

APPENDIX A

3. What is the Direct Supervision and Control of a Lay Person in Conducting a Title Examination?

Background

A finding has been made by the committee that a lay person may not conduct a title examination unless this examination is "under the direct supervision and control of an attorney". For purposes of this opinion a "title examination" is the process of evaluating at county courthouses recorded legal instruments such as Deeds and Wills, to establish a history of ownership (chain of title); the review of other legal instruments such as rights of way, leases, deeds of trust, and other liens; making a determination of the attachment of these liens and encumbrances to the subject real estate; a review of tax records to determine proper assessment; and, the report of the results of that examination, by various means to another.

It is clear that a licensed attorney at law must be included in the title examination/ certification process. An attorney who a) conducts his/her own examination and reports his/her findings or b) issues, as a title insurance agent a title policy based on those findings, is operating within the bounds of the law. However, when a lay entity is involved in the process the committee feels further guidance is necessary. What is meant by the phrase "under the direct supervision and control of a licensed West Virginia Attorney"?

Analysis and Legal Authority

The most obvious mandate given all lawyers on the issue of the supervision and control of lay searchers can be found within the mandate of Rules 5.3, 5.4 and 5.5 of the Rules of Professional Conduct. Most notably:

"With respect to a nonlawyer employed or retained by or associated with a lawyer...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... (See Rule 5.3 (b))

"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... (See Rule 5.5 (b))"

“Paragraph (b) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegates’ work and retains responsibility for their work. See Rule 5.3...” Comment to Rule 5.5 (emphasis added)

“Professional independence of a lawyer. (a) A lawyer or law firm shall not share legal fees with a nonlawyer... (b) a lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law. (Emphasis added) (c) a lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal service for another to direct or regulate the lawyer’s professional judgment in rendering such legal services. (d) a lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if: (1) a nonlawyer owns any interest therein...(2) a nonlawyer is a corporate director or officer thereof; or (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Direction to the paraprofessional cannot be found in any direct rulemaking by the West Virginia Supreme Court. However, guidance can be found in publications by the National Association of Legal Assistants, Inc., and Rule Making by other jurisdictions.

First of all, Legal Assistants or paralegals are defined as follows:

“Legal assistants, also known as paralegals, are a distinguishable group of persons who assist attorneys in the delivery of legal services. Through formal education, training, and experience, legal assistants have knowledge and expertise regarding the legal system and substantive and procedural law, which qualify them to do work of a legal nature under the supervision of an attorney.” National Association of Legal Assistants (NALA) Model Standards and Guidelines for Utilization of Legal Assistants, September 1997.

“ A legal assistant may perform any task which is properly delegated and supervised by an attorney, as long as the attorney is ultimately responsible to the client, maintains a direct relationship with the client, and assumes professional responsibility for the work product.” Canon 2 NALA Professional Standards

“ A legal assistant must not: (a) engage in, encourage, or contribute to any act which could constitute the unauthorized practice of law; and (b) establish attorney-client relationships, set fees, give legal opinions or advice or represent a client before a court or agency unless so authorized by that court or agency; and (c) engage in conduct or take any action which would assist or involve the attorney in a violation of professional ethics or give the

appearance of professional impropriety. Canon 3 NALA Professional Standards

“ A legal assistant must use discretion and professional judgment commensurate with knowledge and experience but must not render independent legal judgment in place of an attorney. The services of an attorney are essential to the public interest whenever such legal judgment is required. Canon 4 NALA Professional Standards

“A legal assistant must disclose his or her status as a legal assistant at the outset of any professional relationship with a client, attorney, a court or administrative agency or personnel thereof, or a member of the general public. a legal assistant must act prudently in determining the extent to which a client may be assisted with out the presence of an attorney. Canon 5 NALA Professional Standards

“ A legal assistant’s conduct is guided by bar associations’ codes of professional responsibility and rules of professional conduct. Canon 9 NALA Professional Standards.

Kentucky

“For purposes of this rule, the unauthorized practice of law shall not include any service rendered involving legal knowledge or advice, whether representation, counsel or advocacy, in or out of court, rendered in respect to the acts, duties, obligations, liabilities or business relations of the one requiring services where:

- A. The client understands that the paralegal is not a lawyer;
- B. The lawyer supervises the paralegal in the performance of his or her duties; and
- C. The lawyer remains fully responsible for such representation including all actions taken or not taken in connection therewith by the paralegal to the same extent as if such representation had been furnished entirely by the lawyer and all such actions had been taken or not taken directly by the attorney.” Paralegal Code, Ky. S. Ct. R. 3.700, Sub-Rule 2.

