THE IOWA STATE BAR ASSOCIATION
Committee on
Ethics and Practice Guidelines

September 9, 2010

Mr. Dwight Dinkla
Executive Director
Iowa State Bar Association
625 East Court Avenue
Des Moines, IA 50309

Re: Ethics Opinion 10-03 (Business Relationship with non-lawyer; Defining Practice of Law)

Dear Mr. Dinkla:

The Committee has been asked to opine and give guidance to an Iowa lawyer who wishes to become employed by a commercial (non-lawyer or law firm) company that provides representation to individuals before a governmental agency. The company is authorized to represent individuals before the agency by operation of agency rules.

Because we envision that similar situations may exist, albeit in other contexts, we elected to address the issue of the propriety of a lawyer's employment by a commercial entity where the services rendered by the lawyer are rendered directly to the public. The question is answered by determining whether the services rendered by the lawyer are such as to constitute the practice of law. If they are then the Iowa Rules of Professional Conduct would apply.

Iowa Rule of Professional Conduct 32:5.4(b) states that:

> "A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law."

Likewise Rule 32:4.4(d) further extends the prohibition:

" A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

From the rules it is clear that a lawyer may not form a business relationship with a non-lawyer to perform activities which constitute the practice law . But for rule 32:5.4(b) and (d) to apply one must first identify whether or not the service being rendered constitutes s the practice of law.

The Iowa Rules of Professional Conduct do not define what constitutes the practice of law. At the outset we note that Iowa has no statute that specifically defines the practice of law. Instead what constitutes the practice of law is defined by case law In *Bump v. Barnett*, 235 Iowa 308, 315, 16 N.W.2d 579, 583 (1944) the Iowa Supreme Court refrained from providing an all-inclusive definition of the practice of law. Instead it elected to decide such matters largely on their own particular facts on a case by case basis.

In Committee on Professional Ethics and Conduct v Baker, 492 N.W.2d. 695, 701 (Iowa 1992) a lawyer had cooperated with a non-lawyer in the marketing of living-trust materials and was accused of aiding in the unauthorized practice of law. The Court explained that to determine whether an activity constitutes the practice of law, one must not solely focus upon the end product of the service, but instead must discern the nature of the service being rendered. It based its decision on the then applicable Ethical Consideration 3-5 stating that:

"It is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law."

However, EC 3-5 goes on to tell us what the practice of law includes:

However, the practice of law includes, but is not limited to, representing another before the courts; giving of legal advice and counsel to others relating to their rights and obligations under the law; and preparation or approval of the use of legal instruments by which legal rights of others are either obtained, secured or transferred even if such matters never become the subject of a court proceeding. Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal

problem of a client; and thus, the public interest will be better served if only lawyers are permitted to act in matters involving professional judgment. Where this professional judgment is not involved, nonlawyers, such as court clerks, police officers, abstracters, and many governmental employees, may engage in occupations that require a special knowledge of law in certain areas. But the services of a lawyer are essential in the public interest whenever the exercise of professional legal judgment is required. (Emphasis added.)

In short, the practice of law includes the obvious: representing another before the court. But the practice of law includes out-of-court services as well. For example, one who gives legal advice about a person's rights and obligations under the law is practicing law. Or one who prepares legal instruments affecting the rights of others is practicing law. Or one who approves the use of legal instruments affecting the rights of others is practicing law.

Practically speaking, professional judgment lies at the core of the practice of law. When lawyers use their educated ability to apply an area of the law to solve a specific problem of a client, they are exercising professional judgment. The phrase "educated ability" in EC 3-5 refers to the system of analysis lawyers learn in law school. They learn to recognize issues first and then how to solve those issues in an ethical manner, using their knowledge of the law. See EC 3-2 ("Competent professional judgment is the product of a trained familiarity with law and legal processes, a disciplined, analytical approach to legal problems, and a firm ethical commitment."). The practice of law is no different: lawyers determine what the issues are and use their knowledge of the law to solve them in an ethical way. This is the art of exercising professional judgment."

Committee on Professional Ethics and Conduct of the Iowa State Bar Ass'n v. Baker, 492 N.W.2d 695, 701 (Iowa, 1992)

See also *Iowa Supreme Court Commission on Unauthorized Practice of Law v Sturgeon,* 635 N.W.2d. 679 (Iowa 2001)(preparation of bankruptcy forms by a disbarred lawyer held to constitute the practice of law); *Committee on Professional Ethics and Conduct of the Iowa State Bar Ass'n v. Mahoney*, 402 N.W.2d 434 (Iowa, 1987) (tax preparation and labor negotiation is not necessarily the practice of law and properly may be done by nonlawyers. When these tasks are done by a licensed lawyer, however, they constitute the practice of law.)

In this situation the commercial company is authorized by the governmental agency to represent the public for a fee. The authorized representative meets with the customer, discusses the facts pertaining to the claim, obtains documents supporting the customer's position, reviews the claim in relation to the rules and policies of the governmental agency, prepares the forms necessary to institute governmental and files then and then appears at a hearing and advocates for the customer. It is within the prerogative of the governmental agency to allow non-lawyers to perform such activities. But that approval does not preempt the application of the Iowa Rules of

Professional Responsibility when the activities are performed by a lawyer. When a lawyer performs the described activities the nature of the services change. A fiduciary instead of a commercial relationship is established, the services are rendered pursuant to the extensive requirements of the Iowa Rules of Professional Conduct concerning the establishment and maintenance of the lawyer-client relationship as well as specific duties when acting as an advisor and advocate not only to the client but also to the tribunal and the public. The service provided by a lawyer is also shrouded with the protections afforded by the attorney-client and work product privileges. §622.10 Iowa Code; c.f. *Keefe v. Bernard*, 774 N.W.2d 663 (Iowa, 2009).

Opinion

It is our opinion that a lawyer may not establish a business relationship with a non-lawyer entity that provides services to the public which if provided by a lawyer would constitute the practice of law regardless of the fact that the non-lawyer entity is authorized to do so by governmental agency regulation.

Waiver

Having established that an activity constitutes the practice of law we are asked to address the issue as to whether the proscription found in rules 32:5.4(b) and(d) can be intelligently waived by the client. The argument is put forth that inasmuch as the Iowa Rules of Professional Conduct Rule 32:1.7 permits intelligent waiver regarding conflicts of interest a client should be allowed to agree that the service being performed by a lawyer which would constitute the practice of law should not be considered as such. We believe the argument to be faulty. Once a service is determined to be within the ambit of the practice of law the service is regulated by the judicial branch for the protection of not only the client but also the tribunal and the public. To apply waiver in this situation would be tantamount to allowing some other entity to carve out situational exceptions to the protection and regulatory scheme reserved to the Supreme Court. We are of the opinion that the protections afforded by Iowa Rule of Professional Conduct 32:4.5(b) and (d) are not subject to waiver.

Nick Critelli

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