

THE PHILADELPHIA BAR ASSOCIATION
PROFESSIONAL GUIDANCE COMMITTEE
Opinion 2009-3
(March 2009)

The inquirer is proposing to set up a business (“Company”) that will assist workers’ compensation insurers in obtaining approval for Medicare Set Asides (MSA) from the Center for Medicare and Medicaid Services (CMS), which is now required when settling a workers’ compensation case that affects a Medicare-eligible claimant’s medical benefits. Based on the inquirer’s description, the Company would render services to the insurer (not the claimant) in gathering information about the terms of the settlement, the claimant’s complete medical history and proposed future treatment, and necessary executed medical authorizations. All of that information would be processed and presented as required in the MSA procedure, with the hope of getting a cost-efficient approval from CMS to allow for the finalization of the workers’ compensation settlement. The inquirer stresses that this would be done on a “case-by-case basis,” and represents that these services are rendered for the benefit of the insurer.

The Company will be owned by the principals of a Pennsylvania based law firm (of which you are a member) that generally represents claimants in workers’ compensation matters. The inquirer has asked about the ethical and legal¹ implications of this proposed arrangement. The Committee believes that four specific Pennsylvania Rules of Professional Conduct (the “Rules”) are implicated by this proposed business arrangement.

Rule 1.0 **Terminology** provides in part that,

(e) “Informed consent” denotes the consent by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

Rule 1.7 Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

¹ The Committee only offers guidance on conduct under the Pennsylvania Rules of Professional Conduct, and does not consider or opine on matters of substantive law.

- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law;
 - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
 - (4) each affected client gives informed consent.

Applying the language of Rule 1.7(a)(2) to the inquirer's proposed enterprise, the Committee believes that the insurer for whom the Company will provide services is a "third person" under Rule 1.7(a)(2), and the potential revenue generated by the Company's services raise the specter of a conflicting "personal interest of the lawyer(s)" who own the Company. While the inquiry does not provide much operational detail about the Company, the Committee sees the possibility for tension between the inquirer's obligations as an advocate for his workers' compensation clients and his relationship with insurers who pay out on workers' compensation claims. While the inquiry makes it clear that the Company would not perform MSA services on a matter in which the inquirer's law firm represents the claimant, the Committee finds that this would be a non-waivable conflict under Rule 1.7(b). The broader concern however, is whether the inquirer's advocacy on behalf of his workers' compensation clients could be affected by the Company's ongoing relationship with the workers' compensation insurance carriers, whose interests lie in minimizing the exposure in these cases.

The Committee believes that while this situation does present a conflict of interest under Rule 1.7, that it is a waivable conflict provided the inquirer: discloses to all of his workers' compensation clients the fact that he and his firm have the controlling ownership interest of the Company; describes in reasonable detail the MSA services that the Company provides to the insurers; describes in general the payment arrangement (i.e. fee for service not based on a percentage of the set-aside amount); and assures the clients that this side business will not limit the inquirer's zealous advocacy on their behalf. The Committee also finds, pursuant to Rule 1.0e, it would be appropriate for the inquirer to advise them that they have the absolute right to choose their own counsel and that they are welcome to seek another attorney to represent them

in their workers' compensation claim who does not have a similar, complicating relationship.

Rule 5.7. **Responsibilities Regarding Nonlegal Services** provides that,

(a) A lawyer who provides nonlegal services to a recipient that are not distinct from legal services provided to that recipient is subject to the Rules of Professional Conduct with respect to the provision of both legal and nonlegal services.

(b) A lawyer who provides nonlegal services to a recipient that are distinct from any legal services provided to the recipient is subject to the Rules of Professional Conduct with respect to the nonlegal services if the lawyer knows or reasonably should know that the recipient might believe that the recipient is receiving the protection of a client-lawyer relationship.

(c) A lawyer who is an owner, controlling party, employee, agent, or is otherwise affiliated with an entity providing nonlegal services to a recipient is subject to the Rules of Professional Conduct with respect to the nonlegal services if the lawyer knows or reasonably should know that the recipient might believe that the recipient is receiving the protection of a client-lawyer relationship.

(d) Paragraph (b) or (c) does not apply if the lawyer makes reasonable efforts to avoid any misunderstanding by the recipient receiving nonlegal services. Those efforts must include advising the recipient that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the provision of nonlegal services to the recipient.

(e) The term "nonlegal services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

From the inquirer's description of the MSA services, they appear to be non-legal in nature; rather than giving advice or advocating a position on behalf of the insurers, these services focus on gathering, organizing and presenting the settlement materials for consideration by the insurer. However, it is likely that the insurers will know that the people providing this service are, in fact, lawyers or those working for lawyers, and this runs the risk of confusion over just exactly what type of services the MSA clients are receiving. In order to comply with Rule 5.7, the Company will have to make clear to its insurer clients that the scope of its work is strictly non-legal and the inquirer should expressly disclaim any lawyer-client relationship, including confidentiality protections. The inquirer's written description of these services should be drafted in light of Rule 5.7(d)'s requirement to make "reasonable efforts to avoid any misunderstanding" as to

the legal versus non-legal nature of the services the inquirer is rendering to the MSA clients.

Rule 1.6. **Confidentiality of Information** provides in part that,

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation...

Appropriate measures need to be in place to prevent any information that is protected under Rule 1.6 from flowing back and forth between the law firm and the Company. Since the only lawyer-client relationship is the one with the inquirer's workers' compensation clients, that is the only one that enjoys the full benefit of Rule 1.6's protections of confidentiality. However, as a practical matter, it would be inappropriate for any information to flow in either direction, so it is imperative that the inquirer take appropriate "firewall" measures, and document them in the event of a later review.

If undertaken in the manner described above, the Committee believes that the establishment and operation of the Company can be conducted in a manner that is consistent with the inquirer's obligations under the Rules.

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.