

Ethics Informational Packet

LEGAL ASSISTANTS AND NONLAWYER EMPLOYEES

**COURTESY OF
THE FLORIDA BAR
ETHICS DEPARTMENT**

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**ETHICS ALERT:
PROVIDING LEGAL SERVICES TO DISTRESSED HOMEOWNERS**

The Florida Bar's Ethics Hotline has received numerous calls from lawyers who have been contacted by non-lawyers seeking to set up an arrangement in which the lawyers are involved in loan modifications, short sales, and other foreclosure-related rescue services on behalf of distressed homeowners. These non-lawyers include mortgage brokers, realtors, financial management advisors, foreclosure "consultants" and others who engage in foreclosure related rescue services or other similar services. Non-lawyers have proposed a variety of agreements, even offering to hire lawyers as "in-house counsel" to provide services to the non-lawyer's customers. The Foreclosure Rescue Act, Section 501.1377, Florida Statutes, went into effect October 1, 2008 and imposed restrictions on non-lawyer loan modifiers to protect distressed homeowners. The legislature later enacted new registration and licensing standards for private businesses offering loan modification services to homeowners, effective January 1, 2010, in Chapter 494, Florida Statutes. These statutes appear to be the impetus for these inquiries.

Lawyers should be wary of these proposals, as many violate the ethics rules and may subject the lawyer to discipline. Florida Bar members:

- Cannot pay a referral fee or give anything of value to a non-lawyer for referring distressed homeowners to the lawyer. [Rule 4-7.2(c)(14)]
- Cannot directly or indirectly divide fees with a non-lawyer. [Rule 4-5.4(a)]
- Cannot assist in the unauthorized practice of law by:
 - providing legal services for a distressed homeowner while employed as in-house counsel for a non-lawyer company;
 - forming a company with a non-lawyer to perform foreclosure related services if any of the services are the practice of law; or
 - assisting a non-lawyer individual or company in providing services that the individual or company is not authorized to provide or are otherwise illegal. [Rule 4-5.5(a)]
- Cannot assist a non-lawyer in violating the provisions of the Foreclosure Rescue Act, Section 501.1377, Florida Statutes. [Rule 4-8.4(d)]
- Cannot directly contact distressed homeowners to offer representation (including by telephone or facsimile) and cannot allow someone else to directly contact distressed homeowners on the lawyer's behalf. [Rules 4-7.4(a) and 4-8.4(a)]
- Cannot accept referrals from non-lawyers acting in the guise of a "lawyer referral service" (legitimate lawyer referral services must comply with a rule which requires all advertisements and contact with prospective clients to be in compliance with the attorney advertising rules, in addition to other requirements) [Rule 4-7.10]

- Must have a direct relationship with distressed homeowners who hire the lawyer for representation. [Rules 4-1.1, 4-1.2 and 4-1.4]
- Cannot allow a non-lawyer to choose a lawyer for a distressed homeowner or direct a lawyer's representation of a distressed homeowner. [Rules 4-1.1, 4-1.2, 4-1.4, and 4-5.5(a)]
- Cannot allow a non-lawyer who pays for a lawyer to represent another to direct the lawyer or affect the lawyer's independent professional judgment in providing legal services to the client [Rules 4-1.8(f) and 4-5.4(d)]

Several ethics opinions, Opinions [92-3](#) and [95-1](#) in particular, discuss similar proposals and the ethics problems that arise when lawyers enter business arrangements with non-attorneys. These opinions can be accessed on the Florida Bar's website by selecting "ethics opinions" then "list of Florida Ethics Opinions by number."

State statutes and federal rules impose restrictions on providers of foreclosure rescue and/or loan modification services. Although The Florida Bar cannot provide legal advice, lawyers should be aware of and comply with the requirements of state and federal law. State statutes prohibit accepting advance fees and require registration of service providers. There are exceptions for lawyers, but only under specific circumstances. *See* Florida Statutes, Sections [501.1377](#) and [494.00115\(1\)\(d\)](#). The Federal Trade Commission has adopted a rule on Mortgage Assistance Relief Services (MARS). The rule bans providers of mortgage foreclosure rescue and loan modification services from collecting fees *until* homeowners accept a written offer from their lender or servicer. There is an exception for lawyers who meet specific requirements **and** who place their fees into a trust account. This rule effectively bans nonrefundable fees in Florida in these cases, because nonrefundable fees cannot be placed into a trust account under the Rules Regulating The Florida Bar. *See* Rule 5-1.1(a)(1) and Florida Ethics Opinion 93-2.

This alert does not address every potential problem or concern. Lawyers should not assume that conduct is permissible merely because it is not listed above. If you are a Florida Bar member with specific questions about your own conduct related to this type of situation, you should contact The Florida Bar Ethics Hotline at (800) 235-8619.

