

THE PHILADELPHIA BAR ASSOCIATION
PROFESSIONAL GUIDANCE COMMITTEE
Opinion 2012-1
(August 2012)

The inquirer is a lawyer who works for a non-profit legal aid organization. Presently that organization's operation model utilizes volunteer attorneys at several community-based sites to provide *pro bono* consultations to low-income clients and if necessary take cases on a pro bono basis. In addition some of the clients after consultation are referred to other public interest organizations or to private lawyers in the legal aid's referral network who have agreed to take the cases on a low fee basis. Presently, the organization is transitioning to a model that includes these referral activities, but also involves the provision of in-house legal services through staff attorneys to take on representation in cases that would otherwise be referred out of the organization.

As part of this transition, the non-profit would like to create a "Community Advocates" program. The program would recruit volunteers from the community to act as Advocates in the program. They would not provide legal services (including rendering advice) in any form, but would be made aware of the most prevalent legal issues dealt with in the community and trained in how to refer members of their community to a lawyer who might assist them, either at the inquirer's organization, or at other local public interest organizations using the Philadelphia Bar Association's public interest directory if there is a more specialized need. There would be ongoing training and supervision of the Advocates provided by the inquirer's staff, and the Advocates would be asked for advice by the non-profit on how to improve current programs and services. The hope is that trained Advocates would be able to improve the likelihood that members of the community will seek out legal aid and receive the assistance they need, either from the inquirer's organization or others in the city. Advocates would work on a voluntary basis without compensation. The reason for their using in-person solicitation would be to increase access to legal services, and not for the organization's pecuniary gain, as clients are not charged for the organization's services.

The Advocates would interact in two ways with those who may need legal help. First, flyers about the organization would be distributed door to door and would suggest to readers that they call a number which would be answered by the Advocates. In addition, the trained Advocates would make a direct outreach to somebody who might need legal services, in other words, an in person solicitation.

The inquirer recognizes that this program, if not properly constructed, could run afoul of Pennsylvania Rules of Professional Conduct (Rules) 7.2 and 7.3 of the Pennsylvania Rules of Professional Conduct. In addition concerns under Rules 5.3 and 7.1 are also raised by the inquiry.

Rule 5.3, Responsibilities Regarding Nonlawyer Assistants, provides that,

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer.

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and in either case knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment:

(1) Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

(2) Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment (1) to Rule

5.1. Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

Rule 7.1, **Communications Concerning a Lawyer's Service**, provides that,

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Comment:

(1) This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

(2) Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

Rule 7.2, **Advertising**, provides in part that,

...

(b) A copy or recording of an advertisement or written communication shall be kept for two years after its last dissemination along with a record of when and where it was used. This record shall include the name of at least one lawyer responsible for its content.

...

(i) All advertisements and written communications shall disclose the geographic location, by city or town, of the office in which the lawyer or lawyers who will actually perform the services advertised principally practice law. If the office location is outside the city or town, the county in which the office is located must be disclosed.

...

The Comment to paragraph (i) states that,

Disclosure of Geographic Location of Practice

Paragraph (i) requires disclosure of the geographic location in which the advertising lawyer's primary practice is situated. This provision seeks to rectify situations in which a person seeking legal services is misled into concluding that an advertising lawyer has his or her primary practice in the client's hometown when, in fact, the advertising lawyer's primary practice is located elsewhere. Paragraph (i) ensures that a client has received a disclosure as to whether the lawyer he or she ultimately chooses maintains a primary practice located outside of the client's own city, town or county.

Rule 7.3. Direct Contact with Prospective Clients, provides that

(a) A lawyer shall not solicit in-person or by intermediary professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted is a lawyer or has a family, close personal, or prior professional relationship with the lawyer. The term "solicit" includes contact in-person by telephone or by real-time electronic communication, but, subject to the requirements of Rule 7.1 and Rule 7.3(b), does not include written communications, which may include targeted, direct mail advertisements.

(b) A lawyer may contact, or send a written communication to, a prospective client for the purpose of obtaining professional employment unless:

(1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer;

(2) the person has made known to the lawyer a desire not to receive communications from the lawyer; or

(3) the communication involves coercion, duress, or harassment.

The issues raised by the inquiry under these rules are as follows:

Do the described actions by the Advocates constitute the practice of law?

May the advocates have direct non-written communications when making referrals?

Do the proposed communications conform to the requirements of the rules relating to the content of advertising?.

The Committee believes that the Advocates will be exercising legal judgment in evaluating the community members' legal problems and making referrals. They will be trained in some way to purportedly enable them to recognize the legal issues that community members may face and based on that analysis make a determination as to whether to refer them to a lawyer and if so, to whom. That is at least to some degree a legal judgment.

Such conduct is not improper, so long as a licensed lawyer supervises the Advocates and accepts responsibility for their actions. In order to ensure that appropriate supervision is taking place, the Advocates must complete a written intake form, and this written form must be reviewed in a timely manner by a supervising attorney who will be responsible for any mistakes made in the intake and referral process. This prompt review by an attorney of the Community Advocates' work is required by Rule 5.3. The disclosure to the recipients of the services should also clearly communicate that the Advocate is not a lawyer and that the Advocate's intake notes and recommendations will be reviewed by an attorney at the inquirer's program.

Rule 7.3 prohibits a lawyer, either himself or herself or through an intermediary, from soliciting a representation by direct, in person communication. Since the Advocate may recommend that the inquirers own organization be retained by the person he or she is referring, that prohibition could be violated by this arrangement. However, that prohibition only applies where a "significant motive for the lawyer's doing so is the lawyer's pecuniary gain". Since it is explicitly stated in the inquiry that the non-profit organization making the inquiry or those non-profits to whom referrals will be made are not interested in pecuniary gain, Rule 7.3 is not violated by any direct in-person solicitation resulting in representation being undertaken by the inquirer's organization or a referral to a cooperating pro bono agency. However, if referrals were to be made to certain lawyers because they agreed to take cases on a low cost basis, there could be some level of pecuniary gain motivating their participation. In those situations where contact is initiated or suggested by the Advocate, this could be possibly run afoul of the provisions in Rule 7.3a. Accordingly, the Advocates should not make direct referrals to private attorneys who have agreed to participate in the program on a low fee basis, as this might expose the inquirer's program to a claim that there has been a violation of Rule 7.3a. To address this concern, referrals to private counsel should only be made after a review of the case by a volunteer attorney. In addition, those referrals should be made to a program that is also a not for profit entity.

As regards Rule 7.1, providing the content, as described in the inquiry, of the flyers contain truthful and not misleading information about the inquirer's agency as well as the qualifications of the Community Advocates, (including that they are not attorneys) use of the flyers will not run afoul of the Rules. In drafting the

flyer, the inquirer must follow the dictates Rule 7.2 which delineate the parameters of record keeping and advertising content not just for the flyers but also any other advertisements which discuss the services provided by the inquirer's program.

The inquirer organization must require its Advocates to inform the community members that the Advocates are not attorneys, and must do so in a language understood by the community members. Such disclosure could be made on the flyer referred to above, or on a separate disclosure statement that the Advocate would give to the community member in need of help.

CAVEAT: THE FOREGOING OPINION IS ADVISORY ONLY AND IS NOT BINDING ON THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA OR ANY COURT. THIS OPINION CARRIES ONLY SUCH WEIGHT AS AN APPROPRIATE REVIEWING AUTHORITY MAY CHOOSE TO GIVE IT.