THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL ETHICS

FORMAL OPINION 2017-4: Ethical Considerations for Legal Services Lawyers Working with Outside Non-Lawyer Professionals

TOPIC: Ethical considerations for lawyers in not-for-profit legal service organizations when working with outside non-lawyer professionals for the benefit of low-income individuals.

DIGEST: Lawyers in not-for-profit legal services organizations sometimes provide legal assistance to low-income clients indirectly through non-lawyer social-service professionals acting as the clients' agents. The lawyer's assistance may be quite limited, consisting of as little as a single telephone conversation with a non-lawyer who has reached out to the lawyer on the individual's behalf. When such an interaction gives rise to an attorney-client relationship between the lawyer and the individual, the lawyer must heed certain ethical requirements of the New York Rules of Professional Conduct (the "Rules"), including avoiding conflicts of interest, obtaining informed consent to a reasonable limited scope representation, and providing competent services.

RULES: 1.1, 1.2(c), 1.10(e), 6.5

QUESTION: What are the principal ethical considerations for lawyers in not-for-profit legal services organizations who work with outside non-lawyer professionals for the benefit of low-income clients, when the non-lawyer professionals are not agents or clients of the lawyer but serve as agents of the individual clients?

OPINION:

I. Introduction

In the context of the following scenario, this Opinion addresses certain ethical rules that are implicated when legal services lawyers help non-lawyer professionals, such as social workers, assist individuals with matters that may involve legal considerations:

> A not-for-profit legal services organization[1] (the "Organization") provides various kinds of free legal assistance to low-income individuals. One area in which the Organization regularly provides assistance is Medicaid applications. On the understanding that licensed social workers and other non-lawyer social-services professionals (caseworkers) employed by not-for-profit social services agencies are permitted by law to assist Medicaid applicants, the Organization's lawyers provide caseworkers with training on the applicable Medicaid substantive law, procedure and practice. The Organization also invites caseworkers whom it trains, and others with whose agencies it has established relationships, to reach out to the Organization's lawyers when the caseworkers need legal advice to help individuals complete Medicaid applications. As a consequence, the

[1] The "legal services organizations" that are the subject of this Opinion are a type of "qualified legal assistance organization," as defined in Rules 1.0(p) and 7.2(b).

> Organization's lawyers regularly field calls from caseworkers acting on behalf of Medicaid applicants who seek advice on how to answer particular questions on the application form. The interaction between the caseworker and the legal services lawyer typically consists of a single telephone conversation during which the caseworker provides the information about the applicant's circumstances and the lawyer provides brief legal advice for the applicant's benefit. The caseworker may convey the advice to the applicant and/or use it in helping the applicant complete the form. The caseworker's communication with the lawyer may occur while the caseworker is meeting with the applicant or thereafter. Because the communication is typically by telephone, the lawyer may not meet directly with the applicant and may not even speak with him.

This type of scenario is not uncommon in certain not-for-profit legal services practices, given the limited resources available to address the legal needs of low-income individuals. Many New Yorkers who are burdened with civil legal issues can neither afford a lawyer nor access free legal services. Due to this "justice gap," many legal services organizations work closely with non-lawyer professionals in community-based settings that provide services to and advocate for low-income individuals. This allows the legal services organizations to leverage their resources and reach a greater number of individuals in need. In working with such individuals, the non-lawyers may seek advice and assistance from the legal services organizations for these individuals' benefit. While this Opinion does not exhaustively review all the ethical rules that may apply to such interactions, it addresses the rules that are principally implicated.

II. Clarifying the lawyer's and caseworker's respective roles and responsibilities

Lawyers, including legal services lawyers, interact with social workers and other non-lawyer professionals in various contexts and relationships. For example, lawyers employ non-lawyer professionals,[2] lawyers represent non-lawyer professionals as clients (*e.g.*, where a non-lawyer serving as a fiduciary retains counsel to advise on her fiduciary responsibilities),[3] and lawyers are employed by non-lawyers to provide legal assistance to others.[4] Because the legal

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[2] In that event, the lawyers have supervisory authority over, and responsibility for, the non-lawyers. *See* Rule 5.3 ("Lawyer's Responsibility for Conduct of Nonlawyers"); *see also* Rule 8.4(a) (lawyers and firms shall not violate Rules through acts of another).

