

## Utah Ethics Opinions

1999.

99-02. USB EAOO Opinion No. 99-02

Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 99-02

Approved April 30, 1999

**Issue:** Does a lawyer who negotiates or communicates with an opposing party's legal assistant, secretary or other non-lawyer representative about substantive matters assist in the unauthorized practice of law under Utah Rule of Professional Conduct 5.5(b)?

**Opinion:** In general, a lawyer who negotiates or otherwise communicates with a non-lawyer representative on substantive matters affecting the rights of parties to a particular matter is not assisting in the unauthorized practice of law if that representative is supervised by a lawyer as required under Rule 5.3. When the non-lawyer representative is employed in a lawyer's office, the lawyer communicating with such a representative may presume that the representative is supervised within the requirements of Rule 5.3, unless the lawyer is aware of facts and circumstances that impart knowledge that adequate supervision is lacking.

**Analysis:** Under Utah Rules of Professional Conduct 5.5(b), "A lawyer shall not . . . [a]ssist any person in the performance of activity that constitutes the unauthorized practice of law." The Utah Supreme Court has stated that "the practice of law, although difficult to define precisely, is generally acknowledged to involve the rendering of services that require the knowledge and application of legal principles to serve the interests of another with his consent." (fn1) The Court continued, "What constitutes the practice of law in any given situation requires a case-by-case decision, and therefore, each case must be evaluated to determine whether the particular acts involved constitute the practice of law." (fn2)

Lawyers often employ non-lawyer assistants, including secretaries, legal assistants, paralegals and student interns. Such assistants may perform a wide array of services, including interviewing clients, scheduling depositions, drafting documents or pleadings, and conducting legal research. Some of these activities might constitute the practice of law in a given situation if the persons

performing them were to act independently of any supervision. (fn3) However, the Rules of Professional Conduct except such activities from the prohibitions relating to the unauthorized practice of law if the assistants are employed by a lawyer "so long as the lawyer supervises the delegated work and retains responsibility for their work." (fn4) The fact that the practice of law is a licensed profession creates safeguards for the protection of the public. Those safeguards are in place where a paralegal or other non-lawyer acts under a lawyer's supervision, and they are absent when such supervision is inadequate or non-existent. (fn5)

Exceptions to the general rule exist for certain non-lawyer professionals who are licensed and, by the nature of their profession, engage in actions representing clients and negotiating on their behalf. Examples of these are first-party insurance adjusters (fn6) and real estate agents. (fn7) A lawyer may negotiate or communicate with these representatives without fear of assisting in the unauthorized practice of law. If, however, the lawyer knows that the opposing party is also represented in the matter by a lawyer, communication with the non-lawyer representative is improper without the lawyer's consent. (fn8)

Just as defining what constitutes the practice of law is fact-specific and requires a case-by-case analysis, so does defining what constitutes adequate supervision of a non-lawyer assistant. The issue before the Committee does not directly involve the conduct of a supervising lawyer, but rather an opposing party's lawyer's communication with a non-lawyer representative. Where a non-lawyer assistant is employed by a lawyer, an opposing lawyer communicating with that assistant may presume that the assistant is supervised within the requirements of Rule 5.3. The presumption may be overcome where the communicating lawyer is aware of facts and circumstances indicating that adequate supervision is lacking. In that case, counsel may indeed be assisting in the unauthorized practice of law in violation of Rule 5.5(b). The appropriate level of supervision necessary to insure that the representative is not engaging in the unauthorized practice of law is fact-specific and will vary from case to case.

Finally, lawyers employing a disbarred or suspended lawyer as a paralegal should take special care to ensure adequate supervision. Because such an individual has had significant legal training and experience, there may be a tendency for him to engage in conduct that is not properly supervised and, therefore, constitutes the unauthorized practice of law.

## Footnotes

1. *Utah State Bar v. Summerhayes & Hayden, Public Adjusters*, 905 P.2d 867 (Utah 1995).

2. *Id.* at 870.

3. *See Board of Commissioners v. Peterson*, 937 P.2d 1263 (Utah 1997).

4. *See* Rule 5.5 cmt., and Rule 5.3 cmt.

5. *Peterson*, 937 P.2d at 1269.

6. Utah Code Ann. §§ 31A-26-101 to -311 (1999).

7. Utah Code Ann. §§ 61-2-1 to -24 (1997 & Supp. 1998).

8. *See* Utah Rules of Professional Conduct 4.2; Utah Ethics Advisory Op. No. 98-07, 1998 WL 493028 (Utah St. Bar).

**Rules Cited:**

**5.35.5**