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Opinion No. 08-153

Representing Participants in Benefit Review Conference; Unauthorized Practice of Law

QUESTION

Does it constitute the unauthorized practice of law for the purposes of Tenn. Code Ann. § 23-3-101 for a non-attorney to represent an employer and/or the employer's insurer in a Benefit Review Conference at the Tennessee Department of Labor and Workforce Development?

OPINION

The representation of individuals and/or entities at a Benefit Review Conference ("BRC") by a non-attorney is not the "practice of law" as defined by Tenn. Code Ann. § 23-3-101. Such conduct may, however, constitute unlawfully engaging in "law business" under that statute if the representation requires the professional judgment of a lawyer. Though it would not constitute the "practice of law" merely to represent a person or entity at a BRC, the signing and submission of a resulting settlement may constitute the "practice of law" under Tenn. Code Ann. § 23-3-101 depending upon the facts of the case.

ANALYSIS

In Tennessee, there is a statutory prohibition against engaging in the practice of law or law business without a license. Tenn. Code Ann. § 23-3-103(a). The "practice of law" is defined 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(3).

"Law business" is defined as:

> the advising or counseling for a valuable consideration of any person as to any secular law, or the drawing or the procuring of or assisting in the drawing for a valuable consideration of any paper, document or instrument affecting or relating to secular rights, or the doing of any act for a valuable consideration in a representative capacity, obtaining or tending to secure for any person any property or property rights whatsoever, or the soliciting of clients directly or indirectly to provide such services.

Tenn. Code Ann. § 23-3-101(1).

Whether representation by non-attorneys at Benefit Review Conferences constitutes the "practice of law"depends on whether BRC's are proceedings held before a "court, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies" within the meaning of Tenn. Code Ann. § 23-3-101(3). A BRC is a nonadversarial, informal dispute-resolution proceeding that parties must attend in a workers' compensation dispute before filing suit. Tenn. Code Ann. § 50-6-237(a). The BRC is conducted by a workers' compensation specialist, who is an employee of the Department of Labor and Workforce Development. One of the purposes of these conferences is to resolve disputed issues by entering into a settlement agreement. *Id*. Any settlement that is reached by the parties is done so voluntarily. For the settlement to be effective and binding on the parties, however, it must be approved by the court or the commissioner of labor and workforce development. Tenn. Code Ann. §§ 50-6-206, -240.

In Op. Tenn. Att'y Gen. 02-134 (Dec.19, 2002) this office concluded:

> We know of no statute or case law that would support a conclusion that the BRC is a court, administrative board, commission or agency authorized to conduct hearings. . . . Among other things, the BRC provides an opportunity for, but does not compel, a binding settlement of the issues of the claim. . . . The resulting agreement is not an order arising out of a judicial proceeding or a proceeding before a board, commission or agency.

We continue to adhere to that view. Accordingly, it is the opinion of this office that representing the participants at a BRC does not constitute the "practice of law" as defined by Tenn. Code Ann. § 23-3-101.

It is possible, however, that a non-attorney could be called upon to engage in "law business" as a consequence of representing the participants at a BRC. The Tennessee Supreme Court has held that acts of "law business," 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.'" *In re Petition of Burson*, 909 S.W.2d 768, 776 (Tenn. 1995). Thus, an inquiry into

whether conduct by a non-attorney constitutes the unauthorized practice of law is fact-dependent and must be examined on a case-by-case basis. The determination whether a non-attorney has engaged in the unauthorized practice of law during a BRC is thus case-specific and depends on whether the non-attorney has engaged in acts that require the professional judgment of a lawyer.

Though it does not constitute the practice of law merely to represent a person or entity at a BRC, the signing and submission of a resulting settlement may constitute the "practice of law" under Tenn. Code Ann. § 23-3-101(3) because it could be construed as "the appearance as an advocate in a representative 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 . . . ." Any settlement reached during the BRC must be approved by a court or the commissioner or commissioner's designee. If the parties decide to have the settlement approved by the court, a complaint and joint motion for approval must be filed. The court hears the motion and determines whether to grant approval. If the parties decide to have the commissioner or the commissioner's designee approve the settlement, the parties hold a separate meeting during which a worker's compensation specialist goes over the settlement with the employee. If the specialist is convinced the employee understands the terms of the settlement, it is approved.

Courts in Tennessee have held that signing and submitting a complaint or a petition for a declaratory order require the professional judgment of a lawyer. *See Old Hickory Eng'g & Mach. Co. v. Henry*, 937 S.W.2d 782, 786 (Tenn. 1996); *Tennessee Envtl. Council, Inc. v. Tennessee Water Quality Control Bd.*, 254 S.W.3d 396, 409 (Tenn. Ct. App. 2007). Conversely, it has been held that signing a claim against an estate does not require professional judgment. *Green v. Carthage General Hosp., Inc.*, 246 S.W.3d 582, 586 (Tenn. Ct. App.2007). The court's finding often centers around the formality of the proceedings triggered by the submission. *See Tennessee Envtl. Council*, 254 S.W.3d at 404-9. If the proceeding is "informal" and does not adhere to the rules of evidence or involve witness testimony, representation may not require the professional judgment of a lawyer. *Burson*, 909 S.W.2d at 771. If the proceeding is a formal, adversarial hearing, the professional judgment of a lawyer is required and thus representation by a non-lawyer at such a proceeding is the practice of law. *See Tennessee Envtl. Council*, 254 S.W.3d at 409. In a situation involving a settlement created from a BRC, parties choose the process by which to obtain approval. Therefore, the determination of whether the submission of a settlement requires the professional judgment of a lawyer and, thus, constitutes the practice of law may vary from case to case depending upon the facts.

If the signing and submission of a such a settlement is deemed to be the practice of law, it is important to note that such an act could not be done by non-attorney agents of corporations and/or limited liability companies. The Tennessee Supreme Court has held that Tenn. Code Ann. § 23-1-109, which allows a party to act as their own attorney, does not apply to corporations. *Old Hickory*, 937 S.W.2d 782 (Tenn. 1996). The Court further clarified that a corporation "cannot act *pro se* in a court proceeding nor can it be represented by an officer or other non-lawyer agent." *Id*. This office has previously concluded that this ruling applies to limited liability companies as well:

> Like a corporation, a limited liability company must be treated as a separate, legal entity. A limited liability company "has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs, including without limitation, power to: (1) [s]ue and be sued, complain and defend in its LLC name." Tenn. Code Ann. § 48-212-201. . . . As a limited liability company is a entity separate and distinct from its members, managers and/or board or governors, it follows that a non-attorney agent of a limited liability company could not advocate on behalf of the limited liability company in a court proceeding.

Op. Tenn. Att'y Gen. 05-036 Mar. 29, 2005). Since a corporation and/or a limited liability company cannot act *pro se*, it must retain the services of an attorney to engage in all acts deemed to be the practice of law. If signing and submitting a settlement constitutes the practice of law, non-attorney agents of corporations and/or limited liability companies would be prohibited under Tenn. Code Ann. § 23-3-103(a) from performing that act.

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