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Committee Opinion
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LEGAL ETHICS OPINION 1869

ASSISTING PRO SE LITIGANTS—COURTHOUSE ASSISTANCE PROGRAM

The dramatic increase in self-representation in the courts has generated discussion of how and to what extent lawyers may provide limited legal assistance to pro se litigants.[1] This opinion discusses a scenario in which a Circuit Court Committee composed of members of the local bar is considering the creation of a Family Court Self-Help Center (FCSHC) to assist unrepresented persons in family law cases. With the help of volunteer lawyers and paralegals, this program would provide education, materials, legal forms, sample pleadings and general legal information already found on the court's website or the website of other legal services organizations. The volunteers would also assist the pro se litigants in the completion of form documents and pleadings.[2]

An FCSHC "Facilitator," who is a licensed Virginia lawyer or a paralegal with training in family law, will assist customers who are not represented by a lawyer. The Facilitator will distribute court forms and sample pleadings and will assist customers in completing forms and sample pleadings, prepare support calculations and make referrals to legal and community service organizations. The Facilitator cannot represent any customers or provide legal advice. Through the use of a "Customer Agreement" signed by the customer, the Facilitator will have the customer acknowledge in writing that:

- I do not have an attorney.
- I understand that the Facilitator is not my attorney.

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[1] AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE PRO SE LITIGANTS, ABA STANDING COMMITTEE ON THE DELIVERY OF LEGAL SERVICES (November 2009) at 4 at http://www.americanbar.org/content/dam/aba/migrated/legalservices/delivery/downloads/prose_white_paper.authcheckdam.pdf ("ABA Report") *citing Self-Represented Litigants and Court Legal Services Responses to Their Needs: What We Know*, by John Greacen (undated), at http://www.lri.lsc.gov/pdf/02/020045_selfrep_litigants&whatweknow.pdf, reporting on an internal analysis of four California counties, where 91.1 percent of small claims and 81.1 of landlord/tenant proceedings went forward with at least one *pro se* litigant. See also *No Time for Justice: A Study of Chicago Eviction Court*, by the Chicago Lawyers Committee for Better Housing and the Chicago-Kent College of Law Class of 2004 Honors Scholar (December 2003), finding that in 96 percent of observed eviction cases at least one party was unrepresented.

[2] Courts in Washington, California and Florida use courthouse facilitators who assist with detailed procedural information and form preparation on a one-to-one basis. Other courts have established desks staffed by volunteer lawyers who provide similar individual information. Several courts have self-help centers, following a model originated in the Maricopa County branch of the Superior Court of Arizona. These centers or kiosks provide forms, packets of information and sometimes, technological tools to provide directions and answers for an array of procedural questions. State courts also provide extensive information through the Internet. Many courts provide downloadable forms and a few incorporate document assembly tools so that litigants can either fill in the forms online or answer questions that are used to assemble the forms needed for the litigant's matter. *See* ABA Report, *supra*, n.1 at 5.

- I understand that nothing I tell the Facilitator is confidential.
- I understand that the Facilitator will not represent me in court.
- I understand that the Facilitator may assist the other party or parties in my court case.
- I understand that the Facilitator cannot give me legal advice.
- I understand that some issues cannot be addressed without the assistance of an attorney and that I may be referred to an attorney.

Questions Presented:

1. Does the proposed Customer Agreement violate any Rules of Professional Conduct?

The Committee believes that it is not unethical for lawyers to use disclaimers or agreements in order to limit the scope of assistance provided to a pro se litigant to avoid creating an unintended lawyer-client relationship with a person with whom the lawyer is interacting. The Committee addressed this concern in Virginia Legal Ethics Opinion 1842 (2008):

> . . . [T]o avoid any inference that an attorney-client relationship has been established or that the information a prospective client provides will be kept confidential, a law firm may wish to consider the inclusion of a disclaimer on the website or external voicemail warning the person to not disclose confidential or sensitive information. The website disclaimer might also state, for example, that no attorney-client relationship is being formed when a prospective client submits information and that the firm has no duty to maintain as confidential any information submitted. The disclaimer should be clearly worded so as to overcome a reasonable belief on the part of the prospective client that the information will be maintained as confidential. In addition, the Committee recommends the use of a "click-through" (aka "click-wrap") disclaimer, which requires the prospective client to assent to the terms of the disclaimer before being permitted to submit the information.

