

LEGAL ETHICS OPINION 1600

AIDING UNAUTHORIZED PRACTICE
OF LAW – NONLAWYER PERSONNEL–
MISCONDUCT: LEVEL OF DIRECT
SUPERVISION OF NONLAWYER
PERSONNEL REQUIRED.

You have presented two hypothetical situations involving a lawyer or law firm's direct supervision of non-lawyer personnel. The first hypothetical involves:

(a) Virginia lawyer ("A") with an office and extensive practice in City X wishes to open another law office in City Y, approximately 200 miles from City X. "A" intends to employ non-lawyer staff to operate the second office which will deal almost exclusively with clients' collection matters. "A" expects to spend approximately two days per month in residence at the second office; at all other times, the non-lawyer staff will operate at the direction of "A" but without direct supervision, although "A" will be available by telephone and facsimile transmission for consultation.

The second hypothetical involves:

(b) A non-Virginia lawyer ("B"), admitted in another state, who wishes to establish a satellite office in Virginia for the purpose of representing plaintiffs in personal injury matters. "B" does not intend or is not eligible for admission to the Virginia State Bar, and does not expect to be in residence in Virginia, but does intend to employ full-time staff consisting of foreign (non-VSB) attorneys and non-lawyers. The staff will interview clients and witnesses, collect documentation, make settlement demands, and prepare files for trial where necessary. "B" also intends to employ a Virginia licensed lawyer ("C") for purposes of overseeing the work of the non-lawyer staff, monitoring files, signing correspondence, and taking matters to trial where necessary. "C" will maintain a separate practice at another location and will spend two to four days per month in residence in the office established by "B".

You have asked the committee to opine, under the facts of the inquiry, first, as to the appropriate level of supervision which would constitute a lawyer or law firm's sufficient "direct supervision" of non-lawyer personnel. You have also asked that the committee opine as to whether it would be proper for a Virginia lawyer to participate in the law practice as described in the hypotheticals.

The appropriate and controlling disciplinary rules relative to your inquiry are DR:3-104(A), which permits a lawyer or law firm to employ non-lawyer personnel to perform certain delegated functions under the direct supervision of a licensed attorney and which prohibits a lawyer or law firm from permitting such non-lawyer personnel to (1) counsel clients about legal matters; (2) appear as counsel in court ... ; or (3) engage in the unauthorized practice of law; DR:3-104(D) which provides, in pertinent part, that the

lawyer shall examine and be responsible for all work delegated to non-lawyer personnel; DR:1-102(A)(2) which precludes a lawyer from circumventing a Disciplinary Rule through actions of another; and DR:1-102(A)(3) which, in pertinent part, prohibits a lawyer from committing a deliberately wrongful act that reflects adversely on the lawyer's fitness to practice law. Guidance is also available through Ethical Consideration 3-6 [EC:3-6] which, in pertinent part, cautions that a lawyer's delegation of tasks to clerks, secretaries, and other lay persons is proper if the lawyer maintains a direct relationship with his client, supervises the delegated work, and has complete professional responsibility for the work product. Finally, the committee directs your attention to EC:3-5 which states, in pertinent part, that:

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 his educated ability to relate the general body and philosophy of law to a specific problem of a client Where this professional judgment is not involved, non-lawyers ... may engage in occupations that require a special knowledge of law in certain areas. But the services of a lawyer are essential in the public interest whenever the exercise of professional legal judgment is required.

Although not adopted in Virginia, the committee also finds instructive the language of Model Rule 5.3(c)(1) which finds that

a lawyer shall be responsible for conduct of [a nonlawyer employed or retained by or associated with a lawyer] that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved.

The committee has previously opined that it would be improper and violative of DR:3-104(A) for a lawyer to permit a nonlawyer employee to engage in certain non-delegable duties, specifically in-person solicitation of potential clients. See LE Op. 1290. The committee also notes extant Unauthorized Practice of Law Opinions which indicate that it is improper for nonlawyers who are not employees of the lawyer to prepare legal documents even when such documents are subsequently reviewed and approved by the lawyer. See UPL Opinions 76, 86, 91.

With regard to the two hypotheticals you have presented, the committee is of the view that the level of a lawyer's supervision of non-lawyer employees must be such that it permits the lawyer to retain the requisite relationship with the client and the personal responsibility for all work products emanating from representation of the client. The committee believes that such supervision should be significant, rigorous, and efficient. While the committee abstains from specifically quantifying the number of hours per week which would constitute the determination of adequate or significant supervision, it recognizes that a number of factors enter into the reaching such a conclusion. The committee is of the opinion that the combination of (1) an apparently minimal level of

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lawyer time devoted to supervision, as specified; (2) the off-premises location of the non-lawyer personnel; (3) the distance between the primary lawyer's office and the satellite office; and (4) the apparently independent operation of the non-lawyer employees gives rise to a presumption that there is inadequate and insufficient supervision by the Virginia licensed attorney(s).

In addition, it appears to the committee that when the lawyer and his non-lawyer employee are separated both by distance and time, a greater potential exists for a non-lawyer employee to exceed his or her authority in providing services to a lawyer's client. Furthermore, as mandated by DR:3-101(A), a lawyer shall not aid a nonlawyer in the unauthorized practice of law. Although the determination of what activities constitute such unauthorized practice is beyond the purview of this committee, it notes concern that opportunities for those improper activities may be fostered by the lack of a lawyer's adequate supervision of non-lawyer employees. In order to avoid any impropriety, the committee is of the opinion that a lawyer may assign to a non-lawyer employee [especially one located at a distance from the supervising lawyer] only those tasks which do not require the exercise of unsupervised legal judgment.

With regard to your second question, the committee is of the opinion that it would be improper for a Virginia lawyer to participate in the law practice as described in either of the hypotheticals posed. Although, as noted above, this committee is not authorized to determine whether the activities of the non-lawyers constitute the unauthorized practice of law, it is this committee's view that the scenarios described present strong potential for such impermissible activities. Therefore, the committee opines that a Virginia lawyer's participation in the schemes described would be improper and violative of DR:3-104(A) and (D). Furthermore, the committee is of the opinion that, in the first hypothetical, the Virginia lawyer's role in the establishment of the satellite office, out of which non-lawyer employees would be operating largely independently, would be violative of DR:1-102(A)(2) and DR:1-102(A)(3).

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