

## Featured

December 2020 Manuel Jimenez

## Updated – You're the Attorney. You are Responsible.

### Recognizing Potential Issues Related to Paralegal Utilization in California

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Paralegals are ubiquitous in today's legal landscape. As of 2019, there were an estimated 337,800 paralegals employed in the United States, and that number is expected to rise with a projected 10% growth rate between 2019 and 2029.<sup>[1]</sup> Yet, the concept of having paraprofessionals, i.e. specially educated and trained nonlawyers, assisting attorneys with the delivery of legal services is a relatively new phenomenon dating to the 1960s.<sup>[2]</sup>

California attorneys should be aware of the expectations and limitations of paralegal utilization, because it is they who are ultimately responsible for the work of their office. Business and Professions Code, section 6452(b), states, "An attorney who uses the services of a paralegal is liable for any harm caused as a result of the paralegal's negligence [or] misconduct..." But, more than risking civil exposure, attorneys can risk professional discipline for issues arising out of staff performance.

Who is a paralegal in California? California, unlike most other states, restricts who may hold themselves out and work as a paralegal. In 2000 California codified Business and Professions Code, sections 6450-6456, which defines who may use the title of "paralegal" and sets qualifications and continuing education requirements.<sup>[3]</sup> Business and Professions Code, section 6450(c) sets out the requirements needed to qualify as a California paralegal. Without such qualifications it is unlawful for a person to identify themselves as a paralegal in any advertisement, letterhead, business card or otherwise.<sup>[4]</sup> Furthermore, Business and Professions Code, section 6451, makes it unlawful to perform paralegal services for a client unless under the direction and supervision of an attorney, law firm, governmental agency or other like entities.

Attorneys have an obligation to supervise the work of their employees. California Rules of Professional Conduct, rule 5.3 details an attorney's responsibilities with regards to nonlawyer assistants, specifically stating the circumstances that attorneys with firm managerial responsibilities and those who supervise nonlawyer staff are responsible for subordinate nonlawyer staff violations of the rules of professional conduct. The comment to rule 5.3 states, in part, "A lawyer must give such assistants appropriate instruction and supervision concerning all ethical aspects of their employment."

Courts have found attorney's culpable of failing to perform with competence for failing to appropriately control the activities of their nonlawyer employees.<sup>[5]</sup> Attorneys have "a personal duty to obey the State Bar Act and Rules of Professional Conduct and to reasonably supervise their agents and employees to that end."<sup>[6]</sup> Although a single instance of negligence resulting from staff error is not necessarily tantamount to a disciplinable offense, an attorney's responsibility to reasonably supervise his staff means that where an attorney has been alerted to problems and fails to address them, such a failure may be disciplinable as a failure to perform with competence.<sup>[7]</sup> While an attorney may not be at risk of discipline for not knowing every item of information that his office receives, this principal presumes that the attorney has adequate office procedures and trained his staff in those procedures, ensures that they follow those procedures, and that the attorney adequately supervises his staff.<sup>[8]</sup>

Another area where attorneys must adequately train and supervise their staff is the attorney-client privilege and confidential communications. There is a long history recognizing that agents of an attorney are covered by the attorney-client privilege.<sup>[9]</sup> California has specifically codified a paralegal's duty of confidentiality in Business and Professions Code, section 6453, which reads, "A paralegal is subject to the same duty as an attorney specified in subdivision (e) of Section 6068 to maintain inviolate the confidentiality, and at every peril to himself or herself to preserve the attorney-client privilege..." But, again, it is the responsibility of the attorney to ensure that their non-attorney employees understand their obligation to keep client confidences.<sup>[10]</sup> The Committee on Professional Responsibility and Conduct issued Formal Opinion 1979-50, which gives guidance about the utilization of nonlawyer staff. It reads, in part, "Attorneys must take steps to insure that secretaries and other nonlawyer employees understand their obligation not to disclose client confidences or secrets." Failing to do so can result in professional liability and the requirement to disclose to the client and withdraw from employment.<sup>[11]</sup>

