Formal Opinion 98-75

Ethical Considerations in the Use of Nonlawyer Assistants

Preface

This Opinion is an update of Formal Opinion 75-1 which discussed the general principles that must be observed in the employment of nonlawyer assistants. In 1975, the Code of Professional Responsibility was in effect; lawyer conduct in Pennsylvania is now regulated by the Rules of Professional Conduct (Rules) which deal more fully with the use of nonlawyer assistants.

In the past twenty-three years, the use of nonlawyer personnel in law offices has proliferated. Experience has shown that many tasks formerly performed by lawyers can be delegated to properly-supervised nonlawyers. These assistants may have developed their skills by practical training in the law office or by formal education in schools that offer limited instruction in substantive law and procedure. These personnel, whether trained in the law office or in formal schools, are popularly known as "paralegals."

But law offices also use the services of other, less sophisticated, nonlawyer assistants. They include "secretaries, investigators, law student interns, . . ." Comment, Rule 5.3; also switchboard operators, receptionists, messengers, bookkeepers, librarians, et al. Both classes are included as "nonlawyer(s) employed or retained by or associated with a lawyer." Rule 5.3 Whether the nonlawyer is an employee or independent contractor is immaterial. Comment, Rule 5.3

Rule 5.3 provides:

**RULE 5.3 Responsibilities Regarding Nonlawyer Assistants**

With respect to a nonlawyer employed or retained by or associated with the lawyer:

(a) a partner in a law firm should make reasonable efforts to ensure that the firm has measures in effect giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer should make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and in either case knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

The Rules define "partner" as "an equity owner in a law firm, whether in the capacity of a partner in a partnership, a shareholder in a professional corporation, a member in a limited liability company, a beneficiary of a business trust, or otherwise." A "firm" or "law firm" "denotes a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization and lawyers employed in a legal services organization." Rules, Terminology

Rule 5.3(a) imposes "organizational" responsibility on a "partner," but the definition of partner does not include, for example, members of the legal department of a corporation or sole practitioners. However, they have responsibility for nonlawyer conduct under Rule 5.3(b) and (c). A partner acting as a supervisory lawyer has a dual responsibility.

The thrust of Rule 5.3 is to impose responsibility on partners and supervisory lawyers to prevent or correct the misconduct of nonlawyer assistants.

MEASURES THAT SHOULD BE ADOPTED TO ASSURE PROPER NONLAWYER CONDUCT

The "measures" referred to in Rule 5.3 that must be adopted should take into account that nonlawyers "do not have legal training and are not subject to professional discipline." Rule 5.3, Comment. Obviously, the kind of training and supervision will vary, depending on the responsibilities of the nonlawyer assistant.

1. CONFIDENTIALITY
Rule 1.6(a) states that "a lawyer shall not reveal information relating to the representation of a client . . . ." The Comment adds "The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all "information relating to the representation, whatever its source." This prohibition applies to all classes of legal assistants, even the lowliest of whom may be exposed to information relating to the representation. They must be instructed not to reveal information even to their closest friends and relatives. Unless a matter of public record, even the name and identity of a client must be kept confidential. ABA/BNA Lawyers' Manual on Professional Conduct 55:307.

2. CONFLICTS OF INTEREST

Lawyers are forbidden to represent a client if that representation will be adverse to another client. Rule 1.7. Rule 1.10 imputes the disqualification of a lawyer in a law firm to the other lawyers when any one of them has a prohibited conflict of interest. The principles of these sections have been extended to nonlawyer assistants. Their conflicts of interest can be charged to their employing lawyer or law firm. But a nonlawyer assistant who arrives with a disqualifying conflict of interest may be employed if the sanitizing procedure of Rule 1.10(b) is followed: She must be screened and the client must be notified.

In a recent Texas case, a law firm hired a paralegal knowing that she had worked on a case in which the hiring firm was representing the opposing party. The hiring firm was disqualified. The court held that it was presumed that, because she had worked on the case, she had confidential information and the hiring firm failed to screen her from the continuing litigation. In re American Home Products Corporation, Texas Supreme Court May 8, 1998 No. 97-0655, ABA/BNA Lawyers' Manual on Professional Conduct, Current Reports, Vol. 14, No. 10 (June 10, 1998) p. 247. See also Samuel C. Stretton, When the Hiring of a Paralegal Poses Conflict Questions, Pennsylvania Law Weekly, October 10, 1998, p. 4.

Conflicts can arise after the nonlawyer assistant has been hired, for example, in a situation where an independent paralegal is working simultaneously for two law firms. The ABA "Model Guidelines for the Utilization of Legal Assistant Services" (1991), quoted in New York State Bar Association Guidelines for the Utilization by Lawyers of the Services of Legal Assistants, 1997, p. 9, state that conflicts may also develop if the legal assistant has "other interests" including "personal relationships, as well as instances where the legal assistant may have a financial interest (i.e. as a stockholder, trust beneficiary or a trustee . . .) that would conflict with the clients in the matter in which the lawyer (and/or legal assistant) has been employed." The nonlawyer assistant should be instructed to notify her supervising lawyer of such a potential conflict.
With respect to nonlawyer-assistant conflicts that arise after hiring, again, by analogy, the solution of Rule 1.7(b) could be invoked: (1) The lawyer must believe "the representation will not be adversely affected" and (2) the client consents after full disclosure and consultation.

