

Text referenced within

Eastern Panhandle Organization of Homeowners Associations'

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Florida test to determine if an activity is defined as the practice of law – Legal seminars can be given by non-lawyers as long as the information provided is general legal advice...just do not answer specific legal questions.

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Are you accused of practicing law without a license?

Soreide Law Group, will represent you before the Florida Bar's unlicensed practice of law division. The unlicensed practice of law can not only result in a complaint being filed against your out of state license but also result in criminal charges in the state of Florida. Here are the relevant cases covering the most common types of UPL in Florida.

SUMMARY OF UNLICENSED PRACTICE OF LAW CASES

In order to determine whether an activity constitutes the unlicensed practice of law, a two part analysis must be made. First, it must be determined whether the activity is the practice of law. The second question is whether the practice is authorized. If an activity is the practice of law but the activity is authorized, the activity is not the unlicensed practice of law and may be engaged in by a nonlawyer. The Florida Bar v. Moses, 380 So. 2d 412 (Fla. 1980).

The first question which must be addressed in order to determine whether a service or activity constitutes the unlicensed practice of law is to determine whether the activity constitutes the practice of law. In The Florida Bar v. Sperry, 140 So. 2d 587 (Fla. 1962), judg. vacated on other grounds, 373 U.S. 379 (1963) the Court found that setting forth a broad definition of the practice of law was "nigh onto impossible" and instead developed the following test to determine whether an activity is the practice of law:

...if the giving of (the) advice and performance of (the) services affect important rights of a person under the law, and if the reasonable protection of the rights and property of those advised and served requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advice and the performance of such services by one for another as a course of conduct constitute the practice of law.

When applying this test it should be kept in mind that "the single most important concern in the Court's defining and regulating the practice of law is the protection of the public from incompetent, unethical, or irresponsible representation." The Florida Bar v. Moses, 380 So. 2d 412, 417 (Fla. 1980). Although a codified definition does not exist, there is a large body of case law applying the Sperry test to determine whether a specific activity constitutes the unlicensed practice of law. Therefore, although one cannot go to one particular source such as a dictionary for a definition, in most instances whether an activity constitutes the unlicensed practice of law can be found in case law. Once it is determined whether an activity is the practice of law, it must be determined whether the

Court or another body has authorized a nonlawyer to engage in the activity. An activity may be authorized by court rule, case law, an administrative rule or a federal rule or statute. What follows is a summary of what has been held to constitute the unlicensed practice of law in various circumstances. Any authorized activities are also noted. (Please note that the following is only a partial list of unlicensed practice of law cases. There are over 230 reported unlicensed practice of law cases/opinions in Florida.)

1. ACCOUNTANTS

Generally, it constitutes the unlicensed practice of law for an accountant, whether or not a CPA, to draft corporate documents. Although the accountant may not draft the documents, the accountant may sell the forms necessary to establish a corporation and complete the forms with information provided in writing by the individual. The Florida Bar v. Fuentes, 190 So 2d 748 (Fla. 1966); The Florida Bar v. Town, 174 So. 2d 395 (Fla. 1965), The general rule and exception applies to all nonlawyers. A CPA may represent individuals before the IRS in tax matters. This practice is specifically authorized by 26 C.F.R. § 601.502 and C.F.R. Part 10. As the activity is authorized by a federal rule, Florida may not enjoin the activity as the unlicensed practice of law. The Florida Bar v. Sperry, 363 U.S. 379 (1963).

2. ADMINISTRATIVE PRACTICE

In the Florida Bar v. Moses, 380 So. 2d 412 (Fla. 1980) the Supreme Court of Florida held that the legislature has the constitutional authorization to oust the Court's responsibility to protect the public from the unlicensed practice of law in administrative proceedings under Article V, Section 1 of the Florida Constitution, and when it does so any "practice of law" conduct becomes in effect, authorized representation. In other words, the legislature may authorize nonlawyer representation in administrative proceedings. The activity is still the practice of law, it is merely authorized. However, in order to do so, the agency must have a properly promulgated rule and the nonlawyer must follow the dictates of the rule. The authorization is not blanket authority to appear in any proceeding but must be sought on a case-by-case and agency-by-agency basis.

