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August 26, 2005

Opinion No. 05-133

Request for Clarification of Opinion No. 05-076 Regarding Public Adjusters and the Practice of Law

QUESTIONS

1. Does Attorney General Opinion No. 05-076 conclude that the practice of public adjusting per se constitutes the unauthorized practice of law in Tennessee?

2. Is any decision about whether a public adjuster is violating Tennessee law by engaging in the unauthorized practice of law a fact question to be decided on a case by case basis?

OPINIONS

1. No. Op. Tenn. Att'y Gen. No. 05-076 concludes that public adjusting constitutes the unauthorized practice of law to the extent that the particular conduct at issue requires the professional judgment of a lawyer.

2. Whether particular conduct amounts to the "practice of law" or "law business" depends on the facts and circumstances of the conduct or undertaking at issue. As indicated in our prior opinion, a public adjuster has an affirmative duty not to violate Tennessee's prohibition against the unauthorized practice of law and engages in this conduct as his or her own peril.

ANALYSIS

The request seeks "clarification" of Op. Tenn. Att'y Gen. No. 05-076 issued May 10, 2005. Materials submitted with the request for clarification include a letter from an insurance company to a Tennessee public adjuster stating that the company would not be negotiating with the public adjuster concerning a particular claim but would instead deal directly with the claimant. The requestor also has submitted copies of various cases including: *Unauthorized Practice of Law Comm. v. Jansen*, 816 S.W.2d 813 (Tex. App. 1991), *writ denied*, which held that certain discrete activities by a first-party public adjuster did not constitute the practice of law under a Texas statute; *In re Petition of Burson*, 909 S.W.2d 768 (Tenn. 1995), regarding the practice of law in Tennessee and which has already been discussed at length in Op. Tenn. Att'y Gen. No. 05-076; *Utah State Bar v. Summerhayes & Hayden, Public Adjusters*, 905 P.2d 867 (Utah 1995), holding that third-party public adjusting, which is not at issue in this clarification, is the unauthorized practice of law; and *Linder v. Insurance Claims Consultants, Inc.*, 560 S.E.2d 612 (S.C. 2002), holding that defendants had engaged in the unauthorized practice of law, although the business of public insurance adjusting

did not per se constitute the practice of law in South Carolina. *Linder* has also been discussed at length in our prior opinion. While case law from other states may provide some guidance, the scope of conduct constituting the unauthorized practice of law varies from state to state.

1. Op. Tenn. Att'y Gen. No. 05-076 states that a public adjuster, who is not licensed to practice law in Tennessee, engages in the unauthorized practice of law by negotiating settlements and giving advice to third parties about insurance claims if his or her conduct requires the professional judgment of a lawyer. Our prior opinion did not conclude that the business of public insurance adjusting is per se the unauthorized practice of law. It instead cautioned that conduct by independent public adjusters who are neither licensed to practice law in Tennessee nor are supervised by a licensed Tennessee attorney may amount to the unauthorized practice of law under Tennessee's Unauthorized Practice and Improper Conduct statutes, Tenn. Code Ann. § 23-3-101 *et seq*., if the representative conduct constitutes the "practice of law" or "law business" and requires the exercise of professional legal judgment in its undertaking.

2. Although questions about whether conduct amounts to the "practice of law" or "law business" necessarily depend on the particular nature of the conduct and undertaking at issue, one may readily conceive of conduct that fits under the umbrella of "public adjusting" and that, on its face, appears to constitute the unauthorized practice of law. Neither the original request nor the request for clarification has provided specific factual situations or details. The proposed legislative definition of "public adjusting" discussed in our prior opinion, however, plainly encompasses some forms of conduct that could constitute the unauthorized practice of law. The determination whether particular conduct or an undertaking constitutes the unauthorized practice of law will always be fact-dependent, and the Tennessee Supreme Court remains the final arbiter in terms of guidance and regulation. We decline to give a hypothetical answer regarding factual scenarios that are not before us.

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