

UPL ADVISORY OPINION

UPL 06-01

(April 2006)

**Preparation and Submission of
No-Action Letter**

This is an Advisory Opinion regarding Rule 31 of the Rules of Supreme Court of Arizona regarding whether an individual is engaging in the unauthorized practice of law by preparing no-action letters or submitting requests for no-action letters, which involve the Securities Division of the Corporation Commission, if the individual is not an active member of the State Bar of Arizona.¹

Issues:

1. Is the preparation and submission of a no-action letter request pursuant to A.R.S. § 44-1826 the practice of law? Yes, a no-action letter request constitutes the practice of law.
2. Does the preparation and submission of a no-action letter request violate Rule 31 of the Supreme Court of Arizona if done by an individual who is not an active member of the State Bar of Arizona? Yes, this may violate Rule 31 of the Supreme Court of Arizona unless submitted by the individual for whom the action pertains or by an individual specified in Rule 31(d) including a full-time officer or employee of a legal entity or a partner, member or manager of a limited liability company.
3. If the Securities Division accepts and responds to a no-action letter request prepared and filed by an individual who is not an active member of the State Bar of Arizona, does any attorney of the Securities Division violate any law or ethical duty by assisting in the unauthorized practice of law? Yes, an attorney of the Securities Division who knowingly accepts and responds to a no-action letter request prepared and filed by an individual who is not pro per, an active member of the State Bar of Arizona, or an individual defined in Rule 31(d) (13) violates ER 5.5, Unauthorized Practice of Law, and ER 8.4, Misconduct by assisting in the unauthorized practice of law.

Facts:

As part of their ongoing duties, the Securities Division of the Corporation Commission receives requests for permission to engage in certain specified activities related to securities products issues. The director formally responds to these written requests by providing interpretative no-action letters. These letters advise the requestor that the division agrees not to institute enforcement proceedings against specified persons for taking part in the activities that are specified in the request.

¹ Opinions of the Committee are advisory in nature only and are not binding in any disciplinary or other legal proceedings. © State Bar of Arizona 2006

No-action requests to the Division must provide a brief summary of the statutory and regulatory provisions that relate to the request. The no-action request must detail (i) the relevant facts; (ii) a discussion and analysis of the law relating to the facts presented; (iii) a statement of the legal authority for granting the request; (iv) a statement of the reasons a no-action letter is appropriate; (v) any adverse or beneficial effect on the public interest resulting from granting the request; and (vi) specific certifications.

A no-action letter response is limited to the specific security, case, matter, facts, person or transaction described in the request.

Relevant Authority:

Arizona Supreme Court Rule 31:

Rule 31. Regulation of the Practice of Law

(a) Supreme Court Jurisdiction Over the Practice of Law

1. *Jurisdiction.* Any person or entity engaged in the practice of law or unauthorized practice of law in this state, as defined by these rules, is subject to this court's jurisdiction.

2. *Definitions.*

A. "Practice of law" means providing legal advice or services to or for another by:

- (1) preparing any document in any medium intended to affect or secure legal rights for a specific person or entity;
- (2) preparing or expressing legal opinions;
- (3) representing another in a judicial, quasi-judicial, or administrative proceeding, or other formal dispute resolution process such as arbitration and mediation;
- (4) preparing any document through any medium for filing in any court, administrative agency or tribunal for a specific person or entity; or
- (5) negotiating legal rights or responsibilities for a specific person or entity.

B. "Unauthorized practice of law" includes but is not limited to:

- (1) engaging in the practice of law by persons or entities not authorized to practice pursuant to paragraphs (b) or (c) or specially admitted to practice pursuant to Rule 33(d); or

- (2) using the designations “lawyer,” “attorney at law,” “counselor at law,” “law,” “law office,” “J.D.,” “Esq.,” or other equivalent words by any person or entity who is not authorized to practice law in this state pursuant to paragraphs (b) or (c) or specially admitted to practice pursuant to Rule 33(d), the use of which is reasonably likely to induce others to believe that the person or entity is authorized to engage in the practice of law in this state.