This alert also does not address the issue of what conduct by non-lawyers is permissible. Questions regarding whether conduct of non-lawyers constitutes the unlicensed practice of law should be directed to The Florida Bar Unlicensed Practice of Law Department at (850) 561-5840.

This alert does not address whether a lawyer is subject to the registration and licensing provisions of Chapter 494. Lawyers with questions about whether they are subject to an exemption should contact the Office of Financial Regulation at (850) 410-9896. Information is also available on the Office of Financial Regulation website at www.flofr.com.

Updated April 2011

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 12-2 September 21, 2012

A lawyer may provide their log-in credentials to the E-Portal to trusted nonlawyer employees for the employees to file court documents that have been reviewed and approved by the lawyer, who remains responsible for the filing. The lawyer must properly supervise the nonlawyer, should monitor the nonlawyer's use of the E-Portal, and should immediately change the lawyer's password if the nonlawyer employee leaves the lawyer's employ or shows untrustworthiness in use of the E-Portal.

[This opinion was affirmed by the Board of Governors at its December 7, 2012 meeting.]

RPC: 4-5.3, 4-5.5

Opinion: 87-11

Case: *In re Amendments to the Florida Rules of Civil Procedure et al.*, 102 So.3d 451, (Fla. 2012)

Rules of Judicial Administration: 2.060(d), 2.420, 2.425, 2.515

The Professional Ethics Committee has been asked by The Florida Bar Board of Governors to issue a formal opinion on whether lawyers may permit supervised nonlawyers to use the lawyer's access credentials (log-in name and password) for filing documents with a court using the E-Portal.

The Supreme Court of Florida adopted amendments on June 21, 2012, to Florida rules of court requiring mandatory electronic filing of all documents filed in Florida courts.¹ Implementation of this order is by a schedule adopted by the Court in an administrative order.² The implementation of mandatory filing will be phased in over time.³ Ultimately, all court documents will be filed electronically unless exempted by the Court.⁴ Filing will occur via the E-Portal, which is a single website to serve all Florida courts. The Florida Court's E-Filing Authority oversees the E-Portal and "was created pursuant to legislative directive to provide

¹ *In re Amendments to the Florida Rules of Civil Procedure, the Florida Rules of Judicial Administration, the Florida Rules of Criminal Procedure, the Florida Probate Rules, the Florida Small Claims Rules, the Florida Rules of Juvenile Procedure, the Florida Rules of Appellate Procedure, and the Florida Family Law Rules of Procedure—Electronic Filing*. 102 So.3d 451, (Fla. 2012).

² *Id.*

³ http://www.flclerks.com/e-Filing_Authority/Resources/EFA_Documents/SC11-399/11-399_091912_OrderReqResponse.pdf

⁴ *In re Amendments, supra.*

oversight to the development, implementation and operation of a statewide portal designed to process the filing of court documents.”⁵

Currently, the E-Portal permits only lawyers to obtain a user name and password for filing. Clerk’s offices have received communications from lawyers and others asking if a lawyer may provide the lawyer’s log-in name and password to nonlawyers who are supervised by the lawyer so that the nonlawyer may file documents electronically on the lawyer’s behalf.

The E-Portal Authority Board met on June 15, 2011, and unanimously adopted a motion to allow a non-lawyer to use a lawyer’s credentials to electronically file documents via the E-Portal under the direction or supervision of the lawyer.⁶ On September 28, 2011, the E-Filing Authority Board voted to retract the policy that was adopted on June 15, 2011 and voted not to take a position on the issue.⁷

The Florida Courts Technology Commission, which is responsible for developing standards for e-filing, adopted at its September 26-27, 2011 meeting, a requirement to add the following certification to the E-Portal:

I certify that the filing transmitted through the portal, including all attachments contains no confidential or sensitive information, or that any such confidential or sensitive information has been properly protected by complying with the provisions of Rules 2.420 and 2.425, Florida Rules of Judicial Administration.⁸

The certification was modified by the Florida Courts Technology Commission at its May 8-9, 2012 meeting as follows:

The attorney filing, or directing and authorizing this filing (including all attachments), certifies that it contains no confidential or sensitive information, or that any such confidential or sensitive information has been properly protected by complying with the provisions of Rules 2.420 and 2.425, Florida Rules of Judicial Administration.⁹

⁵ E-Filing Authority Board website: http://www.flclerks.com/eFiling_authority.html

⁶ E-Filing Authority Board June 15, 2011 minutes, available at: http://www.flclerks.com/e-Filing_Authority/Resources/Minutes/Minutes-June_2011.pdf

⁷ E-Filing Authority Board September 28, 2011 minutes, available at: http://www.flclerks.com/e-Filing_Authority/Resources/Minutes/Sept_2011_BOD_draft_minutes.pdf

⁸ Florida Courts Technology Commission September 26-27, 2011 minutes, available at: http://www.flcourts.org/gen_public/technology/FCTC-September2011Minutes.pdf

⁹ Florida Courts Technology Commission May 8-9, 2012 minutes, available at: http://www.flcourts.org/gen_public/technology/FCTC-May2012MeetingMinutes.pdf

The certification, which as of the date of this opinion had not yet been implemented, may be in the form of a check box required to be checked before submitting a filing through the e-portal or an affirmative statement regarding compliance with the referenced rules.

