

## **WHAT YOUR OFFICE SUPPORT STAFF AND YOU NEED TO KNOW ABOUT YOUR PROFESSIONAL RESPONSIBILITY FOR NONLAWYER ASSISTANTS**

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After several years of working with the Kentucky Bar on CLE programs concerning professional responsibility and malpractice prevention, I thought I'd met with just about everybody concerned. Thanks to an invitation from the Kentucky Academy of Trial Attorneys to make a presentation at their annual program for law office support staff, I now recognize that there was a glaring omission in my experience. While not being blind to the importance of nonlawyers to overall legal professionalism, it was not until I performed research with only law office support staff in mind that I realized how much I was underestimating the significance of support staff to the success or failure of a firm. Apparently, I am not alone in spotting a need for emphasis on this aspect of a lawyer's professional responsibility. Last May I had the opportunity to attend a program about paralegals at the ABA's 19th National Conference on Professional Responsibility. It had the bemusing title "Nonlawyers Are People Too: The Pros and Cons." (Say What!?) The upshot of all this was to suggest that the timing is right to bring you up-to-date on your professional responsibility for the nonlawyers working in the office.

### **THE RULES**

Kentucky is one of the few states whose highest court has adopted specific guidelines on the use of paralegals by attorneys.<sup>1</sup> The basic idea is to encourage use of paralegals to expand the public's opportunity for less expensive legal services. The key points of the Supreme Court's rule are:

- ◆ Direct supervision of a paralegal by a licensed lawyer is required.
- ◆ A lawyer must ensure that a paralegal does not engage in the unauthorized practice of law.
- ◆ It must be made clear to a client that a paralegal is not a lawyer.
- ◆ The lawyer must remain fully responsible for the representation.

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<sup>1</sup> Rule 3.700 Provisions Relating to Paralegals, Rules of the Supreme Court.

- ◆ The lawyer must instruct a paralegal to preserve the confidences and secrets of a client.
- ◆ The Kentucky Rules of Professional Conduct are not binding on lay personnel.

This primary guideline on use of nonlawyer assistants in Kentucky is embellished in the Kentucky Rules of Professional Conduct in several places:

- Rule 5.3 - Responsibilities Regarding Nonlawyer Assistants: Makes partners and lawyers with supervisory authority over nonlawyers responsible for ensuring that their conduct is “compatible with the professional obligation of the lawyer.”<sup>2</sup>
- Rule 5.4 - Professional Independence of a Lawyer: Prohibits sharing fees with nonlawyers. A key exception for support staff is that a firm may include nonlawyer employees in a compensation or retirement plan.<sup>3</sup>

### **THE ISSUES**

It is clear that use of nonlawyer assistants in Kentucky is not only OK, but actually encouraged. What is not so clear are the categories of work that may be delegated and the associated ethical pitfalls. What follows is a gloss of current issues and considerations in properly controlling and directing the nonlawyers in your office.

- **Delegating and Supervising Work**: Determining whether delegation of work to a nonlawyer results in the unauthorized practice of law is made difficult because the Kentucky definition of the practice of law is so broad.<sup>4</sup> The overarching guidelines are that the lawyer maintain a direct relationship with the client, supervise the nonlawyer, and assume full responsibility for work product.<sup>5</sup> If the delegation involves the exercise of independent legal judgment or counseling clients on legal issues, then the delegation has gone too far.<sup>6</sup>

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<sup>2</sup> Partners and supervisory lawyers become responsible for nonlawyer professional misconduct only if the misconduct is ordered, ratified, or condoned by them. Ky. R.P.C. 5.3, para. (c).

<sup>3</sup> Ky. R.P.C. 5.4 para. (a)(3).

<sup>4</sup> SCR Rule 3.020 Practice of Law Defined: “The practice of law is any service rendered involving legal knowledge or legal advice, whether of representation, counsel or advocacy in or out of court, rendered in respect to the rights, duties, obligations, liabilities, or business relations of one requiring the services.”

<sup>5</sup> ABA/BNA Lawyers’ Manual on Professional Conduct, Unauthorized Practice of Law, Lawyer Responsibility for Nonlawyer Personnel 21:8601 and 8604.

<sup>6</sup> Supreme Court Rule 3.700 describes a paralegal’s scope of activity as follows: . . . a paralegal is a person under the supervision and direction of a licensed lawyer, who may apply knowledge of law and legal procedures in rendering direct assistance to lawyers engaged in legal research; design, develop or plan modifications or new procedures, techniques, services, processes or applications; prepare or interpret legal documents and write detailed procedures for practicing in certain fields of law; select compile and use technical information from such references as digests, encyclopedias or practice manuals; and analyze and follow procedural problems that involve independent decisions. Rhode Island provides even more specific guidelines:

[L]egal assistants may, while assisting their lawyer-employers:

