

ATTORNEY SUPERVISION OF PARALEGALS

by Stacey Hunt, CAL, CAS

To improve the bottom line, while at the same time keeping fees low enough to stay competitive, many attorneys employ professional paralegals to assist them with their practices. What sort of tasks may an attorney delegate to a paralegal employee? The answer to that depends on the skill and experience of the paralegal and the level of trust he or she has incurred during employment. There is a basic understanding that a paralegal can do everything an attorney can do except give legal advice, appear in court or set fees. Other than that, the sky is the limit. What is less clear is the point at which the attorney delegates so much that she opens herself up to potential discipline by the State Bar or even a malpractice suit. When is the line of proper supervision of a paralegal crossed? In the case of *Ferris v. Snively*, 172 Wash. 167 (19 P.2d 942, 945-946) the Supreme Court of Washington described the function of law clerks: "The line of demarcation as to where their work begins and where it ends cannot always be drawn with absolute distinction or accuracy. Probably as nearly as it can be fixed, and it is sufficient to say that it is work of a preparatory nature, such as research, investigation of details, the assemblage of data and other necessary information, and such other work as will assist the attorney in carrying the matter to a completed product, either by his personal

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examination and approval thereof or by additional effort on his part. The work must be such, however, as loses its separate identity and becomes either the product, or else merged in the product of the attorney himself." (Emphasis added) Can a law Firm delegate authority to a paralegal to make appearances at Workers' Compensation Appeals Board hearings and file petitions? Can a paralegal visit prospective clients' homes, answer questions and work with clients to provide revocable living trust packages? Is the supervising attorney responsible if his paralegal fails to timely file a notice of appeal? Can out-of-state attorneys run a bankruptcy practice in California staffed only by paralegal? All of these issues have arisen and been addressed by bar associations and the courts.

Existing Rules and Case Law. The Courts recognize that an attorney cannot work alone. "It must be conceded that any attorney having a large practice must rely to some extent upon his employees for the conduct of the litigation intrusted to him.... However, an attorney who accepts employment necessarily accepts the responsibilities of his trust." *Moore v. State Bar* (1964) 63 Cal.2d 74 (41 Cal.Rptr 161). Along these same lines, the ABA issued its Ethical Consideration 3-6 which states: A lawyer often delegates tasks to clerks, secretaries and other lay persons. Such delegation is proper if the attorney maintains a direct relationship with his client, supervises the delegated work, and has complete professional responsibility for the work product. This delegation enables a lawyer to tender legal services more economically and efficiently. Michael J. Seng of the Fresno firm of Farley, Seng, DeSantos & Green

echoes the sentiment, "Attorneys have to be ultimately responsible for the clients work. They cannot pass the buck to employees." As an attorney who's practice focus on legal malpractice litigation and as a Special Prosecutor for the State Bar of California, Seng has seen these matters arise from time to time. "Especially in the Domestic Relations area where paralegals are extensively utilized, I have seen attorneys allow the paralegals to do all of the client's work except for court appearances. There were

situations where the client had never once met or talked to the attorney." According to Seng, this really opens the attorney up to potential malpractice claims. "Even if the paralegals are qualified to perform the work, client get quite upset when they hire an attorney and feel they never get the benefit of his or her personal expertise. I could see where a client might be justified in arguing she was defrauded about who was going to handle her case." The California Rules of Professional Conduct are relatively vague on these matters. Rule 3-110 (Failing to Act Competently) merely states in part that:

(A) A member shall not intentionally, or with reckless disregard, or repeatedly fail to perform legal, services competently.