C. “Legal assistant/paralegal” means a person qualified by education and training who performs substantive legal work requiring a sufficient knowledge of and expertise in legal concepts and procedures, who is supervised by an active member of the State Bar of Arizona, and for whom an active member of the state bar is responsible, unless otherwise authorized by supreme court rule.

(b) Authority to Practice. Except as hereinafter provided in section (d), no person shall practice law in this state or represent in any way that he or she may practice law in this state unless the person is an active member of the state bar, and no members shall practice law in this state or represent in any way that he or she may practice law in this state, while suspended, disbarred, or on disability inactive status.

(d) Exemptions. Notwithstanding the provisions of section (b):

19. Nothing in these rules shall prohibit the preparation of documents incidental to a regular course of business when the documents are for the use of the business and not made available to third parties.

23. Nothing in these rules shall prohibit a certified legal document preparer from performing services in compliance with Arizona Code of Judicial Administration, Part 7, Chapter 2, Section 7-208.

Arizona Code of Judicial Administration § 7-208: Legal Document Preparers.

F. Role and Responsibilities of Certificate Holders.

1. **Authorized Services.** A certified legal document preparer may:
 - a. Prepare or provide legal documents, without the supervision of an attorney, for an entity or a member of the public in any legal matter when that entity or person is not represented by an attorney;
 - b. Provide general legal information, but may not provide any kind of specific advice, opinion or recommendation to a consumer about possible legal rights, remedies, defenses, options or strategies;

- c. Provide general factual information pertaining to legal rights, procedures, or options available to a person in a legal matter when that person is not represented by an attorney;
- d. Make legal forms and documents available to a person who is not represented by an attorney; and
- e. File and arrange for service of legal forms and documents for a person in a legal matter when that person is not represented by an attorney.

A.R.S. § 44-1826. No-action requests

A. The director may formally respond to written requests from interested persons for interpretative no-action letters that confirm that the division will not institute enforcement proceedings against certain specified persons for engaging in certain specified activities.

B. A person shall submit a no-action request in writing and a non-refundable filing fee pursuant to section 44-1861, subsection M. The request shall contain the following:

1. A brief summary of the statutory and regulatory provisions to which the request pertains.
2. A detailed statement of the relevant facts.
3. A detailed discussion and analysis of the law as it relates to the facts.
4. A statement of the legal authority for granting the request.
5. A statement of the reasons a no-action letter is appropriate.
6. A statement explaining any adverse or beneficial effect on the public interest resulting from the granting of the request.
7. A certification that, within the knowledge of the person on whose behalf the request is made, the transaction described is not directly or indirectly the subject of any pending or final judicial, SRO or administrative proceeding.
8. A certification that the transaction described has not been commenced or, if the transaction has commenced, a statement concerning the status.
9. An acknowledgment by the person on whose behalf the request is made that the request, together with any documents or information submitted and any response from the division, is public information that may be released for publication, except as otherwise provided by law.

C. Unless otherwise specified in writing by the division, a no-action letter is limited to the specific security, case, matter, facts, person or transaction described in the request and has no preferential value in any other context.

Discussion:

- 1. Is the preparation and submission of a no-action letter request pursuant to A.R.S. § 44-1826 the practice of law? Yes, a no-action letter request constitutes the practice of law.**
- 2. Does the preparation and submission of a no-action letter request violate Rule 31 of the Rules of the Supreme Court of Arizona if done by an individual who is not an active member of the State Bar of Arizona? Yes, this may violate Rule 31 of the Rules of the Supreme Court of Arizona unless submitted by the individual for whom the action pertains or by an individual specified in Rule 31(d) including a full-time officer or employee of a legal entity or a partner, member or manager of a limited liability company.**
- 3. If the Securities Division accepts and responds to a no-action letter request prepared and filed by an individual who is not an active member of the State Bar of Arizona, does any attorney of the Securities Division violate any law or ethical duty by assisting in the unauthorized practice of law? Yes, an attorney of the Securities Division who knowingly accepts and responds to a no-action letter request prepared and filed by an individual who is not pro per, an active member of the State Bar of Arizona, or an individual defined in Rule 31(d) (13) violates ER 5.5, Unauthorized Practice of Law, and ER 8.4, Misconduct by assisting in the unauthorized practice of law.**

