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ATTORNEY GENERAL OPINION NO. 79-298

L. Patricia Casey, Chief of Appeals
Department of Human Resources
Division of Employment
Second Floor, 424 South Kansas
Topeka, Kansas

Re: Labor and Industries--Employment Security Law--Representation of Parties--Unauthorized Practice of Law

Synopsis: Representation by a "duly authorized representative" as used in K.A.R. 48-4-3 does not permit persons to perform functions on behalf of claimants that constitute the practice of law.

* * *

Dear Ms. Casey:

You request our opinion as to whether certain conduct by non-attorneys in representing parties in administrative hearings held pursuant to the Kansas Employment Security Law, constitutes the unauthorized practice of law. You advise that parties to the hearings are designating persons to represent them in the hearings who are neither attorneys nor persons in a day-to-day agency relationship with the party, i.e., officer or employee of a corporation or partner or employee of a partnership. As discussed in an earlier opinion, Attorney General Opinion No. 79-288, representation of parties by "authorized agents" is permissible under regulations of the Secretary of Human Resources (K.A.R. 48-3-2). That opinion does not, however, set out the parameters of permissible conduct by such representatives as it relates to the unauthorized practice of law, nor does it state the conditions where such representation is proper.

The only statute even remotely connected to the unauthorized practice of law is K.S.A. 21-3824 which proscribes the "false impersonation . . . [of] a person licensed to practice or engage in any profession or vocation for which a license is required by the laws of the state of Kansas."

However, as noted by the Court in State v. Schumacher, 214 Kan. 1 (1974), the definition and regulation of the practice of law are matters left to the judiciary:

> "It is clearly the prerogative of the Supreme Court to define the practices of law:
>
> "'It is unnecessary here to explore the limits of judicial power conferred by [Article 3, Sec. 1, of the Kansas Constitution], but suffice it to say that the practice of law is so intimately connected and bound up with the exercise of judicial power in the administration of justice that the right to regulate the practice naturally and logically belongs to the judicial department of the government. (In re Integration of Nebraska State Bar Ass'n, 133 Neb. 283, 275 N.W. 265, 114 A.L.R. 151.) Included in that power is the supreme court's inherent right to prescribe conditions for admission to the Bar, to define, supervise, regulate and control the practice of law, whether in or out of court, and this is so notwithstanding acts of the legislature in the exercise of its police power to protect the public interest and welfare.' (Martin v. Davis, 187 Kan. 473, 478-479, 357 P.2d 782 (1960).
>
> "See, In re Hanson, 134 Kan. 165, 170, 5 P.2d 1088 (1931); State v. Rose, 74 Kan. 260, 85 Pac. 803 (1906); and State v. Blase, 208 Kan. 969, 494 P.2d 1224 (1972)." 214 Kan. at 9, 10. (Emphasis added.)

The difficulty with any attempt to comprehensively define what comprises the practice of law is that the question is usually dependent almost entirely upon the facts of each specific case. There are, though, a number of Kansas precedents which attempt to define the practice of law. Perhaps the best review of the Kansas position in this regard is found in State v. Schumacher, supra. There, the Court specifically addressed the question:

> "I. What is the Practice of Law?
>
> "Although it may sometimes be articulated more simply, one definition has gained widespread acceptance, and has been adopted by this Court:
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> "'A general definition of the term frequently quoted with approval is given in Eley v. Miller, 7 Ind. App. 529, 34 N.E. 836, as follows:
>
> "'As the term is generally understood, the practice of law is the doing or performing of services in a court of justice, in any matter depending therein, throughout its various stages, and in conformity to the adopted rules of procedure. But in a larger sense it includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured, although such matter may or may not be pending in a court.' State, ex rel., v. Perkins, 138 Kan. 899, 907, 908, 28 P.2d 765 (1934).
>
> "The court, in Perkins, also pointed out that [o]ne who confers with clients, advises them as to their legal rights, and then takes the business to an attorney and arranges with him to look after it in court is engaged in the practice of law." 138 Kan. at 908. The quotation from the Eley case has been adopted as the general rule in 7 C.J.S., Attorney and Client, §3g (1937).

> "A more recent source defines the practice of law as 'the rendition of services requiring the knowledge and application of legal principles and technique to serve the interests of another with his consent." R.J. Edwards, Inc. v. Hert, 504 P.2d 407, 416 (Okla., 1972)." Id. at 9.

