THE PHILADELPHIA BAR ASSOCIATION
PROFESSIONAL GUIDANCE COMMITTEE
Opinion 2012-9
(November 2012)

The inquirer is a lawyer who represents a government authority that exercises condemnation powers. In connection with a particular seizure of real estate, a person who is not a lawyer has communicated with the inquirer, claiming to represent a landowner whose land was taken by condemnation.

The question raised by inquirer is whether dealing with the non-lawyer in an effort to resolve the ongoing matter constitutes a violation of Rule 5.5 of the Rules of Professional Conduct, which bars a lawyer from "assisting" any person in the unauthorized practice of law.

A preliminary question that must be addressed is whether or not this particular situation is one that involves the unauthorized practice of law by the layperson. There is little definitive guidance in the law regarding what constitutes the unauthorized practice of law.¹ As stated by the Supreme Court in Shortz v. Farrell, 327 Pa. 81, 193 A.20 (1937), the object of the prohibition on the unauthorized practice of law is to protect the public by preventing inexpert and unlearned persons from offering legal services to the public. A precise description of the boundaries of the practice of law is difficult to formulate. As the Pennsylvania Supreme Court stated in Dauphin Cty. Bar Assn. v. Mazzacaro, 465 Pa. 545, 351 A.2d 299 (1976),

[m]arking out the abstract boundaries of legal practice would be an elusive, complex tax "more likely to invite criticism than to achieve clarity." . . . The threads of legal consequences often weave their way through even casual contemporary interactions. There are times, of course, when it is clearly within the ken of lay persons to appreciate the legal problems and consequences involved in a given situation and the factors which should influence necessary decisions. No public interest would be advanced by requiring these lay judgments to be made exclusively by lawyers. Where, however, a judgment requires the abstract understanding of legal principles and a refined skill for their concrete application, the exercise of legal judgment is called for. . . . While at times the line between lay and legal judgments may be a fine one, it is nevertheless discernible. Each given case must turn on a careful analysis of the

¹ Engaging in the unauthorized practice of law is a misdemeanor of the third degree under 42 Pa.C.S.A. 2524.
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particular judgment involved and the expertise that must be brought to bear on its exercise. 465 Pa. 553.

In this particular case, certainly persons who have had their land condemned have a defined set of rights, the protection of which requires legal knowledge and skills. On the other hand, if a condemnee is willing to accept the validity of the condemnation award in the first place, then at least a major part of the negotiation over the appropriate cash award is a matter of real estate valuation expertise as opposed to legal expertise. Without knowing exactly what the interaction has been between the layperson and the condemnee in this case, it is impossible to make a judgment as to whether or not the layperson who wishes to "represent" the condemnee is purporting to engage in the practice of law. If the sole purpose of the layperson is to assist the condemnee in negotiating a fair purchase price, then the layperson might not be practicing law. On the other hand, if the lay person is giving any advice beyond that in connection with the condemnation, as by assessing the validity of the condemnation and the adherence by the governmental authority in accomplishing the taking and assessing its value to the procedures necessary to do so, then he or she is practicing law. We express no opinion on that topic.

However, we will consider the question posed based upon the assumption that the layperson is, in fact, practicing law, namely whether merely dealing with the condemnee through that person, thereby recognizing that person's status as a representative of the condemnee, constitutes the prohibited "assisting" of another in the practice of law which is prescribed by the Rules.

There appears to be little published authority on this issue. We have discovered only two opinions on the topic. In one of them, the Professional Ethics Committee of the Michigan Bar Association opined that:

We believe that DR3-101(A) likewise requires more of a lawyer than simply avoiding active assistance to unauthorized practice. It is our opinion that an attorney has an ethical obligation to employ appropriate means to prevent unauthorized practice of law by non-lawyers.


In that case, the Committee opined that a lawyer serving as a hearing officer could not allow a non-lawyer to appear in a representative capacity for a state agency at an administrative hearing.2 It is worth noting that this opinion was issued before the

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2 As in this case, there was a question as to whether the non-lawyer in fact was engaged in the unauthorized practice of law. The Committee therefore held that its conclusion was applicable only if the conduct at issue "falls within accepted judicial and/or legislative definitions of unauthorized practice."
adoption of the current Rules of Professional Conduct, at a time when Michigan still followed the Canons of Professional Responsibility and the accompanying Disciplinary Rules. The applicable Canon stated "[a] lawyer should assist in preventing the unauthorized practice of law," and the applicable Disciplinary Rule stated, "[a] lawyer shall not aid a nonlawyer in the unauthorized practice of law." Thus, while the holding was based on Disciplinary Rule that was for all intents and purposes the same as the Rule applicable here, today there is no Canon containing the more affirmative axiomatic norm which admonished lawyers to more affirmatively "assist in preventing" the unauthorized practice of law.

We also found an opinion of the Mississippi Bar Association that required a lawyer to report another lawyer engaged in the unauthorized practice of law, that is, a lawyer licensed in a state other than Mississippi who was practicing law in Mississippi. See Op. FIO 221 of the Mississippi Bar (Nov. 17, 1994) http://www.msbar.org/ethnic_opinions.php?id=484. The rationale for that opinion rested at least in part upon the notion that the person engaged in the unauthorized practice of law was a lawyer, and therefore that Rule 8.3 was implicated. That is not so in this case, where the person violating the proscription on the unauthorized practice of law is not a lawyer.

