

The Lawyer's Duty To Supervise Paralegals

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Lawyers rely on paralegals to perform a wide range of tasks. Some limit the work of paralegals to organizing and maintaining files. Others call upon them to render services that are commonly viewed as lawyers' tasks. Whether relying on paralegals to fill a role at either end of this spectrum or somewhere in between, the duty upon the lawyer is the same - to properly train and supervise them to ensure that they do not take any action that may violate a Disciplinary Rule. The incentive for lawyers to satisfy this responsibility is two-fold. First, the Disciplinary Rules specifically require lawyers to adequately supervise nonlawyers working for them. Second, if a paralegal's actions constitute a violation of the Disciplinary Rules, it is the "supervising" lawyers who face discipline, not the paralegal.

In this article, we first briefly analyze the rule that governs a lawyer's obligation to supervise paralegals, DR 1-104. We then explore the type of work that lawyers may delegate to paralegals, the nature of the supervision required and the consequences of inadequate supervision. Finally, we suggest a plan for training and supervising paralegals that will help ensure that lawyers comply with their obligations under DR 1-104 and the other applicable Disciplinary Rules.

DR 1-104 Is The Controlling Rule

For purposes of this discussion, the key provisions of DR 1-104 are subsections (c) and (d). DR 1-104(c) requires that "[a] law firm shall adequately supervise, as appropriate, the work of... non-lawyers who work at the firm." It defines "adequate" as follows:

The degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter, and the likelihood that ethical problems might arise in the course of working on the matter.

That definition is vague, but perhaps properly so, given the uniqueness of each situation in which a potential ethical obligation may arise.

In contrast to subsection (c), which looks to prophylactic supervision, subsection (d) addresses situations in which the paralegal is engaged in questionable conduct:

(d) A lawyer shall be responsible for ... the conduct of a non-lawyer employed or retained by or associated with the lawyer that would be a violation of the Disciplinary Rules if engaged in by a lawyer if:

(1) The lawyer orders, or directs the specific conduct, or, with knowledge of the specific conduct, ratifies it; or

(2) The lawyer is a partner in a law firm in which the...non-lawyer is employed, or has supervisory authority over the...non-lawyer, and knows of such conduct, or in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could be or could have been taken at a time when its consequences could be or could have been avoided or mitigated.

Although subsection (c) applies only to the firm in assigning supervisory authority, subsection (d) makes clear that the partners in the firm (and the associates, to the extent they have supervisory authority) are on the hook for their failure to supervise adequately.

Definition Of Adequate Supervision

The task of training and supervising paralegals is a significant part of a lawyer's and law firm's obligations under the Disciplinary Rules. "The fact that a lawyer is busy or distracted in other critically important work, such as the work of providing legal services to clients or generating a high percentage of the firm's fee revenue does not excuse neglecting supervisory responsibilities or ignoring inappropriate conduct on the part of a supervised nonlawyer." *Restatement (Third) of the Law Governing Lawyers*, § 11, comment (f). Indeed, providing adequate supervision to paralegals should not be viewed as an onerous chore, for it can lead to the legitimate delegation of numerous tasks that otherwise would have to be performed by a lawyer. These tasks include:

- conducting legal research;
- writing legal memos;
- drafting pleadings and briefs;
- obtaining and drafting affidavits;
- assisting at trials;
- drafting contracts and mortgages;
- covering real estate closings;
- drafting separation agreements
- drafting trust instruments;
- preparing draft tax returns; and
- assisting in estate planning.

N.Y.C.B.A. Formal Op. 1995-11, 1995 WL 607778.

There are, however, some limitations on the work paralegals can do. The New York City Bar Association Ethics Committee states that "a lawyer should not permit a paralegal within his or her employ to give advice regarding legal relationships, rights or obligations which he or she has developed independent of or unbeknownst to a supervising attorney; nor counsel on the legal consequences of actions or the application of legal precepts to facts." *Id.* In addition, sensitive information, lawyers must properly train and supervise paralegals to ensure they understand and maintain the sanctity of client confidences. It is therefore critical that paralegals learn the obligations regarding the preservation of client confidences spelled out in DR 4-101 *before* ever being assigned to a case. While this training is, in itself, part of a lawyer's obligation, there is an additional incentive. A paralegal who reveals a confidence or waives a

privilege is not subject to any official sanction. Instead, the lawyer will pay the price for the paralegal's negligence or misconduct. Careful training goes a long way toward reducing that risk.

Conflicts issues present a murkier question than the preservation of confidences. In a cursory opinion, the Second Department of the Appellate Division held that a firm representing a party in a litigation must be disqualified because it hired a paralegal who worked for opposing counsel in that litigation. *Glover Bottled Gas Corp. v. Circle M. Beverage Barn, Inc.*, 514 N.Y.S.2d 440 (2d Dept. 1987). The court did not say whether screening would have averted the disqualification, and there are no cases in New York addressing the propriety of screening paralegals. Other jurisdictions, though, have ruled that the screening of nonlawyers can avert disqualification. *Kapco Mfg. Co. v. C & O Enterprises, Inc.*, 637 F. Supp. 1231 (N.D. I11 1985); *Herron v. Jones*, 637 S.W.2d 569 (Ark. 1982).

The four Appellate Divisions impose significant punishment when faced with a lawyer's failure to supervise paralegals. In the most extreme example, the Fourth Department disbarred one lawyer for essentially permitting his nonlawyer employees to take over for him while he remained at home for unspecified reasons. *In re Stenstrom*, 605 N.Y.S.2d 603 (4th Dept. 1993). In *In re Parker*, 670 N.Y.S.2d 414 (1st Dept. 1998), a lawyer was suspended because he permitted his assistant to negotiate and finalize a contract for the sale of real property and to represent the client at a foreclosure sale. In *In re Kraft*, 543 N.Y.S.2d 449 (1st Dept. 1989), a lawyer was censured for failure to supervise and for neglect even though he "was himself, to some extent, victimized by the unauthorized actions of one of his employees."

In re Bonnano, 617 N.Y.S.2d 584 (3d Dept. 1994), provides a useful lesson on the need to maintain supervision throughout the paralegal's employment. In that case, the paralegal won the lawyer's confidence through "exemplary" work, leading to increased responsibility and decreased supervision. The paralegal (a law grad who could not pass the bar exam) held himself out as a lawyer to clients and third parties, and also embezzled client funds. Even though the lawyer fired the paralegal as soon as he discovered the misconduct, the court censured him for his failure to supervise.

To ensure that these and other problems do not arise, lawyers are well advised, to take the following precautions:

- (1) institute a comprehensive paralegal training program covering the potential ethical issues we've discussed;
- (2) prepare an ethics manual for paralegals that clearly spells out the ethical rules applicable to their work and the limits on the tasks they are authorized to perform;
- (3) perform a conflicts check for each newly hired paralegal to determine whether she worked on any matters previously that may create a potential conflict;
- (4) regularly review the work performed by all paralegals to ensure that they are providing only the type of services for which they are properly authorized and that they are being adequately supervised by a lawyer in that work; and
- (5) designate a person or committee to whom paralegals can go with assurance of confidentiality when they have questions implicating ethical issues or concerns regarding the adequacy of their supervision.

For all of these safeguards to be effective, they must be carried out in the first instance by lawyers, and generally should not be delegated to administrative personnel who may supervise other, non-legal aspects of the paralegals' work. Finally, none of these suggestions is a substitute for simply ensuring that all work performed by paralegals is adequately supervised by a lawyer with sufficient experience to fill that supervisory role.

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