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Case Study 2: Advising Governance Structures

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CASE STUDY 2: ADVISING GRASSROOTS ORGANIZATIONS

*Bruce A. Green**

*Marci Seville ***

I. FACTUAL BACKGROUND

The Progressive Workers Center (“PWC”) is a grassroots organization focused on low-wage worker organizing. The public interest law office in which you work occasionally accepts client referrals from PWC, and PWC occasionally asks your office for legal advice about its operations.

The PWC mission statement, posted on the organization’s website, says: “We are a multi-racial, grassroots advocacy worker center. We strive to improve job conditions for low-wage workers. We achieve our mission through worker and community organizing, public education, and direct representation of workers enforcing their labor rights.”

PWC staff members are all community organizers. There are no lawyers on staff. As part of its organizing efforts, PWC does intakes on working conditions and potential labor violations. PWC files administrative claims with the state labor agency for individuals or groups of workers claiming violations of state wage and hour laws. PWC also represents the workers in the administrative wage claim hearings. Non-lawyers can do so under state law.

Anna Johnson, who worked for six years cleaning rooms in a small non-union hotel, attended a PWC meeting, learned about her wage and hour rights, and was then interviewed by PWC organizer Amelia Lunes. Lunes determined that Johnson was owed overtime and compensation for being denied meal and rest breaks. Johnson said other workers at the hotel had similar claims.

Lunes also learned that Johnson had been sexually harassed by various hotel guests during her six years of employment and that this

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continued to be a problem. Johnson complained to her manager about the harassment but nothing happened.

Lunes did a detailed intake about the harassment and wage claims, and created a PWC intake file with her interview notes, a diary Johnson kept about the harassment, and records Johnson kept about her work hours and pay. Lunes referred Johnson to private counsel for her sexual harassment claim and the lawyer filed a civil complaint under the state's anti-discrimination law.

Lunes prepared a wage claim for Johnson and filed it with the state agency. She also wrote to the employer in January 2018 detailing what she considered to be legal violations and setting forth a settlement demand. She concluded her letter as follows:

PWC believes that its members are entitled to all rights under state and federal labor laws. The settlement offer in this letter remains open until February 1, 2018. If this case is not resolved informally, PWC will litigate Ms. Johnson's claims for wage violations and sexual harassment to the fullest extent of the law, seeking all available remedies for monetary and injunctive relief, fees, and costs.

II. ISSUE #1: UNAUTHORIZED PRACTICE OF LAW

Shortly after sending the demand letter, Lunes received a letter from the employer's attorney asserting that Lunes and PWC were engaging in the unauthorized practice of law ("UPL"), with potential exposure to civil penalties and criminal liability. Lunes has now come to you for legal advice about the UPL allegations. What advice should you give?

To begin with, most states have UPL provisions that forbid non-lawyers from practicing law without authorization. The provisions apply to organizations (other than law firms), as well as to individuals.

An organization may have in-house lawyers or an in-house law office, to give advice to the organization. A not-for-profit organization that is not itself a legal services organization may also have in-house lawyers who give legal assistance to third parties—for example, a social services agency may have lawyers on staff to assist the agency's clients.¹ But in that case, the lawyers must be able to maintain professional independence from the non-lawyer organization. In this case study, PWC

1. N.Y.C. Bar Comm. on Prof. Ethics, Op. 2017-4: Ethical Considerations for Legal Services Lawyers Working with Outside Non-Lawyers Professionals (June 20, 2017), <http://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/formal-opinion-2017-4-ethical-considerations-for-legal-services-lawyers-working-with-outside-non-lawyer-professional>.

does not have lawyers on staff, so it must be careful to avoid violating UPL laws.

UPL is a matter of state law, and the relevant laws vary from state to state, so a lawyer advising PWC should begin by becoming familiar with the jurisdiction's UPL laws and relevant judicial decisions interpreting them.

The UPL laws should not be taken lightly. In some states, individuals and entities are subject to criminal prosecution under the laws.² More often, an entity with authority to enforce the law brings an injunction action. An organization that engages in UPL may also risk liability to the client if the client is unhappy with the result. And, of course, there is both reputational risk and the cost of responding to UPL allegations.

There is a great deal of uncertainty surrounding the meaning, scope, and application of the UPL laws, wholly apart from the fact that they differ from state to state. In general, the laws forbid non-lawyers from holding themselves out as lawyers. But they also forbid non-lawyers from engaging in the unauthorized practice of law even if the non-lawyers make clear that they are not lawyers.

In general, "the practice of law" includes representing parties in court or similar adjudicative proceedings and drafting legal documents, such as litigation filings and wills or other estate-planning documents.³ However, the practice of law may also include assisting parties with respect to legal claims outside court proceedings—for example, drafting demand letters, giving advice about how to handle a potential legal dispute, negotiating on behalf of a party, etc.