[3] When the non-lawyer is the lawyer's client, the relationship is subject to the full panoply of ethical rules governing lawyers representing clients. *Cf.* NYCBA Formal Op. 2005-2 (Feb. 2, 2005) (addressing lawyer's duties arising from representation of underwriter that has fiduciary duties to issuer).

[4] Here, too, the lawyer owes the individual client the full panoply of ethical duties and must take care to avoid any improper influence by the agency on the lawyer's independent judgment. *See* Rule 1.8(f) (duties of lawyers compensated by someone other than client); Rule 5.4(c) (same); *see also* NYCBA Formal Op. 1997-2 (May 1, 1997) (discussing obligations of lawyer employed by social services agency serving juveniles).

and ethical ramifications differ, lawyers must be clear about the nature and scope of their relationships with non-lawyers with whom they work. *See, e.g.*, NYCBA Formal Op. 2014-1 (Jan. 1, 2014); *cf.* Rule 4.3 (requiring clarification of lawyer's role in dealing with unrepresented persons).

This Opinion addresses a particular kind of interaction between a legal services lawyer and non-lawyer professional— i.e., where a caseworker employed by, or working under the aegis of, a social services organization seeks legal advice on behalf of a client from an attorney at a law firm or organization separate from where the caseworker is employed. In the example above, the caseworker is assisting a Medicaid applicant in completing the application form.[5] If the caseworker perceives that a lawyer's input is needed, she acts as the applicant's agent by contacting the legal services lawyer on behalf of the applicant. The lawyer provides advice based on facts about the applicant provided by the caseworker. The caseworker may convey the lawyer's advice to the applicant and may use the advice in helping the applicant complete the form. The caseworker's communication with the lawyer may occur during or after a meeting between the caseworker and the applicant. The lawyer may never meet or even speak with the applicant, because the interaction is typically conducted by phone between the lawyer and the caseworker.

In this scenario, it is important as a threshold matter for the lawyer and caseworker to have a shared understanding of their respective roles on behalf of, and relationships to, the individual whom they are assisting – namely, that the caseworker, acting on behalf of a particular individual (here, a Medicaid applicant), seeks the lawyer's input in assisting that individual. In other words, the caseworker is the individual's agent in seeking legal advice and the legal services lawyer serves, albeit briefly, as the individual's lawyer, not the caseworker's lawyer.[6]

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[5] We assume for purposes of this Opinion that the legal services lawyer has no reason to believe the caseworkers are providing assistance they are not legally authorized to provide. Otherwise, the legal services lawyer would have to consider whether she is assisting in the unauthorized practice of law. What constitutes the unauthorized practice of law is a legal question outside the scope of this Opinion. However, the subject of knowingly aiding non-lawyer agents in the unauthorized practice of law is discussed in, *e.g.*, NYSBA Ethics Op. 1068 (August 10, 2015); *see also* NYSBA Ethics Op. 705 (May 26, 1998); NYCBA Formal Op. 2014-1 (Jan. 1, 2014).

[6] This differs from the situation in which the caseworker seeks and receives legal "information" rather than legal "advice" from the legal services lawyer. In that situation, the caseworker may not need to, or seek to, engage the lawyer to form any kind of attorney-client relationship, even one that is limited in scope, with the Medicaid applicant, and the caseworker may not disclose any confidential information regarding that individual. The distinction between legal information and advice is discussed in, *e.g.*, ABA Formal Op. 10-457 (August 5, 2010) ("Although no exact line can be drawn between legal information and legal advice, both the context and content of the information offered are helpful in distinguishing between the two . . .. With respect to context, lawyers who speak to groups generally have been characterized as offering only general legal information. With respect to content, lawyers who answer fact-specific legal questions may be characterized as offering personal legal advice, especially if the lawyer is responding to a

This shared understanding may have been established in the course of earlier, similar interactions between the lawyer and the caseworker, in which case they can quickly reconfirm it. If not, the lawyer and caseworker should explicitly communicate about this at the outset of their interaction.

