



Ethics For Legal Support Staff

RISK MANAGEMENT HANDOUTS OF
LAWYERS MUTUAL

Ethics for Legal Support Staff

RISK MANAGEMENT HANDOUTS OF LAWYERS MUTUAL

TABLE OF CONTENTS

Introduction	1
Risk Management	1
Paralegal Certification	6
Unauthorized Practice of Law	7
Guidelines for Use of Non-Lawyers in Rendering Legal Services	13
Selected Ethics Options Pertaining to Legal Assistants	18
Professional Organizations	20

DISCLAIMER: This document is written for general information only. It presents some considerations that might be helpful in your practice. It is not intended as legal advice or opinion. It is not intended to establish a standard of care for the practice of law. There is no guarantee that following these guidelines will eliminate mistakes. Law offices have different needs and requirements. Individual cases demand individual treatment. Due diligence, reasonableness and discretion are always necessary. Sound risk management is encouraged in all aspects of practice.

INTRODUCTION

Attorney malpractice is on the rise. Each year, Lawyers Mutual processes an increasing amount of claims that can be directly attributed to errors made by support staff. Examples include calendaring incorrect deadlines, title search errors, verified complaints that were not properly filed, and lapsed statute of limitations deadlines that resulted from closing a file prematurely or accidentally removing it from the docket system.

Poor client relations can also contribute to malpractice actions against lawyers, and support staff are in a position to affect these interactions. By helping to keep the lines of communication open between attorneys and their clients, and by providing a friendly, receptive voice, support staff can have a large influence on the client's impression of the firm. Furthermore, by aiding the management of cases, legal assistants can allow the attorneys to spend an increased amount of time resolving the client's problem and help reduce costs to the client.

While it is true that it is the attorney who ultimately faces malpractice liability, support staff undoubtedly share an interest in avoiding ethics violations and malpractice accusations. Malpractice

claims cost the firm money, which in turn means that fewer financial resources are available for salary increases, office equipment, supplies, and other benefits. Even if the claim is unsuccessful, litigating the matter often forces the attorney to not only invest large sums of money, but also sacrifice an enormous amount of billable hours. Claims or grievances against an attorney can also create stress, frustration, distraction, and irritability, any of which can result in a difficult work environment. If an error leading to a malpractice claim or grievance was caused by a legal assistant, it could result in the termination of that employee.

Both attorneys and their support staff also have interest in avoiding ethical violations. An ethics violation does not necessarily establish malpractice,¹ but it may result in a grievance review by the State Bar. If this occurs, punishment may include suspension or disbarment, which in turn results in the loss of employment for the attorney's support staff. By regularly attending ethics seminars, staff members can maintain familiarity with up-to-date knowledge of ethical guidelines, and in turn avoid these less than favorable situations.²

RISK MANAGEMENT

PRESERVING CLIENT CONFIDENCES

Under Rule 5.3(b) of the North Carolina Rules of Professional Conduct, "a lawyer having direct supervisory authority over a non-lawyer staff member is obligated to ensure that the conduct of the non-

lawyer is compatible with the professional obligations of the lawyer."³ This means that the legal support staff, as extensions of the lawyers who supervise them, must conform their behavior to the same ethical obligations. These provisions are especially relevant to confidential information.

¹ See, *Astarte, Inc. v. Pac. Indus. Sys., Inc.*, 865 F. Supp. 693 (D. Colo. 1994) (violation of an ethical code does not create a private cause of action as they were not designed as standards for civil liability); *Nagy v. Beckley*, 578 N.E.2d 1134 (Ill. App. Ct.), *appeal denied*, 584 N.E.2d 131 (Ill. 1991) (ethics rules may be relevant to establish the standard of care in a legal malpractice suit, but they are not an independent form of liability); *Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C.*, 813 S.W.2d 400 (Tenn. 1991) (conduct that violates ethical codes does not necessarily breach a duty to the client and therefore will not constitute actionable malpractice).

² Marisa S. Campbell, *Ethics Tune-Up* (Aug. 4, 2006) (unpublished CLE manuscript, on file with N.C. B. ASS'N).

³ N.C. RULES OF PROF'L CONDUCT R. 5.3 (2003).

CASE STUDY

One afternoon, a paralegal sees an old friend of the family in the office. The two engage in a brief conversation about non-legal matters, say good-bye, and go about their business. Roughly two weeks later, the paralegal coincidentally bumps into that client's mother in the grocery store. Since the mother is also a close friend of the family, the paralegal stops to say hello. During the course of this conversation, the paralegal innocently mentions that he bumped into her son in the office a few days earlier. Knowing that the paralegal was employed by a criminal defense firm, the client's mother consulted her son about his troubles and learned that he had recently been involved in a DUI incident. The client was a legal adult and wished to keep the matter private, but the paralegal accidentally revealed this confidential information.⁸

Ethics opinion RPC 216 states that an attorney who determines that a paralegal understands and will comply with the attorney's duty to protect the confidences of the client may allow that paralegal to have access to confidential information, even without the prior consent of the client.⁴ In fact, some courts have even gone so far as to extend the attorney-client privilege to certain client-paralegal interactions.⁵ Therefore, it is essential that all support staff fully understand that it is unethical to provide a third party with any information that a client divulges, or even the fact that someone is a client.⁶ It is also unethical to reveal information that is otherwise readily available in the public record.⁷

Do not talk with clients about their matters in the reception area or while walking to the office. Instead, private conversations are best kept behind closed doors. Similarly, emphasize the need to remain in the office when discussing private matters. If the client insists on meeting in a restaurant or other public area, make the best effort possible to ensure privacy, and alert the client that the information may be available to those who can hear what is being said.⁹

When answering the phone, it is best to avoid addressing the client by name (i.e. "Hello, Mr. Jones."). Instead, the phone should be answered by offering the identity of the paralegal ("Hello, this is David."). If an individual is calling to request information, remember that it is inappropriate to confirm or deny that a particular individual is a client, so the identity of the caller needs to be confirmed. If there is any uncertainty as to whether or not it is the client, take his or her information and call back.¹⁰

Confidential information can also be accidentally divulged in other ways. "Water cooler conversations" should always be avoided, incidents with clients should never be discussed with family or friends, and case debriefing should always occur in a private area or office. Because speakerphone can inadvertently divulge confidential information, it should never be used when the office door is open. Finally, receptionists should be made aware that it is inappropriate to tell any of the office professionals the name of the party on the phone when there are others in the reception area.¹¹

It is equally important to be reasonably safe when handling client-related documents. Never leave files out on the desk if they pertain to a client different from the person who is currently in the office. If a computer screen faces the door, make sure individuals walking past the office cannot read it. Regardless, all office computers should be password protected, and all programs should be closed when not in use.¹²

⁴ N.C. RULES OF PROF'L CONDUCT R. 1.6 (2003); N.C. ST. B. Ethics Comm., RPC 216 (1997).

⁵ See, *Pennsylvania v. Mrozek*, 657 A.2d 997 (Pa. 1995) (an individual's statement to a lawyer's secretary revealing that he needed to speak to a lawyer because he had just committed a homicide was protected).

