

PHILADELPHIA BAR ASSOCIATION  
COMMITTEE ON PROFESSIONAL GUIDANCE  
OPINION 2012-3  
(August 2012)

Inquirer states that in May 2011, he was suspended from the practice of law for three years, retroactive to May 2009. Inquirer does not state the basis of the suspension, nor does he state whether he has been reciprocally suspended by the federal courts, both factors which may be relevant to this analysis. As reciprocal suspension would be the usual course, for purposes of this opinion the Committee will assume that this has occurred.

Inquirer states that he would like to work in the field of Social Security Disability law as a “non-attorney representative at the administrative level to assist claimants in obtaining benefits.” He states that “practice before the Social Security Administration is an administrative practice, and claimants may be represented by “non-attorney advocates.” Inquirer prefaces his specific inquiries with: “Assuming the suspension on [*sic*] my ability to practice law in the Commonwealth has been completed and assuming after full disclosure to the Social Security Administration of all facts, that the Social Security Administration would allow me to practice as a ‘non-attorney representative;” and asks for advice or guidance concerning ethical issues he believes he faces:

1. [If I work] in a solo office with a secretary, where I would clearly designate that the scope of services is limited to representation as a non-attorney advocate of claimants seeking benefits at the administrative hearing level [and] assuming that I could advise claimants that I was a graduate of an accredited law school, but not licensed as an attorney in the Commonwealth of Pennsylvania or any other jurisdiction, and that services are limited in scope, what ethical problems are present?
2. What ethical problems exist if I were to be employed by another attorney or law firm to provide services limited to representation of claimants as a non-attorney representative?
3. What ethical problems are present in the scenario where I might be an employee in a company with no attorneys that provides services to claimants seeking social security benefits?

To address inquirer’s questions, it is necessary to look at both the Pennsylvania Rules of Professional Conduct (“RPC”), which are rules of ethics, and the Pennsylvania Rules of Disciplinary Enforcement (“Pa.R.D.E” or “Enforcement Rules”), which are procedural but also in part constitute substantive law. Under the Enforcement Rules, violation of either set of rules is grounds for discipline. Pa.R.D.E. 203(b)(1) and (3).

RPC 5.5(a) provides that “A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction....” The definition of “practicing

law” is not included in either the RPC or the Pa.R.D.E., and, therefore, much of inquirer’s inquiry is a legal issue addressed by substantive case law in the state and federal courts, which is beyond the scope of this Committee’s charge. However, RPC 5.5 goes on to identify further limitations on such activity:

- (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
  - (1) except as authorized by these Rules ... or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
  - (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

The remainder of Rule 5.5 states permissible activities for “a lawyer admitted in another United States jurisdiction, and ***not disbarred or suspended from practice in any jurisdiction.***” [Emphasis added] As inquirer does not fall within this definition, these rules do not provide him with any safe harbor for any activities which may be deemed the practice of law.

Also relevant is RPC 7.1, which states that “a lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services.” (see discussion below)

Inquirer is limited in his post-suspension ability to engage in law-related activities not only by RPC 5.5 but also by the Enforcement Rules. In this regard, inquirer’s assumption that the expiration of the period of suspension stated in the Supreme Court Order, “completes the suspension on the respondent-attorney’s ability to practice law,” is incorrect. Under Pa.R.D.E. 218 the period of suspension stated in the Court’s Order merely defines the date on which a suspended attorney is eligible to be reinstated, if he complies with all of the terms of the suspension, meets all of his obligations to the Pennsylvania Lawyers Fund for Client Security, and successfully prosecutes a reinstatement petition. Accordingly, the fact that the three year period of inquirer’s suspension has elapsed means only that he is eligible to be reinstated, not that the suspension of his “ability to practice law has been completed” and thus has no relevance to the inquiry. Inquirer remains a “formerly admitted attorney,” as defined by Pa.R.D.E. 102(a), and is governed by all rules applicable to that status.