See also annotations defining the practice of law at 111 A.L.R. 19, 125 A.L.R. 1173 and 151 A.L.R. 781, cited by the Court in State, ex rel., v. Schmitt, 174 Kan. 581, 588 (1953).

The specific issue of whether representation by non-attorneys in the context of an administrative hearing constitutes the unauthorized practice of law has not been addressed by the Kansas court. However, a number of other jurisdictions have addressed the issue. In one of the leading cases, the Supreme Court of Colorado, in Denver Bar Association et al v. Public Utilities Commission of Colorado, 154 Colo. 273, 391 P.2d 467 (1964) (annotated in 13 A.L.R. 3d 799) invalidated a rule of the Colorado Public Utilities Commission which allowed the representation of parties by non-attorneys. The rule which the Court invalidated was even more restrictive in allowing representation by non-attorneys than are the regulations adopted by the Department of Human Resources (K.A.R. 48-3-2). The Colorado rule allowed representation by non-attorneys only if the representative was "a practitioner duly admitted to practice before the interstate commerce commission." Denver Bar Assoc., supra at 469. The Colorado rule, like the Kansas regulations, also authorized parties to represent themselves, as well as the representation of partnerships by a co-partner; corporations, by an officer or full-time employee; and municipal corporations by an authorized agent, officer or employee (all essentially, pro se representation). The Kansas regulations (K.A.R. 48-3-2) would appear to authorize representation by any non-attorney so long as he was "duly authorized." As will be discussed later, that regulation, to be valid, must be restricted in its application. In its opinion in the Denver Bar Assoc. case, the Colorado Supreme Court noted that:

> "Whether one, in representing another before the Commission under Rule 7(b), is practicing law depends upon the circumstances of the particular case there under consideration. The character of the act done, rather than that it is performed before the Commission, is the factor which is decisive of whether it constitutes the practice of law." (Citations omitted.) 391 P.2d at 471.

The Court concluded that:

> "Although the Commission is an administrative agency of the legislature, People v. Colo. Co. 65 Colo 472, 178 P 6, nevertheless its actions would be characterized as judicial where it resolves disputes of adjudicative facts, and persons appearing in representative capacities in respect thereto would be practicing law. 1 Davis, Administrative Law Treatise 415, §703. On the other hand, its actions may be legislative or non-judicial, and persons appearing in representative capacities in respect to these matters would not be practicing law." (Citations omitted.) 391 P.2d at 391.

See, also, Re Unauthorized Practice of Law in Cuyahoga County Re Brown, Weiss and Wohl, et al., 175 Ohio St. 149, 192 N.E.2d 54 (1963) (annotated in 2 A.L.R. 3d 712) and Public Service Commission v. Hahn Transportation, Inc., 253 Md. 571, 253 A.2d 845 (1969).

We believe that the Kansas courts would adopt a similar approach, i.e., that the determining factor in the inquiry is the nature of the proceedings in which the non-attorney seeks to represent a party. Where the hearing is of an adjudicatory nature, involving the exercise of quasi-judicial powers, a party must be represented by one who has the requisite legal skills and knowledge to preserve his or her rights.

The question of when an administrative body exercises quasi-judicial powers has been addressed by the Kansas court. The keystone decision in this regard is Gawith v. Gage's Plumbing & Heating Co., Inc., 206 Kan. 169 (1970). There, the Court held that:

> "In determining whether an administrative agency performs legislative or judicial functions, the courts rely on certain tests; one being whether the court could have been charged in the first instance with the responsibility of making the decisions the administrative body must make, and another being whether the function the administrative agency performs is one that courts historically have been accustomed to perform and had performed prior to the creation of the administrative body.
>
> "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist, whereas legislation looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.
>
> "In applying tests to distinguish legislative from judicial powers, courts have recognized that it is the nature of the act performed, rather than the name of the officer or agency which performs it, that determines the character as judicial or otherwise." Id. at 169, Syl. ¶¶1, 2, 3, 4.

The Court, in Thompson v. Amis, 208 Kan. 658 (1972), relied upon Gawith and expanded the concept by noting that:

> "It may be added that quasi-judicial is a term applied to administrative boards or officers empowered to investigate facts, weigh evidence, draw conclusions as a basis for official actions, and exercise discretion of judicial nature." Id. at 663.

