

ETHICS OPINION

R0 2014-01

QUESTION:

May a non-lawyer represent a party in a court-ordered arbitration proceeding in Alabama?

ANSWER:

No, absent a federal or state statute allowing such, the representation of a party by a non-lawyer in a court-ordered arbitration proceeding in Alabama would constitute the unauthorized practice of law. Moreover, a lawyer has an obligation to bring the matter of the non-lawyer's representation of a party to the attention of the arbitrator and where appropriate, to the attention of the court.

DISCUSSION:

The Disciplinary Commission of the Alabama State Bar has been asked to opine on whether the representation of a party by a non-lawyer in a court-ordered arbitration would constitute the unauthorized practice of law by the non-lawyer and, if so, what duties would an attorney involved in the matter as an arbitrator or lawyer have to raise such issue in the arbitration or before the court. By way of background, Canon IV(C) of the Alabama Code of Ethics for Arbitrators and the American Arbitration Association Code of Ethics provides that "[t]he arbitrator should not deny any party the opportunity to be represented by counsel or by any other person chosen by the party." Some have interpreted this provision as allowing the representation of a party to a arbitration by a non-lawyer. However, the preamble to the Alabama Code of Ethics for Arbitrators also states that all provisions of the Code should be read in conjunction with applicable law. In addition, Rule 26 of the American Arbitration Association Commercial Arbitration Rules and Mediation Procedures states that a party may be represented by "any other representative of the party's choosing, unless such choice is prohibited by law."

As such, the question then becomes whether a non-lawyer may represent a party during a arbitration in Alabama or whether such representation would constitute the unauthorized practice of law. As a starting point, Rule 5.5, Ala. R. Prof. C., provides as follows:

Rule 5.5.

Unauthorized Practice of Law.

(a) A lawyer shall not:

(1) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(2) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

(b) Subject to the requirements of Rule VII, Rules Governing Admission to the Alabama State Bar (Admission of Foreign Attorneys Pro Hac Vice), a lawyer admitted in another United States jurisdiction but not in the State of Alabama (and not disbarred or suspended from practice in that or any jurisdiction) does not engage in the unauthorized practice of law when the lawyer represents a client on a temporary or incidental basis (as defined below) in the State of Alabama. Services for a client are within the provisions of this subsection if the services:

(1) are performed on a temporary basis by a lawyer admitted and in good standing in another United States jurisdiction, including transactional, counseling, or other nonlitigation services that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice;

(2) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding held or to be held in this or in another jurisdiction; or

(3) are performed by an attorney admitted as an authorized house counsel under Rule IX of the Rules Governing Admission to the Alabama State Bar and who is performing only those services defined in that rule.

(c) A lawyer admitted to practice in another jurisdiction but not in the State of Alabama does not engage in the unauthorized practice of law in the State of Alabama when the lawyer renders services in the State of Alabama pursuant to other authority granted by federal law or under the law or a court rule of the State of Alabama.

(d) Except as authorized by these Rules or other law, a lawyer who is not admitted to practice in the State of Alabama shall not (1) establish an office or other permanent presence in this jurisdiction for the practice of law, or (2) represent or hold out to the public that the lawyer is admitted to practice law in Alabama.

(e) Practicing law other than in compliance with this rule or Rule VII or Rule VIII of the Rules Governing Admission to the Alabama State Bar, or other rule expressly permitting the practice of law, such as the Rule Governing Legal Internship by Law Students, shall constitute the unauthorized practice of law and shall subject the lawyer to all of the penalties, both civil and criminal, as provided by law.

Rule 5.5 does not state that representing a party in a arbitration is not the practice of law. Rather, Rule 5.5 is, in part, a multi-jurisdictional practice rule that expressly allows attorneys licensed in other states to represent parties in arbitrations taking place in Alabama. In doing so, it does not expressly allow non-lawyers to represent parties in arbitration.

