

STATE BAR ASSOCIATION OF NORTH DAKOTA

ETHICS OPINION

Opinion No. 07-01

INTRODUCTION

The Ethics Committee received a request for an opinion asking whether Rule 5.5(e) of the North Dakota Rules of Professional Conduct prohibits administrative law judges (ALJ) from allowing a non-attorney to represent the interests of a corporation at administrative hearings.¹

ASSUMED FACTS

The Requesting Attorney raised two hypothetical fact situations in which a corporation was a party:

1. Hearings involving the North Dakota Department of Human Services (DHS), which has promulgated rules that permit non-attorney representatives in administrative hearings.²
2. Hearings involving North Dakota administrative agencies, which do not have rules permitting non-attorney representation.

ISSUES PRESENTED

Whether an ALJ violates Rule 5.5(e) by permitting a non-attorney to represent a corporation at a hearing involving DHS?

Whether an ALJ violates Rule 5.5(e) by permitting a non-attorney to represent a corporation at a hearing involving an administrative agency which has not promulgated an administrative rule permitting non-attorney representation?

¹ The Committee understands the term “administrative hearing” as used in the request to mean an “adjudicative proceeding” as defined in N.D.C.C. § 28-32-01(1).

² The rules are somewhat vague regarding whether the rules can be equally

DISCUSSION

Rule 5.5(e) provides “[a] lawyer shall not assist another person in the unauthorized practice of law.” The word “assist” is generally understood to mean to aid, help or lend countenance. See Black’s Law Dictionary 111 (5th ed. 1979). Whether the appearance of a non-attorney in a representative capacity at an administrative hearing constitutes the unauthorized practice of law is a legal question beyond the jurisdiction of this Committee.³ For purposes of this opinion, the Committee assumes the appearance of a non-attorney in a representative capacity at an administrative hearing constitutes the unauthorized practice of law, unless a law or administrative rule permits non-attorney representation at the hearing.⁴ Thus, the question is whether an ALJ “assists” a non-attorney in the unauthorized practice of law by permitting the non-attorney to

applied to both natural and artificial persons.

³ Perhaps this question is best addressed by the North Dakota Bar Association’s Consumer Protection Committee, which has unauthorized practice of law as one of its missions. See, e.g., Kentucky Bar Association Unauthorized Practice of Law Opinions KBA U-56 (Jan. 1999) and KBA U-46 (Mar. 1994) (addressing similar issues at the unauthorized practice committee level).

The request for the ethics opinion specifically inquired about the applicability of Wetzel v. Schlenvogt, 2005 ND 190, 705 N.W.2d 836, to administrative hearings. This is a legal question that cannot be answered by this Committee.

⁴ N.D.C.C. § 27-11-01 prohibits the unauthorized practice of law. The practice of law is not limited to preparation of cases and their conduct in court. See Cain v. Merchant's Nat'l Bank & Trust Co., 268 N.W. 719 (N.D. 1936). The Committee did not find any statutory or case law clearly stating whether a non-attorney representing an artificial or natural person at an administrative hearing constitutes the practice of law. An administrative rule promulgated by the Office of Administrative Hearings, N.D. Admin. Code § 98-02-02-05, appears to limit representation of parties at administrative hearings to licensed attorneys unless otherwise authorized by law. DHS has adopted administrative rules that appear to allow non-attorneys to represent “claimants” at administrative hearings. See N.D.A.C. §§ 75-01-03-01(1), (2), (4) and (5), 75-01-03-03.1, and 75-01-03-15(1). These rules have the force and effect of law unless declared invalid by a court. N.D.C.C. § 28-32-06. What is a “claimant” may be open to legal interpretation, and is a legal question this Committee cannot answer.

appear in a representative capacity at an administrative hearing. The Committee found ethics opinions and judicial decisions from other jurisdictions instructive on this issue.