(B) To perform legal services competently means diligently to apply the learning and skill necessary to perform the members' duties arising from employment or representation. If the member does not have sufficient learning and skills when the employment or representation is undertaken, or during the course of the employment or representation, the member may nonetheless perform such duties competently by associating or, where appropriate, professionally consulting another member reasonably believed to be competent, or by acquiring sufficient learning and skill before performance is required, if the member has sufficient time, resources, and ability do to so. The discussion of this Rule states that "The duties set forth in rule 3.110 include the duty to supervise the work

of subordinate attorney and non-attorney employees and agents." The ABA Model Rules of Conduct Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants) puts the onus on the firm's partner or supervising attorney to monitor the conduct of its employees: With respect to a nonlawyer employed or retained by or associated with a lawyer: (a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures 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 shall 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 person that would be a violation of the

Rules of Professional Conduct if engaged by a lawyer if:

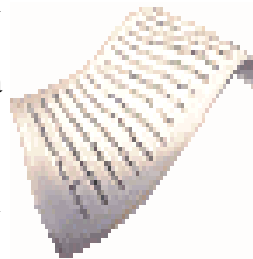
(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

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

Opinions and Rulings

In its Formal Opinion No. 1988-103, the State of Bar of California found that a law firm may delegate authority to a paralegal to make appearances at Worker's Compensation Appeals Board

hearings and to file petitions, motions or other material, as long as (1) the client is advised, and (2) the paralegal is adequately supervised. The State Bar found that because the client had been informed of and had consented to the involvement of the paralegal, no violation occurred with respect to dishonesty or deceit. If the status of the employee as a paralegal, rather than an attorney, is fully disclosed at all proceedings, the firm would not be guilty of



violation of the prohibition of an attorney lending his or her name to a nonlawyer. Finally, because the Labor Code expressly authorizes nonlawyers to represent applications before the WCAB, the firm would not be considered to be aiding in the unauthorized practice of law. The situation of the paralegal visiting clients' homes in connection with revocable living trust packages was looked at by the Orange County Bar Association in its Formal Opinion No. 94-002. The paralegal only answered specific questions which the attorney had trained her to answer. If questions or issues arose in which the paralegal had not been trained, she would decline to answer until she had conferred with the attorney. The revocable living trust packages were authored by the attorney. With these facts, Orange County concluded that "the activities performed by this paralegal ... should not be considered the unauthorized practice of law, particularly since the attorney is supervising the paralegal and maintaining a direct relationship with the client." (Emphasis added) In what situations have attorneys been cited for failing to supervise the work of subordinate attorney and non-attorney employees? In Moore, supra (63 Cal.2d 74), attorney Moore had his license suspended for three months when his secretary failed to file an answer to a complaint, allowing the client's default to be taken. The Disciplinary Board of the State Bar recommended public reproof of an attorney for allowing an office manager to sign his time to court documents. Vaughn v. State Bar, 6 Cal.3d 847, 857 (100 Cal.Rptr.713,719). One of the issues involved in Trousil v. State Bar 38 Cal.4th 337, 342 (211 Cal.Rptr. 525), was the fact that a client's settlement check was not promptly mailed due to a series of secretarial errors. The court found that "even assuming arguendo that there was no deliberate wrongdoing, nevertheless where fiduciary violations occur as a result of lapses in office procedure, they

may be deemed 'willful' for disciplinary purposes." A New York case entitled United States of America v. Marcus Hooper, 1994 U.S. App. LEXIS 36133 (decided 12/19/94). found that an attorney's failure to timely file a notice of appeal was due to a "poorly supervised legal assistant," and did not meet the "excusable neglect" standard of Rule 4(b). In a California bankruptcy case. In Re Hessinger & Assoc., 1994 Bankr. LEXIS 1210 (decided 8/9/94), the Court found that Hessinger, an out-of-state attorney, was engaging in the unauthorized practice of law. Hessinger set up a shop in California utilizing "credit specialists" to solicit bankruptcy petitions from clients. The credit specialists interviewed clients, set fees, made decisions on exemptions, and completed the petition without supervision. The petitions were signed without review by an experienced attorneys working for Hessinger. Don't take chances with your practice your license. Use paralegals for the purposes for which their profession was created: to do work of a preparatory nature that will assist you in carrying out the matter to a completed product. As Michael Seng points out "the client didn't hire the paralegal, the client hired the attorney. Even if your support staff is totally competent, you should still take time to establish a relationship with your clients and review their work."

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