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ADVISORY COMMITTEE ON PROFESSIONAL ETHICS

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OPINION 671

Activities and Obligations of Pro Bono Attorneys

The inquirer is a New Jersey attorney who volunteers one night each week at a non-profit center ("Center") which provides support to abused women. She has never practiced matrimonial law. She and another attorney discuss issues such as domestic violence, divorce, and child support with women who make appointments with the Center. Apparently all such discussions are on an individual basis, although inquirer states that "all communications are shared with staff members of the Center."

The Center advertises this legal counseling service to its clients. Both the attorney and the Center apparently make an effort to advise each woman that the attorney is not acting, and will not act, as her attorney, or prepare any legal documents on her behalf. Rather, they state that the attorney is acting in some sense (not expressed in the inquiry) on behalf of the Center. In some cases a "legal consultation agreement" designed by the Center is required to be executed by the woman and by the attorney providing advice. In pertinent part, this agreement recites that the attorney is acting on behalf of the Center, not the woman, and that the attorney-client privilege does not apply. At the same time, the agreement places on the woman being counseled the obligation to notify the Center if her abuser has at any time sought legal advice from the attorney's firm, so as to identify potential conflicts.

The inquirer indicates that in most situations her role is to advise the women concerning general subjects such as the grounds for divorce, and the factors which are taken into consideration by the court when awarding support payments or ordering equitable distribution. She states that she usually urges the women to retain an attorney and directs them to the applicable lawyer referral service in the county. Finally, the inquirer states that it is not her intention to gain any monetary benefits from her activities, and that she does not presently accept any such person as a private client.

While the inquirer frames several questions, the inquiry essentially can be broken down into the following areas:

1. For situations involving the provision of legal advice under the auspices of a non-profitable or charitable organization, at what point does an attorney-client relationship develop, and what effect does the execution of a form denying such a relationship have on the status of the participants?
2. When is it proper for a non-profit organization to sponsor such legal counseling activities, and under what circumstances is it appropriate for an attorney to participate in them?

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3. What standards concerning experience and knowledge cover attorneys who provide *pro bono* legal advice?
 4. Under what circumstances may an attorney accept employment as counsel by an individual who was originally first contacted through *pro bono* activities for a charitable or non-profit organization?

At the outset, we note the great importance of *pro bono publico* contributions of time and resources by attorneys. At present and for the foreseeable future, such *pro bono* contributions are an essential supplement to existing publicly-funded legal assistance activities of Legal Services, the Public Defender, and similar institutions. *Pro bono* assistance can take many forms, and all are important. A common form is the provision of generalized legal advice, usually in lecture format, to a group of people. Sometimes *pro bono* activity involves individualized one-time counseling to people concerning their specific legal problems, as is apparently the case with the inquiry at hand. In addition, many attorneys accept entire cases on referral from Legal Services or other sources, and provide representation in those cases as if they were fully compensated. The Rules of Professional Conduct specifically contemplate, condone, and indeed encourage such *pro bono* activity, RPC 6.1, and must be read and interpreted with

a sense of the importance of this activity in mind.

A second overarching observation is that the same ethical rules apply regardless of whether legal advice and representation is provided on a compensated or a *pro bono* basis. There is no separate, more relaxed version of applicable ethical precepts for attorneys providing *pro bono* advice. Duties of competence, confidentiality, and conflict avoidance, for example, all remain fully applicable.

1. The attorney-client relationship.

With those observations in mind, we turn first to the question of when an attorney-client relationship develops. In situations where a lawyer is providing general information to a group of people about the law or legal rights, such as discussing the grounds for divorce, an attorney-client relationship would not normally attach or develop. It would not be commonly understood or thought by members of the audience in such a situation that they had become the clients of the attorney. By contrast, when an attorney discusses a specific client's situation on an individual basis with that client, with or without the presence of a third party, most individuals would tend to assume that they were entitled to rely on the specific advice of that attorney as it applied to their situation, however that advice might be qualified. It is conceivable that in a unique circumstance no attorney-client relationship would develop. This could happen if the attorney only provided general legal information to the individual about the overall situation (*i.e.*, divorce, domestic violence), not in any way tailored to the individual's particular circumstances. It also might happen if the communication between the individual and the attorney was very brief and limited (*e.g.*, a single question during a telephone call), without really developing the factual setting of the particular case.

Notwithstanding these possible exceptions, however, in the vast majority of one-on-one discussions between an attorney and individual seeking help, there is a presumption that legal advice may be relied upon by the client, and that an attorney-client relationship exists. In the case of *pro bono* advice in a setting other than the attorney's office, the context suggests that an attorney-client relationship exists, but may be limited in scope and duration to the provision of advice at that single point in time, with no continuing representation. We conclude that as soon as the legal counseling becomes particularized to an individual - eliciting facts and providing reaction and advice specific to the individual's situation - an attorney-client relationship is presumed to exist.

