



OFFICE OF LEGAL AFFAIRS

ADVISORY OPINION
NO. 2012-01

SUBJ: Whether service as a court-appointed arbitrator in Pennsylvania constitutes the practice of law for purposes of Part 1604

DATE: August 21, 2012

Question Presented

Are court-appointed arbitrators in Pennsylvania engaged in the practice of law? If so, are staff attorneys who register to serve as such subject to LSC's outside practice of law regulations at Part 1604, including the rule on remitting compensation to the program?

Short Answer

In Pennsylvania, the practice of law requires an attorney-client relationship or its equivalent. Functioning in a quasi-judicial role, court-appointed arbitrators in Pennsylvania do not represent clients. Therefore, they are not "engaged in the practice of law," and staff attorneys who register to serve as such are not subject to LSC's outside practice of law regulations at Part 1604, including the rule on remitting compensation to the program.

Facts

An LSC grant recipient in Pennsylvania allows its staff attorneys¹ to serve as court-appointed arbitrators in civil cases selected by local courts for compulsory arbitration. The attorneys hear cases on their own time (using vacation or other leave) and do not use any program resources. They are paid approximately \$200 a day by the local courts and are not required remit compensation to their program.

Analysis

LSC strictly prohibits full-time staff attorneys from engaging in the outside practice of law unless it is performed *pro bono* pursuant to guidelines issued by LSC,² relates to completing representation begun under prior employment,³ or is undertaken pursuant to a court appointment.⁴

¹ We assume for purposes of this opinion that the staff attorneys who are serving as court-appointed arbitrators meet the definition of "full-time attorney" in section 1604.2(a).

² The LSC Act requires that "the corporation shall ... insure that attorneys employed full time in legal assistance activities supported in major part by the Corporation refrain from (A) any compensated outside practice of law, and (B) any uncompensated outside practice of law except as authorized in guidelines promulgated by the Corporation." 42 U.S.C. § 2996f(a)(4), Part 1007(a)(4).

³ 45 C.F.R. § 1604.4(c)(1).

⁴ *Id.* § 1604.7.

LSC's regulations at Part 1604 implement this prohibition and the corresponding exceptions. 45 C.F.R. § 1604, *et seq.*

A question has arisen as to whether it is permissible under LSC's outside practice of law regulations for full-time staff attorneys to serve as court-appointed arbitrators in Pennsylvania. As a threshold matter, however, we must determine whether this kind of legal activity constitutes "the practice of law" for purposes of Part 1604.

Whether an activity constitutes the practice of law depends on the facts of each case. OLA External Opinion ("Ex. Op.") No. 2003-1003 (Sept. 16, 2003). Several factors guide LSC's determination, including (1) the definition of practice of law that has been adopted in the particular jurisdiction, (2) the qualifications for the position (especially whether it can be performed by non-attorneys), (3) the self-presentation made by the individual attorney, (4) how payment is structured (hourly or flat fee), and (5) whether the work is done directly with clients or through an organization. Ex. Op. 2005-1004 (June 10, 2005).

The most heavily-weighted factor has historically been the local definition.⁵ The Supreme Court of Pennsylvania⁶ has held that the practice of law is not capable of a comprehensive definition. Harkness v. Unemployment Compensation Bd. of Review, 920 A.2d 162, 166 (Pa. 2007). For this reason, it has not attempted to provide an all-encompassing statement of what activities comprise the practice of law, considering the issue instead on a case-by-case basis. Id. But it has identified three broad categories of activities that constitute the practice of law:

(1) the instruction and advising of clients in regard to the law so that they may pursue their affairs and be informed as to their rights and obligations; (2) the preparation of documents for clients requiring familiarity with legal principles beyond the ken of ordinary laypersons; and (3) the appearance on behalf of clients before public tribunals in order that the attorney may assist the deciding official in the proper interpretation and enforcement of the law. Id. at 167.

The common thread among these categories is the presence of an attorney-client relationship or its equivalent.

Pennsylvania courts have also emphasized the importance of serving a client or acting on behalf of another. For example, the Supreme Court of Pennsylvania has held that attorneys serving as lobbyists were engaged in the practice of law because they "provide[d] legal analysis to *their clients* regarding proposed legislation." Gmerek v. State Ethics Comm'n, 807 A.2d 812, 819 (Pa. 2002) (emphasis added). An insurance adjuster's *representation of tort claimants* in settlement negotiations with other insurers was held to be the (unauthorized) practice of law in Dauphin

⁵ See Ex. Op. 2005-1004 (June 10, 2005) (listing the factors considered in evaluating whether an action constitutes "practice of law" and suggesting that the local definition is "perhaps the most important"); OLA Opinion Letter dated June 18, 1999 (stating that LSC would likely defer to the state's definition of what constitutes "practice of law" for purposes of Part 1604); OLA Opinion Letter dated Apr. 14, 1998 ("It would not be appropriate for the Corporation to impose one definition for all jurisdictions because the definition of practice of law is a local matter and has many implications in the area of professional responsibility.").