⁶ Campbell, *supra*.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

RULE 1.6: CONFIDENTIALITY OF INFORMATION

- (a) A lawyer shall not reveal information acquired during the professional relationship with a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
- (b) A lawyer may reveal information protected from disclosure by paragraph (a) to the extent the lawyer reasonably believes necessary:
- (1) to comply with the Rules of Professional Conduct, the law or court order;
 - (2) to prevent the commission of a crime by the client;
 - (3) to prevent reasonably certain death or bodily harm;
 - (4) to prevent, mitigate, or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services were used;
 - (5) to secure legal advice about the lawyer's compliance with these Rules;
 - (6) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client; to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
 - (7) to comply with the rules of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court.
- (c) The duty of confidentiality described in this Rule encompasses information received by a lawyer then acting as an agent of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court regarding another lawyer or judge seeking assistance or to whom assistance is being offered. For the purposes of this Rule, "client" refers to lawyers seeking assistance from lawyers' or judges' assistance programs approved by the North Carolina State Bar or the North Carolina Supreme Court.

INADVERTENT DISCLOSURE OF CONFIDENTIAL INFORMATION

New means of technology such as fax machines, cellular and cordless telephones, and electronic mail each create new challenges in maintaining confidentiality. Wireless phones broadcast the communication over the public airwaves and can therefore be easily intercepted. Both faxes and e-mails are susceptible to accidental delivery to an incorrect recipient, and e-mails are often stored in a location that is rarely protected by more than a simple password.¹³ So how can confidential information be protected, and to what extent are legal professionals liable for information disclosed by accident?

North Carolina ethics opinion RPC 215 acknowledges the professional obligation to protect and preserve the confidences of a client, but it also clarifies that this obligation does not require the exclusive use of infallibly secure methods of communication.¹⁴ Similarly, RPC 133 states that “reasonable care” is the standard required when disposing of documents containing confidential client information.¹⁵ When communicating with a client, reasonable care generally includes selecting a means of communication that will best maintain confidential information in light of the circumstances. Additionally, any time a legal professional must use a medium that he or she knows is susceptible to interception, he or she must alert the client to the device being used and the potential risks that are inherent to that equipment.¹⁶

Many of the precautions that can be taken with faxes and e-mails may seem fairly obvious, but they can potentially be overlooked in a fast-paced work environment. All correspondence should either be marked as confidential or include a disclaimer regarding confidentiality. Additionally, double-check all e-mail addresses and fax numbers prior to transmission.¹⁷

Nonetheless, there is always a possibility that errors will occur, and both the North Carolina State Bar Ethics Committee and the ABA Committee on Ethics and Professional Responsibility have addressed this issue. ABA Opinion 92-368 states that a legal professional who inadvertently receives materials that appear to be confidential and not intended for him or her should refrain from examining the documents further, notify the sender, and abide by his or her instructions.¹⁸ The North Carolina State Bar adopted RPC 252, “Receipt of Inadvertently Disclosed Materials from Opposing Party,” which states that a legal professional who receives materials that appear on their face to be subject to the attorney-client privilege, or otherwise confidential, which were inadvertently sent to the lawyer by the opposing party or opposing counsel, should refrain from examining the materials further and return them to the sender.¹⁹

¹³ N.C. RULES OF PROF'L CONDUCT R. 3.7(a) (2003).

¹⁴ *Id.*

¹⁵ N.C. ST. B. Ethics Comm., RPC 133 (1992).

¹⁶ N.C. ST. B. Ethics Comm., RPC 215 (1995).

¹⁷ Campbell, *supra*.

¹⁸ ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 368 (1992).

¹⁹ N.C. ST. B. Ethics Comm., RPC 252 (1997).

²⁰ Mark Curriden, *The Paralegal Who Smoked the Tobacco Industry*, 14 LEGAL ASSISTANT TODAY 42 - 51 (May / June 1997).

CASE STUDY

Merrell Williams was a paralegal for Kentucky's largest law firm, Wyatt, Tarrant and Combs, who represented Brown & Williamson Tobacco Company. From 1988 to 1992, Mr. Williams removed over 4,000 pages of confidential client documents, had them photocopied and distributed them to government officials, the media, academics, and others. These documents were Brown & Williamson's own and concerned the health effects of cigarette smoking, the addictive nature of nicotine, and their search for a safer cigarette.

Mr. Williams ignored a judge's gag order restraining him from discussing the contents of the documents, even with his own attorney, and he consequently faced a one million dollar lawsuit from his former law firm for stealing their client's confidential corporate records. Mr. Williams' response to their allegations of theft was that the situation was “like telling the judge that somebody stole your dope.”

Acknowledging that the duty to maintain a client's confidences is uncompromising and is the fundamental principle in the client-lawyer relationship, Laurie L. Levenson, Associate Dean of the Loyola Law School in Los Angeles, disagreed with this behavior:

To some he may be a hero, but under the law and ethical standards that now exist, Merrell Williams may be just plain wrong... In the legal system, truth sometimes takes a back seat to systemic interests, including society's interest in protecting open and trustworthy relationships between lawyers and clients. [Mr.] Williams put himself in the tough position of learning that under the ethical rules today, 'two wrongs do not make a right.'²⁰

CONFLICTS OF INTEREST INVOLVING THE SUPPORT STAFF

For any attorney, part of risk management involves taking precautions to avoid potential conflicts of interest. Occasionally, such conflicts arise because a situation pertaining to the support staff is potentially adverse to the interests of the client. Rule 3.7 of the North Carolina Rules of Professional Conduct prohibits a lawyer from accepting employment in most instances if it is reasonably certain that either he or another attorney from the firm will be called as a witness for either side.²¹ However, none of the rules prohibit representation when a non-lawyer employee of the firm will be called as a witness. The rule is designed to prevent a representative of one of the party's from being caught between the potentially conflicting roles of advocate and witness, but since this danger does not exist for legal assistants, the firm may continue to represent the client even when a secretary or paralegal will likely be called as a witness.²²

Under ethics opinions RPC 74 and 176, the firm may also continue to represent a client whose interests are adverse to those of a party that is represented by a lawyer or firm for whom the paralegal was previously employed.²³ “The imputed disqualification rules contained in [Rule 1.10] of the Rules of Professional Conduct do not apply to non-lawyers.”²⁴ However, while the firm may continue to employ the paralegal, RPC 74 stresses the need to take extreme care in insuring that the paralegal is totally screened from the case.²⁵

Finally, firms should be alert to conflicts of interest that can manifest themselves in ways that are less clear. For example, the employment of third party services such as court reporters may not be influenced by the prospect of prizes or premiums that the company offers to support staff members. Court reporting services vary in terms of cost, efficiency and quality, and all of these are factors that should be considered by the lawyer and the client when purchasing said service. To allow such a decision to be influenced by benefits offered to the staff would conflict with the interests of the client.²⁶

²¹ N.C. RULES OF PROF'L CONDUCT R. 3.7(a) (2003).

