

**NEBRASKA ETHICS ADVISORY OPINION FOR LAWYERS**  
**No. 11-01**

**A.**

A LAWYER SUSPENDED FROM THE PRACTICE OF LAW MAY BE EMPLOYED OR SERVE AS A NONLAWYER ASSISTANT OR PARALEGAL PROVIDED THAT SUCH SERVICES ARE RENDERED UNDER THE SUPERVISION OF A LAWYER PURSUANT TO NEB. CT. R. OF PROF. COND. § 3-505.3 AND SUBJECT TO THE FOLLOWING LIMITATIONS:

- (a) All work must be of a preparatory nature only and reviewed by the supervising attorney; and,
- (b) Any client who has contact with the suspended lawyer must be informed that the suspended lawyer is not authorized to practice law or to provide any form of legal advice and any legal issues or questions must be referred directly to the supervising attorney; and,
- (c) Any contact with clients must occur on the business premises of the supervising attorney under his/her supervision; and,
- (d) The suspended lawyer should not otherwise engage in activities which give the appearance of practicing law.

**B.**

A LAWYER WHO HAS BEEN SUSPENDED FROM THE PRACTICE OF LAW MAY APPEAR IN A REPRESENTATIVE CAPACITY BEFORE A FEDERAL ADMINISTRATIVE TRIBUNAL OR AGENCY ONLY TO THE EXTENT SPECIFICALLY PERMITTED BY THE TRIBUNAL OR AGENCY IN WRITING.

**QUESTIONS PRESENTED**

- I. Whether a lawyer who has been suspended from the practice of law may be employed or serve as a nonlawyer assistant or paralegal where such services will be under the supervision of another licensed lawyer; and
- II. Whether a lawyer suspended from the practice of law may appear in a representative capacity before a federal administrative tribunal or agency to the extent permitted by such tribunal or agency, even if such services while appearing before the tribunal or agency constitute the practice of law.

## FACTS

A lawyer was suspended indefinitely from the practice of law in Nebraska. Prior to his suspension, he worked in a neighboring foreign country as an international legal consultant with emphasis in international corporate business law.

He currently provides volunteer services for a non-profit immigration law clinic in Omaha (the "Non-Profit Clinic"). The Non-Profit Clinic wishes to hire the lawyer as a paralegal or as a representative of the Non-Profit Clinic who is accredited to practice before the Board of Immigration Appeals ("BIA").

### Potential Hire as a Paralegal

If the suspended lawyer is hired as a paralegal for the Non-Profit Clinic, he would work under the continual supervision of an attorney employed or retained by the Non-Profit Clinic. His duties would include meeting with clients to obtain the history of facts relevant to the legal issues involved in the matter and completing forms relevant to particular immigration relief sought under the supervision of an attorney. In addition, the suspended lawyer would accompany clients to Visa interviews with the Bureau of Customs and Immigration Services ("CIS") to serve as an interpreter and answer questions to clarify information provided relative to criminal histories. Any interaction which the suspended lawyer would engage with clients would be prefaced with an explanation that he is not authorized to practice law and is working under the supervision of an attorney. Any questions arising which require any form of informal or formal opinion would be referred to the supervising attorney.

### Potential Hire as a Fully or Partially Accredited Representative

The Non-Profit Clinic has purportedly received the necessary recognition from the BIA to designate representatives to appear on behalf of its clients before the CIS and BIA. *See e.g.* 8 CFR § 1292.2. CFR § 1292.2 provides in part that "an organization may apply to have a representative accredited to practice before the service alone or the service and the board (including practice before immigration judges). An application for accreditation shall fully set forth the nature and extent of the proposed representative's experience and knowledge of immigration and naturalization law and procedure and the category of accreditation sought." The suspended lawyer has not provided any detail concerning the nature and extent of services that would be rendered while practicing before the CIS or BIA; however, it is assumed for purposes of this opinion that he would be performing a full range of legal services in which an attorney would be expected to perform on behalf of a client while appearing before any court or tribunal including, but not limited to, consultation with clients, legal research, preparation of the case for presentation, preparing and submitting pleadings, discovery, interview of witnesses, attendance before the board for purposes of presenting the case and completing the presentation of the case before the applicable tribunal.

