

**Commission on the Unauthorized Practice of Law
Of the NEBRASKA SUPREME COURT**

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Power of Attorney Does Not Grant Authority to Practice Law
Advisory Opinion 02-2015

The Commission on Unauthorized Practice of Law (“Commission”) received a request for an advisory opinion regarding whether a power of attorney grants the authority to practice law. This advisory opinion is issued pursuant to Neb. Ct. R. §3-1012(D) and will address the following questions:

- 1) Does the Nebraska Uniform Power of Attorney Act enable a person to practice law?
- 2) Does drafting a Power of Attorney or advising someone on a Power of Attorney constitute unauthorized practice of law?

Our answer to question 1 is no. The power to define and regulate the practice of law is under the exclusive jurisdiction of the Nebraska Supreme Court. A power of attorney may not supersede the authority of the Supreme Court, nor is the power to act as an attorney conferred under the Uniform Power of Attorney Act.

Our answer to question 2 is yes, *unless* an exception applies under the Rules on Unauthorized Practice of Law. The power of attorney is a legal document affecting one’s rights and obligations. Nonlawyers are prohibited from engaging in the practice of law which includes drafting legal documents on another’s behalf and providing legal advice to another.

Analysis

- 1) Does the Nebraska Uniform Power of Attorney Act enable a person to practice law?

Pursuant to its inherent power to do so, the Nebraska Supreme Court exercises exclusive jurisdiction over the regulation of the practice of law in Nebraska.¹ Definitions of the practice of law may be found in the Rules on Unauthorized Practice of Law (“UPL Rules”)² and the Admission Requirements for the Practice of Law (“Admission Rules”).³ Additionally the Admission Rules set forth the fees, requirements and processes involved for becoming a licensed Nebraska attorney. The UPL Rules expressly prohibit individuals who are not licensed pursuant to the Admission Rules from practicing law, with some exceptions which allow nonlawyers to engage in activities that would otherwise be prohibited as the practice of law.⁴ There is no such exception that entitles a nonlawyer to practice law under the authority of a Power of Attorney.

¹ State ex rel. Comm. On Unauth. Prac. Of Law v. Tyler, 283 Neb. 736, ___ N.W.2d ___ (2012)

² See Neb. Ct. R. §§3-1001 to 3-1020

³ See Neb. Ct. R. §§3-100 to 3-129

⁴ Neb. Ct. R. §3-1004

The admission to the practice of law entails a rigorous applicant review process carried out by a Supreme Court appointed six member volunteer commission of Nebraska licensed attorneys (“Bar Commission”) and a Director of Admissions who is employed by the Court.⁵ The Bar Commission recommends approved applicants to the Court for admission and licensing. Applicants who are denied admission by the Bar Commission may appeal to the Court.⁶

A *juris doctor* degree from an ABA-approved law school is required of all applicants for admission in Nebraska.⁷ Applicants must undergo a character and fitness screening to “ensure the protection of the public and to safeguard the justice system”.⁸ This review includes a background investigation covering academic background, employment history, prior professional licensing, military service, credit history, civil litigation and criminal history.⁹ Applicants must submit fingerprints, character references and two notarized affidavits of moral character.¹⁰ In addition to all other admission requirements set forth under the Admission Rules, the “essential eligibility requirements” are fundamental character and fitness standards which must be met by all applicants.¹¹ Any applicant may petition the Court for a waiver of any of the requirements “where strict compliance will cause undue hardship to the applicant”.¹²

In addition to the educational, character and fitness requirements outlined above, nonlawyer applicants for admission must attain passing scores as established by the Supreme Court for the Uniform Bar Exam and Multi-state Professional Responsibility Exam.¹³ Attorney applicants must present a certificate of good standing where they are currently admitted and present either a qualifying MPRE score that is less than five years old, or be able to demonstrate a record of law practice for five of the seven years immediately preceding the application for admission.¹⁴