In some settings, the law "authorizes" all or some non-lawyers to engage in what would otherwise be forbidden practice of law—for example, non-lawyers may assist parties in various federal and state administrative proceedings and in some state small-claims court proceedings; accountants may provide tax advice.

Here, PWC's lawyer should determine whether PWC has engaged, or has likely engaged, in the unauthorized practice of law. One question is whether, in this particular state, non-lawyers may assist parties in filing wage claims with the state agency. In many states, non-lawyers may assist others in making administrative filings such as this one. If

2. See, e.g., N.J. STAT. ANN. § 2C:21-22 (2015).

3. See, e.g., AM. BAR ASS'N, *Task Force on the Model Definition of the Practice of Law: Appendix A: State Definitions of the Practice of Law* (2016), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/model-def_migrated/model_def_statutes_authcheckdam.pdf (compiling different state laws and the way in which each defines the "practice of law").

this state is not one where lay assistance is permitted, then PWC's representatives should be advised to stop the practice. But if lay assistance is allowed, then the public interest law office which receives referrals from PWC may have a useful function to perform, namely, to train PWC personnel regarding wage claims and to serve as an ongoing source of information.⁴

In most jurisdictions, even if handling administrative claims is permissible, Lunes has probably crossed the line by purporting to represent Johnson with regard to her legal claim and threatening to litigate on her behalf. If this is a serious UPL question, as is likely, the lawyer should first help PWC address the immediate problem, which is the accusation made by the employer's attorney. The best approach is probably to help Johnson to secure a lawyer to represent her in dealing with the employer and for Lunes and PWC to remove themselves from the wage claim representation. As long as Lunes is assisting Johnson, the UPL accusation will have strategic value for the employer. The accusation may drive a wedge between PWC and Johnson and derail Johnson's pursuit of a remedy. Once Johnson has a lawyer and PWC is no longer handling representation on the wage claim, the employer probably cannot get any benefit in dealing with Johnson by pursuing the accusation. Of course, the employer may still see some benefit in pursuing a UPL allegation against PWC.

The lawyer should then help PWC in its work going forward to understand what it may or may not do on behalf of workers like Johnson who appear to have legal claims. If state law permits, it may assist workers in filing administrative claims. But it may not pursue legal claims as a representative of individual clients or threaten to do so by sending letters like the one Lunes prepared, which threatened to "litigate Ms. Johnson's claims . . . to the fullest extent of the law." Ideally, when workers are in a position to file lawsuits, PWC will assist workers like Johnson in securing a lawyer.

It would also be useful for the public interest law office to take other steps to assist PWC in avoiding UPL problems. In particular, the law office might thoroughly review all of PWC's website and social media content to see if they contain any statements that might expose the organization or staff to UPL claims. It might also present a training for

4. Some guidance may be found in a recent opinion of the New York City Bar's Committee on Professional Ethics, which addresses the work of legal services lawyers with caseworkers in social service agencies who assist clients in administrative matters. The opinion observes that the relationship between the lawyers and the caseworkers may be structured in different ways, but it focuses on the situation where the lawyer is willing to represent the clients, for whom the caseworkers serve as agents. See Op. 2017-4, *supra* note 1.

PWC staff and members about when organizing may cross the line into UPL and how they should be mindful of the UPL issue when writing blogs, composing emails, tweeting, etc.

PWC may use individuals' experiences and grievances in organizing on behalf of its members collectively and undertake other work that is not exclusively reserved to lawyers. But it should take care to avoid conveying to workers or employers that it is representing individual workers with regard to legal disputes. For example, the lawyer may encourage PWC to revise its mission statement to eliminate the reference to "direct representation of workers enforcing their labor rights."⁵ It would be less problematic to refer to "advocacy for workers' labor rights," which sounds less like representing individuals in litigation and more like organizing for collective rights. In corresponding with employers, PWC might be encouraged to avoid rhetoric that suggests it is representing a particular individual worker in litigation, as distinguished from administrative processes in which state or federal law allow non-lawyer assistance. If PWC lawfully represents individuals in particular agency settings, it should be specific about which ones. PWC may also convey that it represents its membership and seeks enforcement of the law on behalf of its constituency in general. While PWC might refer to individual workers who are mistreated, it should make clear that it does not act as their individual representatives in litigation but advocates on behalf of its membership or its constituency.