## APPLICABLE RULES OF PROFESSIONAL CONDUCT

### **RULE 5.5 UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE LAW.**

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

**COMMENT** (Applicable Sections):

[1] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the Bar protects the public against rendition of legal services by unqualified persons. 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. See Neb. Ct. R. of Prof. Cond. § 505.3.

### **Neb. Ct. R. § 3-1003. GENERAL PROHIBITION.**

No nonlawyer shall engage in the practice of law in Nebraska or any manner represent that such nonlawyer is authorized or qualified to practice law in Nebraska except as may be authorized by published opinion or court rule.

### **Neb. Ct. R. § 3-1002A. A DEFINITION OF NONLAWYER.**

The term “nonlawyer” means any person not duly licensed or otherwise authorized to practice law in the State of Nebraska. The term also includes any entity or organization not authorized to practice law by a specific rule of the Supreme Court whether or not it employs persons who are licensed to practice law.

### **Neb. Ct. R. § 3-1001.**

The “practice of law” or “to practice law,” is the application of legal principles and judgment with regard to circumstances or objectives of another entity or person which require the knowledge, judgment and skill of a person trained as a lawyer. This includes, but is not limited to, the following:

- (a) Giving advice or counsel to another entity or person as to the legal rights of that entity or person or the legal rights of others for compensation, direct or indirect, where a relationship of trust or reliance exists between the party given such advice or counsel and the party to whom it is given.
- (b) Selection, drafting or completion, for another entity or person, of legal documents which affect the legal rights of the entity or person.

(c) Representation of another entity or person in a court, in a formal administrative adjudicative proceeding or other formal dispute resolution process, or in an administrative adjudicative proceeding in which legal pleadings are filed or a record is established as the basis for judicial review.

(d) Negotiation of legal rights or responsibilities on behalf of another entity or person.

(e) Holding oneself out to another as being entitled to practice law as defined herein.

**Neb. Ct. R. § 3-1004. EXCEPTIONS AND EXCLUSIONS.**

Whether or not they constitute the practice of law, the following are not prohibited:

(C) Nonlawyers appearing in a representative capacity before an administrative tribunal or agency, subject to the following:

(1) A nonlawyer may appear in a representative capacity before a federal administrative tribunal or agency to the extent permitted by such tribunal or agency.

**Neb. Ct. R. § 3-1005. NONLAWYER ASSISTANTS.**

Nothing in these rules shall affect the ability of a nonlawyer assistant to act under the supervision of a lawyer in compliance with Neb. Ct. R. of Prof. Cond. § 505.3.

**Neb. Ct. R. of Prof. Cond. § 5.3. RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS.**

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

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority 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; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of

the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

**COMMENT (Applicable Sections);**

[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must 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.

[2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment [1] to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

**DISCUSSION**

*A lawyer suspended from the practice of law may be employed or serve as a nonlawyer assistant or paralegal provided that such services are rendered under the supervision of a lawyer pursuant to Neb. Ct. R. of Prof. Cond. § 3-505.3 and subject to the following limitations:*

- (a) All work must be of a preparatory nature only and reviewed by the supervising attorney; and,*
- (b) Any client who has contact with the suspended lawyer must be informed that the suspended lawyer is not authorized to practice law or to provide any form of legal advice and any legal issues or questions must be referred directly to the supervising attorney; and,*
- (c) Any contact with clients must occur on the business premises of the supervising attorney under his/her supervision; and,*
- (d) The suspended lawyer should not otherwise engage in activities which give the appearance of practicing law.*

By definition, a suspended lawyer is a "nonlawyer" for purposes of the Rules of Professional Conduct and Neb. Ct. R. § 3-1001 et seq. as the suspended lawyer is not "otherwise authorized to practice law in the State of Nebraska" at the present time. See Neb. Ct. R. § 3-1002. In fact, the term "nonlawyer" generally includes suspended and disbarred lawyers, as well as lawyers who have resigned in the face of disciplinary charges. See ABA Manual on

Professional Conduct, § 21:8025. *See also State Ex. Rel. Nebraska State Bar Assoc. v. Frank*, 219 Neb. 271, 363 N.W.2d 139 (1985). (“It should be obvious that one who is suspended from the practice of law is no longer an admitted attorney”, referencing R.R.S. § 7-101 which provides in pertinent part that “no person shall practice law as an attorney . . . by drawing pleadings or other papers to be signed and filed by a party, in any court of record of the State, unless he has been previously admitted to the Bar by order of the Supreme Court of this State.”)