III. Avoiding conflicts of interest

Before providing assistance, the legal services lawyer must learn whom she will be assisting and ascertain that she is not precluded from providing assistance by a conflict of interest rule. For example, if the Organization handles contested divorces or other litigation, it is conceivable that another lawyer employed by the Organization already represents a client in a matter adverse to the Medicaid applicant. In that event, absent an exception or a permissible waiver, Rules 1.7 and 1.10 would require all lawyers in the Organization to decline to advise the applicant, even if the two representations were entirely unrelated in subject matter and would be handled by different lawyers in different offices of the Organization.

However, there is an exception in Rule 6.5, which relaxes the otherwise applicable conflict of interest rules for "lawyer[s] who, under the auspices of a program sponsored by a . . . not-for-profit legal services organization, provide[] short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter." Rule 6.5 provides:

> (a) A lawyer who, under the auspices of a program sponsored by a court, government agency, bar association or not-for-profit legal services organization, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:
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> > (1) shall comply with Rules 1.7, 1.8 and 1.9, concerning restrictions on representations where there are or may be conflicts of interest as that term is defined in these Rules, *only if the lawyer has actual knowledge at the time of commencement of representation that the representation of the client involves a conflict of interest*; and
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> > (2) shall comply with Rule 1.10 *only if the lawyer has actual knowledge at the time of commencement of representation that another lawyer*

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question that can reasonably be understood to refer to the questioner's individual circumstances."); D.C. Legal Ethics Op. 316 (2002) ("Providing legal information involves discussion of legal principles, trends, and considerations. . . . Providing legal advice, on the other hand, involves offering recommendations tailored to the unique facts of a particular person's circumstances.") (citing NYCBA Formal Op. 1998-2 (September 1, 1998) (recommending that lawyers in educational settings refrain from appearing to give a general solution applicable to all apparently similar individual problems)); Va. Legal Ethics Op. 1869 (May 28, 2013; approved by Va. S.Ct. Nov. 2, 2016) ("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.").

> *associated with the lawyer in a law firm is affected* by Rules 1.7, 1.8 and 1.9.
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> (b) *Except as provided in paragraph (a)(2), Rule 1.7 and Rule 1.9 are inapplicable* to a representation governed by this Rule.
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> (c) Short-term limited legal services are services providing legal advice or representation free of charge as part of a program described in paragraph (a) with no expectation that the assistance will continue beyond what is necessary to complete an initial consultation, representation or court appearance.
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> (d) The lawyer providing short-term limited legal services must secure the client's informed consent to the limited scope of the representation, and such representation shall be subject to the provisions of Rule 1.6.
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> (e) This Rule shall not apply where the court before which the matter is pending determines that a conflict of interest exists or, if during the course of the representation, the lawyer providing the services *becomes aware of the existence of a conflict of interest* precluding continued representation.

(emphasis added)

Accordingly, where the lawyer is providing short-term limited legal services of the kind described in Rule 6.5(c), she need only be concerned about conflicts of which she has "actual knowledge" at the time of commencement of the representation. She need not run a firm-wide conflict check, as would otherwise be required by Rule 1.10(e). NYSBA Ethics Op. 1012 (July 30, 2014) (Although Rule 6.5 does not explicitly address Rule 1.10(e), the "clear implication of Rule 6.5 is that a Participating Lawyer may undertake a limited-services representation without first consulting the conflict-checking system required by Rule 1.10(e)").[7] Additionally, the conflicts of other lawyers in her firm or organization would not be imputed to her, as they otherwise would be under Rule 1.10(a), unless she has "actual knowledge" of the conflict. *See generally* NYSBA Ethics Op. 1012 (July 30, 2014).