See Schulze v. Board of Education, 221 Kan. 351, 354 (1977); Stephens v. Unified School District, 218 Kan. 220, 233-236 (1975); Copeland v. Kansas State Board of Examiners in Optometry, 213 Kan. 741, 743 (1974); Gonser v. Board of County Commissioners, 1 Kan. App. 2d 57, 61 (1977).

We think there can be little question that hearings held pursuant to the Kansas Employment Security Law, K.S.A. 44-701 et seq., as amended, are of a quasi-judicial nature. This is especially true in view of the limits of judicial review available with regard to final decisions of the Board of Review. Following the hearing and administrative appeals process authorized by K.S.A. 1978 Supp. 44-709, appeal to a district court may be commenced, but the scope of such review is limited, in part, as follows:

> "In any judicial proceeding under this section the findings of the board as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of said court shall be confined to questions of law." K.S.A. 1978 Supp. 44-709(i)(4).

Thus, in proceedings before the hearing examiner, the referee and board of review, evidence will be presented and a record made. This process will, of necessity, involve the introduction of testimony and other evidence, possibly the examination and cross-examination of witnesses, and a familiarity with legal principles sufficient to build a case for appeal. In short, the rights of the claimant to benefits under the law will be substantially affected by the presentation of the claim.

In Denver Bar Assoc., supra, the Colorado Supreme Court set forth its view of the permissible and impermissible conduct for non-attorneys as it relates to the unauthorized practice of law in administrative hearings:

> "It would appear from the decisions that the following would constitute the practice of law before administrative commissions:
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> "1) Where one instructs and advises another in regard to the applicable law on an agency matter so that he may properly pursue his affairs and be informed as to his rights and obligations . . . .
>
> "2) Where one prepares for another documents requiring familiarity with legal principles beyond the ken of the ordinary layman . . . .

"3) Where one prepares for another, for filing before the administrative agency, applications, pleadings, or other procedural papers requiring legal knowledge and technique . . . .

"4) Where one appears for another before an administrative tribunal in adversary or public proceedings involving the latter's rights of life, liberty or property according to the law of the land . . . .

"5) Where one, on behalf of another, examines and cross-examines witnesses and makes objections or resists objections to the introduction of testimony, the exercise of which requires legal training, knowledge, and skill . . . .

"6) Where one represents another in a rate-making or rate-revision case and the question of deprivation of property without due process of law is present . . . .

"As an arm of the legislature, the Commission may authorize by rule certain things, the doing of which does not constitute the practice of law. Among the more common of these activities, in which laymen may represent others, are:

"1) The completion of forms which do not require any knowledge and skill beyond that possessed by the ordinarily experienced and intelligent layman . . . .

"2) Representation of another in a hearing relating to the making or revision of rates, except as noted in the foregoing item No. 6 . . . .

"3) Performing the services of engineers, experts, accountants and clerks . . . .

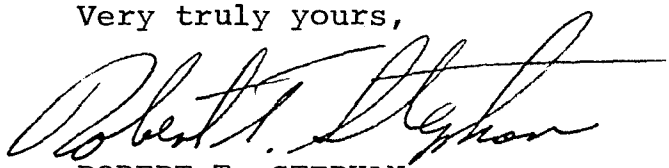
> "4) Acting in an agency proceeding involving the adoption of a rule of future action which affects a group and where no vested rights of liberty or property are at stake." (Citations omitted.)

We are of the opinion then, that in administrative hearings involving the exercise of quasi-judicial powers (See Thompson v. Amis, supra) parties must be represented by an attorney or represent themselves, which would include officers or employees of corporations, or a partner from the partnership or legal guardians and conservators which representation is essentially pro se.

We are persuaded by the reasoning of the Colorado Supreme Court, and thus conclude that "duly authorized representative" as used in K.A.R. 48-3-2 does not permit a person, not authorized to practice law in this state, to represent claimants in hearings pursuant to the employment security law where the activities performed by such person constitute the practice of law. Such persons may, if permitted by the hearing examiner, perform other functions to assist claimants which do not constitute the practice of law.

In summary, representation by a "duly authorized representative" as used in K.A.R. 48-4-3 does not permit persons to perform functions on behalf of claimants that constitute the practice of law.

Very truly yours,



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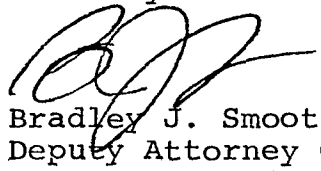

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