Neb. Ct. R. § 3-1005 allows a nonlawyer assistant to act under the supervision of an attorney pursuant to the supervisory mandates set forth in Neb. Ct. R. of Prof. Cond. § 5.3. However, it is clear in Nebraska and other jurisdictions that the nonlawyer’s activities are subject to greater scrutiny when the nonlawyer is also a suspended lawyer. In Advisory Opinion 96-1, the Committee opined that a suspended attorney may be employed as a paralegal and/or law clerk if the employment is at a place and in such a manner as to not give the appearance of practicing law. The Committee further opined that a suspended attorney may not be employed as a paralegal and/or law clerk at an office where he or she previously shared office space or practiced law. The Committee went further in Advisory Opinion 06-6 by determining that a suspended attorney may not be employed in any form of quasi-legal capacity with his or her prior firm, regardless of the nature of the location that such services would be rendered, whether or not the individual has contact with clients, and regardless of any attorney supervision as the mere appearance of the suspended attorney in association with his or her former associates creates the appearance of impropriety as well as the ability of the suspended lawyer to commit further violations of the rules while such individual’s license is suspended.

There is further authority that the activities of an individual charged with the unauthorized practice of law may be subject to greater scrutiny if the individual is a disbarred or suspended lawyer. *In re Jorissen* (Minn. 1986). In *In re State Ex. Rel. Nebraska State Bar v. Frank, supra*, the Court held “We believe it is one thing for a lay person to engage in the unauthorized practice of law and thereby subject himself or herself to criminal penalties, and quite another situation where one who has been bound by oath to comply with the Code of Professional Responsibility nevertheless completely ignores the Order of this Court suspending him from practice.” *See also In re Christianson*, 215 N.W.2d 920 (N.D. 1974).

Similarly, it should be noted that suspended or disbarred lawyers who are found to have engaged in unauthorized practice are subject not only to normal sanctions for such activities, but to additional professional discipline including disbarment. *ABA Lawyers Manual on Professional Conduct*, § 21-8026. *See State Ex. Rel. State Bar Association v. Frank, supra; State Ex. Rel. Thierstein*, 218 Neb. 603, 357 N.W.2d 442 (1984). This underscores the necessity of caution that any suspended lawyer must exercise while performing paralegal activities and the penalty of further possible sanctions, including disbarment that may follow if the line is crossed.

There is limited authority in Nebraska which distinguishes the activities of a lawyer versus a paralegal or legal assistant. Although the Nebraska Supreme Court has authorized a lawyer to function in a nonlawyer, paralegal and/or law clerk capacity in two cases, each of these cases involved a conditional admission of charges. *See e.g. State Ex. Rel. Nebraska Bar Assoc. v. Fitzgerald*, 227 Neb. 90, 416 N.W.2d 28 (1987), *State Ex. Rel. Nebraska Bar Assoc. v. Garvey*, 235 Neb. 737, 457 N.W.2d 297 (1990).

In a disciplinary proceeding involving a suspended attorney who was charged with engaging in the unauthorized practice of law while acting as a law clerk, the Minnesota Supreme Court noted as follows: "The composition and preparation of legal documents by one not authorized to practice law for approval and signature by an attorney does not ordinarily constitute the unauthorized practice of law . . . . As long as a legal assistant's work is of a preparatory nature only, such as legal research and investigation, such that the work merges with the work of a supervising attorney, it is not considered to be the practice of law . . . . Where, the nonlawyer acts in a representative capacity in protecting, enforcing, or defending the legal rights of another, and advises and counsels that person in connection with those rights, the nonlawyer steps over that line." *In re Jorissen*, 391 N.W.2d 822 (Minn. 1986).

