

COMMITTEE ON THE UNAUTHORIZED PRACTICE OF LAW

Appointed by the Supreme Court of New Jersey

OPINION 47

**Accountants: Drafting
Corporate Documents --
Modifying Opinion 2**

The Committee received an inquiry from a New Jersey lawyer requesting the Committee issue an advisory opinion on nonlawyers drafting corporate documents. Inquirer stated that in the course of his representation of corporate clients he frequently is presented with poorly drafted operating agreements prepared by accountants or other laypeople. In Opinion 2, the Committee found that an accountant who is not a lawyer may not prepare a certificate of incorporation for filing with the State, nor may he or she prepare a corporate charter, by-laws, resolutions, or similar documents. 92 *N.J.L.J.* 313 (May 15, 1969). The Committee hereby reaffirms this prior opinion in part: preparing corporate operating agreements, by-laws, resolutions, and similar legal documents is the practice of law and may only be performed by lawyers.

The Committee, however, hereby also modifies Opinion 2. Balancing the public interest, the Committee finds that nonlawyers may present to customers prepared, fill-in-the-blank certificates of incorporation, certificates of formation, statements of qualification, and certificates of limited partnership (collectively referred to as “certificates”) and type, transcribe, or translate the customers’ information in the form documents. Nonlawyers, however, may not advise or counsel the customer as to the appropriate contents of the certificates. Lastly, the Committee

finds, again balancing the public interest, that accountants who are licensed (*i.e.*, certified public accountants)¹ may advise clients as to the appropriate contents of certificates provided the licensed accountants inform their clients that assistance of counsel in the drafting of such documents is advisable.

The New Jersey Supreme Court has adopted a functional definition of the practice of law. “The practice of law in New Jersey is not limited to litigation. . . . One is engaged in the practice of law whenever legal knowledge, training, skill, and ability are required.” *In re Jackman*, 165 N.J. 580, 586 (2000). While the Court has the power to prohibit a nonlawyer from engaging in conduct that is the practice of law, it exercises this power only when doing so is in the public interest. *In re Opinion No. 26 of the Committee on the Unauthorized Practice of Law*, 139 N.J. 323, 340 (1995). “The question of what constitutes the unauthorized practice of law involves more than an academic analysis of the function of lawyers, more than a determination of what they are uniquely qualified to do. It also involves a determination of whether non-lawyers should be allowed, in the public interest, to engage in activities that may constitute the practice of law.” *Id.* at 327.

In *In re Application of New Jersey Society of CPAs*, 102 N.J. 231, 241-42 (1986), the Court held that preparation and filing of a New Jersey Inheritance Tax Return is the practice of law but a licensed certified public accountant may engage in this activity if the client has been notified that review of the return by an lawyer would be advisable. *Id.* at 241-42. The Court stated that this requirement of notification was “essential for the protection of members of the public who might otherwise be willing to rely entirely on the skill of the accountant to protect their interest.” *Id.* at 242. The Court also stated that “in cases involving an overlap of

¹ Accountants are licensed as certified public accountants by the New Jersey State Board of Accountancy, *N.J.S.A. 45:2B-42 et seq.*

professional disciplines we must try to avoid arbitrary classifications and focus instead on the public's realistic need for protection and regulation.” *Id.* at 237. *See also New Jersey State Bar Ass’n v. New Jersey Ass’n of Realtor Bds.*, 93 N.J. 470, 475-76 (1983) (licensed real estate brokers and salespersons may craft contracts for the sale of residential real estate, a task that is the practice of law, provided certain conditions, including an attorney-review clause in the contract, are met).

The Committee considered whether it is in the public interest to permit nonlawyers such as accountants to draft corporate documents or whether the public needs to be protected. “Relevant factors include the likelihood of any demonstrable harm to the members of the public who employ the services of the alleged unauthorized practitioners, the cost savings accruing to those members of the public, the voluntary nature of the decision to accept legal services from a person other than a lawyer, and the extent of the service recipient’s knowledge of the risks involved in proceeding without a lawyer.” Michels, *New Jersey Attorney Ethics*, Section 39:4, p. 950 (Gann 2011). The Committee also considered whether the public can be protected by something less than a complete prohibition on nonlawyers undertaking these tasks.