III. ISSUE #2: PRESERVING ATTORNEY-CLIENT CONFIDENTIALITY AND PRIVILEGE IN THE PRESENCE OF NON-LAWYERS

Busy with a huge organizing project, PWC referred Johnson's co-workers to your office for representation on their wage claims. Johnson's co-worker Maria Hernandez arrived at your office with PWC staff member Juan Gonzalez, and they both joined you in the conference room for the interview. You explained to Ms. Hernandez that you would like to interview her without Juan Gonzalez present, to ensure that the conversation will be protected by attorney-client privilege. However, Ms. Hernandez wants the PWC staff members to stay with her for moral support since she has never dealt with lawyers before. Ms. Hernandez speaks enough English to do the interview in English, so the PWC staff member is not needed for language interpreting. Another complication is that PWC's Juan Gonzalez has not worked with you before, and he

5. See *supra* Part I (referring to the PWC mission statement).

raises concerns about why the lawyers are trying to exclude PWC from the interview.

From a purely “legal ethics” perspective,⁶ the problem is one of confidentiality. In general, a lawyer must preserve the confidentiality of all of the information learned during, or relating to, the lawyer’s representation of a client. Even if information is not protected by the attorney-client privilege, the lawyer must ordinarily safeguard the confidentiality of this information.⁷ The lawyer may disclose or use the client’s confidential information only to the extent expressly or impliedly authorized by the client to further the ends of the representation.⁸

In this scenario, the PWC staff member’s presence in the interview immediately destroys confidentiality. While a lawyer is impliedly authorized to bring non-legal employees, such as paralegals, to an interview with a client or to share the client’s confidential information with them afterwards in order to secure their assistance in the representation, Mr. Gonzalez is not an agent or employee of the lawyer.⁹ One problem this poses is that, as things now stand, Mr. Gonzalez’s presence in the interview is likely to destroy the attorney-client privilege. Another is that Mr. Gonzalez is not duty-bound to preserve the confidentiality of what he learns.

One possibility to explore is that Mr. Gonzalez may serve in an insider status that does not destroy confidentiality. For example, it is possible that Mr. Gonzalez could serve as an agent of the client or of the lawyer and that he has legitimate contributions to make in one role or the other. If so, the ground rules would have to be clear. Mr. Gonzalez and

6. Under the ABA Model Rules of Professional Conduct, Rule 1.6 establishes the lawyer’s confidentiality obligations. MODEL RULES OF PROF’L CONDUCT r. 1.6 (AM. BAR ASS’N 2018). All states have a rule corresponding to Rule 1.6, although the wording of the state rules varies. *See, e.g.*, N.Y. RULES OF PROF’L CONDUCT r. 1.6 (2017), <https://www.nysba.org/DownloadAsset.aspx?id=50671>; TEX. RULES OF PROF’L CONDUCT r. 1.05 (2018), <https://www.texasbar.com/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentID=27271>.

7. *See* MODEL RULES OF PROF’L CONDUCT r. 1.6 cmt.

8. *See id.* r. 1.6(a).

9. There are abundant decisions and other writings on the scope of the attorney-client privilege, many dealing with the requirement that communications take place in confidence, not in the presence of third parties. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS: THE ATTORNEY-CLIENT PRIVILEGE §§ 70-71 (AM. LAW INST. 2018). Sections 70 & 71 of the Restatement of the Law Governing Lawyers provide the following explanation: the privilege does not apply unless communications are made “in confidence,” meaning that at the time of the communication with counsel, the client “reasonably believes that no one will learn the contents of the communication except a privileged person as defined in § 70 or another person with whom communications are protected under a similar privilege,” *id.* § 70—i.e., “the client’s lawyer, agents of either [the client or the lawyer] who facilitate communications between them, and agents of the lawyer who facilitate the representation.” *Id.* § 71.

his employer, PWC, would have to be willing to assume a confidentiality duty (preferably in writing) and other fiduciary responsibilities. Mr. Gonzalez's role would have to be documented.

Among the roles served by lawyers' agents are translator, paralegal, or consulting expert. Mr. Gonzalez may well be able to serve in an expert consulting role, providing information and advice about how to use organizing tactics or engage the community to benefit Ms. Hernandez's lawsuit, how to locate and communicate with witnesses, or how to address other issues in the representation as to which he has special expertise. However, if Mr. Gonzalez is to serve in a fiduciary role, he and PWC may have to commit to subordinating their own interests to those of the client. Otherwise, his asserted fiduciary status may appear to be pretextual.

Assuming Mr. Gonzalez remains an outsider to the representation—serving neither as an agent of the client nor as an agent of the lawyer—then the interview may not go forward in his presence unless the client gives “informed consent” to his receipt of her confidences. In this scenario, Ms. Hernandez, the client, wants Mr. Gonzalez in the meeting, but her decision does not yet appear to be adequately “informed” by an understanding of the risks, including the loss of attorney-client privilege. While the lawyer may attempt to give a fuller explanation of the risks, benefits, and alternatives, the lawyer may prefer to suggest alternative ways in which to make the client comfortable in the meeting, as well as alternative ways to preserve PWC's and its staff members' positive relationship with Ms. Hernandez and her lawyer.