Rule 4-5.3 addresses a lawyer's responsibility for the conduct of nonlawyer employees, and provides in subdivision (c) that "[a]lthough paralegals or legal assistants may perform the duties delegated to them by the lawyer without the presence or active involvement of the lawyer, the lawyer shall review and be responsible for the work product of the paralegals or legal assistants." The comment further explains a lawyer's ability to delegate, in stating that "[i]f an activity requires the independent judgment and participation of the lawyer, it cannot be properly delegated to a nonlawyer employee."

This Committee has previously opined that a lawyer may not permit a nonlawyer employee to sign the lawyer's name together with the nonlawyer's initials to discovery and notices of hearing in Florida Ethics Opinion 87-11. That opinion was based, in part, on the then existing Rule of Judicial Administration 2.060(d) which requires that all pleadings be signed by at least one lawyer of record in the matter who is licensed in Florida or who has obtained permission to appear in the matter in which the pleading is filed. Current Rule of Judicial Administration 2.515 is substantially the same. This Committee was of the opinion that permitting a nonlawyer to sign pleadings would be assisting in the unlicensed practice of law, in violation of Rule 4-5.5, Rules of Professional Conduct.

The Committee is of the opinion that a properly supervised nonlawyer may use the credentials of a lawyer to file documents via the E-Portal at that lawyer's direction. Such a task is akin to a nonlawyer transporting a properly prepared and signed pleading to the clerk's office and physically filing it, which is a ministerial task that may be properly delegated. The Committee cautions that the lawyer will remain responsible for the nonlawyer's conduct and must properly supervise the nonlawyer. A prudent lawyer will monitor the nonlawyer's activity and should immediately change the lawyer's password if a nonlawyer with access to the lawyer's credentials leaves the lawyer's employ or demonstrates unreliability in using the E-Portal. The Committee's opinion would remain unchanged if the certification in its current form is added to the E-Portal as a check box upon filing documents so long as the lawyer specifically reviews the documents to be filed, ensures that the documents are in compliance with the confidentiality provisions of Florida Rules of Judicial Administration 2.420 and 2.425, and instructs the nonlawyer employee to make the certification upon filing the documents. This opinion is limited to filing documents via the E-Portal and specifically does not address the issue of electronic signing of pleadings.

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 89-5 November 1, 1989

A law firm may permit a paralegal or other trained employee to handle a real estate closing at which no lawyer in the firm is present if certain conditions are met.

RPC: 4-5.5(b)

Opinion: 73-43

Case: *Cooperman v. West Coast Title Company, 75 So. 2d 818 (Fla. 1954)*

In Opinion 73-43, this Committee concluded that it was permissible for a lawyer to have a legal assistant prepare real estate documents under the lawyer's supervision, but that it would be improper for the legal assistant to attend closings at which no attorney in the firm was present. The committee reasoned that there was no purpose for the legal assistant to attend closings except to give legal advice and that the legal assistant's presence could be construed by the clients as answering unasked questions about the propriety or legality of the closing documents.

The Unlicensed Practice of Law Committee has requested that we reconsider the issue of whether a legal assistant or other nonlawyer employee with real estate expertise may be permitted to conduct or otherwise participate in a closing in place of a lawyer in the firm. That committee does not agree with the premise of Opinion 73-43: that conducting a closing necessarily involves the giving of legal advice, in fact or by implication. That committee notes that title companies are permitted by the supreme court to conduct closings. *Cooperman v. West Coast Title Company, 75 So. 2d 818 (Fla. 1954)*. The committee also points out that the typical residential real estate transaction is nonadversarial and that allowing a trained paralegal to handle the closing will enable a law firm to assist in real estate transactions at a lower cost to clients.

The majority of this Committee (seven members dissent) now concludes that law firms should be permitted to have trained nonlawyer employees conduct closings at which no lawyer in the firm is present if certain conditions are met. Accordingly, this Committee recedes from Opinion 73-43.

Rule 4-5.5(b), Rules Regulating The Florida Bar, forbids a lawyer to assist a person who is not a member of the Bar in the performance of activity that constitutes the unlicensed practice of law. But, as the comment states, this rule "does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work."

