

THE PHILADELPHIA BAR ASSOCIATION
PROFESSIONAL GUIDANCE COMMITTEE

Opinion 2016-4
(June 2016)

The Inquirer is a disbarred attorney. The Inquirer has presented the Committee with a job description to review in order to determine whether it comports with Pennsylvania Rule of Disciplinary Enforcement 217(j) concerning the types of law-related activities that a “formerly admitted attorney” may engage in during the period that the formerly admitted attorney is disbarred or suspended from the practice of law in Pennsylvania.

The job description submitted by the Inquirer is entitled “Director of Risk Management (Legal and Governmental Affairs).” The proposed Director of Risk Management would report directly to the General Counsel of the Company. The Inquirer raised concerns with certain components of the proposed job including “assisting with the preparation of contracts, leases and other documents” and serving as the “liaison between the Company and the outside attorneys in litigation matters.” Notably, as part of serving as the liaison between the Company and outside counsel, the Director of Risk Management would be “the principal point of contact for assigned counsel, assist counsel in assembling materials to respond to discovery requests, and communicate the status of pending litigation” to senior staff.

There is no question that the Inquirer, as a disbarred attorney, is considered a formerly admitted attorney under the Pennsylvania Rules of Disciplinary Enforcement and that this job – in its entirety – constitutes a law-related activity.

For several reasons, the Committee concludes that, while the Inquirer may engage in certain activities contained in the proposed job description, the Inquirer cannot assume this position in its current form without potentially violating Pennsylvania Rule of Disciplinary Enforcement (“PA RDE”) 217(j) given that certain activities could constitute providing legal advice or opinion and certain communications with outside counsel go beyond mere ministerial activities.

PA RDE 217(j) states as follows:

(j) A formerly admitted attorney may not engage in any form of law-related activities in this Commonwealth except in accordance with the following requirements:

(1) All law-related activities of the formerly admitted attorney shall be conducted under the supervision of a member in good standing of the Bar of this Commonwealth who shall be responsible for ensuring that the formerly admitted attorney complies with the requirements of this subdivision (j). If the formerly admitted attorney is engaged by a law firm or other organization providing legal services, whether by employment or

other relationship, an attorney of the firm or organization shall be designated by the firm or organization as the supervising attorney for purposes of this subdivision.

(2) For purposes of this subdivision (j), the only law-related activities that may be conducted by a formerly admitted attorney are the following:

(i) legal work of a preparatory nature, such as legal research, assembly of data and other necessary information, and drafting of transactional documents, pleadings, briefs, and other similar documents;

(ii) direct communication with the client or third parties to the extent permitted by paragraph (3); and

(iii) accompanying a member in good standing of the Bar of this Commonwealth to a deposition or other discovery matter or to a meeting regarding a matter that is not currently in litigation, for the limited purpose of providing clerical assistance to the member in good standing who appears as the representative of the client.

(3) A formerly admitted attorney may have direct communication with a client or third party regarding a matter being handled by the attorney, organization or firm for which the formerly admitted attorney works only if the communication is limited to ministerial matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages. The formerly admitted attorney shall clearly indicate in any such communication that he or she is a legal assistant and identify the supervising attorney.

(4) Without limiting the other restrictions in this subdivision (j), a formerly admitted attorney is specifically prohibited from engaging in any of the following activities:

(i) performing any law-related activity for a law firm, organization or lawyer if the formerly admitted attorney was associated with that law firm, organization or lawyer on or after the date on which the acts which resulted in the disbarment or suspension occurred through and including the effective date of disbarment or suspension;

(ii) performing any law-related services from an office that is not staffed by a supervising attorney on a full time basis;

(iii) performing any law-related services for any client who in the past was represented by the formerly admitted attorney;

(iv) representing himself or herself as a lawyer or person of similar status;

(v) having any contact with clients either in person, by telephone, or in writing, except as provided in paragraph (3);

(vi) rendering legal consultation or advice to a client;

(vii) appearing on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, hearing officer or any other adjudicative person or body;

(viii) appearing as a representative of the client at a deposition or other discovery matter;

(ix) negotiating or transacting any matter for or on behalf of a client with third parties or having any contact with third parties regarding such a negotiation or transaction;

(x) receiving, disbursing or otherwise handling client funds.

(5) The supervising attorney and the formerly admitted attorney shall file with the Disciplinary Board a notice of engagement, identifying the supervising attorney and certifying that the formerly admitted attorney's activities will be monitored for compliance with this subdivision (j). The supervising attorney and the formerly admitted attorney shall file a notice with the Disciplinary Board immediately upon the termination of the engagement between the formerly admitted attorney and the supervising attorney.

(6) The supervising attorney shall be subject to disciplinary action for any failure by either the formerly admitted attorney or the supervising attorney to comply with the provisions of this subdivision (j).

Clearly, the activities described in the Inquiry and the accompanying job descriptions for the Director of Risk Management are law-related. While certain job functions associated with the position of the Director of Risk Management, including the preparation of draft contracts, leases and other related documents and legal research, and monitoring proceedings and carrying out compliance and risk management assessments, may be permissible under the supervision of either the General Counsel or another supervising attorney, other job functions clearly implicate the prohibited activities contained in Rules 217(j)(3) and (4).

Among the potentially problematic job functions include the following: (1) "Assist General Counsel in developing advice on broad range of topics, including litigation management, compliance and regulatory issues and leasing support"; (2) "Manage relationships with outside counsel in connection with litigation matters"; (3) "Report and

manage claims”; (4) “Ensure risk management policies and strategies are in compliance with applicable regulations, funding requirements, and strategic imperatives of the corporation”; (5) “Identify, evaluate and analyze risks inherent to the operations and strategic direction of the corporation”; (6) “Formulate, implement, administer and evaluate risk management strategies to effectively and cost-effectively manage risk”; (7) “Provide information to relevant official bodies and stakeholders as necessary and appropriate”; and (8) “Assist in the development of policies and procedures to ensure compliance.”

While some of the aforementioned functions may be fine insofar as they are done exclusively with and at the discretion of the General Counsel, there is no question that the General Counsel and those working under him serve as counsel to the organization. In essence, internal communications by the Inquirer with other representatives of the Company – where the General Counsel is not present or is not participating – would appear to violate Rule 217(j)(4)(vi) in that the Inquirer may be providing legal consultation or advice to a client.

Similarly, the job description raises concerns about the level of communications between the Director of Risk Management, outside counsel and other third parties. There is no question that, based upon the job description, those discussions would go well beyond mere ministerial matters and could potentially include evaluations and recommendations for settlement, the analysis of claims, analysis of legal issues and positions of the Company, etc. Those kinds of discussions would go beyond the limitations proscribed by Rule 217(j)(3) and are prohibited.

As a result, the Committee is concerned that the job description for the Director of Risk Management as it is presently formulated could create a potential problem for the Inquirer in trying to comply with Rule 217 of the Pennsylvania Rules of Disciplinary Enforcement.

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 to it.