

110 A Look at Ethical Duties of Paralegals and Support Staff

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Faculty Biographies

Luis G. Figueroa

Luis G. Figueroa is Managing Attorney-Florida Trial Division for Nationwide Trial Division in Longwood, Florida.

Mr. Figueroa began his legal career specializing in personal injury defense, police liability, public pensions and employment litigation. He has presented courses at the Tampa Police Academy and has authored several articles for legal publication, including Matthew Benders Florida Torts Reporter. In 1992, he formed the Law Offices of Luis Figueroa for the Nationwide Insurance Enterprise.

In his spare time, Mr. Figueroa is active in his church, coaches youth basketball and soccer, and takes part in various community activities.

He received a BA from the State University of New York and attended law school at Syracuse University.

John J. Flynn

John J. Flynn is legal director for Nationwide Mutual Insurance Company's Trial Division in Pickerington, Ohio. He has full responsibility for the Trial Division Law Offices in Connecticut, Delaware, Maryland, New Jersey, Rhode Island, Virginia, and Washington, DC.

Prior to joining Nationwide, Mr. Flynn was the chief hearing examiner for the Commonwealth of Pennsylvania Insurance Department, served three years as a Commonwealth assistant attorney general in the Department of Professional Affairs and spent three years in private practice.

He currently is a member of the Pickerington School Committee, coaches Little League baseball, is an advisor to the Pickerington Diamond Club, and is active in his community church.

Mr. Flynn received his BA from Shippensburg University and his JD from the Dickinson School of Law.

Kenneth B. Gardner

Kenneth B. Gardner is the Florida managing attorney for Progressive in Orlando, Florida. He oversees four staff counsel offices in Florida.

Prior to joining Progressive, he was in private practice handling insurance defense and product liability litigation. He has been practicing law for 15 years. Before practicing law, he was employed as a claims adjuster for approximately five years.

He is a member of the Florida Bar and Orange County Bar Association.

Mr. Gardner received his bachelors degree from the University of Florida and his JD from Cumberland School of Law at Samford University.

A LOOK AT THE ETHICAL DUTIES OF PARALEGALS AND SUPPORT STAFF

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I. Introduction

- A. Presentation will provide an overview of Rule 5.3 governing responsibilities of attorneys in supervising lay personnel.
- B. Presentation deals with the evolving area of attorney liability for ethical conduct of paralegals and support staff.
- C. Presentation will review recent case law in this area.
- D. Presentation will provide a general overview of the ethical obligations of lay personnel including paralegals.
- E. Presentation will provide recommendations for exercising reasonable supervision.

II. ABA Model Rule 5.3

- A. Requires partners and supervising lawyers in a law firm undertake reasonable efforts to guarantee lay personnel conduct adheres to the professional regulations governing attorney behavior.
- B. Model Rule 5.3 provides

“With respect to a nonlawyer 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 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 a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with 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 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.”

- C. Rule 5.3 extends the responsibility regarding nonlawyer assistance to any lawyer who has supervisory or managerial authority.
- D. This continues the emphasis on the attorney who supervises lay personnel to execute that supervisory authority in a manner consistent with professional ethics.
- E. The supervisory attorney remains solely responsible for violations of the regulations governing the practice of law.
- F. The supervising attorney is ultimately responsible for the protection of the client's interest in all matters entrusted to his care. This would by its very nature include actions performed on the client's behalf by the attorney's support staff and paralegals.

III. Attorney Liability for Ethical Violations by Lay Personnel

- A. Any ethical violation of professional ethics by lay personnel can subject the supervising attorney to a myriad of legal and professional penalties dependent upon the degree of the violation. These include
 - (1) *Exposure to professional disciplinary processes*—as the client's interest in any entrusted matter is paramount, the supervising attorney and their supervisors would be professionally held liable before the applicable disciplinary bodies. It is the attorney who engages and delineates the parameters nonlawyer assistance and therefore breaches of professional responsibility by these nonlawyers ultimately must be borne by the supervising attorney. Knowledge of the breach is not necessarily an element of the disciplinary proceeding as the professional is better equipped to prevent such breaches of ethical duty than would be a client.

- (2) *Liability for professional negligence*—any breach of an ethical duty that affects the outcome or recovery of a particular matter can be the basis for professional malpractice. For instance failure to file specific pleadings or legal documents that result in a client loss can be used as the basis of a malpractice action even if caused by lack of diligence of lay personnel.
- (3) *Liability for other professional negligence*—lawsuits can be brought under the theories of *respondeat superior*, negligent supervision and potentially negligent hiring.
- (4) *Liability under the principles of agency*--As work delegated to lay personnel is performed by them as agents of the lawyer, a potential action exists under this theory. Supervision of an agent is the general responsibility of a principle.