The Customer Agreement similarly has the pro se litigant understand and acknowledge that the limited assistance provided by the Facilitator does not create a lawyer-client relationship, that no legal advice is given, that information will not be kept confidential[3] and that the Facilitator may provide assistance to adverse litigants. Without such disclaimers in the Customer Agreement a person receiving limited assistance might form a belief or expectation that the Facilitator is their lawyer and thereby bound by the ethical duties that apply when a lawyer-client relationship is formed. *See* LEO 1842.

[3] Given the limited scope of the services in this hypothetical the disclosure of confidential information is likely to be minimal.

Further, Rule 1.2(b) provides that a lawyer may limit the objectives of the representation if the client consents after consultation. Comment 6 to that rule provides: "The objectives or scope of services provided by the lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client." The proposed Customer Agreement is consistent with these principles.

2. Would a lawyer participating in the FCSHC be providing "short-term limited legal services" contemplated by Rule 6.5 of the Virginia Rules of Professional Conduct? For example, would a participating lawyer be providing "short term limited legal services" if he or she participates in a legal education seminar or other information session sponsored either by the local court(s) or the local bar association, which is open to members of the public, and specifically tailored to pro se litigants on general family law issues in Virginia, to include: presentation of educational material, forms, sample pleadings, and information already found on the court's website and the websites of legal services groups; as well as a mock demonstration on how to present evidence in an *ore tenus* uncontested divorce hearing or in an *ore tenus pendente lite* support hearing?

Comment [1] to Rule 6.5 provides useful guidance in addressing this question:

> Legal services organizations, courts and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services - such as advice or the completion of legal forms - that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or *pro se* counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. *See*, e.g., Rules 1.7, 1.9 and 1.10.

In other words, a lawyer providing "short-term limited legal services" under Rule 6.5 has created a lawyer-client relationship, albeit the scope of the representation has been limited with the informed consent of the client pursuant to Rule 1.2(b). However, for purposes of Question 2, the Committee does not believe that the term "short-term limited legal services" embraces any of the activity you have described, i.e., the participation of volunteer attorneys in a legal education class or information seminar that is open to the public, providing education materials, forms, sample pleadings and other information already found on the Court's website or the websites of legal services groups.[4] Accordingly, a volunteer lawyer's participation in any of the activities

[4] Authorities have long distinguished between providing "legal information" and giving "legal advice." *See* Virginia Legal Ethics Op. 1577 (1995) and Va. UPL Op. 185 (1995)(concluding bankruptcy legal information hotline staffed

described in Question 2 is not a "short-term limited legal service" subject to Rule 6.5. Merely providing sample pleadings or forms to a pro se litigant is not the practice of law; however, the completion of a form pleading or legal document for the pro se litigant would be.[5]

3. Does a lawyer provide "short-term limited legal services" by participating in a self-help or pro se legal information center housed within the courthouse and sponsored either by the local court(s) or the local bar association, which is open to members of the public, and specifically tailored to pro se litigants, to assist them in the dissemination of educational materials, forms, sample pleadings, and information already found on the court's website and the website of legal services groups; to assist with the completion of forms and sample pleadings, preparation of support calculations and to otherwise assist in the answering of general questions?