3. APPEARANCES PRO SE

The general rule is that an individual may appear pro se and represent themselves in court. Fla. Stat. § 454.18. This general rule does not apply to probate proceedings or to corporations. In a probate proceeding, unless the individual attempting to appear pro se is the sole interested party in the matter, the individual must be represented by a member of The Florida Bar. Rule 5.030, Probate and Guardianship Rules, Falkner v. Blanton, 297 So. 2d 825 (Fla. 1974). A corporation, as a fictitious entity, may not appear pro se. Szteinbaum v. Kaes Invecciones Valores, 476 So. 2d 247 (Fla. 3d DCA 1985). The general rule that a corporation may not appear pro se does not apply to small claims court as Rule 7.050 of the Small Claims rules specifically allows a corporation to appear pro se. However, an exception exist for evictions. In those cases, a corporation may not appear pro se and must be represented by an attorney. Johnstown Properties Corp. v. Gabriel, 50 Fla. Supp. 138 (Fla Polk Cty. Court 1980).

4. FEDERAL PRACTICE

Generally speaking, you must be a member of The Florida Bar in order to represent an individual in federal court. In the area of federal administrative practice, if there is a rule or regulation which allows an attorney admitted in another state or a nonattorney to appear before the agency, Florida cannot enjoin the activity as the unlicensed practice of law. The Florida Bar v. Sperry, 373 U.S. 379 (1963). The activity is still the practice of

law, it is merely authorized. Whether the activity is allowed and the extent to which the individual may appear and/or practice will be governed by the rules of that particular agency. If the agency does not have a rule allowing the practice, any representation would constitute the unlicensed practice of law. The Fla. Bar re: Advisory Opinion – Nonlawyer Representation in Securities Arbitration, 696 So. 2d 1178 (Fla. 1997).

5. HOUSE COUNSEL

An attorney licensed in a state other than Florida may work in Florida as Authorized House Counsel for a corporation if the attorney registers pursuant to Chapter 17 of the Rules Regulating The Florida Bar. The activities which the Authorized House Counsel may perform are limited and do not include going to court.

6. OUT-OF-STATE ATTORNEYS

An attorney admitted to the practice of law in a state other than Florida may not engage in the general practice of law in Florida or establish a law office in Florida. An attorney licensed to practice law in a state other than Florida may establish an interstate practice in Florida only if the attorney follows the guidelines of *The Florida Bar v. Savitt*, 363 So. 2d 559 (Fla. 1978). An attorney admitted to the practice of law in a state other than Florida may not appear in a Florida court as the representative of a party unless the attorney first seeks permission to appear pro hac vice pursuant to Rule 2.510 of the Florida Rules of Judicial Administration. (It should be noted that this rule does not allow a resident of Florida to appear pro hac vice.) Rule 4-5.5 of the Rules Regulating the Florida Bar describes the legal services in an out-of-state attorney can provide in Florida on a temporary basis.

7. BANKRUPTCY

It constitutes the unlicensed practice of law for a nonlawyer to prepare bankruptcy forms for another. *The Florida Bar v. Catarcio*, 709 So. 2d 96 (Fla. 1998). This includes the petition and any necessary schedules. However, the nonlawyer may sell blank forms necessary for a bankruptcy and complete the forms with information provided in writing by the individual. *The Florida Bar v. Brumbaugh*, 355 So 2d 1186 (Fla. 1978). It also constitutes the unlicensed practice of law for a nonlawyer to represent someone in bankruptcy court. *The Florida Bar v. Kaufman*, 452 So. 2d 526 (Fla. 1984).

8. DO-IT-YOURSELF LEGAL KITS AND BOOKS

Generally speaking, a nonlawyer may sell legal forms and kits and complete them with information provided in writing by the customer. *Florida Bar v. Brumbaugh*, 355 So. 2d 1186 (Fla. 1978). If the nonlawyer is using a Supreme Court Approved form, the nonlawyer may engage in limited oral communication to elicit the factual information that goes in the blanks of the form. Rule 10-2.1(a), Rules Regulating The Florida Bar. Generally speaking, it does not constitute the unlicensed practice of law for a nonlawyer to sell a book that contains general legal information. *New York County Lawyers Association v Dacey*, 287 N.Y.S. 2d 422 (N.Y. 1967); 283 N.Y.S.2d 984 (N.Y. App. 1967). The book may also contain legal forms.