The pitfall most associated with paralegals is the unauthorized practice of law. Paralegals often have a great deal of client contact, which may invite situations where they are asked questions that call for legal advice.<sup>[12]</sup> Clients may assume that paralegals are attorneys because they appear sophisticated and otherwise professional. Business and Professions Code, section 6125 explicitly forbids anyone who is not an active member of the State Bar from practicing law. Business and Professions Code, section 6126, makes it a misdemeanor for anyone not authorized to practice law in California to advertise, or otherwise hold one's self out as being authorized to practice law, or actually practice law. Business and Professions Code, section 6450(b) delineates specific activities prohibited by paralegals. The following is a partial list of prohibited activities:

- Provide legal advice.
- Represent a client in court.
- Select, explain, draft, or recommend the use of any legal document or for any person other than the attorney who directs and supervises the paralegal.
- Engage in conduct that constitutes the unlawful practice of law.
- Contract with, or be employed by, a natural person other than an attorney to perform paralegal services.

Attorneys have an obligation to ensure that their staff does not engage in the unauthorized practice of law. California Rules of Professional Conduct, rule 5.5(a)(2), prohibits an attorney from aiding anyone in the unauthorized practice of law. As previously stated, attorneys are liable for their employee's misconduct, including the unauthorized practice of law pursuant to Business and Professions Code, section 6452(b). In *In the Matter of Bragg* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 615, the court disciplined an attorney when it found the attorney to have aided in the unauthorized practice of law, where his non-attorney staff worked in offices bearing the attorney's name, answered phones in attorney's name, and conducted correspondence and negotiations in the attorney's name, with little oversight from the attorney. In *In the Valinotti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 520, the court found that an attorney deliberately aided and abetted the unauthorized practice of law by his non-attorney staff who worked in offices bearing the attorney's name, answered phones in attorney's name, and conducted correspondence and negotiations in the attorney's name, with little oversight from the attorney. In *In the Valinotti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 520, the court found that an attorney deliberately aided and abetted the unauthorized practice of law by his non-attorney staff who worked in offices bearing the attorney's name, answered phones in attorney's name, and conducted correspondence and negotiations in the attorney's name, with little oversight from the attorney.

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Even where an attorney is the victim of duplicitous staff, the attorney may be held responsible for employee misconduct. For example, in June 2014, a paralegal was sentenced to 27 months after admitting to stealing \$327,000 from an attorney's law firm and its clients.<sup>[13]</sup> The attorney who employed the paralegal was disbarred after stipulating to charges including failing to perform with competence and moral turpitude through gross negligence, related to his failure discover his employee's misdeeds.<sup>[14]</sup> Attorneys can delegate authority, but not responsibility. Courts have repeatedly found attorneys culpable of misconduct because of their staff's activities. For example, in *In the Matter of Rubens*, the Review Department of California's State Bar Court held that an attorney was culpable of moral turpitude for his failure to exercise proper control and supervision over non-attorney staff and abdicating responsibility for client matters to support staff.<sup>[15]</sup>

Attorneys are especially vulnerable to allegations of misconduct when they delegate duties to staff involving their client trust account. Respondents have a "personal obligation of reasonable care to comply with the critically important rules for the safekeeping and disposition of client funds."<sup>[16]</sup> Moreover, "Trust account deficiencies are attributable to attorneys—not their employees..."<sup>[17]</sup> Responsibility for trust fund management and oversight cannot be delegated.<sup>[18]</sup> In *In the Matter of Conner*, the Review Department held an attorney culpable of moral turpitude based upon gross negligence because the attorney's slipshod procedures allowed entrusted funds to be misappropriated without his knowledge.<sup>[19]</sup>

In sum and substance, every attorney should recognize that they may be held responsible for the errors and misdeeds of their staff, including paralegals. You can delegate authority to staff in your law practice to make your practice more efficient, but you cannot delegate responsibility. You're the attorney. You're responsible.

