

Illinois State Bar Association
Recommendations to Lawyers Regarding the Use of Non-Lawyer Assistants
by: ISBA Task Force on Unauthorized Practice of Law

Approved by Assembly June 17, 2006

Introduction

These Recommendations are intended to provide guidance to lawyers regarding the use of non-lawyer assistants in their practices by highlighting the specific ethical responsibilities of lawyers as supervisors, such that their non-lawyer assistants do not engage in either unethical conduct or the unauthorized practice of law. These Recommendations supersede both the "ISBA Recommendations to Lawyers for the Use of Legal Assistants, May 10, 1988," and the "Position Paper of the ISBA Real Estate Law Section Council and Unauthorized Practice of Law Committee Regarding the Use of Attorney Assistants in Real Estate Transactions, May 16, 1984."

Illinois Rule of Professional Conduct 5.3 sets forth lawyers' responsibilities regarding non-lawyer assistants, and reads:

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

- (a) The lawyer, and, in a law firm, each partner, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer and the firm;
- (b) each lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for a nonlawyer's conduct that would be a violation of these Rules if engaged in by a lawyer if:
 - (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner in the law firm, or has direct supervisory authority over the nonlawyer, and knows of the nonlawyer's conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Illinois Rules of Professional Conduct 5.5 (b) lays out a lawyer's responsibilities regarding non-lawyers and unauthorized practice of law:

A lawyer shall not: ...

- (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

Recommendations

1. Conduct in Accordance with the Illinois Rules of Professional Conduct

A lawyer is responsible for ensuring that the conduct of non-lawyer assistants is compatible with the professional obligations of the lawyer.

Commentary:

This recommendation recognizes that while lawyers may delegate work to non-lawyer assistants, lawyers are responsible for the conduct of those assistants pursuant to Illinois Rule of Professional Conduct 5.3(b). Lawyers should review their professional obligations with their non-lawyer assistants, and, as a best practice, set forth guidelines for the conduct of those non-lawyer assistants.

2. Use of and Responsibility For Legal Assistants

A lawyer is responsible for the work product of his/her non-lawyer assistants, and delegation of any task to non-lawyer assistants should never diminish the lawyer's exercise of independent professional judgment. Except as otherwise provided by rule, statute or Rule of Professional Conduct, a lawyer may permit a non-lawyer assistant to perform services in connection with the lawyer's representation of a client, provided:

- (a) The lawyer retains a direct relationship with the client;
- (b) The lawyer supervises the non-lawyer assistant's performance;
- (c) The lawyer instructs the non-lawyer assistant on and remains responsible for the preservation of the confidences and secrets of the client;
- (d) The lawyer assumes responsibility for informing the client that the non-lawyer assistant is not a lawyer and that the lawyer is personally responsible for the supervision and work product of the non-lawyer assistant; and
- (e) The lawyer instructs the non-lawyer assistant on ethics of the legal profession and ensures that the non-lawyer assistant acts in accordance with the Illinois Rules of Professional Conduct.

Commentary:

These recommendations follow Rule 5.5(b) of the Illinois Rules of Professional Conduct, which states: "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," and Rule 5.3 of the Illinois Rules of Professional Conduct regarding responsibilities regarding non-lawyer assistants.

While the responsibility for compliance by the lawyer and all employees with standards of professional conduct rests with members of the Bar, a non-lawyer assistant should understand those standards. It is, therefore, incumbent upon the lawyer employing a non-lawyer assistant to continuously instruct him/her of the ethical and legal restraints and responsibilities incident to the job as well as supervise the non-lawyer assistant's work.

Under the appropriate supervision and circumstances, this Recommendation contemplates that the non-lawyer assistant may appear in court for the purpose of handling ministerial acts such as submitting agreed or stipulated matters. *Illinois v. Alexander*, 53 Ill. App. 2d 299, 202 N.E.2d 841 (1964).

There is an on-going proliferation of independent contractors offering to perform various functions for lawyers. When do independent contractors engage in the unauthorized practice of law? Is an independent contractor different from a lawyer's employee? How are the confidences of a client preserved? Is there a difference between having an employee performing tasks subject to the lawyer's supervision as compared to an outside commercial entity performing those tasks? It is crucial to note that non-lawyer assistants cannot work outside the supervision of a licensed attorney (Rule of Professional Conduct 5.3; *In re Estates of Devine*, 263 Ill. App. 3d 799, 808, 809, 635 N.E.2d 581, 200 Ill. Dec. 242 (Ill. App. Ct. 1st Dist. 1994)). Ultimately, the lawyer must realize the responsibility for the conduct of all individuals to whom work is delegated. (See *In re Yamaguchi*, 118 Ill. 2d 417, 428, 515 N.E.2d 1235, 113 Ill. Dec. 928 (Ill. 1987); *In re Estate of Devine* at 808, 809; ISBA Ethics Advisory Opinion 88-8.)