- **Client Confidentiality:** This is the major professional responsibility risk involving support staff. An ironclad office rule must be that firm business is never discussed outside the office other than in the furtherance of the client's case. This policy forbids discussing firm activities with family, friends, relatives of clients, or anyone else. The office staff must be trained to be sensitive to discussing client matters in the office in open areas or other places in the office where conversation can be overhead. Client files must be put out of sight when not in use and should not be left displayed on desks even for brief absences. Modern technology has introduced new risks. Of course, we all know to be careful with the telephone, especially the staff member working in the client reception and waiting area. But do not overlook confidentiality security requirements for fax correspondence and personal computer monitors which often can be viewed by a casual passerby. Finally, everyone must be alert to special circumstances raising confidentiality risks such as use of temporary employees. Temporary help must be given special instructions on client confidentiality and should be screened from office matters outside the scope of their limited role in the office.
- **Conflicts of Interest:** A blossoming ethics problem area is conflicts of interest involving support staff. Since the Rules of Professional Conduct do not apply to nonlawyers, and a lawyer is responsible only if the lawyer ordered, ratified or condoned the violation; it follows that a conflict of interest by staff members should rarely cause a problem. This, however, is not the case. The newest nonlawyer conflict situation is when a layperson moves from one law firm to another.<sup>7</sup> If client conflicts arise from the switch, withdrawal or disqualification of the hiring firm may be necessary. Screening is one way to resolve the issue, but it is best to do a conflicts check before you hire and know what your risks are from the beginning.<sup>8</sup> Other conflicts concerning support staff involve financial

- ◆ attend client conferences and correspond with and obtain information from clients;
- ◆ draft legal documents for lawyer review and witness the execution of documents;
- ◆ assist at closings and similar meetings between parties and lawyers;
- ◆ maintain estate and guardianship trust accounts, transfer securities and other assets, and assist in the day-to-day administration of trusts and estates;
- ◆ conduct research, check citations in briefs and memoranda, and index and organize documents;
- ◆ prepare summaries of depositions, interview witnesses, and obtain records;
- ◆ prepare summaries of trial transcripts and obtain information from courts.

*Rhode Island Supreme Court, Guidelines for Use of Legal Assistants, Provisional Order No. 18, Feb. 1, 1983.*

<sup>7</sup> ABA/BNA Lawyers' Manual on Professional Conduct, Unauthorized Practice of Law, Lawyer Responsibility for Nonlawyer Personnel 21.8612.

<sup>8</sup> Kentucky Formal Ethics Opinion 308 (1985) provides guidance for the situation when a paralegal leaves a firm and is hired by another firm that is opposing counsel in several cases against the paralegal's former firm. The former employer-firm should 1) debrief departing paralegal; 2) inform hiring firm of debrief; 3) request hiring firm screen former employee; 4) request hiring firm instruct paralegal not to reveal confidences; 5) request hiring firm to advise if breach; 6) request hiring firm to withdraw if breach; 7) get written assurances from hiring firm; 8) advise affected clients of paralegal's change in employment; 9) move to disqualify hiring firm if client so requests.

interest and personal interest conflicts. As an evolving situation, it is not all clear how far a lawyer must go in resolving these and other nonlawyer conflicts. What is clear is that in today's heightened ethical environment, the lawyer who ignores a conflict in the office of any sort is in harm's way. Everyone in the office must be alert to potential conflicts of interest and report any discovered or suspected immediately. The risk for the lawyer is disqualification, bar disciplinary action, and a malpractice claim. For the nonlawyer it is employee discipline, termination, and legal action by the aggrieved party.

- **Giving Legal Advice:** Frequently, during a case a nonlawyer is tasked to pass on to the client legal advice from the lawyer. On other occasions, in the absence of a lawyer, a client will press a staff member for immediate help. Either situation poses the risk of a nonlawyer engaging in the unauthorized practice of law. One state found no problem with a nonlawyer passing legal advice to a client as long as that advice is not interpreted or expanded, and does not involve exercise of independent legal judgment.<sup>9</sup> When pressed for legal advice by a client the nonlawyer must just say no (nicely). After having said no, the next step for the nonlawyer is to expeditiously see to it that a lawyer promptly responds to the client's question.
- **Malpractice Considerations:** Firm lawyers are fully responsible for the work product of the office nonlawyer staff. Any nonlawyer error or omission will likely constitute malpractice by the supervising lawyer. A lawyer who is casual in reviewing research and document preparation by support staff is particularly vulnerable. One area in which to exercise particular care is when nonlawyers assist in new client reception and screening. The nonlawyer must be carefully instructed to make it clear to the potential client that they are not a lawyer and may not commit the supervising lawyer to accept the client. Failure to do so could reasonably lead nonclients into believing they are represented by the firm. Very few situations are more dangerous for a lawyer than when someone believes the lawyer is representing them and the lawyer doesn't know it.

## CONCLUSION

One way Lawyers Mutual's professional liability policy protects insured lawyers against malpractice claims is by covering nonlawyers acting within the scope of their duties as a firm employee. Comforting as it is to have this protection, there is no substitute for an aggressive and ongoing professional development program for the office support staff. In addition to in-house sessions, participation in programs such as the fine one offered by KATA for support staff is well worth the money. This is true if for no other reason than it is your professional responsibility to make sure the public is properly served by everyone who works in your office.

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<sup>9</sup>“(Para) Legal Aid”, ABA Journal/July 1993 at 101.