9. EVICTIONS

It constitutes the unlicensed practice of law for a nonlawyer to represent a third party in an eviction. Generally speaking, a nonlawyer may not prepare evictions forms for another unless the nonlawyer is merely typing the information provided in writing by the individual or completing a Supreme Court Approved form with the factual information provided by the individual. An exception exists for property managers. In *The Fla Bar re:*

Advisory Opinion Nonlawyer Preparation of Landlord Uncontested Evictions, 605 So. 2d 867 (Fla.1992), clarified, 627 So. 2d 485 (Fla.1993) the Court held that a property manager may sign and file complaints for evictions and motions for default in uncontested residential evictions for nonpayment of rent as long as the property manager is using a Supreme Court Approved form.

10. FEDERAL PATENT PRACTICE

Title 37 C.F.R. §§10.1(1), 10.6, and 10.36 allow an attorney admitted in another state or a registered patent agent to prepare and file patent applications before the Office of Patent and Trademark. The activity is the practice of law, it is merely authorized by federal regulation. Therefore, under the dictates of *The Florida Bar v. Sperry*, 373 U.S. 379 (1963) Florida cannot enjoin the activity as the unlicensed practice of law. However, the authorization granted by the federal regulations does not extend to actions in state court. *Vista Designs, Inc. v. Silverman*, 774 So. 2d 884 (Fla. 4th. DCA 2001).

11. FEDERAL TAX PRACTICE

Title 31 C.F.R. § 10 allows attorneys admitted in any state and some nonlawyers to represent individuals before the IRS. Similar regulations exist for Tax Court. The activity is the practice of law, it is merely authorized by federal regulation. Therefore, under the dictates of *The Florida Bar v. Sperry*, 373 U.S. 379 (1963) Florida cannot enjoin the activity as the unlicensed practice of law. Federal regulations also allow nonlawyers to prepare federal income tax returns for individuals. Arguably, this activity is also the practice of law and merely authorized.

12. GENEALOGISTS/HEIR HUNTERS

While “heir hunting” is generally allowed and would not be considered the practice of law, the heir hunter may not solicit heirs to recover part of the estate or file pleadings to do so. *The Florida Bar v. Heller*, 247 So. 2d 434 (Fla. 1971).

13. HOLDING OUT TO PERFORM LEGAL SERVICES

It constitutes the unlicensed practice of law for a nonlawyer to hold himself out as an attorney either expressly or impliedly. This would include using the title Esquire (*The Fla. Bar v. DeToma*, 501 So. 2d. 599 (Fla. 1987)), using the initials J.D. if they are being used to solicit legal services (*The Florida Bar v. Catarcio*, 709 So. 2d 96 (Fla 1998)), using “legal” in the name of your business (*The Florida Bar v. Miravalle*, 761 So. 2d 1049 (Fla. 2000)), using the title “attorney” or “lawyer” (*The Florida Bar v Gordon*, 661 So. 2d 295 (Fla. 1995)), and using any other title, such as notario publico, which holds the person out as being able to provide legal services (*The Florida Bar v. Borges-Caignet*, 321 So. 2d 550 (Fla. 1975)). It also constitutes the unlicensed practice of law for a corporation to advertise to provide legal services even if the services are being performed by a member of The Florida Bar. *The Florida Bar v. Consolidated Business and Legal Forms*, 386 So. 2d 797 (Fla. 1980). This is due to the fact that a corporation may not practice law.

The Court has also held that it constitutes the unlicensed practice of law for a group of nonlawyers to hold themselves out as a panel of judges capable of granting divorces in Florida. *The Florida Bar v. Gentz*, 640 So. 2d 1105 (Fla. 1994).

Rule 10-2.1(c) of the Rules Regulating The Florida Bar defines “nonlawyer” as including members of the bars of other states. Therefore, the general case law regarding holding out applies to out-of-state attorneys as well. However, if the attorney is part of a properly constituted interstate practice or is engaging in an authorized activity in Florida, the attorney’s title may appear on letterhead and business cards as long as necessary limiting

language is also included. *The Florida Bar v. Kaiser*, 397 So. 2d 1132 (Fla. 1981), *The Florida Bar v. Savitt*, 363 So. 2d 559 (Fla. 1978).

