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Court Loosens Strictures on Laymen's Use of Simple Corporate Legal Forms

Relaxing a longstanding prohibition, a Supreme Court committee says nonlawyers' limited use of simple incorporation documents does not constitute the unauthorized practice of law.

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Relaxing a longstanding prohibition, a Supreme Court committee says nonlawyers' limited use of simple incorporation documents does not constitute the unauthorized practice of law.

Laymen can present customers with prepared, fill-in-the-blank certificates of incorporation, certificates of formation, statements of qualification and certificates of limited partnership and may type, transcribe or translate the customers' information.

They cannot, however, advise customers about what information is needed to complete the certificates, though certified public accountants can provide advice about the "appropriate contents" if they also tell their clients it would be a good idea to have an attorney assist with the drafting process.

The relaxed strictures, laid out in Committee on the Unauthorized Practice of Law *Opinion 47*, released Tuesday, do not extend to more complicated business papers, including corporate charters, bylaws, resolutions and charters.

The committee said its decision reaffirmed but modified *Opinion 2*, dated May 15, 1969, which declared that the preparation or filing of a certificate of incorporation by an accountant constituted the unauthorized practice of law.

"The fact that the certificate of incorporation follows a prepared form available to the public generally will not mitigate the offense of unlawful practice, since the discretion and judgment exercised in determining the proper contents and the consequences thereof fall within the province of an attorney," the committee stated in 1969.

But times have changed, the committee said Tuesday, noting that many accountants use fill-in-the-blank certificate forms, available on the Treasury Department website or from Internet companies, to set up various business entities, including professional corporations, limited liability companies and limited liability partnerships.

It said its loosening of the *Opinion 2* strictures resulted from balancing the need to protect the public against the public interest in allowing accountants and other nonlawyers to draft company documents.

"[S]ome 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 opinion said.

The committee also cited an intervening Supreme Court case, *In re Application of New Jersey Society of CPAs*, 102 N.J. 231 (1986), which held the preparation and filing of a state inheritance tax return is the practice of law but a licensed certified public accountant may do the job if the client is told it would be advisable to have an attorney review the return.

The committee quoted language from the case that when professional disciplines overlap, "we must try to avoid arbitrary classifications and focus instead on the public's realistic need for protection and regulation."

In permitting CPAs a greater role than other nonlawyers, the committee described them as "trusted advisors to business" who are held to high standards by the licensing board.

In addition, the committee said, "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's reason for keeping corporate operating agreements, bylaws, resolutions and similar legal documents off limits to nonlawyers is that they "set forth the internal procedures and rules for the corporation" and drafting them "requires discretion and sound legal judgment to anticipate potential problems and protect the client."

Thus, "the legal expertise of a lawyer is required."

Gianfranco Pietrafesa, chairman of the State Bar Association's Business Law Section and practices in the corporate department of Archer & Greiner's Hackensack office, says the opinion "reflects today's reality" and he is fine with it.

But Pietrafesa also says "people get what they pay for — a form that may or may not be appropriate for their particular situation. They do not get legal advice from a corporate lawyer on additional or alternative provisions that can better protect them."

The committee said it revisited *Opinion 2* at the request of a lawyer who complained that in representing corporate clients, he is frequently presented with poorly drafted operating agreements prepared by accountants and other lay people.

Pietrafesa says he, too, has encountered problems caused by nonlawyers forming business entities, the use of poorly drafted form documents and the lack of documents besides certificates that a lawyer would have advised them to have, such as operating agreements for limited liability companies and stockholders' agreements for corporations.

"Clients end up spending more money to correct the problems caused by poorly drafted documents or getting involved in disputes or litigation as a result of having poorly drafted or no documents," he says.

Dayton solo E. Martin Davidoff, who also has a CPA practice, says it is in the public interest for those filling out corporate forms to get some guidance from their accountants rather than none at all and "the reality is that CPAs have been doing it for years."

As an attorney, he prefers not to use the generic forms available online, which lack language he includes on such topics as limiting ability and indemnifying litigation costs.

The idea that CPAs will advise their clients to consult a lawyer is unrealistic in his view.