As explained in response to Question 2, the examples of "short-term limited legal services" in Comment 1 to Rule 6.5 do not include the dissemination of educational materials, forms, sample pleadings and general legal information already found on the court's website or the websites of other legal services groups; nor do they include preparing support calculations or otherwise assisting in the answering of general questions. Therefore, the volunteer lawyer's participation in such activity does not, in the Committee's view, constitute "short-term limited legal services" subject to Rule 6.5. Whether such activity constitutes the "practice of law" is a question beyond the purview of this Committee but prior opinions of this Committee and the Standing Committee on the Unauthorized Practice of Law and other legal authorities provide guidance on this question.[6] However, if the volunteer assists the pro se litigant in the completion

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by non-lawyers is not "practicing law" but recommending disclaimer that the information provided "is not legal advice."); Va. UPL Op. 131 (1989) (non-attorneys may provide general information about legal matters (i.e. religious freedom) to members of the general public through seminars, publications, responses to letters, and telephone inquiries); Va. UPL Op. 104 (1987) (Committee approved of an attorney licensed in a foreign jurisdiction publishing articles containing general legal information in a Virginia newspaper stating that "general legal information is distinguished from specific legal advice to specific clients with regard to their respective problems."); Va. LEO 1368 (1990) (lawyer-mediator who provides legal information not legal advice to disputants is not per se engaged in the practice of law). For a detailed and thorough analysis of the difference between "legal information" and "legal advice" *see Report: Unauthorized Practice of Law Guidelines for Virginia Mediators* at http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/resources/upl_guidelines.pdf (last checked December 18, 2012).

[5] In Va. Legal Ethics Op. 1761 (2002) this Committee concluded that it would not be improper for a legal aid office to assist pro se litigants who did not qualify for legal services by providing sample pleadings and forms where no legal advice is given.

[6] In regard to providing general legal information *see* note 4, *supra*. *See* also, Va. UPL Op. 73 (1985) (It is not the unauthorized practice of law for a non-lawyer to prepare form documents such as wills, leases, power-of-attorney, bills of sales for sale for the general public. It is, however, the unauthorized practice of law for a non-lawyer to give assistance to the general public in the completion of such forms or to render any legal advice concerning the completion of the forms.); *New York Lawyers' Assn. v. Dacey*, 287 N.Y.S.2d 422, 21 N.Y.2d 694, 234 N.E.2d 459 (N.Y. Ct. App. 1967) (publication of book *How to Avoid Probate* and multitude of forms for all manner of legal

of form legal documents or sample pleadings or gives legal advice to assist in the completion of legal forms, such activity is considered "short-term limited legal services" according to Comment 1 to Rule 6.5.[7]

4. Is an attorney-client relationship established by participation in any of the activities described in (2) or (3)?

This is a question of law beyond the Committee's purview.[8] Whether information given by a volunteer lawyer to a pro se litigant is "legal advice" or "legal information" is also fact-specific and the Committee cannot render findings of fact or conclusions of law.[9] Comment 1 to Rule 6.5 explains that a client-lawyer relationship is established, however, if a volunteer lawyer performs "short-term limited legal services."

5. Is it necessary to keep a conflict list of participants who attend sessions or centers as described in (2) or (3)?

Whether a list of participants or customers must be maintained is fact-specific and will depend upon the nature of the services provided to a customer and whether a volunteer lawyer is aware of a conflict when providing short-term limited legal services to a customer.[10] If the

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situations is a commonplace activity and their use by the Bar and public in general; and conjoining of the text and the forms with advice as to how the forms should be filled out does not constitute the unlawful practice of law).

[7] *See also* Va. UPL Op. 207 (2005) (preparation of warrants in debt and other forms necessary for *pro se* representation by non-lawyer is unauthorized practice of law) (2005)*;* Va. Legal Ethics Op. 1803 (2005) (attorney serving as institutional attorney at a state prison pursuant to Va. Code §53.1-40 has an attorney-client relationship with at least some of the inmates receiving assistance, based on the legal advice or services provided in those instances).

[8] *See* notes 4-6, *supra*. *See also* Pt. 6, §I(B) of the Rules of the Supreme Court of Virginia:
Generally, the relation of attorney and client exists, and one is deemed to be practicing law whenever he furnishes to another advice or service under circumstances which imply his possession and use of legal knowledge or skill. Specifically, the relation of attorney and client exists, and one is deemed to be practicing law whenever -

> 1. One undertakes for compensation, direct or indirect, to advise another, not his regular employer, in any matter involving the application of legal principles to facts or purposes or desires.
> 2. One, other than as a regular employee acting for his employer, undertakes, with or without compensation, to prepare for another legal instruments of any character, other than notices or contracts incident to the regular course of conducting a licensed business.
> 3. One undertakes, with or without compensation, to represent the interest of another before any tribunal - judicial, administrative, or executive - otherwise than in the presentation of facts, figures, or factual conclusions, as distinguished from legal conclusions, by an employee regularly and bona fide employed on a salary basis, or by one specially employed as an expert in respect to such facts and figures when such representation by such employee or expert does not involve the examination of witnesses or preparation of pleadings.

