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ADVISORY OPINION 94-001

The Committee on Unlawful Practice of The West Virginia state Bar has received an inquiry regarding whether the newly enacted provisions of West Virginia Code §23-1-13 violated the prohibitions against the unlawful practice of law by unlicensed attorneys. In particular, the inquiry addressed to the Committee deals specifically with the question as to whether or not the use of lay representatives in hearings before the Workers' Compensation Commission constitutes the unlawful practice of law.

West Virginia Code §23-1-13 holds in part that:

(b) At hearings and other proceedings before the Commissioner...an employer who is a natural person may appear, and a claimant may appear, only as follows:

- (1) By an attorney duly licensed and admitted to the practice of law in this state;
- (2) By a non-resident attorney...who has complied with the provisions of Rule 8.0-Admission Pro Hac vice...;
- (3) By a representative from a labor organization who has been recognized by the Commissioner as being qualified to represent a claimant or who is an individual otherwise found to be qualified by the Commissioner to act as a representative. Such representative shall participate in the presentation of facts, figures and factual conclusions as distinguished from the presentation of legal conclusions in respect to such facts and figures; or
- (4) Pro se.

(c) At hearings and other proceedings before the Commissioner...an employer who is not a natural person may appear only as follows:

- (1) By an attorney duly licensed and admitted to the practice of law in this state;
- (2) By a non-resident attorney...who has complied with the provisions of Rule 8.0- Admission Pro Hac Vice...;
- (3) By a member of the Board of Directors of a corporation or by an officer of the corporation, for purposes of representing the interest of the corporation in the presentation of facts, figures and factual conclusions as distinguished from the presentation of legal conclusions in respect to such facts and figures; or

(4) By a representative from an employer service company who has been recognized by the Commissioner as being qualified to represent an employer...Such representative shall participate in the presentation of facts, figures and factual conclusions as distinguished from

the presentation of legal conclusions in respect to such facts and figures.

Clearly, the provisions of West Virginia Code §23-1-13 (b) (1) , (b) (2) , (b) (4) , (c) (1) , (c) (2) , do not constitute the unlawful practice of law. Therefore, this opinion will center solely on whether or not the provisions of West Virginia Code §23-1-13(b) (3) , (c) (3), and (c) (4), constitutes the unlawful practice of law.

The above-referenced code sections allow both "lay" representatives (labor organizations, employer service companies, or other individuals found to be qualified by the Commissioner), and corporations through their Board of Directors and officers, to act in a representative capacity in Workers' Compensation hearings. While such individuals or companies are allowed to appear in hearings, West Virginia Code §23-1-13 expressly limits their participation to the presentation of facts, figures, and factual conclusions as distinguished from the presentation of legal conclusions in respect to such facts and figures.

Pursuant to the provisions of Section 4A, Article 1, Chapter 51 of the West Virginia Code of 1931, as amended, the West Virginia Supreme Court, on March 28, 1947, by rule defined the practice of law in the state of West Virginia in the following terms, in part:

"It is essential to the administration of justice and the proper protection of society that only qualified persons duly licensed be permitted to engage in the practice of law. It is harmful to the public interest to permit anyone to represent falsely that he is qualified to perform legal services...

In general, one is deemed to be practicing law whenever he or it furnishes to another advice or service under circumstances which imply the possession or use of legal knowledge and skill...

More specifically, but without purporting to formulate a precise and completely comprehensive definition of the practice of law or prescribe limits to the scope of that activity, one is deemed to be practicing law whenever (1) one undertakes, with or without compensation and whether or not in connection with another activity, to advise another in any manner involving the application of legal principles to facts, purposes or desires; (2) one undertakes, with or without compensation and whether or not in connection with another activity, to prepare for another legal instruments of any character; or (3) one undertakes, with or without compensation and whether or not in connection with another activity, to represent the interest of another before any judicial tribunal or officer, or to represent the interest of another before any executive or administrative tribunal, agency or officer otherwise than in the presentation of facts, figures or factual conclusions as distinguished from legal conclusions in respect to such facts and figures."

