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## Ethics Advisory Opinions

### Ethics Advisory Opinion 02-12

Upon the request of a member of the South Carolina Bar, the Ethics Advisory Committee has rendered this opinion on the ethical propriety of the inquirer's contemplated conduct. This Committee has no disciplinary authority. Lawyer discipline is administered solely by the South Carolina Supreme Court through its Commission on Lawyer Conduct.

#### Full Text

May a paralegal alone interview clients and obtain information necessary for the preparation of Health Care Powers of Attorney and Living Wills? May a paralegal alone assist clients in the execution of those completed documents?

#### Summary

The facts may involve questions of the unauthorized practice of law and if so, are inappropriate topics for this committee. If the facts are construed to invoke only the mandate of Rule 5.3 (SCACR 407) that a lawyer supervise non-lawyer personnel, then it appears ethically permissible for a paralegal, under the supervision and at the direction of the responsible attorney, to interview clients alone in order to gather information, but not permissible for a paralegal alone to assist the client in the execution of the documents.

#### Discussion

The Ethics Advisory Committee, under its Scope of Authority and Rules of Procedure, does not issue opinions on the unauthorized practice of law. The South Carolina Supreme Court has exclusive jurisdiction regarding matters of the unauthorized practice of law. See *In re Unauthorized Practice of Law Rules Proposed by the South Carolina Bar*, 309 S.C. 304, 422 S.E.2d 123 (1992). Attorneys in South Carolina faced with questions of unauthorized practice of law are further advised to review *Linder, et al. v. Insurance Claims Consultants et al* 348 S.C. 477, S.E. 2d 627 (2001), *Doe v. Condon*, 341 S.C. 22, 532 S.E.2d 879 (2000); *State v. Buyers Service Co., Inc.*, 292 S.C. 426, 357 S.E.2d 15 (1987); and *Matter of Easler*, 275 S.C. 400, 272 S.E.2d 32 (1980).

If the conduct of the paralegal is deemed the unauthorized practice of law, then there is a duty incumbent on the lawyer to avoid assisting in the unauthorized practice of law. Rule 5.5(b) of the South Carolina Rules of Professional Conduct, (SCACR 407) states: "A lawyer shall not . . . [a]ssist a person who is not a member of the bar in the performance of activity that

constitutes the unauthorized practice of law." See also *In the Matter of Edens*, 344 S.C. 394, 544 S.E.2d 627 (2001).

The Ethics Advisory Committee does, however, strive to offer lawyers guidance on their prospective conduct as it may be affected by the Rules of Professional Conduct (SCACR 407). While it is difficult to define a paralegal's duties without defining what constitutes the unauthorized practice of law, we trust that this discussion and the cited cases offer guidance in assisting an attorney in determining the dictates of his or her conduct.

Given that the paralegal's conduct falls under the requirements of Rule 5.3 of the Rules of Professional Conduct, a lawyer's prospective conduct in supervising the paralegal is ripe for discussion.

Rule 5.3 of the Rules of Professional Conduct:

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

(a) a partner 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;

(c) Furthermore, the Comment to Rule 5.3 states:

Lawyers generally employ assistants in their practice, including secretaries, investigators, law students interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer should give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

In *Buyers Service*, 292 S.C. 426, 357 S.E.2d 15 (1987), the company argued that forms used to prepare deeds, notes, and other instruments related to mortgage loans and transfers of real property are standard and require no creative drafting; however, the court held that when Buyers Service personnel prepared legal instruments, they acted as more than mere scriveners in the process.

The Supreme Court of South Carolina has set forth a standard of what should be the proper role of paralegals:

"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, such as legal research, investigation, or the composition of legal documents, which enable the licensed attorney-employer to carry a given matter to a conclusion through his own examination, approval, or additional effort." *Easler*, 275 S.C. 400, 72 S.E.2d 32 (1980) (emphasis added).

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, ". . . [i]t is well settled that a paralegal may not give legal advice, consult, offer legal explanations, or make legal recommendations." See *Doe*, 341 S.C. 22, 532 S.E.2d 879 (2000) (citing *State v. Despain*, 319 S.C. 317, 460 S.E.2d 576 (1995) (emphasis added)). The court in *Doe* held that a paralegal engages in the unauthorized practice of law when he or she meets individually with clients to answer estate planning questions. Thus, it appears that a paralegal may not give advice or answer estate planning questions but may gather client information and answer general planning questions during initial client interviews.

It can be argued that since the form for a Health Care Power of Attorney is created by statute, assisting a person in completing and executing such a document is purely a matter of facilitating that person's wishes. The enabling statutes do not require the assistance of a lawyer, and indeed, hospital personnel, senior service centers, councils on aging, and the like, routinely advise persons on Health Care Powers of Attorney and assist in their execution.

On the other hand, we 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 of paramount concern." *Buyers Service*, 292 S.C. 426, 357 S.E.2d 15 (1987).

When a client retains a lawyer for what may be considered a routine transaction, that client clearly expects to receive more than the mere blank form with instructions on how to complete it. Furthermore, once retained, the lawyer must then provide consultation. Because a lawyer has a duty to supervise a nonlawyer who is working under his or her direction, this supervision should include the period during the execution of documents as well. While it may be permissible for the paralegal alone to gather information, we deem it not permissible for the paralegal alone to assist the client in the execution of the documents outside of the presence of the lawyer. We further opine that once a client has consulted the lawyer or the paralegal, the lawyer's duty to supervise the paralegal (coupled with the lawyer's duty to advise and protect the client) invokes the lawyer's intervention.

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