The Court opined: "Where the individual charged with the unauthorized practice of law has had legal training, his activities are subject to even closer scrutiny." The Court further stated that a suspended lawyer should not be permitted to perform even those law related activities that can, under limited circumstances, be performed by nonlawyers, if such activities involve professional expertise or are traditionally performed by lawyers.

The ABA Lawyers Manual on Professional Conduct notes a number of tasks that are generally held to be non-delegable to nonlawyer employees which include, but are not limited to, "establishing a nonlawyer relationship, maintaining direct contact with clients, giving legal advice, and exercising legal judgment." In the present case, it is important to note that the subject lawyer is not simply a nonlawyer, but rather a nonlawyer who has been suspended from the practice of law. Thus, while the rules allow the suspended lawyer to serve in a paralegal capacity, the level of scrutiny of those activities will necessarily be higher, particularly when the actual order of suspension in this case requires the suspended lawyer to prove, among other things, that he has not practiced law during the period of suspension.

It is, therefore, the opinion of the Committee that, pursuant to the authority stated herein, the suspended lawyer may be employed by the Non-Profit Clinic to serve in a paralegal capacity provided that the work is of a preparatory nature only, such as the completion of forms and other immigration documentation that do not require particular legal expertise. Any contact which the suspended lawyer has with clients of the Non-Profit Clinic should take place at the Clinic premises under the supervision of an attorney. Any such contact must be free of any legal advice, opinions or guidance and should be prefaced with an explanation that the suspended lawyer is not authorized to practice law, is working under the supervision of an attorney, and that any questions that arise during the meeting must be directed and answered by the supervising attorney. The suspended lawyer should not be allowed to accompany clients to any form of interview, regardless of the purpose, as any such activity would create the appearance of impropriety as well as the opportunity to engage unlawfully in the practice of law. All nonlawyer work product that is generated by the suspended lawyer must be reviewed by a supervising lawyer for such work product as used in connection with any form of legal representation of the client. To be sure, in the criminal proceeding related to the enforcement of R.R.S. § 7-101 against a soon-to-be disbarred attorney who had engaged in the unauthorized practice of law during his suspension, the Court adopted the testimony of an expert witness who stated that a "paralegal works under the supervision of an attorney and . . . the paralegal's work must lose its identity as work of the paralegal and become the work product of the attorney." *In*

*re NSBA v. Thierstein*, 220 Neb. 766, 371 N.W.2d 746 (1985). The Court further noted that there was no supervision, direction, or approval of the attorney's work by a supervising attorney.

*A lawyer who has been suspended from the practice of law may appear in a representative capacity before a federal administrative tribunal or agency only to the extent specifically permitted by the tribunal or agency in writing.*

As noted, Neb. Ct. R. § 3-1004(c)(1) provides that a nonlawyer may appear in a representative capacity before a federal administrative tribunal or agency to the extent permitted by such tribunal or agency. The Committee is of the opinion that the foregoing section should be strictly construed to limit a suspended lawyer's ability to appear in a representative capacity before such tribunal to the representation specifically permitted in writing by the tribunal. Any representation which is not stated with specificity in the written certification by the tribunal that is in the nature of the practice of law is prohibited unless it may be done, if at all, in a paralegal capacity as limited in this opinion and only while under the supervision of an attorney.

### CONCLUSION

This opinion provides further guidance as to the permissible activities that a suspended Nebraska lawyer may engage in that are related to the practice of law. Any such activities will be subject to higher scrutiny than similar activities pursued by laypersons and others who have not previously been admitted to the practice of law in order to maintain the integrity and effect of the decision that gave rise to the suspension of the lawyer. It further follows that any attorney who operates in a supervisory role of a suspended lawyer acting in a paralegal or similar capacity is bound by the Rules of Professional Conduct to properly supervise the suspended lawyer while under his or her watch and refrain from authorizing the suspended lawyer from engaging in any activities while under such supervision that could give rise to any violation of the order of suspension or the Rules of Professional Conduct.