As explained in the accompanying Comments, Rule 6.5 relaxes the usual conflict rules because compliance with those rules would be impracticable in the context of programs providing short-term limited legal services. By relaxing the usual conflict rules, Rule 6.5 reduces obstacles to participation in programs that provide short-term limited legal services, thereby increasing the availability of such services to people in need. *See* NYCBA Formal Op.

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[7] Rule 1.10(e) requires "law firm[s]" to run conflict checks when, *inter alia*, agreeing to represent a new client. Under Rule 1.0(h), a legal services organization is a law firm. *See* Rule 1.0 (h) (stating that "'firm' or 'law firm' includes, but is not limited to, a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other *association authorized to practice law*; or lawyers employed in a *qualified legal assistance organization*, a government law office, or the legal department of a corporation or other organization") (emphasis added); Rules 1.0(p) and 7.2(b) (stating that "qualified legal assistance organization" includes legal aid office "operated or sponsored by a bona fide, non-profit community organization").

2009-3 (March 2, 2009) (applying DR 5-101-a (predecessor to Rule 6.5) to law student participation in school-run legal clinics); Roy D. Simon & Nicole Hyland, *Simon's New York Rules of Professional Conduct Annotated* (2016 ed.) at 1642 (Rule 6.5 relieves pro bono lawyers and their firms from the "heavy burden of performing a time-consuming full-nine-yards conflict check.").

Whether, in our scenario, Rule 6.5 applies to the short-term limited advice sought by the caseworker on behalf of the Medicaid applicant depends on whether the legal services lawyer is providing the advice "under the auspices of a program sponsored . . . by a not-for-profit legal services organization," *i.e.*, the Organization that employs the lawyer. The Rules do not define the term "program" and we are unaware of any authority defining that term for purposes of Rule 6.5. The dictionary definition of "program" broadly includes "a plan or system under which action may be taken toward a goal." Merriam-Webster Dictionary, at https://www.merriam-webster.com/dictionary/program.

Comment [1] to Rule 6.5, in listing examples of programs within the rule, encompasses a range of formats for addressing pro bono client needs. These include "advice-only clinics," which would presumably provide services at specified places and times, perhaps by appointment, and "legal-advice hotlines" that would allow callers to access services on an as-needed basis without advance scheduling or face-to-face interaction. Comment [1] states:

> Legal services organizations, courts, government agencies, bar associations and various non-profit organizations have established programs through which lawyers provide free short-term limited legal services, *such as advice or the completion of legal forms*, to 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.

(emphasis added). Nothing in Comment [1] suggests that "program" is to be construed formally or restrictively. *See also* Simon & Hyland, *supra*, at 1631 (describing various programs under Rule 6.5, including a legal hotline that assists nearly 1000 callers a month by providing free "simple legal advice" on a broad range of civil issues).

The term "program" in Rule 6.5 would encompass formal programs in which lawyers would be available at a specified time and place to assist individuals with specified legal problems. *See, e.g.*, NYCBA Formal Op. 2005-1 (January 2, 2005) (discussing, prior to the adoption Rule 6.5's predecessor, DR 5-101-a, bar association programs in which bankruptcy lawyers provide short-term advice to consumer debtors). But we see no reason why the term "program" in Rule 6.5 should be limited to such formal programs. The apparent purpose of Rule 6.5 was to expand the availability of free, brief legal assistance to low-income individuals who would otherwise not receive any legal help at all, in part by reducing the impediment posed by time-consuming firm-wide conflict checking. Arrangements under which such short-term assistance is provided may come in various forms. A legal services office might regularly provide brief legal advice to caseworkers for the benefit of the individuals the caseworkers serve.

The availability of such advice might be limited to particular subjects (*e.g.*, Medicaid) and times (*e.g.*, office hours). We believe that such regular provision of assistance would constitute a "program" within the meaning of Rule 6.5 and should therefore be entitled to the benefit of the rule's liberalized conflict of interest provisions.