The question of what a formerly admitted attorney in Pennsylvania may do with respect to the practice of law is governed by Pa.R.D.E. 217(j), which states:

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 subdivi-

sion (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.

The Note to that rule makes clear that there is a difference between formerly admitted attorneys and others who may engage in law-related activities:

Subdivision (j) is addressed only to the special circumstance of formerly admitted attorneys engaging in law-related activities and should not be read more broadly to define the permissible activities that may be conducted by a paralegal, law clerk, investigator, etc. who is not a formerly admitted attorney.

See, also, *Sperry v. Florida*, 373 U.S. 379 (1963).

Should a formerly admitted attorney engage in activities which are believed to violate Rule 217, Office of Disciplinary Counsel may pursue further disciplinary sanctions, institute contempt proceedings, and/or oppose reinstatement if sought by the formerly admitted attorney. See Pa.R.D.E. 203(b)(3), 208. The limitations established by that rule are discussed in *Matter of Perrone*, 587 Pa. 388; 899 A.2d 1108; 2006 Pa. LEXIS 1005 (2006):

It is therefore clear that subsection (j) sets forth a global prohibition on the performance of all law-related activities unless they comply with the requirements of the rule, regardless of whether they are performed as an independent contractor or otherwise. Similarly, subsection (j)(4)(ii), states, “[w]ithout limiting the other restrictions in this subdivision (j)(4), a formerly admitted attorney is specifically prohibited from engaging in any of the following activities: . . . (ii) **performing any law-related services from an office that is not staffed, on a full time basis, by a supervising attorney.**” Pa.R.D.E. 217(j)(4)(ii) (emphasis added). Thus, the plain language of the rule establishes that subsection (j)(4) applies to all law-related services performed by formerly admitted attorneys, regardless of the manner by which they are performed.

However, case law suggests that there are instances in which a formerly admitted attor-

ney may engage in law-related activities if that attorney is a member in good standing of a federal forum, based upon principles of federal supremacy. See, e.g., *Surrick v. Killion*, 2005 U.S. Dist. LEXIS 6755 (2005) and 449 F.3d 520 (3d Cir. 2006). *In re Arora*, No. 19 DB 2000 (2003), cited by inquirer, involved an attorney who was suspended from practice by the INS due to submitting false documentation, reciprocally suspended from the bar in Pennsylvania, and then reinstated as an attorney before the INS; she was practicing before the INS and was petitioning for reinstatement in the Commonwealth. The opinion does not address whether she violated Rule 217. Reinstatement was granted. The applicability of those facts to inquirer's proposed conduct is a question of law which is beyond the scope of this committee's authority and is left to inquirer's analysis, although it is suggested that inquirer consider whether admission to practice as an attorney before a federal administrative agency is analogous to permission to act as a non-attorney. Inquirer is also encouraged to review *Office of Disciplinary Counsel v. Frank J. Marcone*, 579 Pa. 1; 855 A.2d 654; 2004 Pa. LEXIS 1865 (2003).

Inquirer notes that it appears that Rule 217 "would prohibit an unlicensed formerly suspended attorney from appearing as a non-attorney advocate in front of the Social Security Administration." Inquirer's reading of the rule is correct. Apparently in view of these limitations on his ability to act as an attorney, inquirer asks us to assume that, "after full disclosure to the Social Security Administration of all facts," the Social Security Administration would allow him to practice as a "non-attorney representative." One of the difficulties with this assumption is that the procedure for becoming either an attorney or non-attorney representative of a claimant appears to require that one have a client who designates the attorney or non-attorney as his representative. See <http://www.ssa.gov/online/ssa-1696.pdf>. If this is the case, in order to obtain leave to act as a non-attorney representative, the inquirer would have to engage in activities which are precluded to him by Rule 217, such as having direct client contact and rendering legal consultation, practicing in a solo office, and representing himself as a lawyer or person of similar status, in order to secure such leave. The prohibitions of Pa.R.D.E. 217 against client contact, rendering legal advice, appearing on behalf of a client, would exist regardless of the context in which inquirer practiced, as posited in his various scenarios.