3. CLIENT PROPERTY

Nonlawyers who are hired to handle the books and accounts of the firm should understand the requirements of Rule 1.15 relating to the safekeeping of client's funds and property and the technical provisions of Rule 1.15(d) relating to Interest on Lawyer Trust Accounts. With respect to funds and property of third parties, a lawyer has fiduciary responsibility which cannot be delegated. Lawyers and law firms have not been immune from embezzlement by defaulting employees; bonding these personnel should be considered. See Barrie Althoff, "Ethical Responsibilities of Lawyers Regarding Nonlawyer Assistants", Washington State Bar News, June 1998, 39, 41.

4. NONLAWYER-ASSISTANT DEALINGS WITH THIRD PARTIES

Rule 8.4 states that it is professional misconduct for a lawyer to:

(a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or to do so through the acts of another;

It is important, therefore, for a lawyer to caution her nonlawyer assistants concerning their conduct in dealing with third persons. Thus, nonlawyer assistants should be instructed not to "(a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid aiding and abetting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6." Rule 4.1.

Nonlawyer assistants should be cautioned not to "communicate about the subject of the representation with a party (the nonlawyer assistant) knows to be represented by another lawyer in the matter, unless (the nonlawyer assistant) has the consent of the other lawyer or is authorized by law to do so." Rule 4.2.

See Holdren v. General Motors Corp., No. 97-2538-JWL (D.Kan. 7/27/98), ABA/BNA Lawyers' Manual on Professional Conduct, Current Reports, Vol. 14, No. 17, p. 432. The plaintiff, a managerial employee of GM suing the company for age discrimination, was encouraged by his lawyer to get sworn statements from other GM managerial employees
which would be favorable to the plaintiff and damaging to GM. GM was granted an order against the lawyer to "cease endorsing, encouraging, directing or facilitating his client's communications with any 'parties' within the meaning of Rule 4.2." The ruling would have been the same if the communications had been by nonlawyer assistants of the plaintiff's lawyer.

Nonlawyer assistants should also be made aware of the prohibitions of Rule 4.3 covering dealings with persons not represented by counsel. Investigators should be cautioned not to violate the rights of third persons. Rule 4.4.

THE LAWYER'S RESPONSIBILITY TO SEE THAT NONLAWYER ASSISTANTS DO NOT ENGAGE IN THE PRACTICE OF LAW

Rule 5.5 forbids a lawyer to aid a nonlawyer in the unauthorized practice of law. The Comment points out that she may use "paraprofessionals" and delegate functions to them so long as the lawyer supervises the delegated work and retains responsibility for the work.

Rule 5.5 does not define "the practice of law." The Comment points out that what constitutes the practice of law is "established by law and varies from one jurisdiction to another." In Pennsylvania, a statute, 42 Pa. C.S.A Section 2524 makes it a misdemeanor of the third degree for any person who is not a lawyer (1) "to practice law . . .," or (2) "hold himself out to the public as being entitled to practice law," i.e. to impersonate a lawyer. The statute does not "preclude the use of any other person who performs all his employment under the direct supervision and control of a person duly admitted to practice law." Again, what constitutes the practice of law or the unauthorized practice is not defined. Guidance is found in court decisions and opinions of Bar Association Committees. See, e.g., Dauphin County Bar Association v. Mazzacaro, 351 A.2d 229, 233 (Pa. Supreme Ct. 1976) ("Where . . . a judgment requires the abstract understanding of legal principles and a refined skill for their concrete applications, the exercise of legal judgment is called for").

The proper supervision and control by the lawyer over the activities of nonlawyer assistants protect the lawyer from violating Rule 5.5 and the legal assistant from violating 42 Pa.C.S.A. Section 2524.

*Questions concerning the scope of this statute may be directed to the Unauthorized Practice of Law Committee.

Examples of nonpermitted and permitted activity by nonlawyers follow:
1. APPEARANCE IN COURT

A nonlawyer assistant cannot appear before a court or an administrative tribunal unless such appearance is authorized by statute, court rule or administrative regulation. This includes even routine matters such as seeking a postponement. ABA Op. 316 (1967). Nor can a nonlawyer sign her name or the name of the lawyer to court pleadings. Wolfram: Modern Legal Ethics, p. 892.

(Certain statutes, regulations and court rules permit the appearance of nonlawyers on behalf of clients. See, e.g., Federal Administrative Procedure Act, 5 USC Section 555(b); 3RD Circuit Local Appellate Rule 46.3 permitting the appearance in court of an "eligible law student" under certain circumstances; Pennsylvania Bar Admission Rules 321 and 322 permitting the limited appearance in court (other than the Supreme, Superior and Commonwealth Courts) of law students and certified legal interns).