Obviously, if a state or federal statute or law specifically allows a non-lawyer to represent a party during a arbitration, such statute or law would control. However, the Disciplinary Commission is unaware of any Alabama Supreme Court opinion that addresses whether representation of a party during an arbitration proceeding would constitute the unauthorized practice of law. The Disciplinary Commission is also unaware of any law or statute that expressly permits or prohibits the representation of a party by a non-lawyer during a arbitration.

The Supreme Court of Alabama has previously stated that “the specific acts which constitute the unauthorized practice of law are and must be determined on a case-by-case basis.” Coffee Cty. Abstract and Title Co. v. State, ex rel. Norwood, 445 So. 2d 852, 856 (Ala. 1983). As a starting point, § 34-3-6, Ala. Code 1975, which defines the practice of law, provides, in pertinent part, as follows:

- (a) Only such persons as are regularly licensed have authority to practice law.
- (b) For the purposes of this chapter, the practice of law is defined as follows:

Whoever,

- (1) In a representative capacity appears as an advocate or draws papers, pleadings or documents, or performs any act in connection with proceedings pending or prospective before a court or a body, board, committee, commission or officer constituted by law or having authority to take evidence in or settle or determine controversies in the exercise of the judicial power of the state or any subdivision thereof; or
- (2) For a consideration, reward or pecuniary benefit, present or anticipated, direct or indirect, advises or counsels another as to secular law, or draws or procures or assists in the drawing of a paper, document or instrument affecting or relating to secular rights; or
- (3) For a consideration, reward or pecuniary benefit, present or anticipated, direct or indirect, does any act in a representative capacity in behalf of another tending to obtain or secure for such

other the prevention or the redress of a wrong or the enforcement or establishment of a right; or

(4) As a vocation, enforces, secures, settles, adjusts or compromises defaulted, controverted or disputed accounts, claims or demands between persons with neither of whom he is in privity or in the relation of employer and employee in the ordinary sense; is practicing law.

(c) Nothing in this section shall be construed to prohibit any person, firm or corporation from attending to and caring for his or its own business, claims or demands, nor from preparing abstracts of title, certifying, guaranteeing or insuring titles to property, real or personal, or an interest therein, or a lien or encumbrance thereon, but any such person, firm or corporation engaged in preparing abstracts of title, certifying, guaranteeing or insuring titles to real or personal property are prohibited from preparing or drawing or procuring or assisting in the drawing or preparation of deeds, conveyances, mortgages and any paper, document or instrument affecting or relating to secular rights, which acts are hereby defined to be an act of practicing law, unless such person, firm or corporation shall have a proprietary interest in such property; however, any such person, firm or corporation so engaged in preparing abstracts of title, certifying, guaranteeing or insuring titles shall be permitted to prepare or draw or procure or assist in the drawing or preparation of simple affidavits or statements of fact to be used by such person, firm or corporation in support of its title policies, to be retained in its files and not to be recorded.

In addition, the Supreme Court of Alabama has repeatedly held that the purpose of § 34-3-6 is to ensure that laymen do not serve others in a representative capacity in areas that require the skill and judgment of a licensed attorney. Porter v. Alabama Ass'n of Credit Executives, 338 So.2d 812 (Ala.1976).

It is the opinion of the Disciplinary Commission that under section (b)(1) of the UPL statute a non-lawyer may not represent a party during a arbitration absent an express federal or state statute or law allow for such. A non-lawyer representative would be making an appearance in a representative capacity. Moreover, it is presumed that during the arbitration, the non-lawyer representative would be introducing exhibits, conducting examination of witnesses, including expert witnesses, objecting to exhibits and making legal arguments on behalf of the party and/or providing legal advice to the party. Such activities generally require the skill and judgment of a licensed attorney and under the UPL statute constitutes the practice of law.

In addition, Rule 5.5, Ala. R. Prof. C., prohibits a licensed Alabama lawyer from assisting “a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.” If a lawyer were to stay silent and allow a

non-lawyer to represent a party in a arbitration, that lawyer would be aiding and abetting that non-lawyer in the unauthorized practice of law. As such, a lawyer has an obligation to bring the matter of the non-lawyer's representation of a party to the attention of the arbitrator and where appropriate, to the attention of the court and the Office of General Counsel.