The above definition of the practice of law was expanded upon by the West Virginia Supreme Court in the case of *West Virginia State Bar v. Earley*, 109 S.E.2d 420 (W.Va. 1959) .In that litigation, in attempting to define what constituted the practice of law, the West Virginia Supreme Court held that:

"The courts in numerous decisions in different jurisdictions have undertaken to define and designate what constitutes the practice of law; but it is generally recognized that it is extremely difficult, perhaps impossible, to formulate a precise and completely comprehensive

definition of the practice of law or to prescribe limits to the scope of that activity...

It is clear, however, that a licensed attorney at law in the practice of his profession generally engages in three principle types of professional activity. These types are legal advice and instructions to clients to inform them of their rights and obligations; preparation for clients of documents requiring knowledge of legal principles which is not possessed by an ordinary layman; and appearance for clients before public tribunals, which possess the power and authority to determine rights of life, liberty, and property according to law, in order to assist in the proper interpretation and enforcement of the law...The practice of law is not limited to the conduct of cases in courts. It embraces the preparation of pleadings and other papers incident to actions and special proceedings and the management of such actions and proceedings on behalf of clients before judges and courts and, in addition conveyancing, the preparation of legal instruments of all kinds and in general all advice to clients and all action taken for them in matters connected with the law."

The West Virginia court in *Brammer v. Taylor*, 338 S.E.2d 207 (W.Va. 1985) , went on to qualify the holdings in *Earley* by stating that:

"Drafting a will for another person, advising another person how to draft a will or supervising its execution are activities which constitute the practice of law...Certainly such activities come within our definition of the practice of law, as they constitute the giving of advise to another person on a matter involving the application of legal principles to facts, purposes or desires, and they involve the preparation of legal instruments for another person.

On the other hand, merely typing a legal instrument drafted by another person or merely reducing the words of another person to writing does not constitute the preparation of a legal instrument and, thus, does not constitute the practice of law."

If the provisions of West Virginia Code §23-1-13 that are in question constitute the practice of law then it is clear that the legislature, as well as the Commissioner of the Workers' Compensation Commission are without the power to permit lay individuals to appear at Compensation hearings in representative capacities. In order to protect the public from being advised and represented in legal matters by unqualified and undisciplined persons over whom the courts can exercise little, if any control, only duly licensed persons meeting the qualifications for admissions to the Bar established by the West Virginia Supreme Court are permitted to practice law in the State of West Virginia. *State Ex rel. Frieson v. Isner*, 285 S.E.2d 641 (W.Va. 1981); and *Definition of the Practice of Law*, (1947) as amended in 1961, Volume 1, West Virginia Code at 569-570. The practice of law, both in court and out of court, by a person not licensed to practice is an illegal usurpation of the privilege of a duly licensed attorney at law. *West Virginia state Bar v. Earlev*, 109 S.E.2d 420 (W.Va. 1959) .As was declared by the West Virginia Supreme Court in *State Ex Rel. H. K. Porter Co. v. White*, 386 S.E.2d 25 (W.Va. 1989) .

"Article 8, section 1 et seq. of the West Virginia Constitution vest in the Supreme Court of Appeals the authority to define, regulate and control the practice of law in West Virginia...[I]n the exercise of their inherent power the courts may supervise, regulate and control the practice of law by duly authorized attorneys and prevent the unauthorized practice of law by any person, agency, or corporation...The justification for excluding from the practice of law persons who are not admitted to the Bar and for limiting and restricting such practice to licensed members of the legal profession is not the protection of the members of the Bar from

competition or the creation of a monopoly for the members of the legal profession, but is instead the protection of the public from being advised and represented in legal matters by unqualified and undisciplined persons over whom the judicial department of the government could exercise slight or no control...The licensing of lawyers is not designed to give rise to a professional monopoly but instead to serve the public right to protection against unlearned and unskilled advise and service in relation to legal matters.