IV. Obtaining consent to reasonable limited scope representation

Rule 6.5(d) requires lawyers providing short-term limited legal services to "secure the client's informed consent to the limited scope of the representation." Limited scope representations are governed by Rule 1.2(c), which provides in pertinent part that a lawyer may limit the scope of the representation if "the limitation is reasonable under the circumstances [and] the client gives informed consent."[8]

There is no bright-line rule for determining the reasonableness of a limited scope representation. *See* NYCBA Formal Opinion 2016-2 (2016) ("Given the variety of considerations that may go into analyzing the reasonableness of a limited scope representation, the Committee cannot offer a bright-line rule."). Rule 1.2(c) broadly provides that reasonableness is to be determined "under the circumstances." More specifically, Comment [7] to Rule 1.2 recognizes that limiting a representation to a brief telephone call may be reasonable:

> Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. *If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation*. Such a limitation, however, would not be reasonable if the time allotted were not sufficient to yield advice upon which the client could rely. (emphasis added)

This Committee does not determine factual questions, but in our view, the limited representation provided by the legal services lawyer in our scenario appears reasonable in scope. The lawyer's brief advice advances the client's objective of a successful Medicaid application. The caseworkers who play the primary role in assisting applicants have training and experience in completing such applications, and there is no apparent reason to believe that they will misjudge the extent to which legal advice is needed. To paraphrase Comment [7] to Rule 1.2(c), "the time allotted" for the telephonic consultation – which would be determined by the number and complexity of the caseworker's questions and the lawyer's answers – appears "sufficient to yield advice upon which the client [can] rely."

Even assuming *arguendo* that the applicant might benefit from the lawyer reviewing and advising on the entire application, the lawyer's more limited involvement would not violate Rule

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[8] The term "limited scope representation" is not defined in the Rules. In NYCBA Formal Op. 2016-2, this Committee opined that "a limited scope representation is one that limits or excludes services that the client would reasonably expect to be included in the representation under the circumstances."

1.2(c) because the standard under the rule is whether the limitation is reasonable under the circumstances, not whether absence of the limitation could potentially be beneficial. Otherwise, limited scope representations would rarely pass muster, because a full-fledged representation (which the client may be unable to afford) nearly always has potential benefits absent from a more limited representation (which may be all the client can afford). *See* NYCBA Formal Op. 2016-2 (discussing potentially useful services that may reasonably be excluded from limited scope representation of deposition witness).

With regard to informed consent, Rule 1.0(j) provides:

> "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.

In our scenario, in order to establish informed consent under Rule 1.2(c), the Medicaid applicant should be made aware that (1) the lawyer's services are limited to providing advice on questions posed by the caseworker, (2) the lawyer will not be involved in the application on an ongoing basis, does not take responsibility for the adequacy of the caseworker's assistance, and cannot predict whether the application will be granted, and (3) there are inherent risks of miscommunication, as described in §V below, whenever a client representative such as the caseworker serves as intermediary between a lawyer and client. The applicant may as a practical matter have no reasonably available alternative to getting brief advice from the legal services lawyer through the caseworker, but if there are any such alternatives, they should be identified to the applicant. The applicant can be made aware of the foregoing information, and give his consent, via the caseworker. The lawyer should get confirmation from the caseworker that (i) she understands this information and has conveyed it to the applicant, and (ii) she has authority from the applicant to engage the lawyer on the applicant's behalf to provide the limited services.