Since PWC refers multiple clients to the lawyer's office, the office should reach an understanding with PWC regarding its relationship and what, if any, role PWC and its staff members can take in individual cases. Further, the lawyer's office should either train the staff members or ensure that PWC trains them, so that staff members understand the importance of attorney-client confidentiality and the significance of measures taken to protect it.¹⁰ In this case, the lawyer should explain to Mr. Gonzalez respectfully and diplomatically (ideally prior to the client meeting) that the rules for lawyers require that this meeting take place in private. It may be that a decision is later made to share information with PWC about the progress of the representation or even to allow PWC to

10. In the process, the lawyers should also ensure that PWC representatives are trained to understand that their communications with potential claimants, such as Ms. Johnson and Ms. Hernandez, are not protected from discovery and about what care should be taken when they conduct and document such communications to avoid creating discoverable material that may later be used in litigation to the claimant's detriment.

have representatives at certain meetings, but almost certainly the first meeting should occur in confidence so that the client can make disclosures in a privileged context.

IV. ISSUE 3: PUBLICIZING A LAWSUIT

PWC actively uses Facebook and Twitter to promote its organizing efforts. Given the current focus on sexual harassment and the #MeToo movement, PWC thinks it is time to take action and expose the names of the hotel guests who were Johnson's harassers. PWC has drafted a statement to post on Facebook naming all the harassers and wants to issue a press release as well. PWC has not consulted with the private lawyer representing Johnson on the harassment claim, but PWC told your public interest office during a recent meeting of its plans to move ahead on this.

Ms. Johnson's lawyers and their agents are limited in their ability to publicize the harassment claim, both because doing so may contravene the ABA Model Rules of Professional Conduct (Rule 3.6) and because doing so may be strategically unwise.¹¹ If PWC is not the lawyers' agent and is not otherwise acting at its behest, it is not itself restricted. But there are two risks here. One is that PWC will be perceived to be acting on the lawyers' behalf, in which case the lawyers may be accused (wrongfully or not) of violating limitations on publicizing litigation. The other risk is that, without the lawyers' guidance and instruction, PWC will undermine Ms. Johnson's interests.

You should counsel PWC about the risk that its post will undermine Ms. Johnson's case and ascertain PWC's priorities—whether it is willing to put Ms. Johnson's case at risk in order to promote its sense of its broader constituency's interests. If PWC does not want to jeopardize Ms. Johnson's case, you might offer to speak on PWC's behalf with Ms. Johnson's private counsel.¹² The aim would be to ascertain what

11. See MODEL RULES OF PROF'L CONDUCT r. 3.6(a) (AM. BAR ASS'N 2018).

12. It is ethically perilous for a lawyer acting on behalf of PWC to speak directly with Ms. Johnson, since she is represented in the matter. Most states have an ethics rule based on ABA Model Rule 4.2, which provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." *Id.* r. 4.2. However, PWC's non-lawyer representatives on their own initiative, may speak directly with Ms. Johnson, even though she is represented, to ascertain whether she is willing to have PWC publicize her lawsuit and the underlying wrongdoing. This is likely to be true even if PWC is represented by counsel, since Rule 4.2 ordinarily does not apply to non-lawyer clients who are acting on their own rather than as lawyers' agents. *Id.* r. 4.2 cmt. Further, a lawyer who is not representing another client in the matter, may speak with Ms. Johnson, even though she is currently represented. *Id.* For example, if Ms. Johnson were seeking a "second opinion" or were

Ms. Johnson prefers and what is in her best interests—whether PWC should refrain from issuing the proposed statement, whether PWC should go ahead independently to act in its constituents’ interests, or whether Ms. Johnson’s counsel offers to coordinate with PWC. The latter route poses risks: if PWC may be perceived to be acting on behalf of Ms. Johnson, then her lawyers should discourage PWC from issuing a statement that the lawyers could not themselves issue. In general, this requires refraining from issuing public statements that will undermine the fairness of the proceedings such as by tainting the jury pool. In this case, the proposed post is potentially inflammatory, and, though it does not necessarily jeopardize the fairness of the proceedings, the trial judge may be displeased if it appears that a party to the lawsuit had a hand in it. On the other hand, Ms. Johnson may be willing to assume some risks if she is strongly aligned with PWC and its organizing objectives.

contemplating changing counsel, a lawyer who did not already have a client in the matter could speak with her for these purposes.