[9] *See* note 4, *supra*.

activity described in Questions 2 and 3 does not constitute the practice of law or create a client-lawyer relationship, it is not necessary to keep a conflict list of participants who attend sessions or centers. If the volunteer lawyer provides a "short-term limited legal service" under Rule 6.5, a client-lawyer relationship is created, and the lawyer may need to make a list of those persons to avoid conflicts that may arise in the future after providing short-term limited services to a customer. Under the written Customer Agreement the "client" will have waived any conflict created by that lawyer's (or any other participating lawyer's) short-term limited assistance to another party in the same matter. This conflict waiver, which is limited to the lawyer's representation of other clients in a short-term limited representation, is to allow the program to serve participants in the program whose interests are directly adverse.

However, after concluding a short-term limited representation, the participating lawyer may still be personally disqualified under Rule 1.9(a) if he or she is subsequently employed on an ongoing basis by a new client adverse to the former client in the same or substantially related matter. For example, if the participating lawyer assists a mother in filing a petition for child custody, the same lawyer may not represent the father in the same or related matter on an ongoing basis. Rule 1.9(a). The waiver executed by the customer in the hypothetical does not address conflicts that may arise *after* a limited representation governed by Rule 6.5. While working under the auspices of the program, Rule 6.5(a) requires compliance with Rules 1.7 or 1.9(a) if the lawyer knows that the representation of the short-term limited legal services client involves a conflict. If the lawyer is aware of a conflict, the lawyer must either decline the representation[11] or obtain the affected client's consent. Under those circumstances, a record of the short-term limited representation would likely be necessary to detect, manage or avoid concurrent conflicts and successive employment conflicts in the same or substantially related matter.[12]

As Rule 6.5(a)(2) states, unless the participating lawyer knows that another lawyer in the firm has a conflict, a lawyer associated in the participating lawyer's law firm may represent a client adverse to the limited representation client. Rule 1.10 does not apply and the conflict is not imputed to the participating lawyer's firm. While Rule 6.5 dispenses with the need for the volunteer lawyers to conduct conflicts checks before providing short-term limited legal services

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[10] As a practical matter, if the participant and volunteer/facilitator both sign off on the Customer Agreement a record will be made, and a "client list" can be easily made by a compilation of the agreements. The Committee assumes that the program will retain these agreements in case questions, concerns, misunderstandings or complaints are made about the services provided or the agreements under which they were provided.

[11] Even if the participating lawyer declines the representation because he or she knows of a conflict, it would behoove that lawyer to make a record of the declination in case the issue is raised later.

[12] The Rules of Professional Conduct do not mandate that a lawyer keep a "conflict list" or a list of persons he or she has represented. However, as a practical matter, such lists are often the only means by which conflicts can be detected.

to a customer, the rule does not govern conflicts that may arise after a volunteer lawyer has provided short-term limited legal services to a customer and is thereafter asked to undertake representation by an adversary in the same or substantially related matter.

6. Does Rule 6.5 apply to participation in a program described in (2) or (3)?

Rule 6.5 does not apply unless the services provided are "short-term limited legal services." As stated previously, much of the activity you describe does not constitute "short-term limited legal services" subject to Rule 6.5. However, if the volunteer assists the pro se litigant in the completion of form legal documents or sample pleadings or gives legal advice in the completion of legal forms, such activity is considered "short-term limited legal services" subject to Rule 6.5.