The Committee reviewed the submission by inquirer, who noted that his clients have encountered legal difficulties arising from inadequate operating agreements drafted by nonlawyers. The Committee informally sought information from licensed accountants about their practices and reviewed published material from the accountant community. The consensus was that most responsible accountants understand that a lawyer’s participation in certain tasks relating to the formation of a corporation is required, not merely because it is the practice of law but because accountants may not have the legal expertise to recognize potential problems and protect the client against such problems. The Committee also learned that some clients require only minimal service for simple or routine matters, such as the formation of numerous bare-

bones corporations to hold separate parcels of real estate, and do not seek or want sophisticated legal advice.

The Committee decided that the preparation of corporate operating agreements, by-laws, resolutions, and similar legal documents by nonlawyers is likely to harm members of the public. These documents set forth the internal procedures and rules for the corporation. Drafting such documents requires discretion and sound legal judgment to anticipate potential problems and protect the client. The legal expertise of a lawyer is required.

The Committee, however, differentiates between drafting corporate operating agreements, by-laws, resolutions, and similar legal documents and drafting routine certificates. These certificates follow a prepared form that is readily available to the public. The New Jersey Department of the Treasury, Division of Revenue, offers an online fill-in-the-blank form for the formation of various corporations, including professional corporations, limited liability companies, and limited liability partnerships. Many accountants use these prepared forms, and the Committee is aware that various Internet business service providers also offer fill-in-the-blank forms of certificates for a minimal charge.

While drafting a certificate of incorporation was held by this Committee in Opinion 2 to be the practice of law, the Committee notes that use of the fill-in-the-blank prepared forms achieves a cost savings to customers who presumably are aware of the risks involved in having this service performed by a person who is not a lawyer. The Committee finds that the public does not need to be protected by a rule that prohibits nonlawyers from offering customers fill-in-the-blank prepared certificates.

The Committee must caution the accountants and business service providers that offer customers prepared forms of certificates: nonlawyers may not “counsel, advise, analyze, or otherwise help the purchaser complete the forms” Opinion 40, 176 *N.J.L.J.* 1195, 13 *N.J.L.*

1311 (June 21, 2004). “[A]lthough the sale of “Do-it-Yourself” kits is permissible, and [] a non-lawyer seller may assist the purchaser by typing, transcribing, or translating, the rendering of any other assistance with the preparation, review, analysis, or completion of materials included in these kits in person, in writing, electronically, or otherwise constitutes the unauthorized practice of law and is therefore prohibited.” Accordingly, nonlawyers may provide customers with fill-in-the-blank prepared forms for certificates and may type, transcribe, or translate the information provided by the customers onto the form, but they may not counsel, advise, analyze, or otherwise help the customer fill out the form.

Balancing the public interest, the Committee finds that licensed accountants (*i.e.*, certified public accountants) may provide assistance to clients in the drafting of certificates. Licensed accountants are trusted advisors to businesses and are held to high standards by the licensing Board. The Committee cautions that determining the proper contents of these certificates and the consequences of including or omitting certain provisions ordinarily require the discretion and judgment of a lawyer. Determining the proper contents of the certificate is a task best handled by a licensed accountant and a lawyer working together. If a lawyer is not involved in the drafting of the certificate, the licensed accountant must inform the client that review by a lawyer is advisable.

In sum, corporate operating agreements, by-laws, resolutions, and similar legal documents require legal expertise and may only be drafted by a lawyer. Nonlawyers, however, may present to customers prepared, fill-in-the-blank certificates of incorporation, certificates of formation, statements of qualification, and certificates of limited partnership and type, transcribe, or translate the customers’ information in the form documents. Nonlawyers may not advise or counsel the customer as to the appropriate contents of the forms, but certified public accountants

may advise clients as to the appropriate contents of certificates provided they inform their clients that assistance of counsel in the drafting of such documents is advisable.