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[1] Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook*, 2016-17, Paralegals and Legal Assistance, on the Internet at <http://www.bls.gov/ooh/legal/paralegals-and-legal-assistants.htm> (visited September 14, 2016).

[2] Cannon, T. A. (2013). Concise guide to paralegal ethics (4th ed.). New York: Aspen Law & Business, pp. 5-6.

[3] *Id* at p. 8.; B&P Code §§ 6450-6456.

[4] B&P Code § 6452.

[5] See *In the Matter of Rubens* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 468, 476-479; *In the Matter of Jones* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 411,418 [former rule 6-101(A)(2)]; *In the Matter of Phillips* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 315.

[6] *In the Matter of Scapa and Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 635, 648.

[7] *In the Matter of Hindin* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 657, 681-682. See, e.g., *In the Matter of Fonte* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 752 (failure to answer discovery due to calendaring error); *In the Matter of Ward* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 47 (error in calendaring a statute of limitations).

[8] *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 538.

[9] See, e.g., *United States v. Nobles* (1979) 422 U.S. 225, 238-39 (investigator); *In re Hill* (1st Cir. 1986) 786 F.2d 3, 6 n. 4 (paralegal); *United States v. Pipkins* (5th Cir. 1976) 528 F.2d 559, 563 (handwriting analyst); *United States ex rel. Edney v. Smith* (E.D.N.Y. 1976) 425 F. Supp. 1038, 1046 ("Given the complexities of modern existence few, if any, lawyers could as a practical matter represent the interests of their clients without the assistance of a variety of trained legal associates not yet admitted to the bar, clerks, typists, messengers, and similar aides.").

[10] Cal. State Bar Form. Opn. 1979-50.

[11] *Ibid*.

[12] Cannon, T. A. (2013). Concise guide to paralegal ethics (4th ed.). New York: Aspen Law & Business, p. 30.

[13] Egelko, Bob. "Prison for ex-paralegal who secretly settled cases, stole case." San Francisco Chronicle [San Francisco] June 13, 2014.

[14] *In the Matter of Brian Ching*, State Bar case no. 11-O-11019 et al.

[15] *In the Matter of Rubens* (Review Dept. 1995) 3 Cal.State Bar Ct. Rptr. 468, 476-479.

[16] *Palomo v. State Bar* (1984) 36 Cal. 3d 785, 795.

[17] *Ibid*.

[18] *Matter of Malek-Yonan* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 627, 635.

[19] *In the Matter of Conner* (Review Dept. 2008) 5 Cal. State Bar Ct. Rptr. 93; see also *In the Matter of Hagen* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 153; *In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403.

## Manuel Jimenez

Manuel Jimenez is a trial attorney admitted to practice in California and New York. He has tried jury cases to verdict in both states. He prosecutes attorneys charged with professional misconduct before California's State Bar Court. He is a graduate of the University of California, Berkeley and Fordham University School of Law in New York. While at Fordham, he was a Stein Scholar at the Stein Center for Ethics and Public Interest Law and served on the Environmental Law Journal.

Mr. Jimenez formerly served as a prosecutor with the Queens County District Attorneys Office in New York, where he was assigned to the Organized Crime and Rackets and Supreme Court Trial Bureaus. He was recognized by the NYPD's Chief of the Organized Crime Control Bureau for his "dedication, superior achievement and outstanding service to the New York City Police Department." He formerly served as in house counsel for a major insurance company as a trial attorney.

Mr. Jimenez has been a guest speaker in classes at various Bay Area law schools. He served as an adjunct lecturer of legal ethics in the legal studies department of John F. Kennedy University's College of Undergraduate Studies, in Pleasant Hill, California. Twice a candidate for public office, Mr. Jimenez has served on several governmental boards, including: The Edgewater, New Jersey Board of Adjustments; the San Francisco, Treasure Island, Citizens Advisory Board; the San Francisco, Childhood Nutrition and Physical Activity Task Force, and the Lafayette Bicycle Pedestrian Advisory Committee.

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