If the Facilitator is a paralegal rather than a lawyer, the paralegal's assistance may not include the unsupervised preparation of pleadings or other legal documents, nor may the paralegal without supervision assist the pro se litigant in the preparation of sample form pleadings or other legal documents. *See* UPL Op. 207 (2005) (non-lawyer assistance to the general public in the completion of form documents or the providing of legal advice concerning the completion of forms is the unauthorized practice of law).[13] Therefore, the lawyers participating in the FCSHC may not train a paralegal to provide unsupervised services that constitute the unauthorized practice of law. LEO 1792, Rule 5.5(c).

7. If participation in (2) or (3) creates a "short-term limited legal relationship" or an attorney-client relationship, should the Customer Agreement require the customer to sign and acknowledge that:

"(a) the scope of the representation is limited to that provided in the session or center,

(b) the relationship does not continue after the session or center assistance is concluded, and

(c) the pro se litigant should obtain further assistance, if needed, from another lawyer outside the center or session."?

If the lawyer's participation in the FCSHC creates a "short-term limited legal relationship" or a client-lawyer relationship subject to Rule 6.5, it would not be improper for the participating lawyer to have the client acknowledge in writing limitations on the scope of the

[13] "The only assistance that a social worker, or any non-lawyer may provide to a pro se litigant to complete form legal documents is direct translation of the document (if the litigant does not speak or read English) to the litigant's native language, direct transcription, or direct transcription and translation to English, of information necessary to complete forms as dictated by the litigant. The social worker may also provide general administrative instructions such as how and where and when to file the forms with the appropriate court/tribunal." UPL Op. 207 (2005).

representation including that (a) the scope of the representation is limited to the services provided in the session or center; (b) the relationship does not continue after the session or center assistance is concluded; and (c) the pro se litigant should obtain further assistance, if needed, from another lawyer outside the center or session. See Rule 1.2(b).

8. If guidelines were established for attorney volunteers distinguishing between information and legal advice, such as those attached, would that make a difference in the answer to question 4?

Guidelines that assist the volunteers in distinguishing between "legal information" and "legal advice" would help to prevent the inadvertent provision of "legal advice" to a pro se litigant and the unintended creation of a client-lawyer relationship. For further guidance on this subject, there are articles and resources on the Internet often used for training court personnel so that they do not inadvertently engage in the unauthorized practice of law when they assist pro se litigants.[14]

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[14] John M. Greachen, *Legal information vs. legal advice—Developments during the last five years*, American Judicature Society, located at http://www.ajs.org/prose/pro_greacen.asp (last checked December 19, 2012); *Legal Information vs. Legal Advice: Guidelines and Instructions for Clerks and Court Personnel Who Work with Self-Represented Litigants in Texas State Courts*, Texas Courts Online located at http://www.courts.state.tx.us/pubs/LegalInformationVSLegalAdviceGuidelines.pdf (last checked December 12, 2012). To take a quiz on questions that seek legal advice versus legal information see Pro Profs Quizmaker: Legal Advice vs. Legal Information at http://www.proprofs.com/quiz-school/story.php?title=legal-advice-vs-legal-information (last checked on Dec 19, 2012); *Legal Information vs. Legal Advice: A Curriculum for Court Employees*, National Center for State Courts (May 2002) at https://www.ncsconline.org/d_icm/programs/cedp/papers/Research_Papers_2002/ICM_Legal_InfoLegal_Advice.pdf; *Legal Information vs. Legal Advice: Guidelines and Instructions for Court Staff Who Work With Self-Represented Litigants in Utah's State Courts*, Prepared by the Education Subcommittee of the Utah Judicial Council Standing Committee on Resources for Self-Represented Parties (April 2010) at http://www.co.washington.or.us/LawLibrary/upload/TF_Utah_Legal_Info-v-Advise.pdf; *May I help you? Legal Advice vs. Legal Information: A Resource Guide for Court Clerks*, Judicial Council of California, Administrative Office of the Courts and the Access and Fairness Advisory Committee (June 2004) at http://lri.lsc.gov/legal-representation/pro-se/articles-publications/may-i-help-you-legal-advice-vs-legal-information-resource-guide-court-clerks.