²² N.C. ST. B. Ethics Comm., RPC (1987).

²³ N.C. ST. B. Ethics Comm., RPC 74 (1989); N.C. ST. B. Ethics Comm., RPC 176 (1994).

²⁴ N.C. ST. B. Ethics Comm., RPC 176 (1994).

²⁵ N.C. ST. B. Ethics Comm., RPC 74 (1989).

²⁶ N.C. ST. B. Ethics Comm., RPC 102 (1991).

PARALEGAL CERTIFICATION

North Carolina's Paralegal Certification Program is a completely voluntary but highly recommended program designed by the North Carolina State Bar to develop paralegal standards, raise the profile of the paralegal profession, and standardize the expectations of both the public and other legal professionals.²⁷ Participation not only allows legal support staff to display professionalism and expertise in the field, but it also refines their knowledge of ethical practice.

Certification identifies those that have met high professional standards, obtained minimum levels of education, and continued to maintain their professional education. This not only assures clients of competency, but it also enhances the quality of legal services provided by North Carolina's paralegals. Many paralegals have taken an exam to obtain the status of Certified Legal Assistant (CLA), Certified Paralegal (CP) or Certified Legal Assistant Specialist (CLAS) as provided by the National Association of Legal Assistants, Inc. or the National Federation of Paralegal Associations. While these accreditations similarly establish professionalism and education, North Carolina's Paralegal Certification has been approved by the NC State Bar and adopted by the NC Supreme Court as a means of providing legal assistants with knowledge on the current state of North Carolina's laws.

After June 30, 2007, all applicants will be required to successfully pass a written examination and must meet one of the following educational criteria:

(1) The applicant must have earned an associate's, bachelor's, or master's degree or post-baccalaureate certificate from a qualified paralegal studies program; or (2) An applicant must possess an associate's or bachelor's degree in any discipline from any post-secondary institution recognized by the United States Department of Education, with at least eighteen semester credits derived from a qualified paralegal studies program.²⁸ Once certified, renewals will occur on the first day of the month that immediately follows the anniversary of certification, and then on that date each year thereafter. To qualify for renewal, a paralegal must participate in a minimum of six hours of approved continuing paralegal education (CPE) annually, and at least one of these hours must be in ethics/professional responsibility.²⁹

For more information on becoming a North Carolina Certified Paralegal, please visit the NC State Bar's official paralegal certification website at

www.nccertifiedparalegal.org

or reference The North Carolina Administrative Rules of the State Bar, Subchapter G.

²⁷ N.C. ST. BAR, (2006) at <http://www.nccertifiedparalegal.org/> (2006).

²⁸ 27 N.C.A.C. 1G, Section .0119 (a), (2006)

²⁹ *** 27 N.C.A.C. 1G, Section .0120, (2006).³⁶ Lawyers' Liability Review, *supra*, at 17.

UNAUTHORIZED PRACTICE OF LAW

WHAT IS THE UNAUTHORIZED PRACTICE OF LAW?

Many excellent lawyers rely on legal assistants in their daily practice. By delegating certain necessary tasks to a paralegal, an attorney can focus on performing the duties that only a lawyer can perform. Furthermore, this allows an attorney to offer high quality services to clients at more reasonable prices. However, as advantageous as the support staff can be, it is extremely important to realize that there are limits to the jobs that can be performed.

Under North Carolina's General Statute §84-4, it is unlawful for any person other than a licensed attorney to appear as a counselor-at-law in any judicial proceeding, represent or defend another party in an judicial action, or hold him or herself out in any way as competent or qualified to give legal advice, prepare legal documents, or furnish the services of an attorney.³⁰ Any person other than an active member of the North Carolina State Bar who provides these services or any other that constitutes the practice of law is engaged in unauthorized practice and is guilty of a class 1 misdemeanor.³¹ This is true even when no fees are charged for the service, no case is pending in court,³² or the individual for whom the services are provided is a family member, friend, or other person of close or intimate relation.³³

Furthermore, Rule 5.5(b)(2) forbids a legal professional who is not authorized to practice from holding out to the public or otherwise representing him or herself as being admitted to practice law. Comment [11] to the rule adds that an individual who is not licensed "may not directly advise clients or communicate in person or in writing in such a

way as to imply that he or she is acting as an attorney or in any way in which he or she seems to assume responsibility for a client's legal matters." Therefore, a paralegal should not only refrain from conduct that might reasonably suggest that he or she is authorized to provide advice or services regarding legal affairs, but proper risk management suggests that the legal assistant should disclose his or her status as a paralegal upon first meeting the client.³⁴ Additionally, it may be wise to reflect non-attorney status in all correspondence written by a paralegal, and if a client calls seeking information or asking questions regarding their matter, include a verbal reminder that a paralegal cannot counsel in legal affairs.³⁵

"Limiting the practice of law to members of the bar protects the public against the rendition of legal services by unqualified persons."³⁶ Over the last few years, the state bar has received an increasing number of allegations of the unauthorized practice of law, especially from people with limited funds who sought the assistance of non-lawyers in an effort to save money. Unfortunately, the non-lawyer frequently acts in a manner detrimental to the legal rights of those who employed them, and as a result, those who can least afford it are left with costly legal complications.³⁷

WHAT CONSTITUTES THE UNAUTHORIZED PRACTICE OF LAW?

Providing legal advice requires application of knowledge that an attorney has gained through formal education and experience, judgmental and analytical abilities, and understanding of the client's

³⁰ N.C. Gen. Stat. §84-4 (2007).

³¹ N.C. St. B. Ethics Comm., Formal Ethics Op. 13 (1999).

³² See, *State ex rel. Seawell v. Carolina Motor Club, Inc.*, 209 N.C. 624, 284 S.E. 540 (1936) (the practice of law is not limited to the conduct of cases in court, but embraces legal advice, preparation of documents and contracts intended to secure a legal right, and other forms of legal aid, even though such a matter may not be pending in court).

³³ N.C. ST. BAR, (2006) at http://www.ncstatebar.org/faq/f_faq.asp#11.

³⁴ Campbell, *supra*.

³⁵ *Id.*

³⁶ N.C. St. B. Ethics Comm., Formal Ethics Op. 9 (2002).

³⁷ N.C. ST. BAR, (2006) at <http://www.ncstatebar.org/programs/upl.asp>.

CASE STUDY

In one of North Carolina's leading cases on the unauthorized practice of law, the defendant solicited sales for a company that constructed new homes. However, he also prepared deeds of trust despite the fact that he was neither a member of the North Carolina Bar, nor was he licensed as an attorney-at-law. Preparation consisted of using printed forms and inserting the relevant name, description, or term into a blank space. He then saw to the execution, acknowledgement, and recording of the deed. The North Carolina Supreme Court acknowledged that a deed of trust is a legal document and that the actions taken by the defendant would constitute the unauthorized practice of law had they been prepared for another person, firm, or corporation within the meaning of the statute. However, it then ruled that a corporation can act only through its officers, agents, and employees, and just as an individual is free to prepare his or her own will or represent him or herself in a judicial proceeding, a corporation may prepare its own legal documents without violating N.C. Gen. Stat. §84-4 as long as the corporation has a primary interest and not merely an incidental interest in the document.³⁸

situation, context, and goals. Precisely defining legal advice would be a difficult endeavor, but at a minimum this definition would have to include: (1) directing a client how to proceed in a matter that potentially has legal consequences or pertains to a legal right, and/or (2) explaining to a client his or her legal obligations, rights, or responsibilities.