The issues raised in this inquiry, at least as to West Virginia Code §23-1-13(b) (3), and (c) (4) appear to have previously been addressed by the West Virginia Supreme Court in the case of *West Virginia State Bar v. Earley*, 109 S.E.2d 420 (W.Va. 1959). In that litigation, the Committee on the Unlawful Practice of Law brought suit against Emmitt J. Earley. In its complaint the Committee alleged that Mr. Earley had never been admitted or licensed to engage in the practice of law in the State of West Virginia and, while not so licensed, actually advised and represented eleven separate claimants in hearings and proceedings before the West Virginia Workers' Compensation Commissioner and had also prepared notices of appeal to the West Virginia Compensation Appeal Board from awards and rulings of the Commissioner. Mr. Earley admitted that he appeared before the state Compensation Commissioner on behalf of claimants and had filed notices of appeal but denied that he had advised any of the claimants represented by him in regard to their legal rights and remedies. Instead, Mr. Earley alleged that he only helped them present factual documentation to the Commission.

Most importantly, Mr. Barley argued that his lay representation of the claimants was permitted under West Virginia Code §23-1-13. Under the code section that was in effect at the time of Mr. Barley's actions the Workers' Compensation Commissioner was allowed to adopted reasonable rules of procedure regulating the nature and extent of evidence in cases. Pursuant to that authority the Commissioner promulgated rules which authorized claimants or an employer to appear at hearing or proceedings before the Commissioner in person or by agent or attorney. By virtue of that rule Mr. Earley claimed that he had the right to appear as an "agent" for claimants before the Commissioner.

The Supreme Court, in finding that Mr. Earley was engaged in the unlawful practice of law, made four important findings. These findings are as follows:

I. The court first found that hearings before the State Compensation Commission were to be considered as administrative tribunals under the definition of the practice of law as that term was defined by the Supreme Court. Definition of the Practice of ~ 1947, West Virginia Code Volume 1, p. 569-570. In so holding the court held that:

"The State Compensation Commissioner is not a judicial tribunal but an administrative agency which may properly be considered as an administrative tribunal of the government of this State...The particular tribunal, however, is not important, for it is well settled that it is the character of the act, and not the place where it is performed, which is the decisive factor in determining whether the act constitutes the practice of law."

11. The court then went on to hold that the actual appearance in hearings before the Compensation Commissioner did constitute the practice of law. In that regard the court declared:

"As to the character of the acts of the defendant numerous decisions of appellant courts in

different jurisdictions hold that an appearance before a Compensation commission, an Industrial Commission, or a Public Service Commission, or any of its examiners, referees, or individual Commissioners, in behalf of another person in a representative capacity in adversary proceedings constitutes the practice of law."

In coming to this conclusion the West Virginia Supreme Court cited with approval the cases of *People Ex Rel. Chicago Bar Association v. Goodman*, 366 Ill. 346, 8 N.E.2d 941, (1937) 58 S.ct. 42; *Shortz v. Farrell*, 193 A. 60 (Pa. 1937), *Goodman v. Beall*, 200 N.E. 470 (Ohio 1936); and *Clark v. Coon*, 101 S.W.2d 977 (Miss. 1937). Furthermore, the court adopted the language found in state *Ex Rel. Daniel v. Wells*, 5 S.E.2d 181 (S.C. 1939) where the court held that the defendant, a layman who was a paid representative of an insurance company, in appearing on behalf of the company at hearings before individual members of the Workers' Compensation Commission of South Carolina, an administrative tribunal, was engaged in the practice of law. In holding that the appearance before the Commission constituted the practice of law the court quoted the following language:

"Applying the foregoing principles to the work of respondent in appearing at hearings before the individual Commissioners, we think such services constitute the practice of law. While there are no formal pleadings, the issues as to both facts and law are made before such Commissioner. At this hearing the record is made and it is upon this record that the proceedings may be reviewed by the full Commission, from whose award an appeal may be taken to the Circuit Court. The ultimate rights of the parties depend upon the record made before the hearing Commissioner. It is true that the full Commission is empowered to reconsider the evidence and take additional evidence, but such power is exercised only on rare occasions. In the number of appeals to this court, the record in most, if not all of the cases was made before the hearing Commissioner. Examination and cross examination of witnesses require a knowledge of relevancy and materiality. Such examination is conducted in much the same manner as that of the circuit Court. Improper or irrelevant testimony must be objected to, or otherwise it may be considered...While findings of fact will be upheld by the court if there is any evidence on which it can rest, it must be founded on evidence and cannot rest on surmise, conjecture or speculation."

111. Thirdly, the court found that some of the activities of Mr. Earley did not constitute the practice of law. In so holding the court stated that:

"Though the activity of the defendant in appearing as agent at hearings before the State Compensation Commissioner and as duly appointed trial examiners in behalf of claimants and in preparing and filing notices of appeal to the Appeal Board and the other acts mentioned and enjoined in the final decree constitute the practice of law, it is clear that some activities in conjunction with claims for compensation before the Commissioner do not constitute the practice of law and may be engaged in by a layman in behalf of another person without being guilty of unauthorized practice of law."

"Section 14, Article 1, Chapter 23, Code, 1931, provides that the State Compensation Commissioner shall prepare and furnish blank forms of applications for benefits, notice of employers, proofs of injury or death, of medical attendance, of employment and wage earnings and other proofs, and that it is the duty of employers to keep on hand a sufficient supply of such blanks at all times. The completion of such blank forms does not require any knowledge and skill beyond that possessed by the ordinarily experienced and intelligent layman, and a layman may properly complete and file such forms in behalf of another person or employer, employee, claimant or beneficiary without engaging in the practice of law."

IV. Finally, the West Supreme Court held that the State Compensation Commissioner did not have the authority to draft rules or regulations allowing laymen to appear before him as an agent on behalf of claimants or employers. In this regard, the court held that:

"section 13, Article 1, Chapter 23, Code, 1931, empowering the State Compensation Commissioner to adopt reasonable and proper rules of procedure and to regulate and provide for the method of taking proof and evidence, does not undertake to authorize him to promulgate a rule by which a layman may appear as an agent in behalf of a claimant or employer in hearings before the Commissioner and by permission of the Commissioner practice before him. But even if the statute attempted to authorize the Commissioner to promulgate a rule of that character such provision of the statute would be void as a legislative encroachment upon the inherent power of the judicial department of the government. The State Compensation Commissioner, as an administrative agency or tribunal, is without power or authority by rule or otherwise to permit an agent who is not a duly licensed attorney to practice before him and any provision of Rule 21 which attempts to permit an agent who is not a duly licensed attorney to practice before the Commissioner is void and of no force or effect."

A very similar result to the Earley decision was reached by the Ohio Supreme Court in the case of *In Re Unlawful Practice of Law in Cuvahoga County. In Re Brown. Weiss and Wohl*, 192 N.E.2d 54 (Ohio 1963) .In that decision the Ohio Supreme Court ruled that individuals that held themselves out as being qualified to render advise to workmen compensation claimants and as being able to render services in preparation and presentation of such claims, and who actual rendered such advise and service, and received a fee directly from claimants were engaged in the practice of law and therefore must have an appropriate law license. (Also see 2 ALR3d 724) .

Subsequent to Earley, Supra, the West Virginia Supreme Court has addressed, on two separate occasions, what activities constitute the unlawful practice of law. The first decision subsequent to Earley was *State Ex Rel. Thorne v. Luff*, 175 S.E.2d 472 (W.Va. 1970) .In that case an injunction had been sought by the Barbour County Bar Association to enjoin Mr. Thorne from acting as a Commissioner of Accounts because he was not a duly licensed attorney. The West Virginia Supreme Court, in holding that the activities of the Commissioner of Accounts did not constitute the practice of law declared that:

"A Commissioner of Accounts does not represent any body before the County Court. Such Commissioners merely advise and report to the court. The Earley case relied upon by the respondents is entirely different. In that case(A\ A\3*AU AA(engaged in representing the interest of others before the Compensation Commissioner in connection with legal matters, and, of course, such act was held to be the unauthorized practice of law."