V. Providing competent legal assistance

Rule 1.1(a) provides:

> A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment [5] to Rule 1.1, concerning thoroughness and preparation, explains that competence in handling a particular matter includes inquiry into and analysis of factual as well as legal elements of the client's problem.[9]

[9] *See also* Rule 1.2 Cmt. 7 ("Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

The ethical competence issue raised by our scenario is whether the caseworker acting as intermediary between the legal services lawyer and the Medicaid applicant affects the lawyer's ability to be sufficiently factually informed to give sound advice, and whether the lawyer can have sufficient confidence that her advice is being appropriately implemented. In NYCBA Formal Op. 2014-1, this Committee cautioned that the absence of direct communication between lawyer and client may impair competence:

> If the Lawyer has no contact with these clients, the Lawyer might be unable to gather sufficient factual information to allow the Lawyer to analyze the relevant legal issues and to exercise the skill, thoroughness and preparation needed to provide competent representation…. In addition, the Lawyer would not be in a position to ensure that the [intermediary] is implementing the legal advice in a competent manner.

Id. §7(a).

In interviewing the Medicaid applicant, it is possible that the caseworker may misunderstand the applicant's factual circumstances or fail to elicit all relevant facts. It is similarly possible that the caseworker may misunderstand the lawyer's advice, with the result that the advice is incorrectly transmitted to the applicant or utilized by the caseworker in assisting the applicant with the form. These kinds of problems are possible whenever a lawyer interacts with a client's representative or agent.

Generally speaking, the lawyer is entitled to rely on the client's representative or agent where the circumstances indicate that it is reasonable to do so. However, delivering legal services to low-income clients through non-lawyer intermediaries who are not employed by the lawyer may raise special concerns. Such clients often have little if any legal understanding of the issues. They may also be non-English-speaking or speak English as a second language. In the scenario considered here, they may never have met or spoken with the lawyer. They may have little, if any, choice as to the caseworker who acts as their agent in communicating with the lawyer.

There also may be situations where the lawyer has reason to believe that the intermediary – in our scenario, the caseworker – is incorrectly transmitting the facts from the client to the lawyer, inadequately implementing the lawyer's advice or transmitting the advice to the applicant, or otherwise acting in a manner contrary to the client's interests. In that event, the lawyer must take appropriate remedial steps or decline or terminate the representation, as appropriate. *See, e.g.*, Mich. Ethics Op. RI-349 (July 26, 2010) (A legal aid organization may use legal assistant employees as the exclusive communication link with clients and third parties in some matters and situations, but because of the increased risk of failure to meet professional obligations, this practice "should be carefully considered and astutely managed.").

Because of the legal services lawyer's obligation to provide competent representation, she should not proceed with advising the Medicaid applicant through the caseworker unless she reasonably believes that the caseworker's involvement will not result in her failing to provide competent representation as required by Rule 1.1(a). Typically, the lawyer or the Organization

has an ongoing professional relationship with the caseworkers or the agencies that employ them, and thus may be in a position to influence the quality of the caseworkers' services, through training and otherwise. Whether or not required, a lawyer may determine as a matter of judgment to take steps to ensure the caseworker is adequately trained in the pertinent area of law and adequately supervised.

CONCLUSION:

Many not-for-profit legal services organizations work closely with non-lawyer professionals, such as social workers, who are employed by community-based agencies that assist and advocate for low-income individuals. Some legal services organizations make their lawyers available to provide legal advice for the benefit of such individuals. One way this may occur is that a non-lawyer professional, acting as agent for the individual, reaches out to a legal services lawyer for short-term limited legal advice, *e.g.*, advice on how the individual should respond to particular questions in applying for Medicaid. It is important for the lawyer and the caseworker, at the outset of their interaction, to have a shared understanding of their respective roles and responsibilities vis-à-vis the individual. The lawyer's involvement may consist of a single telephone conversation with the non-lawyer, who communicates with the lawyer on the individual's behalf. Such an interaction may give rise to an attorney-client relationship between the lawyer and the individual. If it does, the lawyer must comply with ethical requirements to avoid conflicts of interest, obtain informed consent to a reasonable limited scope representation, and provide competent services. The lawyer's provision of short-term limited legal services is subject to Rule 6.5, which relaxes the otherwise applicable conflict of interest rules. Under Rule 6.5, the legal services lawyer need not conduct an organization-wide conflict check; instead, she is ethically conflicted only if she personally has actual knowledge of a conflict.