Client contact is often delegated to legal assistants and this can potentially be problematic. For instance, as a result of developing a good working relationship with the legal assistant, a client may ask him or her questions that would require legal advice. The information the legal assistant has learned while working for the lawyer can become such second-nature that he or she may forget it is legal advice. However, regardless of the confidence that the legal assistant may have in his or her response, answering such questions violates the unauthorized practice of law statutes unless it is the exact legal opinion of an attorney. The legal assistant may only act as a conduit of information from the lawyer to the client; the relayed information must be given without expansion or interpretation by the legal assistant and the must be made aware that they advice is coming from a lawyer.

North Carolina Statute §84-2 provides a detailed list of many of the activities that constitute the unauthorized practice of law when performed by someone other than a licensed attorney. Such acts include the preparation or aiding in the preparation of deeds, mortgages, wills, trust instruments, inventories, accounts or reports of guardians, trustees, administrators, or executors, preparing or aiding in the preparation of any petitions or orders in any probate or court proceeding, abstracting or passing upon titles, the preparation and filing of petitions for use in any court, providing legal advice, offering legal counsel, or give opinion regarding the legal rights of a person or organization.³⁹

Special attention should be given to restrictions placed on the preparation of legal documents, as this is among the areas in which unauthorized practice more commonly occurs. Immigrant members of the population are led astray by non-lawyers who attempt to help them become American citizens, those in debt receive bad advice when attempting to fill out bankruptcy forms,⁴⁰ and couples seeking to obtain a simple divorce are too often led astray by document preparation services. To arrange or create a legal document or contract by which legal rights are secured is included in the practice of law and should only be practiced by a licensed attorney.⁴¹

Although the issue has not been directly addressed in North Carolina's courts, many other states have held that it is not unauthorized practice for a non-lawyer to type as directed or otherwise duplicate a contract or document.⁴² However, taking the information from one

38 *State v. Pledger*, 257 N.C. 634; 127 S.E.2d 337 (1962).

39 N.C. Gen. Stat. §84-2.1 (2007).

40 *See*, N.C. Gen.Stat. §84-9 (it is unlawful for any individual or company other than a licensed attorney to provide representation in a bankruptcy or insolvency proceeding).

41 *State v. Pledger*, *supra*.

42 N.C. Gen. Stat. §84-2.1 (2007).

location and entering it into a different form, even if it is similar, would qualify as legal advice.⁴³ Filling in the blanks of a previously prepared form has also been found to constitute unauthorized practice since this action left the customer with the impression that the document contained all of the information that was necessary to secure certain legal rights.⁴⁴

Further guidance is provided in many North Carolina ethics opinions. RPC 183 forbids a legal assistant from examining or representing a witness at a deposition.⁴⁵ RPC 70 allows a paralegal to communicate and negotiate with a claims adjuster so long as the legal assistant is directly supervised by an attorney and he or she exercises no independent legal judgment.⁴⁶ Non-lawyers are not permitted to make motions or participate in managing the litigation,⁴⁷ but he or she can deliver a message that alerts the court to a scheduling conflict with another court that prevents the attorney from appearing.⁴⁸

THE OBLIGATION TO SUPERVISE

Recall that RPC 70 permits a non-lawyer to negotiate with a claims adjuster when properly supervised despite the fact that this act constitutes the practice of law. A non-lawyer may also perform a title search, provided he or she is adequately supervised.⁴⁹ In fact, attorneys may hire or contract with paralegals or other non-lawyers to perform a variety of work that qualifies as the practice of law if the non-lawyer is properly supervised by and acting under the direction of a licensed attorney.⁵⁰

Under Rule 5.3(b), a lawyer who has direct supervisory authority over a non-lawyer is required to ensure that the non-lawyer's conduct is compatible

with the professional obligations of the lawyer.⁵¹ Furthermore, that lawyer may be held professionally responsible for the actions of a non-lawyer that violate the rules of professional conduct if the lawyer orders, or with knowledge of the specific conduct, ratifies the act. Liability is also imposed if any partner, person with comparable management authority, or person with direct supervisory authority over the nonlawyer knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial steps.⁵² In fact, in 2003, the Supreme Court of Louisiana held that the failure to supervise staff can result in disbarment!⁵³

UNAUTHORIZED PRACTICE OF LAW TESTS

THE PROFESSIONAL JUDGMENT TEST – Using this test, the court will ask whether the activity at issue is one which requires the lawyer's special training and skills. Viewed in another way, the question is whether the matter handled was of such complexity that only a person trained as a lawyer should be permitted to deal with it.

THE TRADITIONAL AREAS OF PRACTICE TEST – This test asks whether the function in question is one that would traditionally be performed by an attorney or is commonly understood to be the practice of law. There are several shortcomings in this definition, however, as it is self-defining, overbroad, and encompasses all common lawyer activities whether or not they relate to the law or truly require a lawyer's expertise.

THE INCIDENTAL LEGAL SERVICES TEST – This test draws a line around the practice of law based on whether the activity is essentially legal in nature or is a law-related adjunct to some business routine. For example, filling out a simple legal document incidental to a banking or real estate transaction, for which no separate fee is charged, would not constitute the practice of law under this definition.⁵⁴

⁴³ *In re Graham* (Bankr. M.D.N.C. Feb. 10, 2004).

⁴⁴ *In re Moore*, 290 B.R. 287 (Bankr. E.D.N.C. 2003).

⁴⁵ N.C. ST. B. ETHICS COMM., RPC 183 (1994).

⁴⁶ N.C. ST. B. ETHICS COMM., RPC 70 (1989).

⁴⁷ *People v. Alexander*, 53 Ill. App. 2d 299, 202 N.E. 2d 841 (Ill. App. 1964).

⁴⁸ N.C. ST. B. ETHICS COMM., Formal Ethics Op. 10 (2000).

⁴⁹ N.C. ST. B. ETHICS COMM., RPC 216 (1997).

⁵⁰ N.C. ST. BAR, (2006) at http://www.ncstatebar.org/faq/f_faq.asp#11.

⁵¹ N.C. RULES OF PROF'L CONDUCT R. 5.3(b) (2003).

⁵² N.C. RULES OF PROF'L CONDUCT R. 5.3(b) (2003).

⁵³ *In re Sledge*, 859 So.2d 671, 2003 WL 22399648 (La. 2003) (in combination with other considerations, evidence that the attorney allowed his non-lawyer assistant to run his practice with only a token of supervision warranted disbarment).