IV. Judicial Interpretation

A. Maryland

- (1) Attorney Grievance Commission of Maryland v. Ronald S. Goldberg, 292 Md. 650, 441 A.2d 338 (1982)—Attorney's secretary engaged in behaviors such as removing files, not calendaring matters that require attention, writing unauthorized checks from trust accounts and intercepting phone calls to the attorney concerning work that had not been done. There was no evidence presented that the attorney had been aware of these behaviors until after the secretary left his employ. The court ruled that an attorney may not escape responsibilities to his clients by blithely saying that any shortcomings were solely the fault of his employee. The court further found that the responsibility to a client necessarily includes adequate supervision of such employees. Goldberg received a 30-day suspension.
- (2) Potomac Electric Power Co. v. Electric Motor Supply, Inc. et al., 190 F.R.D. 372 (1999)—The court allowed the use of documents that had been subpoenaed by attorneys without notice to opposing side due to lack of prejudice however advised attorneys to properly train office staff in the proper issuance of subpoenas.

B. Arizona

- (1) In the Matter of a Member of the State Bar of Arizona, Fred T. Scanlan, Jr., Respondent, 144 Ariz. 334; 697 P.2d 1084 (1985)—Employee stole over \$30,000 from clients' trust accounts. Court upheld 90 day suspension due to the fact that he entrusted control to employee with minimal supervision and had failed to perform a background check on the employee that might have yielded information concerning untrustworthiness.

C. Florida

- (1) The Florida Bar, Complainant, v. William F. Lawless, Respondent, 640 So.2d 1098 (1994)—Attorney failed to adequately supervise paralegal in immigration matter resulting in a delay of filing immigration documents. Court imposed 90-day suspension.
- (2) The Florida Bar, Complainant, v. Joe M. Mitchell, Respondent, 569 So.2d 424 (1990)—Assistant State Attorney discovered documents filed in various court cases that had his name forged by a legal secretary. There was no evidence in the record controverting the fact that the legal secretary was responsible. The court in upholding a 15-day suspension held that the misconduct in the case, although admittedly caused by a nonlawyer employee involved both fraud upon the court and a neglect of the best interest of the attorney's clients and therefore was an ethical breach on the part of the attorney warranting discipline.

D. Illinois

- (1) In Re Manual James Berkos, Attorney, Respondent, 93 Ill. 2d 408; 444 N.E. 2d 150 (1982)—Secretary accepted payment from client, intercepted mail on matter and failed to file materials resulting in dismissal of appeal, all without supervising attorney's knowledge. Court upheld a 3-month suspension.

E. Michigan

- (1) State Bar Grievance Administrator v. Corace, 390 Mich. 419; 213 N.W. 2d 124 (1973)—Improper signatures by a clerk on a stipulation can subject the supervising attorney to sanctions.

F. Nebraska

- (1) State of Nebraska ex rel. Nebraska State Bar Association, relator, v. Alan H. Kirshen, 232 Neb. 445; 441 N.W. 2d 161 (1989)—A lawyer may not avoid responsibility for misconduct by hiding behind an employee's behavior and may not avoid a charge of unprofessional conduct by contending his employees are incompetent.

G. Oklahoma

- (1) State of Oklahoma, ex. rel. Oklahoma Bar Association, Complainant, v. Michael T. Braswell, Respondent, 1983 OK 63; 663 P.2d 1228 (1983)—While delegation of a task entrusted to a lawyer is not improper, it is the lawyer who must maintain a direct relationship with his client, supervise the work that is delegated and exercise complete, though indirect, professional control over the work product.

H. Pennsylvania

- (1) Craig Spencer et al., Plaintiff v. Milton Steinman, Defendant, 179 F.R.D. 484 (1998)—Ex parte subpoenas sent for production of documents by former paralegal. Court found attorney did assure himself that paralegal had adequate training, nor did he adequately supervise paralegal once he assigned her the task of issuing subpoenas. Therefore attorney cannot escape liability for abusive process by pointing to the inexperience of a subordinate.

I. South Carolina

- (1) In the Matter of Samuel C. Craven, Respondent, 267 S.C.33; 225 S.E.2d 861 (1976)—Solicitation of clients by lay personnel subjects attorney to disciplinary proceedings.