3. Disclosure

The lawyer and the non-lawyer assistant have an affirmative obligation to avoid misleading clients and the public as to the status of the non-lawyer assistant. This obligation shall include, but is not limited to, the disclosure throughout the relationship of the non-lawyer assistant's status to clients or third parties. A lawyer may identify non-lawyer assistants by name and title on the lawyer's letterhead and on business cards that identify the lawyer's firm.

Commentary:

A lawyer should instruct non-lawyer assistants to disclose at the beginning of any dealings with other persons that the non-lawyer assistant is not a lawyer and cannot give legal advice.

A frequent problem with disclosure of a non-lawyer assistant's status is encountered with the signing of correspondence. Non-lawyer assistants may sign letters on the firm's stationery provided the non-lawyer assistant's status is clearly identified. The ISBA, in Ethics Advisory Opinion No. 87-1, indicates that non-lawyer assistants may be included on a law firm's letterhead provided the employee's non-lawyer status is clearly designated and is not misleading.

Since the purpose of the business card is to identify the non-lawyer assistant in business dealings with others and since the business card of a non-lawyer assistant is thus also a form of advertisement for the lawyer by whom the non-lawyer assistant is employed, the lawyer should approve the business card in form and substance. The lawyer who permits his or her name or the name of the firm to appear on the business card of a non-lawyer assistant should be responsible for ensuring that standards of professional dignity and the Illinois Rules of Professional Conduct are met in the form and substance of the card. (See ABA Informal Ethics Opinion 1185.)

Telephone inquiries are another potential source of confusion and non-lawyer assistants should avoid any telephone contact with potential clients or their parties unless their status is clearly explained at the onset of the conversation. The non-lawyer assistant should never give legal advice, even in situations where the non-lawyer assistant is knowledgeable. The rendering of legal counsel falls within the province of a lawyer's responsibilities and should never be delegated to non-lawyers.

4. Confidentiality

An attorney shall instruct the legal assistant on and shall remain responsible for the preservation of the confidences and secrets of the client.

Commentary:

The Illinois Rules of Professional Conduct define a "confidence" as information protected by the lawyer-client privilege under applicable law, and a "secret" refers to other information gained in the professional relationship that the client has requested to be held inviolate or the disclosure of which would be embarrassing to or would likely be detrimental to the client.

The attorney is responsible for instructing the non-lawyer assistant that all information concerning representation of a client (even the fact of representation) must be kept strictly confidential.

Illinois Rules of Professional Conduct 5.3 recognizes this obligation in the context of a lawyer's use of the services of a non-lawyer assistant by ensuring that the conduct of such non-lawyer assistant is compatible with the professional obligations of the lawyer. Lawyers should take appropriate safeguards to ensure that client confidences are preserved by non-lawyer assistant's (See ISBA Ethics Advisory Opinions 03-07.)

5. Conflicts of Interest

A lawyer should take reasonable steps to avoid conflicts of interest among non-lawyer assistants working under his/her supervision.

Commentary:

ISBA Ethics Advisory Opinions 85-14 and 91-17 note that it is improper for assistant public defenders with common office space and shared secretarial and investigatory services to represent adverse parties in proceedings. Similarly, independent lawyers using common non-lawyer assistant services should not represent adverse parties.

When a non-lawyer assistant is employed by a lawyer or law firm, and the non-lawyer was previously employed by another lawyer or law firm who handled cases adverse to the current lawyer or law firm, screening provisions similar to those set forth in Rule of Professional Conduct 1.10(b) should be used. (See also ISBA Ethics Advisory Opinions 96-07, 88-02 and 701.)

6. Employment and Fees

A lawyer may employ a non-lawyer assistant on a salary, hourly or project basis. A lawyer may charge a client for a non-lawyer assistant's time, work and expenses, so long as it is disclosed to the client and the client consents. A lawyer shall not directly share legal fees with a legal assistant. The lawyer shall not form a partnership or professional corporation with a legal assistant if any parts of the activities of the entity consists of the practice of law.

Commentary:

These recommendations are based on Rule 5.4.

It is important to note that Rule of Professional Conduct 5.4(a)(3) prohibits lawyers from sharing fees with non-lawyer assistants, except that a lawyer or law

firm may include non-lawyer employees in compensation or retirement plans even if they are based in whole or in part on a profit sharing arrangement. (See also ISBA Ethics Advisory Opinion 89-05.)

ISBA Ethics Advisory Opinion 86-1 opined that it is professionally improper to charge an hourly rate for a salaried legal assistant as an expense in addition to a percentage of recovery on a contingent fee contract.

ISBA Ethics Advisory Opinion 91-6 explains that under certain circumstances, it is professionally proper to charge for a secretary's overtime work for specific tasks on behalf of the client.

7. Continuing Education

A lawyer is encouraged to facilitate the appropriate continuing education opportunities for non-lawyer assistances.

Commentary:

Just as Illinois lawyers are required to participate in minimum continuing legal education, this ISBA Task Force encourages supervisory lawyers to facilitate appropriate continuing education opportunities for non-lawyer assistants.

Drafted by: ISBA Task Force on Unauthorized Practice of Law Subcommittee on Policy Regarding Non-Lawyer Assistants

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