⁶ The Supreme Court of Pennsylvania has exclusive authority to regulate the practice of law in Pennsylvania, which includes the power to define what constitutes the practice of law. PA. CONST. ART. V, § 10(c); Dauphin County Bar Ass'n v. Mazzacaro, 351 A.2d 229, 233 (Pa. 1976).

County Bar Ass'n v. Mazzacaro, 351 A.2d 229 (Pa. 1976), as was a bank manager's filing of a motion *on his employer's behalf* in a bankruptcy proceeding, In re Henderson, 426 B.R. 526 (W.D. Pa. 2010), and a licensed certified public accountant's provision of advice *to his clients* on the types and benefits of various legal business entities. York County Bar Ass'n v. Kirk, 59 Pa. D. & C. 4th 368 (Pa. Com. Pl. 2002).

Because attorneys serving as court-appointed arbitrators in Pennsylvania's compulsory arbitration program do not have an attorney-client relationship with either party and are not individually responsible for protecting the parties' interests, their review and discussion of legal issues, and ultimate adjudication of the case, does not constitute the practice of law.

The structure of Pennsylvania's compulsory arbitration program (also referred to as "judicial arbitration") supports this determination. Compulsory arbitration was created by the Pennsylvania courts as a means of conserving judicial resources and efficiently disposing of small civil cases. Maurice Rosenberg and Myra Schubert, *Trial by Lawyer: Compulsory Arbitration of Small Claims in Pennsylvania*, 74 Harv. L. Rev. 448, 451 (Jan. 1961); *see also* 42 Pa.C.S.A. 7361 (establishing compulsory arbitration for small civil cases). It requires that such cases be tried before a panel of three court-appointed attorneys (called a "board of arbitrators") before receiving traditional judicial review in a trial court. *Id.* In this way, Pennsylvania's compulsory arbitration operates like a small claims court, leveraging the resources and expertise of the local bar to help reduce docket backlogs.

Arbitrators play quasi-judicial roles within Pennsylvania's compulsory arbitration system. Appointed by the court clerk from a list of participating attorneys, Pa.R.C.P. No. 1302(b), arbitrators are compensated by the court for their service. 42 Pa.C.S.A. 3544(a)(1). They take the oath of office required of judicial officers, Pa.R.C.P. No. 1302(f), and are subject to the Pennsylvania Code of Judicial Conduct in discharging their duties. *Id.* 1302(e). They adjudicate cases in much the same manner as courts, hearing testimony, weighing the evidence, and applying the law. *Id.* 1304; 1305. They have the power to administer oaths or affirmations to witnesses and to adjourn an uncompleted hearing from day to day. *Id.* 1304(b). They do not represent clients; they serve as third-party neutrals, adjudicating facts and making "awards" based on evidence and arguments presented during formal hearings (where the rules of evidence often apply). *Id.* 1306. Their awards have the effect of a final judgment. *Id.* 1307(c).

While only attorneys can serve as arbitrators in Pennsylvania⁷ – a factor that would ordinarily signal the practice of law – other attributes of their service make clear that arbitrators are not, in fact, engaged in the practice of law. Arbitrators are paid a flat fee, not the hourly rates more typically associated with legal practice. Pa.R.C.P. No. 1308(a)(2); 42 Pa.C.S.A. 3544(a)(1). They do not hold themselves out to the public as practicing law, nor are they available for individual hire in matters of compulsory arbitration. Rather, upon a showing that they possess certain minimum qualifications, the clerk registers attorneys for service by adding their names to the list of court-approved arbitrators and appoints them to adjudicate cases as necessary. Pa.R.C.P. No. 1302.

Although arbitrators undoubtedly perform a legal function within the Pennsylvania court system, it is one of impartial decision-maker, rather than party-advocate. This office has previously recognized that attorneys serving in such impartial roles are not engaged in the practice of law. *Ex.*

⁷ Pa.R.C.P. No. 1302(a).

Op. 1998-63 (Jan. 8, 1999) (determining that an attorney's appointment to the post of "Commissioner" does not implicate Part 1604 because the duties are similar to those of a judge, not a lawyer representing a client); Ex. Op. 2003-1003 (Feb. 10, 2003) (determining that work as a mediator in Arkansas does not constitute the practice of law for Part 1604 purposes).

For these reasons, it is our considered opinion that court-appointed arbitrators in Pennsylvania are not engaged in the practice of law. Staff attorneys who register to serve as such are not, therefore, subject to LSC regulations on outside practice at Part 1604. LSC grant recipients in Pennsylvania may establish reasonable policies relating to the court-appointed arbitration work of their staff attorneys, including matters of compensation, as long as "[s]uch activities do not hinder fulfillment of their overriding responsibility to serve those eligible for assistance under the Act." 45 C.F.R. § 1604.1.

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A handwritten signature in black ink, appearing to read "Victor M. Fortuno", with a stylized flourish at the end.

Victor M. Fortuno
Vice President and General Counsel