The majority of this Committee concludes that under Rule 4-5.5(b), a law firm may permit a nonlawyer employee to conduct or attend a closing if the following conditions are met:

1. A lawyer supervises and reviews all work done up to the closing;

2. The supervising lawyer determines that handling or attending the closing will be no more than a ministerial act. Handling the closing will constitute a ministerial act only if the supervising lawyer determines that the client understands the closing documents in advance of the closing;

3. The clients consent to the closing being handled by a nonlawyer employee of the firm. This requires that written disclosure be made to the clients that the person who will handle or attend the closing is a nonlawyer and will not be able to give legal advice at the closing;

4. The supervising lawyer is readily available, in person or by telephone, to provide legal advice or answer legal questions should the need arise;

5. The nonlawyer employee will not give legal advice at the closing or make impromptu decisions that should be made by the supervising lawyer.

When a law firm's involvement in a real estate transaction is limited to issuing title insurance as an agent for a title insurance company, and does not involve representation of either party to the transaction, condition number 3 does not apply. However, the law firm should take care that the parties understand that the firm does not represent their interests.

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 88-6

April 15, 1988

It is not impermissible per se for a lawyer to have a nonlawyer employee conduct the initial interview with a new client, although the practice is discouraged and must adhere to certain guidelines.

RPC: 4-5.3, 4-5.5(b)

CPR: DR 3-104

Opinions: 70-62, 73-41; ABA Informal 998

The Committee has been asked to consider what a legal assistant or other nonlawyer employee may and may not do in an initial interview with prospective clients.

Rule 4-5.3 of the Rules Regulating The Florida Bar provides in pertinent part:

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 [.]

Although this rule does not specifically address the question posed to the Committee, the former rule that governed this area (DR 3-104, Code of Professional Responsibility) provided some insights that remain valid under the current rules. DR 3-104 states that while nonlawyer employees may perform delegated functions under the direct supervision of a lawyer, they may not counsel clients about legal matters or otherwise engage in the unauthorized practice of law. The disciplinary rule further states that the *initial and continuing* relationship with the client is the responsibility of the lawyer, with the work of the nonlawyer employee being merged into the attorney's completed product. Of course, the lawyer must examine and be responsible for all work delegated to the nonlawyer employee. In addition, DR 3-104 points out that nonlawyer employees must first disclose their nonlawyer status before communicating with clients or the public.

Further insight in this area may be gained from two Florida ethics opinions. Opinion 70-62 provides that an attorney may not delegate to a legal assistant any activity requiring the attorney's personal judgment and participation. Opinion 73-41 states that an attorney may use a legal assistant only for work that does not constitute the practice of law. This is consistent with Rule 4-5.5(b).

Although the Florida opinions do not address the specific issue presented to the Committee, an ABA opinion does. ABA Informal Opinion 998 concludes:

While we think it is appropriate for a lawyer to provide himself with such assistance as he deems necessary in order efficiently and economically to perform his work and that of his office, any layman hired by him should not give legal advice or act as a lawyer. We think that the system of conducting initial interviews with clients by non-lawyers could be a violation of the Canons of Ethics, if any advice were given or if the client did not subsequently actually see the lawyer and confer with him.

Accordingly, although we do not condemn the practice which you suggest in all instances, we do think it has great dangers and should be carefully supervised so that in practice it complies with the Canons. It would be better if the prospective client were first interviewed by the lawyer and then by the lay assistant. However, as above stated, we do not categorically state that this is essential.

After a review of the above-stated information, the Committee concludes that while it is preferred that an attorney conduct the initial interview with prospective clients, the use of nonlawyer employees for this purpose is not prohibited per se. However, the lawyer is responsible for careful, direct supervision of nonlawyer employees and must make certain that (1) they clearly identify their nonlawyer status to prospective clients, (2) they are used for the purpose of obtaining only factual information from prospective clients, and (3) they give no legal advice concerning the case itself or the representation agreement. Any questions concerning an assessment of the case, the applicable law or the representation agreement would have to be answered by the lawyer. Furthermore, it is imperative that the lawyer evaluate all information obtained by a nonlawyer employee during the client interview and that the lawyer subsequently confer with the client and establish a personal and continuing relationship.

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 87-11 (Reconsideration) (June 27, 2014)

A lawyer may permit a nonlawyer to place the lawyer's signature on solely electronic documents as permitted by Florida Rule of Judicial Administration 2.515 and only after reviewing and approving the document to be signed and filed. The lawyer remains responsible for the document.

