



**BNA's**

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# Legal Ethics

## Question of the Week:

### Aiding and Abetting the Unauthorized Practice of Law

**R**ule 5.5(a) of the Model Rules of Professional Conduct states that “[a] lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.” Bill Smith is the Vice President-Human Resources of Wagner Corporation. Smith is not a lawyer, but he has many years of experience with labor and employment law issues. His department handles all of the work at the corporation involving such issues, with the exception of controversies that go to trial, for which outside counsel is retained. The HR Department has a budget for outside legal fees. Smith, or someone in his department, will occasionally ask outside counsel, or a member of the corporate legal department, for some reference material or other assistance when trying to resolve a particular item. Does any of this activity constitute a violation of the Model Rules of Professional Conduct?

#### Answer

**Cynthia Fountaine:**<sup>1</sup> As part of the power to regulate the practice of law, courts and state legislatures have the power to regulate the unauthorized practice of law. Most states have statutes or common law rules prohibiting the practice of law by persons who are not licensed attorneys, and the Model Rules of Professional Conduct prohibit a lawyer from assisting a nonlawyer in the unauthorized practice of law.

Therefore, this hypothetical raises two issues. The first is whether Bill Smith’s handling of labor and employment law issues on behalf of Wagner Corporation constitutes the

unauthorized practice of law, and the second is whether the outside counsel or a member of Wagner’s corporate legal department violates Rule 5.5(a) by providing reference material or other assistance to Bill as he attempts to resolve the labor and employment law issues. The answer to both of these questions hinges on how state law defines the “practice of law.”



**Cynthia Fountaine**

The ABA Model Rules do not define what constitutes “the practice of law.” Instead, the definition is left to state bar associations, courts, and legislatures. Most commonly, the “practice of law” is defined with reference to the exercise of legal judgment, and often the inquiry is focused on activities that relate to court proceedings. Some states provide a list of activities that are deemed to be the “practice of law.” Commonly included on such lists are activities such as giving legal advice, representing others in legal matters, and drafting legal documents. In addition, sometimes the “practice of law” is defined as being what a lawyer commonly does.

Bill Smith’s activities should be considered in light of these tests.

Based on the broad language of the hypothetical—“[h]is department handles all of the work at the corporation involving [labor and employment law] issues, with the exception of controversies that go to trial”—there is a good chance Bill’s department is engaged in the unauthorized practice of law, at least in some instances. Presumably “all the work . . . involving [labor and employment law] issues” includes work that requires the exercise of legal judgment, work that is commonly done by lawyers, and work that involves giving legal advice to the corporation. If so, depending on state law, Bill’s activities might be considered the “practice of law” and Bill might be subject to prosecution or other sanction for engaging in the unauthorized practice of law.

The remaining question is whether the outside counsel or a member of Wagner’s corporate legal department has violated Model Rule 5.5(a) by providing information to Bill. Comment 3 to Model Rule 5.5 states: “A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies.”

In determining whether the lawyer in this hypothetical violated Rule 5.5(a), a disciplinary body is likely to consider whether the lawyer knew or should have known that Bill was going to use the information to engage in the unauthorized practice of law. If Bill told the lawyer what the information sought was going to be used for, or if the requests for information included specific factual scenarios that should have indicated to the lawyer that the information was being sought to resolve a particular legal issue, the resolution of which constituted the “practice of law,” then the lawyer might be found to have violated Rule 5.5(a).

<sup>1</sup> Cynthia Fountaine is a Professor of Law at Texas Wesleyan University School of Law. Her areas of expertise include civil procedure, federal courts, civil rights, the jury process, complex litigation, and legal ethics. She is currently on leave working for the ABA Rule of Law Initiative in Amman, Jordan.