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OPINION
of
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Opinion No. 98-02

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QUESTIONS

1. Does appearance by corporate entities, acequias or organizations at State Engineer administrative hearings through an authorized official, employee or member of the entity constitute unauthorized practice of law?

2. Should such appearance be limited in any way?

CONCLUSIONS

1. No. Corporate entities, acequias, or other organizations may represent themselves at State Engineer administrative hearings through an authorized official, employee or member of the entity. Self-representation does not constitute practice of law.

2. No. The new State Engineer Rule 19 requires such parties desiring to represent themselves to file a written authorization and certification regarding the proposed self-representation. No further limitations need be included in the rules.

ANALYSIS:

1. Whether the proposed rules would allow unauthorized practice of law

A. Self-Representation

In reviewing this issue, a key point is that self-representation, or pro se appearance, because it does not

involve the representation of others, is not the practice of law. United States v. Martinez, 101 N.M. 423, 684 P.2d 509 (1984); see State ex rel. Norvell v. Credit Bureau, 85 N.M. 521, 526, 524 P.2d 40, 45 (1973) (Norvell). The question you raise addresses what constitutes self-representation more directly than it does what particular activities constitute the practice of law. If it is found that appearance of an authorized official, employee or member of an organization on behalf of the organization constitutes that organization representing itself, then there can be no unauthorized practice of law. Only if it is determined that an organization cannot represent itself in State Engineer hearings need we reach the issue of whether the activities involved in participating in State Engineer hearings constitute the practice of law.

Case law on this precise issue is scant. In many jurisdictions, including federal courts, the rule is that a corporation cannot represent itself in court. DeVilliers v. Atlas Corp., 360 F.2d 292, 294 (10th Cir. 1966). The New Mexico Supreme Court, however, has not so ruled. When the State asked the Court to make such a ruling in Norvell, the Court's response was

> Notwithstanding the contention of the state that the court erred in not concluding that corporations cannot appear pro se, we want to make it clear that the question of pro se appearances, whether by an individual, partnership, corporation, association or group of any kind, and whether on an isolated or recurring basis, is not before the court for decision. By nothing which we say, nor which the trial court said, is there any intention of holding pro se appearances to constitute unlawful practice of law.

Norvell, 85 N.M. at 529.

Courts in other states have found that organizations may represent themselves in administrative hearings. For example, a Florida appellate court, analyzing relevant statutes, found that although a corporation cannot represent itself in court proceedings, "self-representation by corporations is permissible in administrative proceedings." Magnolias Nursing and Convalescent Center v. Dep't of Health and Rehabilitative Services, 428 So. 2d 256, 257 (Ct. App. Fla. 1982). Similarly, in Idaho State Bar Assoc. v. Idaho Pub. Util. Comm'n., 637 P. 2d 1168 (Idaho 1981), the Idaho supreme court upheld the part of a Public Utilities Commission rule permitting corporations and nonprofits to be represented by an officer and partnerships to be represented by a partner, while

striking down the part of the Commission rule that permitted corporations to be represented by nonattorneys unconnected to the corporation. See Division of Alcoholic Beverage Control v. Bruce Zane, Inc., 239 A. 2d 28 (Ct. App. N.J. 1968) (where agency permitted corporation's president and principal shareholder to represent it at hearing on license suspension, state rule requiring attorney representation of corporations in court did not apply to administrative agencies); In re Unauthorized Practice of Law Rules Proposed by the South Carolina Bar, 422 S.E. 2d 123, 124 (S.C. 1992) (state agencies may by regulation authorize nonattorneys to appear before the agency).