The Committee carefully considered the issue and is of the opinion that merely dealing with a layperson who purports to "represent" a client does not violate the Rules of Professional Conduct. Rule 5.5 states that a lawyer shall not "assist another" in the unauthorized practice of law. We do not believe that merely by interacting with a layperson, the inquirer would be assisting that person.

We nevertheless think it is useful to consider Rule 4.3, addressing the topic of a lawyer's dealing with unrepresented persons. That rule provides:

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.

(b) During the course of a lawyer's representation of a client, a lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the lawyer knows or reasonably should know the

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If there was doubt about that, the Committee held, "the hearing officer discharges the ethical duty by reporting such knowledge as is available to the State Bar Committee on Unauthorized Practice of Law, the authority empowered to investigate and act upon such practices."

The Canons were statements of axiomatic norms. They embodied the general concepts from which the Ethical Consideration and the Disciplinary Rules were derived. Adherence to them was not mandatory. The Disciplinary Rules were mandatory.
The interests of such person are or have a reasonable possibility of being in conflict with the interests of the lawyer’s client.

(c) When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer should make reasonable efforts to correct the misunderstanding.

In the situation posed by this case, the condemnee is an unrepresented person, in that while “represented” by a non-lawyer, he is not “represented by counsel”. And while the lawyer is not dealing directly with the unrepresented person, surely he is dealing with that unrepresented person – just through a non-lawyer. That being so, this rule is implicated. Without knowing all the facts or circumstances involved in the matter, application of this rule is difficult to predict. It is possible that the matter might be so simple and straightforward that the inquirer could deal with the unrepresented person without violating any of the provisions of Rule 4.3. But it is also easy to see how a lawyer dealing with a non-lawyer representative might unwittingly lose sight of his obligations under this rule. Suppose, for example, that in the course of the negotiation with the non-lawyer, it becomes apparent to the inquirer that the non-lawyer is unaware of some aspect of condemnation law or procedure so as to disadvantage his “client” or even that the non-lawyer begins to seek advice of guidance from the inquirer. At that point, if the lawyer simply continues to deal with the non-lawyer as the representative of the “client”, the “client” may never be made aware of the issue, since his unlicensed representative may not make him aware of the issues.

This Committee is reluctant to restrict the choices of lay-persons in how they seek to protect their rights by interpreting the Rules to impose officious duties on lawyers to protect the public from non-lawyers, but these considerations show how difficult the problem posed by the inquirer can be. Both Rules 5.5 and 4.3 reflect the notion that lawyers do have an ethical duty to attempt to ensure that the public is aware of their right to competent representation and the importance of such representation to the full protection of their legal rights.

Part of the problem in this case is that the issue is posed in a case where it may be that the client’s rights can be fully protected without a lawyer. If the condemnee is genuinely not opposed to the condemnation and just wants to obtain full compensation, then the assistance of a non-lawyer knowledgeable about real estate values in the affected area and skilled at negotiation may be effective, and perhaps even cheaper for the condemnee. A lawyer’s refusal to deal with that representative might seem unnecessary in such circumstances, and even reminiscent of the days when efforts to prevent the unauthorized practice of law were more motivated by lawyers’ economic interest than by a wish to protect the public. On the other hand, it is at least as easy to see how some unaware client can be horribly served by someone whose lack of awareness of the substantive and procedural law of condemnation law might lead to a
far worse result than if the client were represented by counsel. Furthermore, if it really is so that the non-lawyer is only offering real estate valuation advice, and helping out in the negotiation, then he or she could presumably be just as able to do so without "representing" the condemnee in all of his or her dealing with the inquirer.

For all these reasons, while the Committee does not believe that the inquirer is required under Rule 5.5 to refuse to deal with one who is engaged in the unauthorized practice of law, it is the Committee's view that the inquirer may refuse to do so, if he or she thinks that is appropriate in the light of his or her specialized knowledge of condemnation law in general and as applied in this particular case. In making that decision, the inquirer may consider whether one purporting to represent the client competently in dealing with the inquirer would be called upon to exercise specialized skills and judgment regarding the substantive and procedural law of condemnation. If the inquirer concludes that is so, then he or she may decline to deal with a non-lawyer purporting to represent the condemnee, . The Committee also believes that the inquirer may also communicate directly with the condemnee, advising that person that he or she would be well advised to obtain counsel.

In response to the inquirer's last question, should she determine that the conduct of any individual constitutes the unauthorized practice of law, there is no duty that requires her to report this conduct to any authority. Although the unauthorized practice of law is a crime, attorneys stand in the shoes of all citizens, upon whom there is no such reporting duty.

**CAVEAT:** The foregoing opinion is advisory only and is based upon the facts set forth above. The opinion is not binding upon the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. It carries only such weight as an appropriate reviewing authority may choose to give it.

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4 Rule 4.2, which bars a lawyer from communicating regarding a matter with a person who the lawyer knows to be represented by counsel, does not prohibit such communications with a person "represented" by a non-lawyer.