2. CONDUCTING A DEPOSITION

May a lawyer ethically permit a nonlawyer assistant to conduct a deposition where a predetermined series of questions, approved by the lawyer would be followed? Even if this arrangement were approved by the client, the court and opposing counsel, the arrangement would be improper. During the examination, the need for lawyer functions, such as advising the witness or objecting to opposing counsel's conduct, could arise. These are uniquely lawyer functions which a nonlawyer assistant cannot perform. A lawyer authorizing such a practice would violate Rule 5.5 which forbids a lawyer to aid a nonlawyer in the unauthorized practice of law (PBA Ethics Op. #87-127; #91-137).

3. CONDUCTING A REAL ESTATE CLOSING

May a lawyer delegate to a nonlawyer assistant the duty of attending a real estate settlement in her place? While the question is still unsettled, the Unauthorized Practice of Law Committee of the Pennsylvania Bar Association has opined (Opinion #96-102) that the attendance at a real estate settlement in the capacity of representing either the seller or the purchaser by anyone other than a lawyer constitutes the unauthorized practice of law. Real estate settlements often proceed in a routine fashion. However, the representation of a seller or purchaser at a real estate settlement may involve the legal interpretation of documents presented at settlement, the legal interpretation of the effect of matters which arise at the time of settlement and advice to the client as to the course of action to be
taken in the opinion of the person giving such advice. To permit a nonlawyer employee to appear at a settlement may place the supervising lawyer in violation of Rule 5.5.

4. IMPERSONATING A LAWYER

Lawyers and their nonlawyer assistants should make certain that clients and other persons dealing with them are aware that the nonlawyer assistant is not a lawyer and cannot give legal advice.

Nonlawyers may not sign engagement letters, set fees or solicit legal business for the lawyer or law firm. Attorney Grievance Commission of Maryland v. Hallmon, 681 A.2d 510 (Ct. of Appeals of Md. 1996).

However, the name of a nonlawyer assistant may appear on the lawyer's or law firm letterhead if her status is properly revealed. PBA Ethics Op. #85-145; #90-54. Nonlawyer assistants may sign letters on firm stationery, again, if they are properly identified, and the letters do not contain legal advice. They may also have business cards with the name of the firm on it if they are properly identified and the information on the card conforms to the standards of Rule 7.2 Advertising. PBA Ethics Op. #85-145.

NONLAWYER COMPENSATION

Rule 5.4 forbids a lawyer or law firm to share legal fees with a nonlawyer. This prohibition, however, relates to sharing of particular fees. Nor can a lawyer form a law partnership with a nonlawyer or practice in the form of a professional association organized for profit in which a nonlawyer has a beneficial interest, is a corporate director or officer or has the right to control the professional judgment of the lawyer.

Rule 5.4(a)(3) permits nonlawyers to share in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement. Thus, for example, it would be proper to compensate a law firm administrator on the basis of a fixed salary plus a percentage of the firm's net profits; he could similarly participate in a profit-sharing retirement plan.

The fees and expenses of legal assistants may be billed to a client who has consented to the arrangement. Illinois State Bar Association Recommendations to Lawyers for Use of Legal Assistants (May 10, 1998).

EMPLOYMENT OF SUSPENDED OR DISBARRED LAWYERS

However, in In re Anonymous 27 D.B. 89, 5 Pa. D. & C. 4th 77 (1990), the board dismissed charges of professional misconduct against a lawyer who hired as a paralegal a suspended (and subsequently disbarred) lawyer who was permitted to have direct contact with clients. The board stated that there is presently no per se rule distinguishing between the permitted conduct of nonlawyer paralegals and those who were formerly members of the bar. The board cautioned, however:

"This determination is not to be understood as a license for a suspended or disbarred attorney to engage in client contact. Such conduct is a dangerous practice which is misleading to the public and predisposes to the unauthorized practice of law. Moreover, that conduct directly contravenes board guidelines and should be subjected to careful scrutiny in a reinstatement proceeding on the issue of moral qualifications."

The Disciplinary Board does not issue advisory opinions.

In any case, a suspended or disbarred lawyer presents problematic issues for the employing lawyer: Clients and others may think she is still licensed to practice; from force of habit she may continue to act as a lawyer.

**CONCLUSION**

An examination of ethics opinions and guidelines that have been issued by courts and bar association committees indicates that the following are the basic precepts that lawyers must observe regarding the employment of nonlawyer assistants:

1. The lawyer must retain a direct relationship with the client.

2. The lawyer is personally responsible for the training, supervision and work product of the nonlawyer assistant.

3. The lawyer must inform the client that the nonlawyer assistant is not a lawyer and that the lawyer is personally responsible for her supervision and work product.

4. The lawyer must instruct nonlawyer assistants in the relevant Rules of Professional Conduct and their correlative obligations thereunder.
Note: The National Federation of Paralegal Associations, Inc., P. O. Box 33108, Kansas City, Missouri 64114; telephone 816-841-4000, has adopted a Model Code of Ethics and Professional Responsibility which could serve as a guide and a text which might be useful to a lawyer in instructing her nonlawyer assistants in their ethical responsibilities.


Dated: December 4, 1998 James M. Houston, Chair

Paralegal Subcommittee

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