After Luff, the West Virginia Supreme Court decided the case of *State Ex Rel. Frieson v. Isner*, 285 S.E.2d 641 (W.Va. 1981) .In Isner, the South Charleston Adjustment Bureau, Inc., a West Virginia Corporation engaged in the business of collecting debts, filed suit against Mr. Frieson seeking to recover three separate debts owed Charleston Area Medical Center, C & p Telephone Company, and Associated Radiologists. Mr. Frieson contended that the appearance in Magistrate Court of South Charleston Adjustment Bureau, a lay collection agency, by its manager, a non-lawyer, constituted the unauthorized practice of law. The West Virginia Supreme Court first found that such activities by the collection agency did constitute the unauthorized practice of law. In so holding the court stated that:

"Where, however, a person, association, or corporation which collects debts as a regular business attempts to enforce the claims of others by resort to legal proceedings, the debt collector is extending his or its business to include legal representation of creditors. Such activity can be viewed in no other light than as the unauthorized practice of law."

The court then addressed the issue as to whether or not West Virginia Code §50-4-4A, which authorized parties to appear in Magistrate Court by lay agents, was unconstitutional as a legislative usurpation of the court's power to define and regulate the practice of law. The West Virginia Supreme Court noted that it cannot be questioned that the legislature cannot restrict or impair the power of the judiciary to regulate the practice of law by enacting a statute permitting or authorizing layman to practice law. The court noted, however, that where the intrusion upon the judicial power is of minimal offense, and is consistent with and intended to be an aid of the aims of the court with respect to the regulation of the practice of law, such legislation may be upheld as being in aid of the judicial power. In holding that the legislative authorization of lay representatives in Magistrate Court was not unconstitutional, the court declared that:

"West Virginia Code §50-4-4A furthers this goal by permitting the casual appearance, not for pay, by layman in a representative capacity as a form of neighbourly or kindred accommodation. It anticipates an isolated or casual appearance by a non-lawyer friend or relative of party to proceedings in Magistrate Courts for the purpose of assisting such party in representing himself in the litigation. The statute does not purport to authorize layman to represent parties in Magistrate Court on a regular basis or to engage in such activity as a business or for pay. It merely authorizes a party who wishes to avoid the expense of hiring an attorney to seek the advice and aid of a friend or family member in presenting his case and to have that person appear with, and perhaps speak for, him. Such representation is well within the spirit and purpose of the Magistrate system as envisioned by this court and the legislature."

"We think that it is clear that the purpose of West Virginia Code §50-4-4A was not to authorize layman to engage in the practice of law free from the requirements and regulation imposed by this court and upon those who wish to practice law in this State. Rather, the clear purpose and intent of this statute is to encourage parties to civil litigation in Magistrate Court to appear on their own behalf as a means of affecting a speedy and efficient resolution of small claims. Appearance of a party in Magistrate Court by lay agent is authorized only when such appearance is an incident of the party's desire to appear pro se." (emphasis added)