14. IMMIGRATION

Title 8 C.F.R. 292 permits an attorney admitted in another state to represent individuals before the INS. This permission does not extend to federal district court. The activity is the practice of law, it is merely authorized by federal regulation. Therefore, under the dictates of *The Florida Bar v. Sperry*, 373 U.S. 379 (1963) Florida cannot enjoin the activity as the unlicensed practice of law. This authorization does not generally extend to nonlawyers. (There are some very limited circumstances in which a nonlawyer may represent someone before INS such as on a one case basis for no fee.) Nonlawyer representation of another in an immigration matter therefore constitutes the unlicensed practice of law. *The Florida Bar v. Matus*, 528 So. 2d 895 (Fla. 1988), *The Florida Bar v. Becerra*, 661 So. 2d 299 (Fla. 1995), *The Florida Bar v. Lopez*, 231 So. 2d 819 (Fla. 1970).

15. INDIVIDUAL REPRESENTATION

Generally speaking, a nonlawyer may not represent another in court. An out-of-state attorney who wishes to represent someone in a Florida court must seek permission to appear pro hac vice in order to do so. Rule 2.510 Fla.R.Jud.Admin. A nonlawyer may be able to represent another individual in an administrative proceeding if the agency has a properly promulgated rule allowing the activity. *The Florida Bar v. Moses*, 380 So. 2d 412 (Fla. 1980). On a related note, the Court has held that it constitutes the unlicensed practice of law for a nonlawyer to represent an individual in a securities arbitration matter. *The Florida Bar re: Advisory Opinion – Nonlawyer Representation in Securities Arbitration*, 696 So. 2d 1178 (Fla.1997).

16. INSURANCE ADJUSTERS

Florida Statute §626.854 sets forth the definitions and prohibitions on the activities of public adjusters. Basically, a public adjuster may represent an insured in negotiations with their own insurance company on matters involving property damage. The public adjuster may not negotiate on matters involving bodily injury or represent the parties in court. *Larson v. Lesser*, 106 So 2d 188 (Fla. 1958).

17. JAILHOUSE LAWYERS

There are several constitutional cases from the United States Supreme Court that deal with the issue of legal assistance to inmates. From an unlicensed practice of law standpoint, the Code of Federal regulations and the Florida Administrative Code allow limited nonlawyer assistance in parole and probation matters. However, a nonlawyer may not give an inmate legal advice, draft pleadings for the inmate or represent the inmate in court. *The Florida Bar v. Mills*, 410 So. 2d 498 (Fla. 1982).

18. LAW CLERKS/STUDENTS

A law student or law graduate may not practice law unless certified by the Supreme Court of Florida as a Certified Legal Intern pursuant to Chapter 11 of the Rules Regulating The Florida Bar. If so certified, the law student or law graduate may represent certain individuals in limited circumstances.

19. MECHANICS LIENS

The Supreme Court of Florida has held that a nonlawyer may prepare the notice to owner and notice to contractor required by the mechanics lien statute. *The Fla. Bar re: Advisory*

Opinion – Nonlawyer Preparation of Notice to Owner and Notice to Contractor, 544 So. 2d 1013 (Fla. 1989). However, a nonlawyer may not prepare liens or give legal advice regarding the statute. The Fla. Bar re: Advisory Opinion – Activities of Community Association Managers, 681 So. 2d 1119 (Fla. 1996).

20. PREPARATION OF LEGAL DOCUMENTS

Generally speaking, a nonlawyer may sell forms and complete the form with information provided in writing by the individual. The Florida Bar v. Brumbaugh, 355 So. 2d 1186 (Fla. 1978). If the nonlawyer is using a form approved by the Supreme Court of Florida, the nonlawyer may engage in limited oral communication to elicit the factual information that goes in the blanks of the form. Rule 10-2.1 (a), R.Reg.Fla.Bar. The nonlawyer may not make any changes to the form and may not give advice on possible courses of action. If the nonlawyer is using a form which has not been approved by the Supreme Court of Florida, the nonlawyer may only type the blanks on the form with information obtained from the individual in writing. This general rule has been applied in a variety of circumstances including the following:

a. BANKRUPTCY

Nonlawyers may only type bankruptcy forms from information provided by the individual in writing; they cannot offer legal advice or help select the forms. In re: Calzadilla, 151 B.R. 622 (Bkrcty. S. D. Fla. 1993).

