NEW YORK STATE BAR ASSOCIATION
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New York State Bar Association
Committee on Professional Ethics

Opinion 1079 (12/16/15)

Topic: Paralegal; legal assistant; billing

Digest: Because New York State does not require paralegals to be certified, the term "paralegal" does not imply certification. Consequently, it is not deceptive for a lawyer to use the title "paralegal" to describe a layperson who assists the lawyer with substantive legal work for which bar admission is not necessary but who is not a graduate of a paralegal program or certified by any certifying body. Nor is it improper to charge for the time of such paralegal in accordance with the lawyer's engagement letter.

Rules: 1.5(a) & (b), 5.3(a), 8.4(c)

FACTS

1. The inquirer is a lawyer who discloses to clients in the retainer agreement that they will be billed for work performed by a "paralegal." The work is performed by a legal assistant who is not a graduate of a paralegal program and is not certified by any certifying body.

QUESTION

2. May a lawyer who discloses to clients that they will be billed for tasks performed by a paralegal bill clients for work performed by a lay person who is neither a graduate of a paralegal program nor certified by any certifying body?

OPINION

3. The answer to this inquiry depends on whether it is deceptive to bill for "paralegal" services when the services are performed by a layperson who is not a graduate of a paralegal program or certified by any certifying body. Rule 8.4(c) of the New York Rules of Professional Conduct (the "Rules") provides that: "A lawyer or law firm shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

Terminology

4. Comment [2] to Rule 5.3 explains that lawyers "generally employ assistants in their practice, including secretaries, investigators, law student interns and paraprofessionals." The only use of the term "paralegal" in the Rules is in Comment [4] to Rule 1.10, on vicarious

disqualification, and the term is not defined anywhere in the Rules. In N.Y. State 255 (1972), however, this Committee defined "paralegal" as "a lay person employed by a lawyer to perform certain law office functions for which legal training and bar admission are not necessary." We also stated that "a lawyer's secretary can be a paralegal employee." See also Rule 5.3, Cmt. [2] (nonlawyer assistants act for the lawyer in the rendition of the lawyer's professional services); ABA Inf. 1185 (1971) (the term "legal assistant" is generally used as connoting a lay assistant to a lawyer). Thus, the Rules do not contain a requirement that a paralegal have any particular training or experience. See also ABA, *Model Guidelines for the Utilization of Paralegal Services* (2004) (hereafter, the "ABA Guidelines"). According to the *ABA Guidelines*, the ABA Board of Governors approved a definition for the term "legal assistant" in 1986 and amended it in 1997 to read: "A legal assistant or paralegal is a person qualified by education, training or work experience who is employed or retained by a lawyer, law office, corporation, governmental agency or other entity who performs specifically delegated substantive legal work for which a lawyer is responsible."

5. The ABA Guidelines state that, to comport with current usage in the profession, they will use the term "paralegal" rather than "legal assistant" – but the Guidelines also tell lawyers to be aware that the terms "legal assistant" and "paralegal" often are used interchangeably. The use of the term "paraprofessionals" in Comment [2] to Rule 5.3 indicates that the Rules place greater importance on the role these individuals play than on the name applied to them. Consequently, although the inquiry asks about using the term "paralegal," our answer would apply equally to "legal assistants" and similar terms, and even to a legal secretary performing similar functions.

Lawyer Responsibilities Regarding Paralegals

6. The only requirement in the Rules pertaining to the work of paralegals is that an employing law firm must ensure that the work of nonlawyers who work for the firm is "adequately supervised, as appropriate." Rule 5.3(a). The degree of supervision required is that which is "reasonable under the circumstances, taking into account such factors as the experience of the person whose work is being supervised, the amount of work involved and the likelihood that ethical problems might arise in the course of working on the matter." *Id*. *See also* N.Y. State 393 (1975) (degree of responsibility that may be entrusted to individual legal assistants may vary according to their education and experience).

Charging for Paralegal Time

7. Rule 1.5(a) provides that a lawyer may not make an agreement for, charge or collect an excessive fee or expense. Rule 1.5(a) also lists factors that the lawyer should consider in determining what is excessive, including the fee customarily charged in the locality for similar legal services.

8. Nothing in the Rules prohibits charging for the time of paralegals. *See* ABA Guidelines, Guideline 8 (lawyer may include a charge for the work performed by a paralegal in setting a

charge and/or billing for legal services). *Cf. Missouri v. Jenkins*, 491 U.S. 274 (1989) (in a case under the Federal fee-shifting statute, U.S. Supreme Court upholds awarding fees for the work of paralegals, law clerks, and recent law graduates, because the statutory phrase "a reasonable attorney's fee," must refer to a reasonable fee for an attorney's work product, and thus must take into account the work of paralegals as well as attorneys).

Certification of Paralegals

9. Although many institutions certify paralegals, and some are even approved by the ABA, New York State is among the majority of states that do not require paralegals to be certified. Consequently, in New York, use of the term "paralegal" does not imply certification. It follows that using the title "paralegal" to describe a layperson who is neither a graduate of a paralegal program nor certified by any certifying body is not deceptive. In the past, we have expressed concern about whether the term "paralegal" provides appropriate notice to the public that the work is being or will be performed by a nonlawyer. In past opinions, we have concluded that it does provide appropriate notice. *See* N.Y. State 640 (1992) (term "paralegal" is sufficient without further qualification to make clear the employee's non-lawyer status). We remain of that view.

CONCLUSION

10. Because New York State does not require paralegals to be certified, the term "paralegal" does not imply certification. Consequently, it is not deceptive for a lawyer to use the title "paralegal" to describe a layperson who assists the lawyer with substantive legal work for which bar admission is not necessary but who is not a graduate of a paralegal program or certified by any certifying body. Nor is it improper to charge for the time of such paralegal in accordance with the lawyer's engagement letter.

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