It appears that the drafters of West Virginia Code §23-1-13 attempted to take the activities of lay representatives out of the definition of the practice of law. The legislature carefully held that lay representatives could participate in the presentation of facts, figures, and factual conclusions but could not participate in the presentation of legal conclusion in respect to such facts and figures. Apparently, this specific language was added in order to attempt to take the activities of such people outside of the definition of the practice of law as that term is defined by the West Virginia Supreme Court. It must be noted, however, that when the Earley decision was announced the same definition of the practice of law existed and the court specifically found that an individual appearing in a representative capacity at hearings before the Workers' compensation Commissioner was engaged in the unauthorized practice of law. As such, it would appear that the Earley decision is still valid, and despite the language of West Virginia Code §23-1-13 which attempts to limit the activities of lay representatives, their actual participation at hearings before the Commissioner, and particularly in determining what

evidence to introduce and how and when to cross examination witnesses, clearly would fall within the definition of the practice of law. Because of the Earley decision, and the other decisions cited therein, it would thus appear that the provisions of West Virginia Code §23-1-13(b) (3) and (c) (4) , would be unconstitutional because they constitute the unauthorized practice of law.

The Committee would note that under Earley, Supra. certain activities of lay representative would not constitute the unlawful practice of law and therefore could be engaged in by lay representatives. Activities which would not constitute the unlawful practice of law would include the completion of blank forms provided by the Workers' Compensation Commission for the reason that the completion of such forms does not require any knowledge or skill beyond that possessed by the ordinarily experienced and intelligent layman. However, actual appearances before the Commission, as a lay representative, would be unconstitutional.

Even if the balancing test provided for in Isner, Supra showed that the intrusion upon the judicial power was of minimal offense by allowing the use of lay representatives in Workers' Compensation hearings, it does not appear that the exceptions allowed for in Isner would be applicable to the provisions of West Virginia Code §23-1-13(b) (3) and §23-1-13(c) (4) .In Isner, where the court allowed lay representatives to represent individuals in Magistrate Court, the court pointed out certain distinctions which they believed permitted such activities as being within the "aid of the judicial power". Specifically, the court noted that the participation of lay representatives (a) was not for pay, (b) would be by layman in a representative capacity as a form of neighbourly or kindred accommodation, and (c) it anticipated an isolated or casual appearance by a non-lawyer friend or relative. The court specifically noted that the statute allowing lay representation did not purport to authorize layman to represent parties in Magistrate Court on a regular basis or to engage in such activity as a business or for pay.

It would appear, that both under Barley and the Isner decisions, the provisions of West Virginia Code §23-1-13(b) (3) and (c) (4) would not constitute a non pay representation by a lay representative as a "form of neighbourly or kindred accommodation." Instead, the cited code provisions anticipate regular appearances before the Workers' compensation Commissioner by individuals and/or companies who provide those services, mostly for pay. As such, those activities in actually appearing before the Commissioner or his representatives would appear to constitute the unlawful practice of law and there is no exception by claiming that this lay representation is "in aid of the judicial power."

Finally, there is the provision of West Virginia Code §23-1- 13(c) (3) .Under that code section an employer, who is not a natural person, is permitted to appear before the Commission and be represented by a member of their Board of Directors or by an

Officer of the corporation. In Earley, Supra., the West Virginia Supreme Court addressed the issue as to whether or not a corporation is required to appear through duly licensed attorneys, or whether or not it could represent itself in the hearings. The West Virginia Supreme Court, in holding that corporations had to appear through duly licensed attorneys declared that:

"A corporation is not a natural person but is an artificial entity created by law and for that reason in legal matters it must act through duly licensed attorneys...A corporation or other lay agency cannot practice law or hire lawyers to practice law for it".

Based upon the cited language in the Earley decision, the Committee finds that the provisions of West Virginia Code §23-1- 13(c) (3) , to the extent that a corporation is represented by a non- attorney before the Workers' Compensation Committee, constitutes the unlawful practice of law and therefore the provisions would be invalid. The Committee further finds that the exceptions provided in Isner, Supra. do not apply to corporations. As previously cited, in Isner the court noted that the use of lay representatives in Magistrate Court would be permitted because (a) the appearances would be casual, (b) the appearances would be for no pay and (c) the provisions anticipated isolated appearances by non-lawyer friends or relatives of a party. The Committee does not believe that any of the exceptions provided for in Isner would apply to corporations and therefore they may only appear before the Workers' Compensation Commission through duly licensed attorneys.

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