While no-action letter requests can be submitted on behalf of persons to confirm that they are not engaging in activities that bring them within certain definitions in the securities area, they are typically submitted on behalf of individuals regarding the qualification for an exemption from registration requirements or in connection with qualification for an exemption from licensure requirements.

Rule 31 defines the "practice of law" as providing legal advice or services to or for another by:

- (1) preparing any document in any medium intended to affect or secure legal rights for a specific person or entity;
- (2) preparing or expressing legal opinions;
- (3) representing another in a judicial, quasi-judicial, or administrative proceeding, or other formal dispute resolution process such as arbitration and mediation;
- (4) preparing any document through any medium for filing in any court, administrative agency or tribunal for a specific person or entity; or
- (5) negotiating legal rights or responsibilities for a specific person or entity.

A no-action letter request by its very nature necessitates a distinction of statutory and regulatory provisions to which the request pertains, an analysis of the law as it pertains to the specific facts involved, and an assessment regarding the legal authority for granting the request.

Further, the request requires a summary of the statutory and regulatory provisions related to the specific request.

As a no-action letter request involves the expression of legal opinions, preparation of a document intended to affect or secure legal rights for a specific person or entity and preparation of a document for filing in an administrative agency for a specific person or entity, the request also involves the practice of law as defined in Rule 31. Further, Rule 31 requires that "[e]xcept as hereinafter provided in section (d), no person shall practice law in this state.. unless the person is an active member of the state bar., ." For these reasons, the preparation and submission of a no-action letter request does constitute the practice of law.

Rule 31(d) delineates exceptions to the provisions of Rule 31(b) with regard to administrative matters before specific agencies including the Arizona Corporation Commission. Subsection (13) provides that in any administrative matter a taxpayer may be represented by:

- (1) a certified public accountant,
- (2) a federally authorized tax practitioner, as that term is defined in A.R.S. § 42-2069(0) (1),
or
- (3) in matter in which the dispute, including tax, interest and penalties, is less than \$5,000 (five thousand dollars), any duly appointed representative.

The language, including reference to a taxpayer (defined in AR.S. § 42-2001 as being "with respect to a joint return, means either party."), indicates that this exception is specific to administrative matters before the Arizona Department of Revenue and does not include no-action letters submitted to the Arizona Corporation Commission.

The remaining language of the exception provided in Rule 31(d) states:

A legal entity, including a governmental entity, may be represented by a full-time officer, partner, member or manager of a limited liability company, or employee, provided that: the legal entity has specifically authorized such person to represent it in the particular matter; such representation is not the person's primary duty to the legal entity, but secondary or incidental to other duties relating to the management or operation of the legal entity; and the person is not receiving separate or additional compensation (other than reimbursement for costs) for such representation.

This exception specifically included the Arizona Corporation Commission with the intent of allowing individuals and companies to be represented by any of the parties listed above, at administrative hearings. While administrative hearings are governed by a hearing officer and not the Arizona Corporation Commissioners, they are for all intent and purposes "before the Arizona Corporation Commission."

The same exception would apply to no-action letters. While the decision regarding a no-action request is made by the Securities Division of the Corporation Commission, it is on behalf of the Arizona Corporation Commission and therefore "before the Arizona Corporation Commission" for purposes of this Rule.

Therefore, if no-action letters are submitted by the individual for whom the action pertains, by an attorney licensed in Arizona, or by an individual specified in Rule 31(d) including a full-time officer or employee of a legal entity or a partner, member or manager of a limited liability company, then the preparation and submission of a no-action letter does not violate Rule 31 of the Rules of the Supreme Court of Arizona.