In 1979, the Standing Committee on Professional and Judicial Ethics, State Bar of Michigan, opined that a lawyer presiding over an administrative proceeding “in which it is apparent a non-lawyer is practicing law” violates the prohibition against aiding a non-lawyer in the unauthorized practice of law. CI-404. The Michigan Standing Committee clarified CI-404 in CI-488, stating a lawyer who presides over an administrative proceeding does not violate the ethical rules by permitting a non-lawyer to practice law if the non-lawyer’s participation is expressly provided by law.

In 1986, the Standing Committee modified its earlier opinions to the extent it is unclear whether the appearance of the non-lawyer constitutes the unauthorized practice of law.⁵ The Standing Committee concluded its earlier opinions “inappropriately place[d] the hearing officer in the position of determining whether, as a matter of ethics, the appearance of a nonlawyer is unauthorized practice, when the question is unsettled in the law.” MI Eth. Op. C-239. To the extent a non-lawyer’s conduct fell within acceptable judicial or legislative definitions of unauthorized practice, the committee concluded “the hearing officer may not ethically permit such practice. But to the extent the parameters of unauthorized practice are not clear, the hearing officer discharges the ethical duty by reporting such knowledge as is available to the State Bar Committee on Unauthorized Practice of Law, the authority empowered to investigate and act upon such practices.” Id. Thus, the Standing Committee concluded:

⁵ The Michigan Standing Committee noted it lacked jurisdiction to opine on whether the facts presented in the request constituted the unauthorized practice of law. MI Eth. Op. C-239. See also CI-551 (“Whether or not the appearance of a nonlawyer in a representative capacity in a contested hearing before the Board constitutes the unauthorized practice of law is therefore a legal question beyond the jurisdiction of this Committee.”).

An administrative hearing officer, presented with a situation which clearly falls within accepted legal definitions of unauthorized practice of law, must refuse to allow such practices in proceedings at which a hearing officer presides.

An administrative hearing officer aware of conduct which does not clearly fall within accepted legal definitions of unauthorized practice, but which may arguably amount to the unauthorized practice of law, discharges the ethical obligation by reporting the facts to the State Bar Committee on the Unauthorized Practice of Law.

Id.

In 1990 the Standing Committee addressed whether judges have an ethical duty to prevent the unauthorized practice of law. MI Eth. Op. JI – 26. Although the Michigan Code of Judicial Conduct contained no explicit judicial directive pertaining to the prevention and reporting of unlawful practice of law, the Standing Committee noted “judges are also lawyers and subject to the Michigan Rules of Professional Conduct to the extent the Code of Judicial Conduct is not inconsistent with the Rules.” Id. Relying on Rule 5.5 of the Michigan Rules of Professional Conduct, the Standing Committee stated “not only must the lawyer avoid assisting a nonlawyer in the unauthorized practice of law, but the lawyer must take the appropriate measures to prevent unauthorized practice.” Id. According to the Standing Committee, “[c]ommon sense dictates that if lawyers are obligated to prevent an unlicensed person from practicing law, then lawyers sitting as judges are equally bound to see that the practice of law is limited to members of the legal profession.” Id. The Standing Committee stated:

A judge who knows of unauthorized practice of law activity, whether or not the activity takes place within or without the presence of the judge, has an ethical duty to take necessary steps to prevent the unauthorized practice and must report the incident to authorities empowered to act upon the matter. When a judge becomes aware during the course of the proceeding that a representative of a party is not licensed to practice law, the judge must stop the proceeding and should place as much information as possible on the record and forward a transcript to the State Bar Committee on Unauthorized Practice of the Law, together with the names

and addresses of all persons having relevant information about the incident and copies of all available pleadings, documents, and correspondence bearing upon the matter.

Id.

With regard to the judge who only suspects the unauthorized practice of law, the Standing Committee opined:

A judge who suspects, but does not know, that a party to a proceeding has or is receiving advice and assistance from an unlicensed person outside the presence of the court should report the matter to the appropriate authority authorized to investigate and act upon the situation. The Committee does not believe judges are required to investigate and report suspicious unauthorized practice of law activity. The judge's obligation to uphold the law does not mandate that a judge take action to investigate violations of law that occur outside the judge's presence.