Upon notification from the Court that an applicant has been approved for admission, the applicant is provided an oath card by the Director. The oath or affirmation upon admission is as follows: “You do solemnly swear that you will support the Constitution of the United States, and the Constitution of this state, and that you will faithfully discharge the duties of an attorney and counselor, according to the best of your ability.”¹⁵ Following the execution of the oath, the newly admitted attorney receives an attorney license number from the Attorney Services Division of the Nebraska Supreme Court. Once licensed, amongst other requirements, an attorney must complete ten hours of “continuing legal education” (“CLE”) credits annually for license renewal, including a minimum of two hours of ethics.¹⁶

The practice of law is further regulated by the Nebraska Rules of Professional Conduct¹⁷, The Code of Professional Responsibility¹⁸ and the Disciplinary Rules which provide:

⁵ Neb. Ct. R §§3-103, 3-104

⁶ Neb. Ct. R §§3-123, 3-126

⁷ Neb. Ct. R §§3-113, 3-119

⁸ Neb. Ct. R. §3-116(A)

⁹ Neb. Ct. R. §3-116

¹⁰ Neb. Ct. R §3-114

¹¹ Neb. Ct. R §3-112

¹² Neb. Ct. R §3-121

¹³ Neb. Ct. R. §3-117

¹⁴§3-119, Supra Note 7.

¹⁵ Neb. Ct. R. §3-128

¹⁶ Neb. Ct. R. §3-401.4(A)

¹⁷ Neb. Ct. R. §3-501.0 to 3-508.5

¹⁸ Adopted July 1990; Readopted September 13, 1995; Readopted May 17, 2000.

“The Nebraska Supreme Court has the inherent power and duty to prescribe standards of conduct for attorneys admitted to practice law in Nebraska; to determine what constitutes grounds for the discipline of attorneys: to disbar, suspend, censure, or reprimand for cause attorneys whose failure to comply with the obligations of a member of the bar has been duly established.

Attorneys are a part of the judicial system of the State and are officers of its courts. A license to practice law confers no vested right, but is a conditional privilege, revocable for cause.

The discipline of attorneys is for the protection of the public, the profession, and the administration of justice.”¹⁹

With regard to the authority conferred by a power of attorney, Neb. Rev. Stat. §30-4002 provides: “For purposes of the Nebraska Uniform Power of Attorney Act: (1) Agent means a person granted authority to act for a principal under a power of attorney, whether denominated an agent, attorney in fact, or otherwise.” Additional statutory provisions similarly limit the authority granted by a power of attorney. For example, the Health Care Power of Attorney outlines the narrow responsibilities of “the attorney in fact” to “make health care decisions on the principal’s behalf. . .” and has priority over others to “act for the principal in all health care decisions” where the principal is incapable of making those decisions.²⁰ Similarly the powers granted through a power of attorney relating to rights of survivorship and beneficiary designations are narrowly defined: “An agent or attorney in fact under a power of attorney . . . may do the following on behalf of the principal or with the principal’s property only if the power of attorney expressly grants the agent or attorney in fact the authority. . . create or change rights of survivorship; or (2) create or change a beneficiary designation.”²¹

Statutory interpretations by courts have affirmed the judiciary’s exclusive jurisdiction over the regulation of the practice of law:

“[i]t is the responsibility of the judiciary to determine what constitutes the practice of law, both authorized and unauthorized. Citation omitted. The legislature may assist the Supreme Court by providing penalties for the unauthorized practice of law . . . but the legislature can in no way hinder, interfere, or frustrate the Supreme Court’s inherent power to regulate the practice of law.”²²

Courts have determined that a Power of Attorney does not expand the bearer’s role to that of a licensed attorney:

“Pursuant to Neb. Rev. Stat. 30-4035, a properly executed Power of Attorney allows an agent to do a number of activities on behalf of the principal. Upon the Court’s review of this statute, there is no language specifically allowing an agent to represent the principal. The agent can assert claims and litigation on behalf of the principal; however this section does not allow a non-licensed attorney to represent a third party.”²³

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²⁰ Neb. Rev. St. §30-3417

²¹ Neb. Rev. St. §40-807

²² *Risbeck v. Bond*, 885 S. W.2d 749 (Mo. App. S.D. 1994)

²³ *Cach, LLC v. Denourie*, Douglas Co. Ct., CI 12-7579

The rigorous admission and disciplinary process are intended to provide protection of the public by ensuring that licensed attorneys are qualified to represent the interests of others “by education, training and experience and that they are held accountable for errors, misrepresentations and unethical practices”. Given the statutory provisions outlining the requirements for attorney admission, license renewal, mandatory continuing education, professional conduct and discipline, it is the conclusion of the UPL Commission that only individuals meeting these requirements may practice law.