South Dakota

South Dakota Supreme Court Rule 97-25 (Utilization rule a (4) states:

“The attorney remains responsible for the services performed by the legal assistant tot he same extent as though such services had been furnished entirely by the attorney and such actions were those of the attorney.”

Pennsylvania

Opinion of the Pennsylvania Bar Association 96-103: Re: Independent paralegal organization.

“It is the opinion of the Pennsylvania Bar Association Unauthorized Practice of Law Committee that an organization of paralegals who form for the sole purpose of providing services only to legal counsel admitted to practice before the Supreme Court of Pennsylvania is not in violation of the Unauthorized Practice of law statutes of the Commonwealth of Pennsylvania.

It is further the opinion of the Pennsylvania Bar Association Unauthorized Practice of Law Committee that if those paralegals at any time offer their services to the general consumer public with regard to the preparation of legal documents or with regard to providing legal advise or representation, the organization and the individual members thereof would be in violation of 42 P.A. CSA Sect. 2524...[unauthorized practice of law statute] (emphasis added)

New York

Citing the Code of Professional Responsibility which states that “A lawyer should assist in preventing the unauthorized practice of law” and its attached disciplinary rules DR3-101, 102 and 103, which approximate the requirements of Rule 5.3, 5.4 and 5.5 of the Rules of Professional Conduct, the New York Bar Association published Guidelines for the Utilization by Lawyers of the Services of Legal Assistants (approved June 8, 1997), which provides inter alia: that a legal assistant may be employed by a lawyer in the representation of a client so long as; the lawyer retains a direct relationship with the client; he supervises the legal assistant’s performance throughout; and remains fully responsible for such representation. Further the lawyer shall not form a partnership with a legal assistant if any part of the firm’s activities consist of the practice of law, or share legal fees with the assistant.

The guidelines further require that the assistant disclose to the client that the services are to be conducted by an assistant who is not a lawyer, and that the lawyer is responsible for the professional development of the assistant.

South Carolina

In South Carolina Ethics Advisory Opinion 02-12 while discussing the sole utilization of paralegals in some instances and citing Rule 5.3 of the Rules of Professional Conduct, the Committee stated:

“While there are no regulations dealing specifically with paralegals, requiring a paralegal to work under the supervision of a licensed attorney ensures control over his or her activities by making the supervising attorney responsible.” State v. Robinson, 321 S.C. 286 468 S.E. 2d 290 (1995)

"The activities of a paralegal do not constitute the practice of law as long as they are limited to work of a preparatory nature...which enable the licensed attorney-employer to carry a given matter to a conclusion through his own examination, approval or additional effort." Matter of Easler, 275 S.C. 400, 272 S.E. 2d 32 (1980)

"Paralegals are routinely employed by licensed attorneys to assist in the preparation of legal documents. Thus, the paralegal plays a supporting role to the supervising attorney, and meaningful attorney supervision must be present throughout the process. However,"...it is well settled that a paralegal may not give legal advice, consult, offer legal explanations, or make legal recommendations." Doe v. Condon, 341 S.C. 22, 532 S.E. 2d 879 (2000)

"...[W]e believe that there comes a time in every transaction where a lawyer's advice and presence are essential. "We are convinced that real estate and mortgage loan closings should be conducted only under the supervision of attorneys, who have the ability to furnish their clients legal advice should the need arise and fall under the regulatory rules of this court. Again the protection of the public is the paramount concern." Buyers Service, 292 S.C. 426, 357 S.E. 2d 15 (1987)

Conclusion

Based on the foregoing, and using the Rules of Professional conduct, the New York and Kentucky Rules as a guide, the Committee is of the opinion that the issue of the degree of direct supervision and control of a lay searcher conducting a title exam is as follows:

- I. Non-lawyer searchers may not offer their services to the general consumer public.

- II. A lawyer may employ a non-lawyer assistant in the representation of the attorney's client; so long as:
 - a. The attorney retains a direct relationship with the client.
 - b. The client understands that a non-lawyer will be conducting the title examination.
 - c. The lawyer, based on the certification, education, training, experience of the searcher, reasonably supervises the searcher throughout;
 - d. The lawyer remains solely responsible for the work-product, including all actions taken or not taken by the searcher to the same extent as if such search had been furnished entirely by the lawyer.

III. Subject to the provisions of Section II, above, Lay title agents must use the services of a licensed West Virginia Attorney to conduct a reasonable examination of title prior to the issuance of title insurance policies, but they are prohibited from sharing fees with that lawyer for title examinations.