⁵⁴ Therese A. Cannon, *Ethics and Professional Responsibility for Legal Assistants*, NC Bar Association (1996).

While there is no specific or definitive list of actions that qualify as proper supervision, it is paramount that a system for regular review of paralegal work product is created and that this review includes feedback on the quality of work. Similarly, it is imperative that the legal assistant knows that the attorney is willing to set aside time to provide necessary feedback when requested. It may even facilitate review to have a comprehensive checklist relevant to the specialized area of law being practiced.⁵⁵

The responsibility should not be absorbed by one side alone; paralegals need to insist on proper supervision if it is not being made available. Among the greatest reasons for this, clients need to communicate with the office regularly, and the legal assistant will handle many of these calls. Because a paralegal can only respond to specific legal questions by passing on the responses of a lawyer, the attorney must either be willing to tell the paralegal how to respond to each question individually or speak with the client directly.⁵⁶

Finally, there is no requirement that the non-lawyer assistant be an employee of the firm. However, an attorney is still bound to the same ethical responsibilities of supervision with a nonlawyer independent contractor.⁵⁷ First, the services of the legal assistant should not be sought if the lawyer himself or herself is not experienced in the specialized area of law since an attorney who is not competent in that area of practice will be unable to supervise another.⁵⁸ Also, if after making a reasonable inquiry the attorney believes that the non-lawyer performed a task without proper supervision, the attorney may not continue to participate in the transaction. This would be particularly relevant in the area of real estate closings, where an attorney may be provided with a title abstract or title opinion that was performed by the assistant of another attorney participating in the sale.

RULE 5.3: RESPONSIBILITIES REGARDING NON-LAWYER ASSISTANTS

With respect to a non-lawyer employed or retained by or associated with a lawyer:

- (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm or organization shall make reasonable efforts to ensure that the firm or organization has in effect measures giving reasonable assurance that the non-lawyer's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the non-lawyer's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a non-lawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
 - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner or has comparable managerial authority in the law firm or organization in which the person is employed, or has direct supervisory authority over the non-lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action to avoid the consequences.

⁵⁵ Campbell, *supra*.

⁵⁶ *Id.*

⁵⁷ N.C. St. B. Ethics Comm., RPC 216 (1997).

⁵⁸ *Id.*

THE UNAUTHORIZED PRACTICE OF LAW AND REAL ESTATE TRANSACTIONS

The assistance of non-lawyers can be especially advantageous in the area of real estate closings, and North Carolina's regulations have developed accordingly. Paralegals are still prohibited from drafting legal documents, providing advice, or otherwise performing duties that would constitute the practice of law, but there are certain limited administrative services that a legal assistant may provide.⁵⁹

Until 2002, North Carolina's ethics opinions clearly required the presence of the closing attorney at a residential real estate closing so that documents could be explained, questions could be answered, and so that the client had an advocate readily available. A non-lawyer could oversee the execution of documents outside the presence of a lawyer only if he or she was adequately supervised, and the attorney was present at the formal closing.⁶⁰

These regulations changed with the adoption of Formal Ethics Opinion 2002-9. Under these new guidelines, an adequately supervised non-lawyer assistant may identify to the client the documents to be executed, direct the client as to the correct place on each document to sign, and handle the disbursement of proceeds for a residential real estate transaction, even if the supervising lawyer is not physically present.⁶¹

In the same year, the State Bar's Authorized Practice Committee further interpreted North Carolina's unauthorized practice of law statutes as they applied to residential real estate transactions. The committee first reiterated that a non-lawyer who is not under the direct supervision of an attorney may not prepare or aid in the preparation of deeds, deeds of trust, or other legal documents, abstract or pass upon titles, advise or give an opinion upon the legal rights or obligations of any person or organization, hold him or herself out as competent or qualified to give legal advice or counsel, or furnish any other service constituting the practice of law.⁶²

EXCERPT FROM AUTHORIZED PRACTICE ADVISORY OPINION 2002-1:

A non-lawyer is engaged in the unauthorized practice of law if he or she performs any of the following functions in connection with a residential real estate closing (identified only as examples):

1. Abstracts or provides an opinion on title to real property;
2. Explains the legal status of title to real estate, the legal effect of anything found in the chain of title, or the legal effect of an item reported as an exception in a title insurance commitment except as necessary to underwrite a policy of insurance and except that a licensed title insurer, agency, or agent may explain an underwriting decision to an insured or prospective insured, including providing the reason for such decision;
3. Explains or gives advice about the rights or responsibilities of parties concerning matters disclosed by a land survey under circumstances that require the exercise of legal judgment or that have implications with respect to a party's legal rights or obligations;
4. Provides a legal opinion or advice in response to inquiries by any of the parties regarding legal rights or obligations of any person, firm, or corporation, including but not limited to the rights and obligations created by a promissory note, the effect of a pre-payment penalty, the rights of parties under a right of rescission, and the rights of a lender under a deed of trust;
5. Advises or instructs a party to the transaction with respect to alternative ways for taking title to the property or the legal consequences of taking title in a particular manner;
6. Drafts a legal document for a party to the transaction or assists a party in the completion of a legal document, or selects or assists a party in selecting a form legal document among several forms having different legal implications;
7. Explains or recommends a course of action to a party to the transaction under circumstances that require the exercise of legal judgment or that have implications with respect to the party's legal rights or obligations;
8. Attempts to settle or resolve a dispute between the parties to the transaction that will have implications with respect to their respective legal rights or obligations.

⁵⁹ N.C. ST. BAR, (2006) at <http://www.ncstatebar.org/programs/upl.asp>.

⁶⁰ N.C. ST. B. Ethics Comm., Formal Ethics Op. 13 (1999).

⁶¹ N.C. ST. B. Ethics Comm., Formal Ethics Op. 9 (2002).

⁶² N.C. ST. B. Authorized Practice Comm., Advisory Op. 1 (2002).

The committee then clarified that a non-lawyer who is not acting under the supervision of a lawyer may (1) present and identify the documents necessary to complete a residential real estate closing, direct the parties where to sign the documents, and ensure that the parties have properly executed the documents; and (2) receive and disburse the closing funds. These administrative or ministerial activities do not necessarily require the exercise of legal judgment or the giving of legal advice or opinion. However, if in the process of performing any of these duties the client were to ask an important issue affecting the legal rights or obligations of the parties, a non-lawyer is not permitted to answer.⁶³

QUASI-JUDICIAL HEARINGS

In October 2005, the Authorized Practice Committee also adopted an advisory opinion regarding non-lawyers and quasi-judicial hearings. Appearing before planning boards, boards of adjustment, and city and county government officials for the purposes such as adopting official zoning maps are legislative in nature. Because of this, interested people may appear and speak on such matters before these bodies as an interested party or even representing an interested group without violating the unauthorized practice restrictions.⁶⁴