Id.

This Committee could not locate a North Dakota Supreme Court case directly on point. A case of note, however, is State v. Benson, 376 N.W.2d 36 (N.D. 1985). In Benson, the criminal defendant, Mr. Benson, sought to be represented by a non-attorney. The trial court judge refused to allow the representation. Id. at 38. Although the case's primary focus was whether Mr. Benson had a Sixth Amendment right to be represented by a non-attorney, the Court wrote that allowing such representation "would sanction the unauthorized practice of law" Id. This opinion suggests that judges in North Dakota have a duty to prevent unauthorized practice of law in judicial proceedings.

Some courts in other jurisdictions have found a judge has an ethical duty to prevent the unauthorized practice of law. For example, in Terpstra v. Farmers & Merchants Bank, 483 N.E.2d 749, 760 (Ind. Ct. App. 1985), the court held a judge would be aiding a non-lawyer in the unauthorized practice of law if the judge permitted

the party's unlicensed counsel "to sit at the counsel table and offer him legal advice." Relying on Rule 5.5, the court in State v. Block, No. 87488, 2007 WL 1219292, at *2 (Ohio Ct. App. Apr. 20, 2007), stated that "[j]udges have the ethical duty to prevent the unauthorized practice of law." Similarly, in Village of Lisbon v. Merino, No. 95 CO 67, 1997 WL 433530, at *2 (Ohio Ct. App. July 30, 1997), the court stated "a trial judge has the ethical duty to prevent unauthorized practice of law and to do so may refuse to allow a non-attorney to counsel a party in court during trial." But see IL Adv. Op. 93-15 (concluding an attorney's participation in an administrative hearing, whether as an attorney or hearing officer, where a lay person represents another party does not constitute aiding in the unauthorized practice of law).

This Committee finds the above decisions persuasive in administrative matters to the extent they conclude the term "assist," as used in Rule 5.5(e), includes permitting the unauthorized practice of law in a proceeding over which an ALJ presides. Thus, in the Committee's opinion, an ALJ "assists" in the unauthorized practice of law, and is in violation of Rule 5.5(e), if the ALJ knowingly permits the unauthorized practice of law in a proceeding over which the ALJ presides. This opinion is limited to actions which clearly fall within the definition of the unauthorized practice of law and are conducted in a proceeding over which the ALJ presides. What constitutes the unauthorized practice of law is a legal question this Committee cannot answer. The Committee has not been asked to, and does not decide, whether an ALJ has an ethical duty to report the unauthorized practice of law that occurs outside of an administrative proceeding over which the ALJ presides.

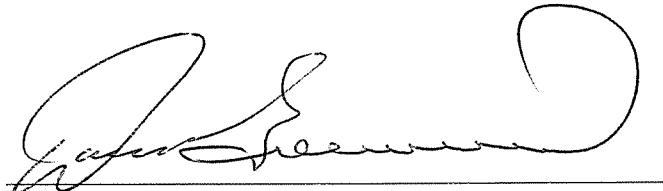
CONCLUSION

The Committee finds it is a violation of Rule 5.5(e) for an Administrative Law Judge to knowingly permit the unauthorized practice of law at a proceeding over which the Administrative Law Judge presides.

This opinion is provided pursuant to Rule 1.2(B), North Dakota Rules for Lawyer Discipline, which provides:

A lawyer who acts in good faith and reasonable reliance on a written opinion or advisory letter of the ethics committee of the association is not subject to sanction for violation of the North Dakota Rules of Professional Conduct as to the conduct that is the subject of the opinion or advisory letter.

This opinion was prepared by Alvin O. Boucher and Douglas A. Bahr and was approved by a unanimous vote of the Ethics Committee on the 27th day of August, 2007.

A handwritten signature in black ink, appearing to read 'Dann Greenwood', is written over a horizontal line.

Dann Greenwood, Chair
Ethics Committee