RPC: 4-5.3(c)

Opinions: 87-11

Cases: *In re Amendments to the Florida Rules of Civil Procedure et al.*, 102 So.3d 451 (Fla. 2012); *In re Amendments to the Florida Rules of Judicial Administration et al.*, 102 So.3d 505 (Fla. 2012)

Misc.: Fla.R.Jud.Adm. 2.515

A Florida Bar member has asked the committee to reconsider Florida Ethics Opinion 87-11, in light of recent changes to Rule of Judicial Administration 2.515 regarding electronic signatures. In Florida Ethics Opinion 87-11, the committee opined that "an attorney should not under any circumstances permit nonlawyer employees to sign notices of hearing" citing the lawyer's obligation to comply with rules of court and to avoid assisting in the unlicensed practice of law.

Since that opinion was written, the Supreme Court of Florida has required that all documents be filed electronically. *In re Amendments to the Florida Rules of Civil Procedure et al.*, 102 So.3d 451 (Fla. 2012). Subsequent to that order, the Rules of Judicial Administration were amended to address electronic signatures. *In re Amendments to the Florida Rules of Judicial Administration et al.*, 102 So.3d 505 (Fla. 2012). New Rule of Judicial Administration 2.515 states as follows:

(a) Attorney Signature. Every pleading and other document of a party represented by an attorney shall be signed by at least 1 attorney of record in that attorney's individual name whose current record Florida Bar address, telephone number, including area code, primary e-mail address and secondary e-mail addresses, if any, and Florida Bar number shall be stated, and who shall be duly licensed to practice law in Florida or who shall have received permission to appear in the particular case as provided in [rule 2.510](#). The attorney may be required by the court to give the address of, and to vouch for the attorney's authority to represent, the party. Except when otherwise specifically provided by an applicable rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney shall constitute a certificate by the attorney that the attorney has read the pleading or other document; that to the best of the attorney's knowledge, information, and belief there is good ground to support it;

and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken and the action may proceed as though the pleading or other document had not been served.

(b) Pro Se Litigant Signature. A party who is not represented by an attorney shall sign any pleading or other paper and state the party's address and telephone number, including area code.

(c) Form of Signature.

(1) The signatures required on pleadings and documents by subdivisions (a) and (b) of this rule may be:

(A) original signatures;

(B) original signatures that have been reproduced by electronic means, such as on electronically transmitted documents or photocopied documents;

(C) electronic signatures using the “/s/,” “s/,” or “/s” formats by or at the direction of the person signing; or

(D) any other signature format authorized by general law, so long as the clerk where the proceeding is pending has the capability of receiving and has obtained approval from the Supreme Court of Florida to accept pleadings and documents with that signature format.

* * *

In light of the new rule of judicial administration, the committee is of the opinion regarding electronic signatures alone that a lawyer may permit a nonlawyer employee to affix the lawyer's electronic signature using the format indicated by subdivision (c)(1)(C) above. The committee cautions that although the lawyer may delegate the electronic signing of the document under the rule of judicial administration, the lawyer must “review and be responsible for the work product” as required by Rule 4-5.3(c). Thus, lawyers may only direct a nonlawyer to affix the electronic signature permitted by the rule after reviewing and approving the document to be filed. The committee's conclusion in Florida Ethics Opinion 87-11, that generally a nonlawyer may not sign pleadings, otherwise remains unchanged.

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 87-11

April 15, 1988

Under no circumstances should an attorney permit a nonlawyer employee to sign the attorney's name, together with the nonlawyer's initials, to notices of hearing and other pleadings.

RPC: 4-3.4(c), 4-5.3(b), 4-5.5, 4-5.5(b)

Case: *Hankin v. Blissett*, 475 So. 2d 1303 (Fla. 3d DCA 1985)

Misc.: Fla.R.Jud.Adm. 2.060(d)

The inquiring attorney requests an opinion regarding the ethical permissibility of the following conduct:

1. An attorney who is on vacation authorizes his secretary, via a telephone call, to sign the attorney's name, together with the secretary's initials, to discovery and notices of hearing.
2. An attorney with a large case load authorizes his secretary or paralegal office manager to sign notices of hearings as a convenience.

Under the Rules of Professional Conduct (Chapter 4, Rules Regulating The Florida Bar), an attorney may delegate functions to a nonlawyer employee so long as the attorney supervises and retains responsibility for the work. Rule 4-5.5, Comment. The delegating attorney has a duty to make reasonable efforts to ensure that the nonlawyer employee's conduct is compatible with the professional obligations of the attorney. Rule 4-5.3(b). One of the attorney's professional obligations is to refrain from knowingly disobeying the rules of a tribunal. Rule 4-3.4(c).