However, the statutory prohibitions remain in place and non-lawyers are still forbidden from holding themselves out as attorneys, providing legal services or advice with relation to the hearing, draft relevant legal documents, or attempt to represent the legal interests of any involved party.⁶⁵ An appearance on behalf

of another for the presentation of evidence, cross-examination of witnesses, and argument on the law at a quasi-judicial proceeding are all the practice of law.⁶⁶

SPECIAL EXCEPTIONS FOR SOCIAL SECURITY ADMINISTRATION HEARINGS

Non-lawyer representation of claimants before the Social Security Administration (SSA) is allowed by the Social Security Act, and if the attorney believes that the legal assistant is competent to represent claimants and that it is in the best interest of a client to be represented by the legal assistant, this may permissibly occur without any involvement from the attorney.⁶⁷ However, the prospective client must be explicitly advised that the person who will be providing the representation is not a lawyer and he or she must be informed if any of the protections typically present in an attorney-client relationship will not exist. Nonetheless, the firm may still want to reassure the client that the non-lawyer is still bound by the same professional obligations, including the duty of confidentiality and the duty to avoid conflicts of interest.⁶⁸

Furthermore, Rule 7.1 forbids a legal professional from making a false or misleading communication about his or her services. Because most consumers will assume that an attorney will provide any representational services, the firm should disclose the fact that representation will be provided by a non-lawyer any time it advertises representation before the Social Security Administration as a service provided by the firm.⁶⁹

⁶³ *Id.*

⁶⁴ N.C. St. B. Authorized Practice Comm., Advisory Op. 1 (2006).

⁶⁵ The advisory committee does make a special note that the opinion should not be interpreted as diminishing the role and expertise of land use professionals as witnesses or to affect the city and county planning staff to present factual information to the hearing board.

⁶⁶ N.C. St. B. Authorized Practice Comm., Advisory Op. 1 (2006).

⁶⁷ N.C. St. B. Ethics Comm., Formal Ethics Op. 6 (2005).

⁶⁸ N.C. St. B. Ethics Comm., Formal Ethics Op. 2 (2005).

⁶⁹ *Id.*

GUIDELINES FOR USE OF NON-LAWYERS IN RENDERING LEGAL SERVICES

Adopted by the NC State Bar on July 17, 1998

Reprinted with permission of the NC State Bar

1. A LAWYER SHALL NOT PERMIT AN ASSISTANT TO ENGAGE IN THE PRACTICE OF LAW.

G.S. 84-4 makes it unlawful for anyone but a licensed attorney to practice law. The term “practice law” is defined in G.S. 84-2.1:

The phrase “practice law” as used in this Chapter is defined to be performing any legal service for any other person, firm, or corporation, with or without compensation, specifically including the preparation or aiding in the preparation of deeds, mortgages, wills, trust instruments, inventories, accounts or reports of guardians, trustees, administrators or executors, or preparing or aiding in the preparation of any petitions or orders in any probate or court proceeding; abstracting or passing upon titles, the preparation and filing of petitions for use in any court, including administrative tribunals and other judicial or quasi-judicial bodies, or assisting by advice, counsel, or otherwise in any legal work; and to advise or give opinion upon the legal rights of any person, firm or corporation: Provided, that the above reference to particular acts which are specifically included within the definition of the phrase “practice law” shall not be construed to limit the foregoing general definition of the term, but shall be construed to include the foregoing particular acts, as well as all other acts within the general definition.

The Rules of Professional Conduct provide: “A lawyer shall not assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.” Rule 5.5(b). The rationale for allowing only licensed attorneys to practice law is articulated in the comment to the rule: “Limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons.” Rule 5.5(b), Comment [1]. As noted in the Comment, however, Rule 5.5 “does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer retains responsibility for their delegated work.” *Id.*

Regardless of the apparent competence displayed by a paralegal or legal assistant, members of the bar must ensure that assistants do not transgress the rules governing the unauthorized practice of law and thereby violate the law and the Rules of Professional Conduct. A lawyer may, however, allow an assistant to perform legally-related tasks, provided the lawyer and the assistant comply with these guidelines. For example, an assistant may communicate and negotiate claims with a claims adjuster for the adverse party’s insurance carrier, as long as the assistant does not exercise independent legal judgment regarding the value of the case. RPC 70.

2. A LAWYER SHALL NOT PERMIT AN ASSISTANT TO APPEAR ON BEHALF OF A CLIENT IN A DEPOSITION, IN COURT OR BEFORE ANY AGENCY OR BOARD, IN PERSON OR ON THE RECORD, UNLESS PERMITTED BY THE NORTH CAROLINA GENERAL STATUTES AND A RULE OF A PARTICULAR COURT, AGENCY OR BOARD.

Although only an attorney may act as a representative of or serve as an advocate for a client before most judicial and administrative bodies, there are exceptions by virtue of statute, administrative rule, court rule and regulation. For example, the Federal Administrative Procedures Act authorizes non-lawyers to represent parties in certain proceedings before specified federal agencies. Also, a qualified law student is allowed to perform certain functions normally restricted to members of the bar provided the student acts under the supervision of an attorney pursuant to an approved program. Even when an assistant is permitted to appear and represent a client, the assistant should disclose his or her non-lawyer status.

A lawyer may not permit an assistant either to examine a witness at a deposition or to represent a client who is being deposed by the opposing attorney. RPC 183.

3. A LAWYER SHALL REQUIRE THAT AN ASSISTANT DISCLOSE THAT HE OR SHE IS NOT A LAWYER WHEN NECESSARY TO AVOID MISREPRESENTATION.

Although an assistant may communicate directly with a client on behalf of the lawyer, early disclosure of non-lawyer status is necessary to assure that there will be no misunderstanding as to the responsibilities and role of the assistant. Disclosure may be made in any way that avoids confusion. Common sense suggests a routine disclosure at the outset of a conference or any type of communication. If an assistant is designated as the individual to contact in a law firm, disclosure of the non-lawyer status should be made at the time of such designation.

Rule 4.2 prohibits a lawyer from communicating with a party known to be represented by an attorney, unless the person's attorney consents. The rule also prohibits a lawyer from using an agent, including an assistant, to make such a communication. The lawyer has an obligation to ensure that his or her assistant does not communicate directly with a party known to be represented by an attorney, without that attorney's consent.

4. A PARTNER IN A LAW FIRM SHALL MAKE REASONABLE EFFORTS TO ENSURE THAT THE FIRM HAS IN EFFECT MEASURES GIVING REASONABLE ASSURANCE THAT THE ASSISTANT'S CONDUCT IS COMPATIBLE WITH THE PROFESSIONAL OBLIGATIONS OF THE LAWYER.

Rule 5.3(a) places responsibility upon the principals of a law firm to see that the firm ensures that the conduct of legal assistants is consistent with the professional obligations of the lawyers in the firm. Thus, it is very important that those lawyers having responsibility for the management of the firm familiarize legal assistants with all relevant provisions of the Rules of Professional Conduct. Particular care must be taken to ensure that legal assistants understand and appreciate the obligation to maintain the confidentiality of information received incident to the representation of clients. More over, "[t]he measures employed in supervising non-lawyers should take account of the fact that they do not have legal training and are not

subject to professional discipline.” Rule 5.3, Comment [1]. In addition to assuring compliance with the attorney’s ethical obligations, an attorney should ensure that a non-lawyer is properly educated or trained to perform any legal task the attorney delegates to the assistant.

