

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

July 5, 2006

Opinion No. 06-108

Practice of Law; Preparation of Petitions for Orders of Protection

QUESTIONS

1. Whether under current law agencies such as shelters, nonprofit agencies, private institutions, religious institutions, military agencies and law enforcement agencies that meet in person with victims of domestic violence, sexual assault and stalkings may assist victims in preparing and filing a petition for an order of protection with the clerk of the court, if the agency has been provided the proper forms for filing by the clerk of the court, as provided for in Tenn. Code Ann. § 36-3-617.

2. Whether the agencies will be required to have an attorney present or work under the direction of an attorney in order to assist the victim in the proper completion and filing of the petition, or is the assistance of the clerk of the court sufficient for this purpose.

OPINIONS

1. Yes, so long as the nonlawyer agency employees do not engage in conduct that requires the professional judgment of a lawyer while undertaking to assist victims in completing and filing these form petitions as authorized in Tenn. Code Ann. § 36-3-617.¹

2. If nonlawyer agency employees do not engage in the unauthorized practice of law while assisting victims in the completion and filing of these petition forms, an attorney would not be required to be present or act in a supervisory role. Under these circumstances, the assistance of the clerk of the court would be sufficient.

ANALYSIS

1. The Domestic Abuse Act, Tenn. Code Ann. § 36-3-601 *et seq.*, provides the procedure for domestic violence victims to file petitions for orders of protection. The Tennessee Legislature has granted the following authority to agencies to assist these victims:

¹The Attorney General has previously addressed similar questions regarding the preparation and use of certain forms by courts. *See* Op. Tenn. Att’y Gen. 04-071 (Apr. 21, 2004) (Court may develop form petition and direct non-attorney members of the Circuit Court Clerk’s office to make these form petitions available for use by pro se litigants seeking to have their driving privileges restored as long as none of the conduct is performed “in a representative capacity” for pro se litigants).

- (1) The clerk of the court may provide order of protection petition forms to agencies that provide domestic violence assistance.
- (2) Any agency that meets with a victim in person and recommends that an order of protection be sought shall assist the victim in the completion of the form petition for filing with the clerk.
- (3) No agency shall be required to provide this assistance unless it has been provided with the appropriate forms by the clerk.

Tenn. Code Ann. § 36-3-617(b)(1)-(3). The opinion request did not provide a copy of the petition form at issue; however, the legislature previously directed the Administrative Office of the Courts to develop a “Petition for Orders of Protection” form. Tenn. Code Ann. § 36-3-604(b). The Administrative Office of the Courts operates under the direction and supervision of the Tennessee Supreme Court. Tenn. Code Ann. § 16-3-801 *et seq.* Copies of this petition form can be found either by contacting the local clerk of court that handles domestic issues, in the Appendix to Tenn. Code Ann. § 36-3-604, or posted on the Administrative Office of the Courts’s website located at <http://www.tsc.state.tn.us/geninfo/Publications/publications.htm#protectionform>.

While Tenn. Code Ann. § 36-3-617 may not facially present an unauthorized practice of law issue, caution should be exercised during the undertaking of assisting domestic violence victims as related conduct could constitute the unauthorized practice of law. The fact that the legislature has authorized nonlawyer agency employees to engage in conduct such as recommending filing and assisting in the completion of these petition forms raises a separation of powers² issue, because such conduct, depending upon the circumstances, might constitute the unauthorized practice of law. The Tennessee Supreme Court has held that it has the inherent authority to regulate the unauthorized practice of law and is the final arbiter regarding these issues. *In re Petition of Burson*, 909 S.W.2d 768, 773-74 (Tenn. 1995).

The Tennessee Code has defined the “practice of law” to include “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. . . .” Tenn. Code Ann. § 23-3-101(2). The Tennessee Supreme Court has previously stated that “the acts enumerated in the definitions of ‘law business’³ and ‘practice of law’ contained within Tenn. Code Ann. § 23-3-101, if performed by a non-attorney constitute the unauthorized practice of law only if the doing of those acts requires the ‘professional judgment of a lawyer.’”⁴ *Burson*, 909 S.W.2d at 776.

² Tenn. Const. art II, §§ 1 and 2.

³An assumption is made that no “valuable consideration” is exchanged between these agencies and the victims they are assisting. Accordingly, none of the conduct in question constitutes “law business” within the meaning of Tenn. Code Ann. § 23-3-101(1).

⁴ The phrase “professional judgment of a lawyer” adopted by the Supreme Court in *Burson* in 1995 originated from Ethical Consideration 3-5 of the Tennessee Supreme Court Rule 8. *Burson*, 909 S.W.2d at 776. As of the date of this Opinion, no Tennessee court has addressed the impact the adoption of the model Rules of Professional Conduct in 2003 may have on the “professional judgment of a lawyer” standard. *See* Tenn. Op. Att’y Gen. No. 05-076 (May

The Domestic Abuse Act does not define or regulate which agencies are allowed to assist domestic violence victims with these petition forms, but it appears their undertaking would be to further the missions of these agencies to assist victims of domestic violence, not to assist consumers with legal matters for a fee. These agencies may assist victims in preparing these form petitions for orders of protection, as provided for in Tenn. Code Ann. § 36-3-617, so long as their assistance does not require the professional judgment of a lawyer. The petition form is primarily fact-based, regarding the petitioner's and respondent's personal information, relationship and requested relief. Nonlawyer agency employees should limit their assistance to helping victims answer fact-based questions on forms and avoid assisting in answering questions or giving advice regarding specific legal situations that may require the professional judgment of a lawyer.

Beyond the ministerial act of filling out a form, nonlawyer agency employees should exercise caution to not appear in a representative capacity nor use the professional judgment of a lawyer when engaging in other activities such as advising victims or appearing before a court as something beyond a witness in a hearing. Agencies that assist victims in this manner may be advised to develop disclaimers regarding the limitations of their undertaking, i.e., that they are not lawyers, cannot give legal advice, or represent victims in court, so that any confusion regarding the agency's role would be clarified on the front end. While discrete acts by nonlawyer agency employees during this assistance may not necessarily require the professional judgment of a lawyer, issues regarding the unauthorized practice of law are heavily fact-dependent, and courts would not just examine specific or isolated conduct but would consider the totality of the circumstances and the entire undertaking.⁵

2. If nonlawyer agency employees do not engage in the unauthorized practice of law while assisting victims in the completion of these petition forms, an attorney would not be required to be present or act in a supervisory role. Under those circumstances, the assistance of the clerk of the court would be sufficient.

PAUL G. SUMMERS
Attorney General

10, 2005).

⁵The Tennessee Supreme Court adopted the following statement of policy by the Board of Law Examiners: "Decisions as to whether a person is engaged in the unauthorized practice will have to be made on a case-by-case basis in the particular context in which the issue may arise." Tennessee Board of Law Examiners' Statement of Policy concerning the meaning of "Practice of Law" and related Opinion, Sept. 25, 1984, *adopted* at 267 Tenn. XXXI (Dec. 19, 1984).

MICHAEL E. MOORE
Solicitor General

JENNIFER E. PEACOCK
Assistant Attorney General

Requested by:

Representative Kim McMillan
House Majority Leader
18 A Legislative Plaza
Nashville, TN 37243-0167