Thus, an attorney practicing in Florida courts is obligated to comply personally with the Rules of Judicial Administration and to ensure that the conduct of his nonlawyer employees is compatible with this obligation. In this respect, Rule 2.060(d) of the Rules of Judicial Administration provides in pertinent part:

Every pleading and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name whose address and telephone number, including area code, shall be stated, and who shall be duly licensed to practice law in Florida or who shall have received permission to appear in the particular case as provided in subsection (b) If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken and the action may proceed as though the pleading or other paper had not been served.

In view of the rules referred to above, the Committee concludes that an attorney should not under any circumstances permit nonlawyer employees to sign notices of hearing.

The Committee is aware of *Hankin v. Blissett*, 475 So. 2d 1303 (Fla. 3d DCA 1985), which held that a notice of appeal on which an attorney's secretary signed the attorney's name met the requirements of Rule 2.060(d) because “a pleading signed in the name of the attorney by the attorney's authorized agent is, in effect, a pleading signed by the attorney.” *Hankin* addressed only the legal sufficiency of pleadings signed by nonlawyers for lawyers. The ruling does not relieve attorneys of their ethical obligation to comply with the letter of Rule 2.060(d). Failure to comply with the letter of the rule carries danger of aiding the unlicensed practice of law in violation of Rule 4-5.5(b).

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 74-35 September 23, 1974

Lawyers are not permitted to delegate to lay persons the handling of negotiations with insurance company adjustors regarding claims of the lawyer's clients.

CPR: Canon 3, EC 3-1, EC 3-2, EC 3-4, EC 3-5, EC 3-6; DR 3-101(A)

Opinions: 70-7, 70-62, 73-41, 73-43

Statute: F.S. Chapter 626

Chairman Zehmer stated the opinion of the committee:

The Board of Governors of The Florida Bar has requested the Committee on Professional Ethics to review and reconsider Florida Ethics Opinion 70-7, issued June 2, 1970, in light of the provisions of the Code of Professional Responsibility which became effective October 1, 1970, and related opinions issued since that date concerning the use of "paralegals" or "lay assistants." (See Florida Opinions 70-62, 73-41 and 73-43.)

Opinion 70-7 [since withdrawn] gave qualified approval to a lawyer's use of lay personnel in handling contacts and negotiations with insurance company adjusters in respect to personal injury claims of the lawyer's clients. The opinion cautioned lawyers against permitting such lay employees to assume duties and responsibilities in such negotiations which would amount to unauthorized practice of law, but it did not undertake to define what would constitute the practice of law in respect to such negotiations. The Board of Governors has been confronted with widely differing interpretations of this opinion in respect to activities which the lawyer may ethically delegate to such lay persons. Such negotiations always involve the exercise of the lawyer's professional judgment, so that, as a practical matter, it is doubtful that a lawyer may delegate any responsibility for negotiation to lay employees and avoid the proscription on aiding the unauthorized practice of law.

Canon 3 of the Code of Professional Responsibility and DR 3101(A) implementing that canon specifically require that "A lawyer shall not aid a nonlawyer in the unauthorized practice of law." The ethical considerations underlying this disciplinary rule emphasize "the need of the public for integrity and competence of those who undertake to render legal services" (EC 3-1), and further state that:

The sensitive variations in the considerations that bear on legal determinations often make it difficult even for a lawyer to exercise appropriate professional judgment, and it is therefore essential that the personal nature of the relationship of client and lawyer be preserved. Competent professional judgment is the product of a trained familiarity with law and legal processes, a disciplined, analytical approach to legal problems, and a firm ethical commitment. EC 3-2.

Accordingly, EC 3-4 states that “[p]roper protection of members of the public demands that no person be permitted to act in the confidential and demanding capacity of a lawyer unless he is subject to the regulations of the legal profession.”

Neither the disciplinary rules nor the ethical considerations under Canon 3 of the CPR state whether the negotiation of claims by lay persons amounts to unauthorized practice of law. EC 3-5 provides only some broad guidelines:

It is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law. 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 legal problem of a client; and thus, the public interest will be better served if only lawyers are permitted to act in matters involving professional judgment. Where this professional judgment is not involved, nonlawyers, such as court clerks, police officers, abstracters, and many governmental employees, 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 EC 3-6 recognizes that lawyers may often delegate tasks to lay employees in order to render legal services more economically and efficiently, the functions that may be ethically delegated are quite limited (see Florida Opinions 70-62, 73-41 and 73-43). Opinion 70-62 specifically states that EC 3-6 does not permit a lawyer to delegate any activity in which the lawyer personally should give his judgment and participation. It seems to us that, even in the simplest of personal injury cases, negotiation of a settlement most favorable to the client necessarily requires the exercise of the lawyer's professional judgment and participation to some extent.