Additionally, although inquirer assumes that he could advise claimants that he was a graduate of an accredited law school, but not licensed as an attorney in the Commonwealth of Pennsylvania or any other jurisdiction, that conduct would violate Rule 217(j)(4)(iv). Because of the likelihood of confusion to a lay person as to the difference between a law school graduate and a licensed lawyer, such representations would violate RPC 7.1, which prohibits a lawyer from making a false or misleading communication about the lawyer's services, and 8.4(c), prohibiting conduct which involves misrepresentation or dishonesty.

The Social Security Act, 42 U.S.C. §406(a)(1), "Representation of Claimants," can be read to suggest that a suspended attorney would be subject to disqualification proceedings should he attempt to represent a claimant as either an attorney or a non-attorney representative; it states, in relevant part:

The Commissioner of Social Security may prescribe rules and regulations governing the recognition of agents or other persons, other than attorneys as hereinafter provided, representing claimants before the Commissioner of Social Security, and may require of such agents or other persons, before being recognized as representatives of claimants that they shall show that they are of good character and in good repute, possessed of the necessary qualifications to enable them to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the presentation of their cases. An attorney in good standing who is admitted to practice before the highest court of the State ... of his residence or before the Supreme Court of the United States or the inferior Federal courts, shall be entitled to represent claimants before the Commissioner of Social Security. **Notwithstanding the preceding sentences, the Commissioner, after due notice and opportunity for hearing, (A) may refuse to recognize as a representative, and may disqualify a representative already recognized, any attorney who has been disbarred or suspended from any court or bar to which he or she was previously admitted to practice or who has been disqualified from participating in or appearing before any Federal program or agency, and (B) may refuse to recognize, and may disqualify, as a non-attorney representative any attorney who has been disbarred or suspended from any court or bar to which he or she was previously admitted to practice.** .... The Commissioner of Social Security may, after due notice and opportunity for hearing, suspend or prohibit from further practice before the Commissioner any such person, agent, or attorney who refuses to comply with the Commissioner's rules and regulations or who violates any provision of this section for which a penalty is prescribed. (Emphasis added.)

The regulations governing representation also appear to undermine inquirer's premise that he might be treated like any other lay representative. 20 CFR §404.1705. "Who may be your representative," makes a clear distinction between an attorney, who must be in good standing, and "person other than attorney." However, neither may be appointed if (3) "prohibited by any law from acting as a representative." Enforcement Rule 217 is law which prohibits a suspended attorney from engaging in the duties of a representative, whether as an attorney or as a "person other than an attorney." If the inquirer were to attempt to represent individuals, he would be subject to proceedings of suspension or disqualification under 20 CFR §404.1745, "Violations of our requirements, rules, or standards," which states:

When we have evidence that a representative fails to meet our qualification requirements or has violated the rules governing dealings with us, we may begin proceedings to suspend or disqualify that individual from acting in a representational capacity before us. We may file charges seeking such sanctions when we have evidence that a representative:



- (a) Does not meet the qualifying requirements described in §404.1705;...
- (d) Has been, by reason of misconduct, disbarred or suspended from any bar or court to which he or she was previously admitted to practice (see § 404.1770(a)).

The only ground under §404.1755 for withdrawing charges against a representative under these circumstances is proof of reinstatement and a determination of the probability that the individual would conduct himself properly in the future.

If, despite the foregoing, the inquirer believes that he can qualify or avoid disqualification as a non-attorney representative, in order to avoid violation of Rule 217, he must do so by some procedure which does not involve representation of a client. In the event that he is successful, he may be in a position to argue that the Supremacy Clause permits him to perform the functions of that role. However, in doing so he must take into consideration the likelihood that the disciplinary system will view this conduct as an effort to circumvent the rules promulgated by the Supreme Court.

*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.*