of a corporation in a contested case hearing. Therefore, a nonlawyer corporate agent cannot initiate a contested case hearing by filing an initial pleading as this action would be in a “representative capacity,” would constitute the “practice of law” under Tenn. Code Ann. §§ 23-3-101 and 23-3-103, and would be considered the unauthorized practice of law if any aspect of the undertaking or conduct requires the “professional judgment of a lawyer.”

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