Obviously, a lawyer is better able to ensure ethical compliance by assistants who are employees of the lawyer because the lawyer is in contact with employees on a regular basis. When the assistant is not working as an employee of the lawyer, but instead contracts independently to perform legally-related tasks, the lawyer is still responsible for the assistant’s work product and ethical conduct. For this reason, special care must be taken by the lawyer to make sure that the assistant performs both competently and ethically before entrusting services to an independent assistant.

A lawyer who discovers that a non-lawyer has misappropriated money from the attorney’s trust account must inform the State Bar. Rule 5.3, Comment [2].

5. A LAWYER HAVING DIRECT SUPERVISORY AUTHORITY OVER AN ASSISTANT SHALL MAKE REASONABLE EFFORTS TO ENSURE THAT THE ASSISTANT’S CONDUCT IS COMPATIBLE WITH THE PROFESSIONAL OBLIGATIONS OF THE LAWYER.

Just as the principals of a law firm have general responsibility to ensure that assistants are aware of the ethical rules, lawyers having direct supervisory authority over assistants must make reasonable efforts to ensure that the work which they are supervising is accomplished in a manner which is compatible with their own professional obligations.

Specifically, Rule 5.3(c) makes a lawyer professionally responsible for conduct of legal assistants over whom he or she has direct supervisory authority, which conduct would violate the Rules of Professional Conduct if engaged in by a lawyer, if (1) the lawyer orders the conduct involved, or (2) the lawyer knows of the conduct at a time when its consequences can be avoided but fails to take reasonable actions to avoid the consequences.

6. A LAWYER SHALL MAINTAIN AN ACTIVE AND DIRECT RELATIONSHIP WITH THE CLIENT, SUPERVISE THE ASSISTANT’S PERFORMANCE OF DUTIES, AND REMAIN FULLY RESPONSIBLE FOR THE WORK PERFORMED.

An attorney shall maintain an active, personal relationship with his or her clients. Maintaining such a relationship with the client, however, does not preclude an assistant from meeting with or talking with the client, nor does it necessarily require regular and frequent meetings between the lawyer and client. However, whenever it appears that consultation between the lawyer and the client is necessary, the lawyer should talk directly with the client and, when reasonable, remain available for consultation with the client.

An assistant should inform the responsible lawyer of all significant actions and services performed by the assistant. A lawyer can maintain ultimate responsibility for the actions of a legal assistant only if the lawyer is fully informed of the actions of the assistant. Only by thorough supervision of the assistant can the lawyer ensure that the assistant is neither engaging in the unauthorized practice of law nor involving the lawyer in any violation of the lawyer’s professional responsibilities.

7. A LAWYER SHALL ENSURE THAT NO INTEREST OR RELATIONSHIP OF THE ASSISTANT IMPINGES UPON THE SERVICES RENDERED TO THE CLIENT.

A lawyer owes his or her client loyalty. The attorney's loyalty must not be diluted by the interest of anyone other than the client. If the interests of a legal assistant might materially limit or otherwise adversely affect the lawyer's representation of a prospective or current client, Rule 1.7 clearly requires the lawyer to decline or discontinue the representation.

Lawyers should make sure that their assistants clearly understand their professional and ethical responsibilities with respect to conflicts of interest. If a lawyer accepts a matter in which the assistant has a conflict of interest that does not affect or limit the lawyer's representation of the client, the lawyer should exclude the assistant from participation in the representation. RPC 176. Although the imputed disqualification rules in Rule 1.10 do not apply to non-lawyers, the attorney must take "extreme care to ensure" that the assistant is totally screened from participation in the case. *Id.* In addition, the lawyer should inform the client that a non-lawyer employee has a conflict of interest which, were it the lawyer's conflict, might prevent further representation of the client in connection with the matter. The nature of the conflict should be disclosed. No interest or loyalty of the assistant may be permitted to interfere with the lawyer's exercise of independent professional judgment.

Similarly, a lawyer is not disqualified from representing a client merely because a secretary or paralegal in his or her office may be called as a witness. RPC 19 & 213. Rule 3.7, holding that a potential conflict exists if an attorney is both an advocate and a witness, does not apply to assistants of the lawyer. RPC 19.

8. A LAWYER MAY CHARGE A CLIENT FOR LEGAL WORK PERFORMED BY A LEGAL ASSISTANT BUT SHALL NOT FORM A PARTNERSHIP OR OTHER BUSINESS ENTITY WITH AN ASSISTANT FOR THE PRACTICE OF LAW.

Numerous authorities, including the United States Supreme Court, recognize that paralegal work may be billed at the prevailing market rate and included in a fee application to a court. *See, e.g., Missouri v. Jenkins*, 491 U.S. 274 (1989). Generally, a lawyer may bill and recover for a nonlawyer's work if the work would have traditionally been performed by the lawyer. Of course, fees for non-lawyer assistants, like fees for attorney's work, must be reasonable.

On the other hand, Rule 5.4 generally prohibits sharing legal fees with a non-lawyer. In accordance with this rule, compensation of an assistant may not include a percentage of the fees received by the lawyer, nor should the assistant receive any remuneration, directly or indirectly, for referring matters of a legal nature to the lawyer. For example, a lawyer may not pay an assistant a discretionary bonus that is based upon a percentage of the fees generated in matters on which the assistant worked. RPC 147. A lawyer may, however, include his or her assistants in a retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement. Rule 5.4(a)(4).

9. A LAWYER'S LETTERHEAD OR A BUSINESS CARD MAY INCLUDE THE NAME OF A NON-LAWYER ASSISTANT IF THE ASSISTANT'S CAPACITY IS CLEARLY INDICATED AND THE DOCUMENT IS OTHERWISE NEITHER FALSE NOR MISLEADING.

A lawyer's letterhead, like other communications about the lawyer or the lawyer's services, must not be false or misleading. Rule 7.1. Specifically, such communication may not misrepresent a fact or omit a fact necessary to make a statement not materially misleading. *See* Rules 7.1(a). To avoid the implication that an assistant whose name appears on the letterhead of a lawyer or law firm is licensed to practice law, the limited capacity of the non-lawyer must be clearly indicated. RPC 127.

Likewise, business cards bearing the name of the lawyer or law firm employing an assistant may be used by the assistant for identification. However, the assistant's non-lawyer status must be evident from the title or other description used with the non-lawyer's name. *See* CPR 253.

An assistant may also sign correspondence on a lawyer's or a law firm's letterhead, subject, however, to the same requirements. For example, an assistant's signature must be accompanied by a title, such as "secretary," "legal assistant" or "paralegal."

10. A LAWYER MAY USE A NON-LAWYER, NON-EMPLOYEE FREELANCE LEGAL ASSISTANT IF THE LAWYER ADEQUATELY SUPERVISES THE NON-LAWYER'S WORK.