b. CORPORATE

A nonlawyer may not prepare corporate documents for another. This includes the articles of incorporation, the corporate charter and related documents. The Florida Bar v. Fuentes, 190 So. 2d 748 (Fla. 1966); The Florida Bar v. Keehley, 190 so. 2d 173 (Fla. 1966).

c. DIVORCE

The general rule discussed above applies to the family law area. The forms contained in the family law rules are considered Supreme Court Approved forms. The nonlawyer may not make any changes to the form and may not give advice on possible courses of action. If the nonlawyer is using a form which has not been approved by the Supreme Court of Florida, the nonlawyer may only type the blanks on the form with information obtained from the individual in writing.

d. INSURANCE DOCUMENTS AND PENSION PLANS

The Supreme Court of Florida has held that a nonlawyer insurance agent may not prepare legal documents, including pension plans. The Florida Bar v. Turner, 355 So. 2d 766 (Fla. 1978). However, in the area of pension plans, the Court has held that certain nonlawyers who are authorized to appear before the IRS are allowed to draft certain pension documents, including the plan itself. The Fla. Bar re: Advisory Opinion – Nonlawyer Preparation of Pension Plans, 571 So. 2d 430 (Fla. 1990).

e. PROBATE

The general rule has been applied to the probate area. The Supreme Court of Florida has held that it constitutes the unlicensed practice of law for a nonlawyer to draft a living trust and related documents for another. The Fla. Bar re: Advisory Opinion Nonlawyer Preparation of Living Trusts, 613 So. 2d 426 (Fla. 1992). The Court also held that a nonlawyer cannot draft a will for a third party. The Florida Bar v. Larkin, 298 So. 2d 371 (Fla. 1974). However, a nonlawyer corporate creditor may file a statement of claim in a probate matter. Summit Pool Supplies v. Price, 461 So. 2d 272 (Fla. 5th. DCA 1985).

f. REAL PROPERTY (INCLUDING REAL ESTATE LICENSEES & TITLE INSURANCE COMPANIES)

In 1950, the Supreme Court of Florida held that a real estate licensee may prepare the contract for sale of real estate but any other documents must be prepared by a member of The Florida Bar. *Keyes Co. v. Dade County Bar Association*, 46 So. 2d 605 (Fla.1950). The drafting of the contract is considered the practice of law, a non-licensee may not draft the contract. The Court merely carved out an exception for licensees. The Court later carved out an exception for title insurance companies. In *The Florida Bar v. McPhee*, 195 So. 2d 552 (Fla. 1967) the Court held that a title insurance company may conduct the closing and prepare documents incident to the issuance of title insurance only if the company is actually issuing the title insurance. Again, the activity is the practice of law, it is just authorized in these limited circumstances to these individuals. As to others, the Court has held that it constitutes the unlicensed practice of law for a nonlawyer to prepare a warranty deed, quitclaim deed, land trusts, leases and mortgage agreements. *The Florida Bar v. Irizarry*, 268 So. 2d 377 (Fla. 1972); *The Florida Bar v. Hughes*, 697 So. 2d 501 (Fla. 1997); *The Florida Bar v. Lister*, 662 So. 2d 1241 (Fla. 1995); *The Florida Bar v. Valdes*, 464 So. 2d 1183 (Fla. 1985)(there are 3 Supreme Court Approved leases which nonlawyers may complete with information provided orally by the individual). However, an authorized agent may bid at a mortgage judicial foreclosure sale. *Heilman v. Suburban Coastal Co.*, 506 So. 2d 1088 (Fla. 4th DCA 1987).

21. SEMINARS ON LEGAL RIGHTS

A nonlawyer may conduct a seminar at which general legal information is given, however, the nonlawyer may not give specific legal advice. *The Florida Bar v. Raymond, James and Associates, Inc.*, 215 So. 2d 613 (Fla. 1968). Therefore, while the nonlawyer may give general information, the nonlawyer may not answer specific legal questions.

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