

Final

Rhode Island Supreme Court Ethics Advisory Panel
Opinion No. 2006-05 Request No. 922
Issued December 14, 2006

Facts

The inquiring attorney is an elder law attorney. The attorney states that the asset-focused practice of estate planning does not address many of the needs of elderly clients, and proposes to hire a nonlawyer “geriatric care manager” (GCM) to assist him/her in serving these clients. The attorney states that a GCM is a person who specializes in long-term care for the elderly. The individual would assist the inquiring attorney by identifying medical and care issues that affect an elderly client’s financial and legal affairs in planning for, or presently dealing with, long-term care due to chronic illness or incapacity. A GCM would, for example, assist the inquiring attorney’s clients in locating appropriate care, and coordinating private and public resources to finance the cost of care. The attorney provided me the following list of additional services that a GCM could provide:

1. screening clients along with the attorney (whether at a private residence, a facility, or the law office) to ascertain care needs are being met as mandated by the rules and regulations that govern elder care;
2. providing information to the attorney regarding safety requirements, and the aids that should be provided to meet those requirements;
3. identifying in-home care and alternative living arrangement options, and providing guidance to the attorney in evaluating care option and living options in regards to meeting the RI Department of Health’s standards;
4. coordinating for the attorney specific goals, and methods for reaching those goals, in regards to quality of care; and assisting the attorney with integrating those goals with the estate plan;
5. following-up with clients to assess if care needs or circumstances have changed, and reporting any changes to the attorney;
6. facilitating and coordinating communication and care among all involved professionals, and between them and the client or family;
7. facilitating and coordinating any legal steps and paperwork necessary in transfers of care, usually in a crisis situation of moving from hospital to appropriate facility, or from an inadequate facility to an appropriate one;

8. educating the attorney in regards to health care and long-term care issues;
9. advocating for quality care;

10. coordinating intervention by the attorney when good care is lacking.

The inquiring attorney states that the GCM would be hired as an employee, and would be under his/her direct supervision. The GCM that the inquiring attorney proposes to hire is a registered nurse. The individual holds a paralegal certificate. The GCM would not provide nursing or medical care, or give medical advice to the attorney's clients.

Issue Presented

The inquiring attorney asks whether he/she may employ a nurse as a geriatric care manager in his/her elder law practice who would provide the described services.

Opinion

The inquiring attorney may hire a nurse-GCM as an employee in his/her elder law practice. The attorney must directly and effectively supervise the GCM; instruct the GCM regarding the Rules of Professional Conduct; and ensure that client confidentiality is maintained, that clients and the public are not misled as to the GCM's nonlawyer status, that the GCM's compensation is not a fee-sharing arrangement, that the GCM complies with the prohibitions against the unauthorized practice of law and direct solicitation, and that the objectives of the Rules of Professional Conduct are otherwise met.

Reasoning

Lawyers customarily employ various nonlawyers to assist them in the delivery of legal services to clients. The Panel is of the opinion that the inquiring attorney may hire a nurse-GCM as an employee of the law firm. The described services that the GCM would provide would appear to facilitate the role of the inquiring attorney in providing legal services to elderly clients, including services related to long-term care. This appears especially so in the case of clients who are in institutional settings. The GCM not only has expertise in geriatric care issues, but would also relieve the inquiring attorney of day-to-day monitoring of client care to ensure quality care.

Employing a GCM, as with employing other nonlawyers, implicates several ethical rules. Rule 5.4 imposes limitations on a lawyer's affiliation with nonlawyers in order to ensure the lawyer's professional independent judgment. The rule states:

Rule 5.4. Professional Independence of a Lawyer. - (a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer; and

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Pursuant to Rule 5.4(a) the compensation of the GCM cannot be a percentage of or otherwise directly linked to the attorney's fees received from clients; or based on client referrals. Rule 5.4(b) and (d) make clear that the GCM, a nonlawyer professional, cannot be a partner in a law firm, or have an ownership interest or serve as a corporate officer or director in a law firm.

Rules relating to information about legal services are also pertinent. Rule 7.1 states that "[a] lawyer shall not make a false or misleading communication about the lawyer's services." Rule 7.5 states in relevant part that "[a] lawyer shall not use a firm name,

letterhead or other professional designation that violates Rule 7.1.” In communicating with clients, institutions, agencies, and members of the public, the GCM must make his/her nonlawyer status known. Similarly, if the GCM is listed on the attorney’s letterhead, business cards, and other written communications, they must make clear that the GCM is not a lawyer.

Rule 5.3 entitled “Responsibilities Regarding Nonlawyer Assistants” requires lawyers to effectively supervise nonlawyer support staff to ensure compliance with the Rules of Professional Conduct; and imposes responsibility on lawyers for violations of the Rules by nonlawyer staff. In compliance with this rule, the inquiring attorney should instruct the GCM on the Rules, with particular attention to the obligation of confidentiality under Rule 1.6, the prohibition against direct solicitation of clients under Rule 7.3, and the prohibition against the unauthorized practice of law under Rule 5.5. Rule 5.5(b) prohibits lawyers from aiding nonlawyers in the unauthorized practice of law. The inquiring attorney should not permit the GCM to render legal advice to the attorney’s clients without the attorney’s knowledge and direction, and must refrain from assigning the GCM tasks that would constitute the practice of law. Provisional Order No. 18 which follows the Comment to Rule 5.5, and which sets forth guidelines for the use of legal assistants, is also instructive.

In sum, the Panel concludes that the inquiring attorney may hire a nurse-GCM as an employee in his/her elder law practice. The attorney must directly and effectively supervise the GCM; instruct the GCM regarding the Rules of Professional Conduct; and ensure that client confidentiality is maintained, that clients and the public are not misled as to the GCM’s nonlawyer status, that the GCM’s compensation is not a fee-sharing arrangement, that the GCM complies with the prohibitions against the unauthorized practice of law and direct solicitation, and that the objectives of the Rules of Professional Conduct are otherwise met.