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INFORMAL OPINION 2010-2

Application of the Rules of Professional Conduct to a Person Licensed to Practice Law When There Is No Attorney – Client Relationship

We have been asked whether a lawyer who left the private practice of law to become a hospital's Director of Risk Management is required by the Rules of Professional Conduct to disclose that he is licensed to practice law when he attempts to resolve disputes and obtain releases from patients and third parties. For the reasons set forth below in our opinion the answer is no.

We have been asked to assume that in hiring the person to be Director of Risk Management, the hospital did not intend to and the person did not agree to create an attorney – client relationship; their intent was to have the person perform the customary and usual duties of a director of risk management. On occasion those duties include attempting to resolve disputes with and obtain releases from patients and third parties. We have also been asked to assume that hospital risk managers who are not lawyers routinely speak with patients and third parties in an attempt to resolve disputes and

obtain releases.[1]

We assume, too, that (a) while the hospital did not intend to hire the person as a lawyer, the hospital had an expectation that the person's training and experience as a lawyer would be useful in carrying out the responsibilities of a Director of Risk Management and (b) the reasons the Risk Manager might prefer not to identify himself as a lawyer are because (i) he is not the hospital's lawyer and (ii) if he attempted to explain that he was a licensed lawyer but was employed as Director of Risk Management not as a lawyer, the patient or third party might simply hear the word "lawyer" and be reluctant to sign anything without consulting her own lawyer. We have been asked to assume that whenever the risk manager talks with patients and third parties he identifies himself as the hospital's Director of Risk Management acting on behalf of the hospital.

Whether an attorney – client relationship exists is a "foundational fact"[2] that determines whether the Rules of Professional Conduct apply to the disclosure issue we have been asked to address. The formation of an attorney – client relationship depends on the intent of the parties.[3] With rare exceptions the law does not force parties into an attorney – client relationship. In some circumstances, the existence of an attorney – client relationship may be inferred from the conduct of the parties. In this case we have been asked to assume that the parties did not intend to create an attorney – client relationship and that their conduct is consistent with that intention. In a

[1] For a ruling that holds Rule 4.2 does not apply to a lawyer serving as a bankruptcy trustee see In Re Rock Rubber & Supply of CT, Inc., 345 B.R. (Bankr. D. Conn. 2006), 402

[2] Hazard & Hodes, The Law of Lawyering, 3rd Edition, Volume 1, §2.5, page 2-8 (2003 Supplement)

[3] Restatement (Third) The Law Governing Lawyers, Vol. 1,. § 14 , page 125.

variety of business settings persons licensed to practice law but who were not hired as lawyers and did not agree to provide services in the context of an attorney – client relationship are often required to speak to and negotiate with non-lawyers making use of their legal training and experience. To conclude that the Rules apply whenever a person licensed to practice law does anything that could also be done by a lawyer in the context of an attorney client relationship would create endless uncertainty and would be inconsistent with the basic premises underlying the Rule that would otherwise require disclosure[4], namely the existence of an attorney –client relationship.

Based on the fact that there is no attorney – client relationship between the hospital and its Director of Risk Management, it is our opinion that there is no duty under the Rules for the Director of Risk Management to explain to patients and third parties that while he is licensed to practice law he is not the hospital's lawyer, but rather its Director of Risk Management. It is worth remembering, however, that some Rules of Professional Conduct apply whether or not there is an attorney – client relationship. For example, Rule 8.4 (3) provides: "It is professional misconduct for a lawyer to: ……(3) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

THE COMMITTEE ON PROFESSIONAL ETHICS

By Wick R Chambers
Wick R. Chambers, Chair

[4] See Rule 4.3, Dealing With Unrepresented Person