Other administrative agencies in New Mexico have adopted rules permitting self-representation of organizations under certain circumstances. For example, the Public Utilities Commission permits certain entities such as utilities and designated types of associations to be represented by an authorized officer or employee in all proceedings. NMPUC Rule 110.12. All other entities may appear before the PUC by an officer or employee only at informal or rulemaking proceedings. Id. The State Corporation Commission follows the narrower approach, allowing all entities to be represented by an officer or employee at informal or rulemaking proceedings. Rules of Procedure of NMSCC, Rule 10. The state Administrative Procedures Act expressly permits nonattorney representation in administrative adjudicatory proceedings. NMSA 1978, Section 12-8-11(F) (1988 Repl. Pamp.). In addition, state magistrate court rules permit corporations to appear through officers, directors, or general managers and partnerships to appear through general partners under certain circumstances. SCRA 1986, Rule 2-107 (1994 Repl. Pamp.).

One recent case, Chisholm v. Rueckhaus and the N.M. Medical Review Comm'n, 124 N.M. 255, 948 P. 2d 707 (Ct. App. 1997), considered what constituted pro se representation in the context of nonattorney appearance before an administrative entity. Chisholm concerned a statutory requirement that a plaintiff with a medical malpractice claim first bring that claim to the Medical Review Commission. Plaintiff was the father of a minor child who was alleged to have been injured when born prematurely. Plaintiff filed the claim, stating that he was acting pro se on behalf of his child. The court of appeals held that a parent's representation of a child does not constitute pro se action. Rather, the father was acting as the child's attorney, in violation of a statute which expressly required that an attorney

file the claim with the Commission. NMSA 1978, Section 41-5-14(D), 41-5-19(A) (1996 Repl. Pamp.). The court's finding that a parent's representation of a minor child does not constitute self-representation has no bearing on the OSE's proposal to allow self-representation by organizational parties. The parent in Chisholm was acting pursuant to a statute allowing parents or other representatives to step into the shoes of a minor child or one otherwise incompetent to bring suit in his or her own name; it is not surprising that the court would protect the child's interests by requiring adherence to the statutory attorney representation requirement.

We should also address a 1958 New Mexico Attorney General Opinion (No. 58-200) which states that one appearing as an advocate on behalf of a corporation in hearings before administrative agencies which consider legal questions, apply legal principles, and weigh facts under legal rules, must be an attorney. In our view, that Opinion has been superseded by intervening legal developments. First, as noted above, the New Mexico Supreme Court in the 1973 Norvell case expressly declined to conclude even that corporations cannot represent themselves in court, let alone before administrative agencies. Second, in 1969 the New Mexico legislature adopted the Administrative Procedures Act which expressly permits parties in administrative hearings to be represented by persons other than attorneys. NMSA 1978, Section 12-8-11(F) (1988 Rep. Pamp.). Third, since that time, the judicial trend has swung decidedly towards a view more permissive of nonattorney representation, both before administrative agencies and in other contexts. See, e.g., ABA Commission on Nonlawyer Practice, "Nonlawyer Activity in Law-Related Situations" (August 1995) (noting the judicial trend since the 1960's against strict technical application of unauthorized practice of law prohibitions and recommending that nonlawyer representation before state administrative agencies be permitted); see also cases cited in this letter.

In sum, in our view, the concept of "self-representation" can and should be interpreted relatively broadly in the context of administrative proceedings so as to encompass representation of organizations by persons affiliated with those organizations.

B. Administrative Agencies Have Broad Authority To Establish Rules of Practice Before The Agency

Public policy supports allowing administrative agencies to determine the circumstances of the agency administrative practice in which attorney representation is and is not required. Not only have courts allowed agencies to permit organizations to represent themselves (see cases noted above), but courts have upheld nonattorney representation before agencies even where there was no "self-representation." See State Bar of Michigan v. Galloway, 335 N.W. 2d 475 (Ct. App. Mich. 1983) (provision in employment security act permitting an employer to be represented in administrative proceedings by nonattorneys controls over general legislative prohibition against practice of law by nonattorneys); Board of Education v. N.Y. State Public Employment Relations Board, 649 N.Y.S.2d 523 (App. Div. 1996) (statute requiring attorney representation does not apply to administrative hearings before PERB); Division of Alcoholic Beverage Control v. Bruce Zane, Inc., supra; Blair v. Service Bureau, Inc., 87 Pittsb. Leg. J. 155 (Penn. 1939) (secretary of corporation could appear before ICC because ICC can regulate its own bar); Liberty Mut. Ins. Co. v. Jones, 130 S.W. 2d 945 (Mo. 1939) (insurance company employees can represent companies in informal conferences before workers compensation commission because this does not constitute advocacy); In re Unauthorized Practice of Law Rules Proposed by the South Carolina Bar, 422 S.E. 2d 123, 124 (S. C. 1992). But see Idaho State Bar Assoc. v. Idaho Pub. Util. Comm'n, supra (court struck down part of PUC rule allowing corporations to be represented by nonattorneys unconnected to the corporation).