- 2) Is it unauthorized practice where a nonlawyer drafts a Power of Attorney or advises another regarding a Power of Attorney?

Advising another in connection with a Power of Attorney and or drafting a Power of Attorney constitutes the practice of law as defined by the UPL Rules. However in certain cases, an exception may apply permitting a nonlawyer to advise and or draft a Power of Attorney.

The Rules on Unauthorized Practice of Law provide in part that the practice of law includes:

(A) Giving advice or counsel to another entity or person as to the legal rights of that entity or person or the legal rights of others for compensation, direct or indirect, where a relationship of trust or reliance exists between the party giving such advice or counsel and the party to whom it is given.

(B) Selection, drafting, or completion, for another entity or person, of legal documents which affect the legal rights of the entity or person.

(E) Holding oneself out to another as being entitled to practice law as defined herein.

A Power of Attorney involves the legal rights and responsibilities of both parties to the agreement. An executed power of attorney permits an individual to authorize another person to make decisions and act on behalf of the individual in connection with property, financial matters, health and other matters, depending on the content of the power of attorney.²⁴ For example, the statutory power of attorney form provides that the principal may make a “grant of general authority” permitting an “agent and any successor agent” to act on the principal’s behalf regarding a long list of matters including real property, tangible personal property, stocks and bonds, insurance and estate matters, claims and litigation, personal and family maintenance, and other personal matters. On the same form, the preamble to the specific duties of an agent states: “When you accept the authority granted under this power of attorney, a special legal relationship is created between you and the principal. This relationship imposes upon you legal duties that continue until you resign or the power of attorney is terminated or revoked.”²⁵ Once the principal grants authority to the agent, that authority will continue unless the principal dies (in some cases) or the principal takes action to revoke the document. The grant of authority by the principal and the corresponding duties of the agent create a relationship that affects the legal rights and responsibilities of the parties. The UPL Rules recognize the inherent right of individuals to represent themselves and to perform tasks for themselves such as drafting a power of attorney.²⁶ However performing these tasks on another’s behalf constitutes the practice of law.

²⁴ Rev. Stat. §30-4041 Statutory form power of attorney

²⁵ Id.

²⁶ Statement of Intent, UPL Rules

Pursuant to the UPL Rules, there is a general prohibition against the practice of law by nonlawyers:

“No nonlawyer shall engage in the practice of law in Nebraska or in any manner represent that such nonlawyer is authorized or qualified to practice law in Nebraska except as may be authorized by published opinion or court rule.”²⁷

The UPL Rules also provide exceptions and exclusions which permit nonlawyers to engage in activities that would otherwise amount to upl violations. Amongst these exceptions are provisions which potentially may be used in connection with a nonlawyer providing advice and or drafting / selecting a power of attorney on behalf of another.

The purpose of the UPL rules is to protect the public:

“Nonlawyers may be untrained and inexperienced in the law. They are not officers of the courts, are not accountable for their actions, and are not prevented from using the legal system for their own purposes to harm the system and those who unknowingly rely on them.”²⁸

For the foregoing reasons, it is the unauthorized practice of law where a nonlawyer gives advice regarding a power of attorney and or drafts a power of attorney on another’s behalf *unless* this assistance is authorized by an exception under the Rules on the Unauthorized Practice of Law.

²⁷ Neb. Ct. R. § 3-1002(A)

²⁸ State Ex Rel Comm On Unauth. Prac. Of Law v. Yah, 281 Neb. 383,391,392 (citations omitted)