J. South Dakota

- (1) In the Matter of the Discipline of Rude, 88 S.D. 416; 221 N.W. 2d 43 (1974)—Case involving trust fund issues, court held that an attorney cannot escape censure by pleading ignorance of his financial affairs or by pointing the finger of guilt at his employees. He is ultimately responsible for supervising the affairs of his office.

V. **Ethical Trigger Points of Ethical Supervision Relating to Lay Personnel**

- A. *Preservation of Client Confidentiality*—Lay personnel owe the same levels of confidentiality to clients of the firm as do the attorneys. They must be aware of all ethical and legal requirements in this regard including but not limited to credit information, medical records, financial disclosures, etc. Lay personnel cannot use any confidential information to the disadvantage of the client or to their own personal advantage or obviously that of any third persons.
- (1) There are certain circumstances in which confidential information may be disclosed and they would follow the same guidelines as though that follow attorneys i.e. potential bodily hard to innocent third parties.
- B. *Conflicts of interest*—Lay personnel must avoid conflicts of interest that arise from previous assignments, previous employment, family relationships or personal business interests. They are prohibited from working on any matters involving issues where conflicts of interest have been identified. Supervising attorneys responsible for erecting “ethical walls” to prevent ethical violations where clients have consented to continued representation after conflict is identified.
- C. *UPL Issues*—Lay personnel must identify themselves properly so as to avoid any actual or unintentional misidentification. For instance paralegal must clearly identify their status and not allow clients or third parties to falsely believe they are attorneys. They must also practice in accordance with all jurisdictional mandates of the particular jurisdiction in which they practice so as not to violate the parameters of UPL including client contact, improper legal opinions or improper appearances.
- D. *Integrity and professionalism*—Lay personnel must operate under code of ethics and cannot engage in fraudulent, misleading, dishonest or immoral conduct. They just adhere to applicable standards in the community governing interaction with the courts, opposing attorneys and peers.
- E. *Education*—Lay personnel must have adequate training both informal and formalized to insure that matters delegated to them are completed competently. Again, final responsibility for the tasks delegated remains with the supervising attorney. They

should have a clear understanding of the professional rules of responsibility governing legal matters within their jurisdiction.

VI. Recommendations for Compliance with Supervisory Responsibilities

- A. *Frequent office meetings with staff.* Communications of expectations is key. Frequent meetings to discuss office procedures, task delegation and case handling will create a sense of teamwork and also provide a forum for problems to be discussed.
- B. *Requiring minimal CLE.* Continuing legal education should be encouraged and if at all possible paid for by the corporation or firm. Minimal hours should be required in accordance with national organizations. For instance the National Association for Legal Association requires 50 hours over a five year period for recertification. Local Bar Associations provide seminar for all levels of lay personnel at cost effective pricing.
- C. *Encouraging lay personnel to become members of professional organizations.* Most jurisdictions have organizations for legal secretaries and paralegals. These afford opportunities for enhancement of professionalism, guidance in relationships with court personnel and the legal community at large. They also are an excellent source of continuing education. Side benefit is the building of morale as personnel feel they are a valued resource for the office.
- D. *Providing mentors.* Many issues arise with new personnel, although primary responsibility lies on the supervising attorney, the establishment of a mentor program can assist in avoidance of impropriety. Personnel would be more apt to ask questions or divulge problems to a mentor knowing that such inquiries are informal and will not have permanent impact on their perception in the office.
- E. *Auditing financial and legal information to ensure office policies are being complied with.* Frequent monitoring of financial and file materials will ensure that office procedures are complied with and can identify workload issues before they become critical.

- F. *Progressive disciplinary policies for violation of ethical responsibilities/competencies.* Each lay personnel should have a thorough understanding of the rules of professional conduct for the jurisdiction and recognize that the violation of any rule can be cause for discipline. This sets the tone for the office and enhances perceptions and realities in regard to professionalism.
- G. *Coaching.* Employees should be frequently coached to set forth ethical and professional expectations. Attorney's position as coach should reinforce highest levels of ethical and moral behaviors.
- H. *Monitoring casework.* As ultimate responsibility lies on supervising attorney, procedures and calendar systems should be in place to monitor all delegated tasks and progress.
- I. *Ensuring subordinate attorneys understand that primary responsibility for legal work rests with them.* Individual attorneys in corporate department or firm need to be aware that ultimate responsibility for violations of professional conduct by subordinate employees can ultimately result in disciplinary and legal action against them. It must be clear that ignorance of improper conduct by lay personnel is not an excuse.
- J. *Delineating parameters for job responsibilities and duties.* All lay personnel should have a written job description communicating expectations and job duties. These should be reviewed at least on an annual basis and incorporated in any job performance review.

VII. Questions and Answers