Moreover, there is a valid distinction between the status of a licensed adjuster and that of the attorney's lay employee handling negotiations. The adjuster is hired directly by the insurance company to adjust claims within the limitations permitted by the relevant provisions of Chapter 626, Florida Statutes. The lay employee of an attorney is not a “public adjuster” as defined in that chapter. The client employs the attorney, not a “public adjuster,” to prosecute his claim against the wrongdoer and the insurer, and is entitled to the lawyer's participation and judgment in the conduct of negotiations.

For the foregoing reasons, it is the Committee's opinion that DR 3-101(A) and the ethical considerations quoted above do not permit lawyers to delegate to lay persons the handling of negotiations with adjusters in respect to claims being handled on behalf of the attorney's clients. To this extent, the Committee recedes from its prior Opinion 70-7.

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 73-43 (March 18, 1974)

A graduate of a paralegal institute who is employed by a law firm may, under the supervision and direction of an attorney, prepare real estate documents for which the attorney takes complete professional responsibility.

Note: The portions of this opinion concerning use of the term "Legal Assistant" and business cards have been overruled by Opinion 86-4. The portions of this opinion concerning the nonlawyer employee's attendance at closings have been overruled by Opinion 89-5.

CPR: EC 3-6

Opinions: 73-4; ABA Informal 909, 1185

Vice Chairman Sullivan stated the opinion of the committee:

A Florida firm has hired an employee who is a graduate of the Paralegal Institute of New York. One of the firm's clients is a condominium developer. A member of the firm asks:

1. Whether the employee, working under the supervision and direction of an attorney in the firm, may prepare for that attorney real estate documents which the attorney is preparing for the firm's condominium developer client.

2. Whether the employee may attend closings of sales of condominium units to be held in the firm's office but without any attorneys in the firm being present. She will give no legal advice.

3. Whether the employee may identify herself in telephone conversations and when writing letters on firm stationery as a Legal Assistant below her name.

4. Whether the employee may use business cards with the firm name and with the words Legal Assistant below her name.

We answer the first question in the affirmative. We recognize the increased use of such personnel and that EC 3-6 of the Code of Professional Responsibility not only permits but encourages their use provided the attorney supervises the work so delegated and takes complete professional responsibility for the work product.

We answer the second question in the negative. The question itself recognizes that the employee may not give legal advice or perform any acts that would amount to practicing law. The Committee, one member dissenting in part, is of the opinion that there is no reason for the employee to attend the closings except to give legal advice and that her presence could be construed as answering unasked questions about the propriety or legality of documents. One

Committeeman is of the opinion that the employee may properly attend such closings provided she does nothing more than distribute documents for signature.

We answer the third question in the negative, two members of the Committee dissenting in part. The Supreme Court of Florida, which has exclusive jurisdiction to regulate the admission of persons to the practice of law, has not authorized any non-lawyers to do work that would constitute the practice of law. It has not created any category of personnel designated as Legal Assistant or Paralegal. Those terms have no official meaning and no precise definition that is generally applied or accepted.

The majority of the Committee is of the opinion that the use of the term Legal Assistant might mislead clients or others into believing that such a non-lawyer assistant is a licensed lawyer or has expertise or authority he or she does not in fact possess. Two members of the Committee are of the opinion that it is not improper for such an employee to use the designation Legal Assistant as long as it is clear from the conversation or letter that the employee is acting on behalf of a lawyer and not purporting to give legal advice or to express opinions on matters involving professional judgment.

We answer the fourth question in the negative. In Opinion 73-4 [since withdrawn], the Committee, after considering ABA Opinions 909 and 1185 which appeared to allow it, stated that the name of the law firm should not be shown on the business card of a lay employee because of the appearance of professional status and the suggestion of advertising. We adhere to that opinion here.

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 73-41

March 11, 1974

Law firm employees who are not admitted to practice in Florida may not take depositions for the firm, nor may they do any work which constitutes the practice of law, even though the employees are law school graduates and are admitted in other jurisdictions.

Opinions: 62-6, 65-24, 67-39, 68-49

Vice Chairman Sullivan stated the opinion of the committee:

A law firm has two employees both of whom are law school graduates and are admitted to the bar in other jurisdictions but not in Florida. A member of the firm asks:

1. Whether the two employees may take depositions in the firm's office under the supervision, direction, control and responsibility of attorneys in the firm.
2. Whether these employees may take depositions outside of the firm's office under the supervision, direction, control and responsibility of attorneys in the firm.

The inquiry does not state whether members of the firm would be present during the taking of the depositions, but we are of the opinion that, whether or not members of the firm would be present, both questions should be answered in the negative.

We are of the opinion that the inquiring attorney's law firm may use the two employees only for work that does not constitute the practice of law. We adhere to the considerations expressed in Florida Opinions 62-6 [since withdrawn], 65-24 [since withdrawn], 67-39 and 68-49, which dealt with similar inquiries.