By the same token, courts generally have not invalidated agency rules that require representation by attorneys. See, e.g., Kyle v. Beco Corp., 707 P. 2d 378 (Idaho 1985) (commission's policy of requiring that corporations be represented by attorneys, later promulgated as rule, was valid and reasonable exercise of commission's discretion); Dobbs Houses, Inc. v. Brooks, 641 S. W. 2d 441 (Mo. 1982) (court upholds agency rule not allowing corporation's employee to represent the corporation); Public Service Comm'n v. Hahn Transportation, Inc., 253 A. 2d 845 (Ct. App. Md. 1969) (court upheld PSC rule requiring attorney representation, notwithstanding longstanding practice allowing nonattorneys). In other words, courts are extremely reluctant to set aside rules adopted by a

state agency concerning attorney representation before that agency.

Relevant New Mexico statutes also support the OSE rule. The statutes do not require attorney representation before the OSE. Rather, they state that "a party may have and be represented by counsel and may conduct cross-examinations required for a full and true disclosure of the facts." NMSA 1978, Section 72-2-17(B)(3) (1997 Repl. Pamp.) (emphasis added).[1] Thus, the statute recognizes that a party might represent itself. There is no requirement that State Engineer hearing officers be attorneys, but only that they "shall be knowledgeable in the water laws of this state, water engineering and administrative hearing procedures." NMSA 1978, Section 72-2-12 (1997 Repl. Pamp.). If a decision by the OSE is appealed to district court, there is a de novo hearing, rather than a hearing based on the record before the State Engineer Office. NMSA 1978, Section 72-7-1 (1997 Rep. Pamp.). Rules of evidence are generally, but not strictly, followed; rules of civil procedure are generally applicable in prehearing proceedings. NMSA 1978, Sections 72-2-13, 72-2-17(B) (1997 Repl. Pamp.). Thus, state statutes support OSE discretion to allow organizations to represent themselves before the agency.

The public interest also weighs strongly in favor of allowing organizational parties to proceed without counsel before the OSE. An attorney representation requirement could have the effect of excluding from a proceeding entities whose property rights were at stake simply because they lacked the funds to hire an attorney. As long as the State Engineer rules ensure that an organization has fully authorized a particular officer or employee to represent it in the proceeding (which they do), the public interest is served by allowing such appearances.

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[1] The statute's express recognition that a party might not be represented by counsel contrasts sharply with the statute at issue in Chisholm, which provided that "An attorney shall submit a case for the consideration of a panel, prior to filing a complaint in any district court . . .", and further that "the attorney submitting the case for review shall be present and shall make a brief introduction of his case." NMSA 1978, Section 41-5-14(D) (1996 Repl. Pamp.).

2. Whether the proposed rules need to limit self-representation by organizations

The OSE's proposed Rule 19 allows organizations to appear pro se on the condition that they file a written authorization that meets specified criteria. We believe that the requirement and authorization criteria proposed are appropriate and would pass legal muster. The rules do not allow nonattorney representation other than pro se appearances, and the authorization requirement ensures protection of the organization and its stakeholders from inappropriate appearances that would not serve the organization's best interests. The rule also serves the public interest by guarding against exclusion of affected entities that lack the funds to hire an attorney. We have set forth above all of the legal authority that we believe supports the rule as proposed by the OSE. We do not believe that any changes in the rule are required.

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