

DELAWARE STATE BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS

OPINION 1985-3

The Committee has been requested to give an opinion on the ethical propriety of allowing a paralegal employed by a lawyer or an insurance adjuster employed by a worker's compensation insurance carrier to appear before the Industrial Accident Board to conduct a pretrial conference under Industrial Accident Board Rule 9 after a petition for worker's compensation has been filed.

Rule 9 of the Industrial Accident Board ("IAB") provides in pertinent part:

(A) In any action, the Board may in its discretion direct the attorneys for the parties or the claimants, if unrepresented, to appear before it for a conference to consider:

- (1) The simplification of the issue;
- (2) The necessity or desirability of amendments to the papers filed or for additional papers to be filed;
- (3) The possibility of obtaining stipulations, admissions of fact and of documents which will avoid unnecessary proof;
- (4) The limitation of the number of expert witnesses;
- (5) Such other matters as may aid in the disposition or expedition of the action.

The Rule further provides that IAB shall make an order which will recite the action taken at the conference, and "[s]uch order when entered controls the subsequent course of the action unless

modified at the hearing to prevent manifest injustice." IAB Rule 9(B). In addition, either party may modify a pretrial memorandum any time up to fifteen (15) working days prior to the hearing for which the pretrial was held, and, with permission of the pretrial officer, within fifteen (15) working days of the hearing. IAB Rule 9(E).

OPINION

It would be unethical to allow a paralegal employed by a lawyer or an insurance adjuster employed by a worker's compensation insurance carrier to appear before the IAB to conduct a pretrial conference after a petition for worker's compensation has been filed.

DISCUSSION

The Delaware Lawyer's Code of Professional Responsibility, in effect at the time the instant opinion was sought, states that: "A lawyer shall not aid a non-lawyer in the unauthorized practice of law." Delaware Lawyer's Code of Professional Responsibility, Canon 3, DR 3-101(A). Similarly, the Delaware Lawyers' Rules of Professional Conduct, effective October 1, 1985, provides that: "A lawyer shall not: . . . assist a person who is not a member of the bar in the performance of

activity that constitutes the unauthorized practice of law." Delaware Lawyers' Rules of Professional Conduct, Rule 5.5(b). See Comment to Rule 5.5 ("Paragraph (b) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work").

The admission of attorneys to practice and the exclusion of unauthorized persons from practice lie solely within the province of the Supreme Court. Delaware Optometric Corporation v. Sherwood, Del.Supr. 128 A.2d 812, 816 (1957); see also, ABA Committee on Ethics and Professional Responsibility, Informal Op. 1272 (1973) (what constitutes unauthorized practice of law in a particular jurisdiction is a matter for determination by the courts of that jurisdiction). The Delaware Supreme Court has defined the practice of law to include administrative hearings. See Delaware State Bar Association v. Alexander, Del.Supr. 386 A.2d 652 (1978), cert. denied, 439 U.S. 808, reh'g denied, 439 U.S. 973. In Alexander the Court stated: "The exercise of such professional skill certainly includes the pursuit, as an advocate for another, of a legal remedy within the jurisdiction of a quasi judicial tribunal." Id. at 661.

The situation before the Committee, however, involves the participation of lay persons in IAB pretrial conferences, and thus the question becomes whether the practice of law includes, in addition to administrative hearings, pretrial conferences held

in anticipation of such hearings before the IAB. The answer lies, we believe, in an examination of the action taken at pretrial conferences before the IAB, as defined in Rule 9, above, in the context of the general scope of the practice of law.

Shortz v. Farrell, Pa. Supr., 193 A. 20, 21 (1937) ("It is the character of the act, and not the place where it is performed, which is the decisive factor"); People ex rel. Chicago Bar Association v. Goodman, Ill. Supr., 8 N.E.2d 941 (1937), cert. denied, 302 U.S. 728, reh'g denied, 302 U.S. 777.

In general, work of a preparatory nature, such as research, investigation of details, or the assembling of data, is not considered the practice of law if performed by a law clerk, Ferris v. Snively, Wash. Supr., 19 P.2d 942 (1933), or an insurance adjuster. Liberty Mutual Ins. Co. v. Jones, Mo. Supr., 130 S.W. 945 (1939), so long as the proceeding has not become an adversary one. Moreover, non-lawyers may fill out and file compensation forms which constitute the pleadings before a worker's compensation administrative board where the forms are uniform, simple, and easily amended. State ex rel. Daniel v. Wells, S.C. Supr., 5 S.E.2d 181 (1939); Shortz, 193 A. at 25 (both cases involving claims adjusters); cf. Texas State Bar Unauthorized Practice Commission v. Cortez, Tex. Supr., No. C-3380 (June 8, 1985) reported in 1 ABA Lawyer's Manual on Professional Conduct (BNA) No. 37, at 804 (June 12, 1985) (involving non-lawyers advising individuals regarding their

registration as aliens). The determination of whether to file, however, may become the practice of law where it implicates legal advice and counsel or the use of legal knowledge. Cortez at 804; see State ex rel. Norvell v. Credit Bar of Albuquerque, Inc., N.M. Supr., 514 P.2d 40, 45 (1973) (enumerating indicia of the practice of law).

Once compensation proceedings become adversarial, or where the role of the representative of the client becomes that of advocate, a lawyer is necessary. Jones, 130 S.W. at 959, 960. Additionally, non-lawyers should not be permitted to participate in proceedings in which their conduct consists of "managing" the litigation. People v. Alexander, Ill. App., 202 N.E.2d 841, 843 (1964).

Turning to the specific circumstances of the query before the Committee, Rule 9 of the IAB provides that the pretrial conference exists for the purposes, inter alia, of simplifying the issues, deciding whether to amend the papers filed or supplement them with additional filings, and agreeing upon stipulations, admissions of fact, admission of documents, and expert witnesses. The Committee is of the opinion that such activities require an understanding of the applicable principles of substantive law, a grasp of the rules of evidence and civil procedure, and an ability to evaluate the strengths and weaknesses of the client's case; in short, they invoke the practice of law. See Dauphin County Bar Association v.

Mazzacaro, Pa. Supr., 351 A.2d 229, 234 (1976) (addressing the negotiation of worker's compensation settlements by claims adjusters). See also Lowry v. State Board of Industrial Insurance Appeals, Wash. Supr., No. 49659-5 (June 21, 1984) reported in 1 ABA Lawyer's Manual on Professional Conduct (BNA) No. 14, at 325 (July 28, 1984) (citing Washington Attorney General Opinion, AGO 6 (1961), as to contested cases before administrative agencies: "A lay representative's responsibilities in conferences, proceedings, and hearings before the board were, necessarily, the practice of law").

Finally, the Committee notes that in Mazzacaro, supra at 234, n. 6, the court, in reviewing the propriety of a non-lawyer's negotiating worker's compensation settlements, considered the public interest in having claimants represented by individuals who are bound by a reviewable code of professional ethics. Further, in Shortz, the court held that an indemnity company could not appear and be represented before a worker's compensation board by a lay claims adjuster on the ground that a corporation cannot appear in a judicial proceeding en propria persona. These are considerations which could become germane to specific factual situations within the scope of the query before the Committee as to whether a paralegal or an insurance adjuster can appear before the IAB to conduct a pretrial conference. The Committee concludes that either situation would constitute the unauthorized practice of law.