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 70-62 February 12, 1971

Lay personnel may be used in a law office only to the extent that they are delegated mechanical, clerical or administrative duties. The attorney may not ethically delegate to a lay employee any activity which requires the attorney's personal judgment and participation.

Canon: 3

CPR: EC 3-5, 3-6

Chairman Massey stated the opinion of the committee:

Inquiry is made pertaining to the use of lay personnel within a law office. The opinion will be divided into two parts.

The first portion is quoted from the inquiry as follows:

We anticipate using the lay person in the real estate field to handle the following matters:

1. After the contract between the parties has been executed and a file set up by the attorney's secretary, the file will be delivered to the lay specialist who will obtain all preliminary data. This would include location and ordering of abstracts and survey where appropriate, checking our internal files to determine if a prior opinion or title policy has been issued by our firm on said property, obtaining pay-off or assumption figures on existing mortgages and liens and, in general, gathering all necessary data involving said transaction.

2. We envision that after the contract stage the next time the file would come back to the attorney would be after the abstract continuation, surveys, and all necessary data has been compiled. The lay assistant would then forward the file back to the responsible attorney with all such data included. The responsible attorney would then examine the abstract and dictate either an Opinion of Title or title binder based on his examination. The file would then go back to the lay assistant who would, following the directives of the attorney, prepare closing statements, and notify all parties of the scheduled closing.

3. All work and documents prepared by the lay assistant would be forwarded back to the responsible attorney at some predetermined time prior to the closing for the attorney's review and approval.

4. The attorney closes the real estate transaction.

5. After the closing the attorney forwards a file back to the lay assistant with appropriate directives as to the recording of documents, pay off of any liens, and disbursements of expenses not disbursed during the closing.

The Committee basically approves the proposal as outlined in the inquiry finding that there is no ethical problem. The sole reservation to be expressed by the Committee is that the attorney should at no time leave to the lay employee those matters calling for the expertise of an attorney. For example, if lay personnel prepare all closing documents, such lay personnel should not be allowed to draw complicated escrow agreements or other collateral contracts. See Canon 3 and ethical considerations thereunder (EC 3-5 and 3-6).

The second part of the inquiry is not quite as easy to answer. It asks of the propriety of:

. . . In the probate field we propose the utilization of lay personnel to prepare estate forms, accountings, tax returns, obtain necessary facts from outside sources for preparation of such estate pleadings, and perform other duties of this nature. In the litigation field we propose utilization of lay personnel to index depositions, prepare interrogatories, prepare schedules of witnesses to be deposed, schedules of witnesses necessary for trial, summarize facts, interview witnesses, and other such related matters. We propose that all work done by a lay person in our office shall be reviewed and approved by a responsible attorney before any item either goes to the files or outside of the office as a completed item of work.

These plans are similar to the proposal as to real estate transactions but not as detailed. Again, the Committee does recognize and approve the use of lay personnel in probate and litigation under the appropriate considerations of Canon 3. Delegation to lay employees of the mechanical, clerical and administrative duties is encouraged. However, the attorney may not ethically delegate an activity in which he personally should give his judgment and participation.

While generally approving the concept stated in this second part of the inquiry, the Committee gives it but a qualified approval as the Committee would prefer to determine such matters on specific factual cases. This is true because the Committee does have reservations as to authorizing lay personnel to prepare interrogatories and to interview all witnesses in every case. What may be permissible in a “run-of-the-mill” case may not be so in complicated, unusual matters.

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 70-1 February 16, 1970

Law, Inc. of Hillsborough County may permit law students employed as clerks to interview prospective clients for the purpose of determining their eligibility to participate in the program and to ascertain the general nature of a prospective client's problem.

Canons: 35 and 47

Opinion: 66-56

Chairman MacDonald stated the opinion of the committee:

Law, Inc. of Hillsborough County, which was the subject of our Opinion 66-56 [since withdrawn], through its chief counsel, a member of The Florida Bar, inquires whether or not it may employ law students as part-time clerks during the school year and as full-time clerks when not in attendance at school, or law graduates in the period between graduation and admission to The Florida Bar. These employees would interview prospective clients of Law, Inc. for the purpose of determining the interviewee's eligibility to participate in the program and to ascertain the general nature of his problem. In the event that the problem were legal he would be referred to a member of the Bar employed by Law, Inc. In some instances the interviewer would endeavor to solve nonlegal problems and in others he would refer the person to an appropriate source of assistance. It would be understood that the law clerk or intern would at all times be under the supervision of a member of The Florida Bar who ultimately will be professionally responsible for his actions.

We see no ethical objection to members of The Florida Bar permitting such action on behalf of the employees of Law, Inc. of Hillsborough County. Compare Rule 1.860, Florida Rules of Criminal Procedure.