It is permissible for a lawyer to employ a non-lawyer, non-employee freelance legal assistant (hereafter, "freelance assistant") provided certain conditions are met. A lawyer must take reasonable measures to determine that the freelance assistant is competent to perform any activities delegated to the assistant. *See*, e.g., RPC 216 (3rd revision). In addition, as with an employee, an attorney must also take reasonable measures to ensure that the freelance assistant complies with the attorney's ethical responsibilities. The lawyer must adequately supervise the freelance assistant and inquire into the freelance assistant's potential conflicts of interest. *Id.* Additionally, the attorney must be competent to do the legal work delegated to the non-lawyer and to supervise adequately the non-attorney. The lawyer may not rely on the experience and knowledge of the freelance assistant in the practice area.

For example, an attorney utilizing a freelance assistant to perform title searches must ensure that the freelance assistant is competent to perform such services. *Id.* Additionally, to supervise the freelance assistant, the attorney must be competent to search and prepare title opinions and may not rely on the experience of the freelance assistant in this area. *Id.* Assuming the attorney satisfies these and all other pertinent ethical obligations under the Rules, the attorney may use a freelance assistant to perform title searches. *Id.* An attorney may not, however, rely on the title summary of a freelance assistance over whom the attorney does not exercise proper supervision. RPC 29.

Finally, an attorney should disclose to the client the use of a freelance assistant, the name of the freelance assistant and how the freelance assistant's services will be charged to the client, if the client inquires. Revised RPC 216.

SELECT ETHICS OPINIONS PERTAINING TO LEGAL ASSISTANTS

ACTIONS PERFORMED BY A NON-LAWYER

- **RPC 70**
Opinion rules that a legal assistant may communicate and negotiate with a claims adjuster if directly supervised by the attorney for whom he or she works.
- **RPC 183**
Opinion rules that a lawyer may not permit a legal assistant to examine or represent a witness at a deposition.
- **2000 FORMAL ETHICS OPINION 10**
Opinion rules that a lawyer may have a non-lawyer employee deliver a message to a court holding calendar call, if the lawyer is unable to attend due to a scheduling conflict with another court or other legitimate reason.
- **2005 FORMAL ETHICS OPINION 2**
Opinion rules that a law firm that employs a non-lawyer to represent Social Security claimants must so disclose to prospective clients and in any advertising for this service.
- **2005 FORMAL ETHICS OPINION 6**
Opinion rules that the compensation of a non-lawyer law firm employee who represents Social Security disability claimants before the Social Security Administration may be based upon the income generated by such representation.

PROTECTION OF CONFIDENTIAL INFORMATION

- **RPC 133**
Opinion rules that a law firm may make its waste paper available for recycling.
- **RPC 215**
Opinion rules that when using a cellular or cordless telephone or any other unsecure method of communication, a lawyer must take steps to minimize the risk that confidential information may be disclosed.
- **RPC 252**
Opinion rules that a lawyer in receipt of materials that appear on their face to be subject to the attorney-client privilege or otherwise confidential, which were inadvertently sent to the lawyer by the opposing party or opposing counsel, should refrain from examining the materials and return them to the sender.

POTENTIAL CONFLICTS OF INTEREST ARISING OUT OF NON-LAWYER EMPLOYEES

■ RPC 19

Opinion rules that a lawyer may represent grantees of deeds he drafted even though his secretary may be called as a witness.

■ RPC 74

Opinion rules that a firm which employs a paralegal is not disqualified from representing an interest adverse to that of a party represented by the firm for which the paralegal previously worked.

■ RPC 102

Opinion rules that a lawyer may not permit the employment of court reporting services to be influenced by the possibility that the lawyer's employees might receive premiums, prizes or other personal benefits.

■ RPC 176

Opinion rules that a lawyer who employs a paralegal is not disqualified from representing a party whose interests are adverse to that of a party represented by a lawyer for whom the paralegal previously worked.

ROLE OF A NON-LAWYER IN REAL-ESTATE TRANSACTIONS

■ RPC 29

Opinion rules that an attorney may not rely upon title information from a non-lawyer assistant without direct supervision by said attorney.

■ RPC 216

Opinion rules that a lawyer may use the services of a non-lawyer independent contractor to search a title provided the non-lawyer is properly supervised by the lawyer.

■ 98 FORMAL ETHICS OPINION 8

Opinion rules that a lawyer may not participate in a closing or sign a preliminary title opinion if, after reasonable inquiry, the lawyer believes that the title abstract or opinion was prepared by a non-lawyer without supervision by a licensed North Carolina lawyer.

■ 2002 FORMAL ETHICS OPINION 9

Opinion rules that a non-lawyer assistant supervised by a lawyer may identify to the client who is a party to such a transaction the documents to be executed with respect to the transaction, direct the client as to the correct place on each document to sign, and handle the disbursement of proceeds for a residential real estate transaction, even though the supervising lawyer is not physically present.

PROFESSIONAL ORGANIZATIONS AND CONTACTS

NATIONAL ORGANIZATIONS

Alliance for Paralegal Professional Standards
www.apps-nc.org

American Association for Paralegal Education
(856) 423 – 2829
Info@aafpe.org
www.aafpe.org

International Paralegal Management Association
(404) 292 – 4762
info@paralegalmanagement.org
www.paralegalmanagement.org

National Association of Legal Assistants
(918) 587 – 6828
nalanet@nala.org
www.nala.org

National Federation of Paralegal Associations, Inc.
(425) 967 – 0045
info@paralegals.org
www.paralegals.org

Standing Committee on Paralegals
American Bar Association
(800) 285 – 2221
legalssts@staff.abanet.org
www.abanet.org/legal-services/paralegals

STATE ORGANIZATIONS

North Carolina Advocates for Justice
Legal Assistants Division
(800) 688 – 1413
www.ncaj.com

North Carolina Bar Association
Paralegal Division
(800) 662 – 7407
sections@ncbar.org
www.paralegaldivision.ncbar.org

North Carolina Paralegal Association, Inc.
(704) 535 – 3363
info@ncparalegal.org
www.ncparalegal.org

North Carolina Paralegal Certification
North Carolina State Bar
919.828.4620
twilder@ncbar.com
www.nccertifiedparalegal.org

LOCAL ORGANIZATIONS

Alamance County Paralegal Association
(336) 227-8851

Asheville Area Paralegal Association
mmiller@vwlawfirm.com
www.aapaonline.net

Catawba Valley Paralegal Association
info@catawbacountyparalegalassoc.org
www.catawbavalleyparagalassoc.org

Cumberland County Paralegal Association
www.ccpara.com

Guilford Paralegal Association
information@guilfordparalegalassociation.org
www.guilfordparalegalassociation.org

Metrolina Paralegal Association
www.charlotteareaparalegals.com

Raleigh-Wake Paralegal Association
www.rwpa.net

Research Triangle Paralegal Association, Inc.
info@rtpanc.org
www.rtpanc.org