



## Committee on Professional Ethics

Opinion 677 - 12/12/95 (47-95)

Topic: Delegation of Lawyer's Duties to Paralegal

Digest: Lawyer may delegate attendance at real estate closing to paralegal under certain circumstances.

Code: DR 1-104(A); EC 1-8; EC 3-1; EC 3-5; EC 3-6.

### QUESTION

May an attorney representing a bank in a real estate transaction delegate attendance at the closing to a paralegal if the attorney is available by telephone?

### OPINION

Nearly thirty years ago this Committee began sketching the ethical line that distinguishes the properly delegable tasks from those which only a lawyer may perform, and the obligations of a delegating attorney. N.Y. State 44 (1967). Fueled by technological and economic change, the question again arises: may the attorney send a paralegal to a real estate closing, and if so, under what circumstances?

Whether a task may be given over to a non-lawyer depends fundamentally on whether the task constitutes the practice of law. The Code affords no definition of legal practice. Rather, and "functionally,"

the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is the educated ability to relate the general body and philosophy of law to a specific legal problem of a client. EC 3-5.

Among activities incident to but not themselves legal practice are some that the lawyer may ask the non-lawyer to perform. The employed non-lawyer may not be given tasks that "lawyers may not do [nor] do the things that lawyers only may do." ABA 316 (1967), cited with approval, N.Y. State 255 (1972). All assigned tasks must be "within the limits prescribed by law." N.Y. State 255 (1972). And, the touchstone of all the distinctions: no ethical delegation will "extend to any matter where the exercise of professional legal judgment is required." N.Y. State 304 (1973).

The set of ethical and appropriate delegations to non-lawyers we have long called, borrowing from the common law, "the merely ministerial."<sup>1</sup> Hence, as we have previously stated in N.Y. State 44 (1967), a non-lawyer should not be asked to:

argue motions, conduct examinations for the purpose of taking the depositions of a witness, or conduct examinations on supplementary proceedings.

**A clerk may, without his employer being present, attend mortgage closings and other out-of-court matters, but only so long as his responsibilities are clearly limited to those functions not involving independent discretion or judgment. (emphasis added).**

We assume that real estate and mortgage closings, or some of them, are as unlikely now as ever they were to require either "independent discretion or judgment" from a paralegal assigned to monitor the ceremony. So long as the closing is properly described as "ministerial," a lawyer may ethically delegate attendance at such a closing to a paralegal, provided the lawyer discharges his or her duty to the client properly in the delegation of this task.<sup>2</sup>

EC 3-6 outlines three minimum additional and necessary conditions of ethical delegation:

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<sup>1</sup> "That which is done under the authority of a superior; opposed to *judicial*. That which involves obedience to instructions, but demands no special discretion, judgment, or skill." Black's Law Dictionary 996 (6th ed. 1990).

We note that we have also concluded that a non-lawyer ought not be permitted to supervise a will execution. N.Y. State 343 (1974). The test is not only whether the task seems ministerial in the abstract, but what consequences follow from the lawyer's presence or absence. N.Y. State 343 held that a delegation of a will execution:

[was] tantamount to counseling a client about law matters and [therewith] permitting a paralegal to engage in the practice of law. Not only is strict compliance with a statute required, but the presence of the attorney provides added assurance that the Will was properly executed by a competent testator.

<sup>2</sup> The Committee believes that the analytical framework provided in this opinion is applicable to delegation arising in the representation of either buyer or seller at a real estate closing, as well as to the representation of the lender at issue in this opinion. Whether in the particular circumstances a buyer's lawyer or a seller's may properly delegate attendance to a paralegal, and if so, whether telephone contact will suffice, depends upon the facts of the particular representation. As distinct from representation of the institutional lender, the buyer or seller may be expected to be present at the closing and ask questions that a paralegal ought not answer. In light of this we believe that if a lawyer for buyer or seller concludes that a paralegal can properly appear at the closing, it would likely be the wiser practice to inform the client in advance that the lawyer plans to have a paralegal attend the closing.

Such delegation is proper if the lawyer maintains a direct relationship with the client, supervises the delegated work, and has complete professional responsibility for the work product. This delegation enables a lawyer to render legal service more economically and efficiently.

We address each of these.

First, delegation must neither interfere with nor substitute for the continuing and direct relation between lawyer and client. As EC 3-1 instructs, the prohibition against unauthorized legal practice "is grounded in the need of the public for integrity and competence" in those who provide legal services. The primacy of the relation between client and lawyer is intended to secure that competence and integrity. If delegation imperils the unmediated relation between client and lawyer, whether in a particular arrangement, or consequent to a pattern of delegation, it goes too far. The lawyer has clients. The paralegal assists.

Second, the lawyer must supervise properly both the substantive and ethical sufficiency of all delegated work. Thus, the lawyer must assure the competence of work performed under delegation. This means the lawyer must consider in advance what will occur under delegation, and review after the fact what in fact occurred, assuring its soundness. Further, whatever occurs under delegation ought generally to comport with what was anticipated. If the unfolding of the "merely ministerial" should happen to reveal the "discretionary," the lawyer must have in place a plan that prevents the practice of law by the unauthorized, and that plan must not prejudice the client.

DR 1-104(A) provides that the delegating lawyer is responsible:

for 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 the conduct; or
- (2) The lawyer has supervisory authority over . . . the non-lawyer, and knows or should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

The obligation of the delegating attorney to review and scrutinize the conduct of the paralegal for conduct forbidden a lawyer is of a very high order. *See also* EC 1-8 ("A law firm should adopt measures giving reasonable assurance . . . that the conduct of non-lawyers employed by the firm is compatible with the professional obligations of the lawyers in the firm.").

The Committee notes that these "supervisory" obligations may or may not be satisfied by an absent lawyer who is available only by telephone. If the lawyer has

rightly assessed the nature and complexity (or lack of it) of the task, and the suitability and background of the paralegal, and if an adequate plan has been made to cope with the unforeseen, the telephone may be all the tool that could be desired. If this proves not to be the case, however, the lawyer's ethical obligations may be found wanting.

Third, the delegating attorney is "completely responsible" for the work-product of the delegation. This requisite may be read as a restatement of the obligations described above with this addition: whatever may be the law of intervening causes or contributory negligence, from an ethical standpoint the lawyer who assigns a non-lawyer to work on a client's matter had better be right about the suitability of that task for delegation, and the suitability of that employee for the task at hand. The delegating lawyer is "completely responsible."

We note that this opinion is consistent with that of other ethics committees that have considered the issue. See, e.g., N.Y. City 1995-11; Nassau County 90-13 (1990). Although the facts of any given delegation will vary, in the end this Committee believes that what is central and unchanged is that the non-lawyer must not be given any task which "calls for the exercise of a lawyer's judgment or participation." N.Y. City No. 78 (1927-28).

### **CONCLUSION**

For the reasons set forth above, the proposed delegation of a paralegal to attend a real estate closing, where the delegating lawyer is available only by phone as necessary, may be entirely permissible, provided the particular closing is "ministerial," and the conditions described above are met.

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