

OFFICE OF LEGAL AFFAIRS

ADVISORY OPINION
NO. 201201

SUBJ: Whether service as 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

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 ("E. 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. E. Op. 2005-1004 (June 10, 2005)

The most heavily weighted factor has historically been the local definition. The Supreme Court of Pennsylvania has held that the practice of law is not capable of a comprehensive definition. Harkness v. Unemployment Compensation Bd. of Review, 620 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. 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.

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

Pennsylvania courts have emphasized the importance of serving a client or acting on behalf of another. For example,

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 efficiently disposing of small civil cases. Maurice Rosenberg and Myra Schubert, Trial by Lawyer: Compulsory Arbitration of Small Claims in Pennsylvania, 74 Arv. 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 heard before a panel of three court-appointed attorneys (called a "board of (s) Tj 0.39 0 Td () Tj 0.0(o)-i-1(it-1(i,a-2(r)3(a)4(t)-212(r)