We stress that the duration and scope of this relationship is a matter of agreement between the parties. Attorneys and prospective clients must define the precise scope of the attorney's representation at the outset of the relationship. A client and an attorney may agree that the attorney will see the client only once; will provide only advice; will provide advice and some intercession on the client's behalf; will offer full representation in the matter up through and including trial court decision; will continue representation through the exhaustion of all appeals, or myriad other possible definitions of the scope of the undertaking. Whatever the scope, both the client and the attorney must achieve clear understanding and agreement at the outset of the relationship, and this understanding thereafter can only be changed with the mutual consent of both parties.

While the foregoing comments underscore the attorney's ability to limit the scope of representation, the attorney may not limit any ethical duty, such as that to provide competent advice or other representation, or preserve a client's confidences, once the activity is undertaken.

2. Organizational sponsorship of legal advice or counsel activities.

All of the potential *pro bono* activity described above is legal service in the public interest, as strongly encouraged by RPC 6.1. Nothing in the Rules of Professional Conduct in any way discourages or limits such activity. Inquirer's questions concerning the effect of RPC 7.3 relate to an entirely different question - when contact with people who may become paying private clients of the attorney is appropriate - which we discuss in section 4 below. Inquirer's time contributed to providing advice to clients of the Center, assuming otherwise conducted in accordance with the applicable Rules of Professional Conduct, is salutary and encouraged. Consistent with our conclusions in the previous section, however, we note that it would be improper for an attorney to participate in such activity if the sponsor in any way sought to limit the attorney's adherence to ethical requirements, such as by mandating disclosure of confidential information.

3. Competence.

One of the signal departures of the current Rules of Professional Conduct is the centering of competence as RPC 1.1, creating a cornerstone for the rest of the rules. Although the general principle is firmly established, there is no simple or formulaic approach to determining when an attorney is competent to give advice in a particular situation. Lack of direct experience in a particular legal area is not an automatic disqualifier. Certainly if an attorney has studied and researched an area of the law, that attorney may well be able to give competent, even excellent advice, notwithstanding any lack of personal direct experience in representing other clients in such matters. In all cases, it is the responsibility of the individual attorney, prior to offering such advice, to make a determination whether, by some combination of education, study, reflection, experience, research and other background, he or she is able to proceed in a competent fashion. Moreover, an attorney must make this same determination before providing general legal information to a group. Since people are likely to rely on statements by an attorney as being expert and accurate, even if they are made to a group and in a generalized way, we emphasize that the duty of competent conduct in such situations is every bit as applicable as to individual representation.

4. Acceptance of subsequent private employment.

In general, RPC 7.3 sets out the situations in which professional employment properly can result from *pro bono* activity in conjunction with an organization. RPC 7.3(c) regulates conduct surrounding the promotion, barring false or misleading statements, as well as coercion and other inappropriate conduct. RPC 7.3(e) sets other parameters, most notably that there is to be "no interference with the exercise of independent professional judgment" when the lawyer is "cooperating with" a variety of entities, including in (4) "any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries," provided that seven conditions are met. It would appear that the Center would qualify as such an organization if it meets these conditions. As noted by the inquirer, all appear satisfied except (iv) (beneficiary of services must be recognized as the client of the lawyer) and (vii) (filing of the organization's "legal services plan" with the Supreme Court). As indicated above, we view one-on-one legal advice as creating an attorney-client relationship, and thus (iv) simply confirms this fact; a change in the Center's approach will be necessary if individual advice is to continue. The filing requirement in (vii) is a different matter. Inquirer indicates that there has been no such filing. Until (vii) is satisfied, inquirer may certainly continue to provide *pro bono* uncompensated legal assistance to individual clients as promoted by the Center, but may not receive payment from either the client or the Center for those services. We note that we do not view the Center, under the facts presented, as operating a "legal aid office" as that term is utilized in RPC 7.3(e)(1) and normally understood, so that exception is foreclosed.

Additional Observations.

In response to other points of inquirer's submission, we note that in all such *pro bono* activities, the provisions of RPC 5.4(c) remain fully applicable, and the Center may not interfere with the lawyer's exercise of professional judgment in rendering services. Furthermore, inquirer notes that a Center representative is nearly always present during the discussions with the abused woman. Presumably this is done for social service reasons, in view of the stress that the woman is under. Nevertheless, given the client's clear entitlement to confidentiality in an attorney-client relationship, as secured by RPC 1.6, we caution that the woman must be advised of her right to consult an attorney in private, if she chooses, and an attorney cannot participate in an effort which conditions availability of legal services on attendance by a third party.

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