Procrastinators’ Programs SM

Ethics

James M. Garner
Sher Garner Cahill Richter Klein & Hilbert, L.L.C.

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The Unauthorized Practice of Law: A Primer and Guide to Avoiding Potential Pitfalls in Your Law Practice

“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.”

Louisiana State Bar Ass’n v. Edwins, 540 So.2d 294, 299 (La. 1989).

Peter L. Hilbert, Jr.
Jennifer H. Mabry
Sher Garner Cahill Richter
Klein & Hilbert, L.L.C.

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Introduction

The current legal market and the evolution in the way that law firms and offices operate present multiple opportunities for even well-intentioned lawyers to unwittingly engage in, or facilitate, the unauthorized practice of law. The interdependence of licensed lawyers, legal support staff, and other non-lawyers, including law clerks and office managers, makes it necessary for lawyers to educate themselves on the ethical and legal rules governing the practice of law and what tasks may properly be delegated to non-lawyers. Paralegals, once relegated to back-office tasks such as organizing and digesting documents, depositions and medical records, have taken on increased responsibilities in many legal practices. In addition, the hiring of recent law school graduates to perform legal work before being admitted to practice raises often-overlooked questions concerning the proper delegation of tasks to these non-lawyers. Add to this the inherent risk involved in entering into dealings with suspended or disbarred lawyers, and the potential pitfalls quickly multiply.

The materials that follow aim to help lawyers avoid the pitfalls that may arise in connection with the unauthorized practice of law. The consequences of this ethical violation can be serious, including potential criminal prosecution, fines, and jail time. And, as illustrated below, the unauthorized practice of law can result from mere negligence and a failure to educate oneself on the ethical rules that govern our profession. Bearing this in mind, we will examine the Louisiana Rules of Professional Conduct on this subject, as well as the Louisiana statutes defining and criminalizing the unauthorized practice of law. We will also discuss the Louisiana Supreme Court’s application of these rules in its disciplinary decisions and explore how these issues can and do impact law practices in Louisiana. Finally, we will explore the ethical issues implicated by the sometimes onerous and restrictive billing guidelines, or “litigation management programs,” imposed by insurance companies or other institutional clients.

The Primary Rule: Rule 5.5 of the Rules of Professional Conduct

- Rule 5.5 of the Louisiana Rules of Professional Conduct is the primary disciplinary rule governing the unauthorized practice of law.

- Paragraphs (a) and (b) of the rule set forth the general prohibition on the unauthorized practice of law and provide examples:

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

   (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

Paragraph (c) provides for pro hac vice admission, allowing lawyers admitted in other U.S. jurisdictions to represent parties on a temporary, limited basis in Louisiana courts, provided such lawyers associate with local counsel:

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer . . . is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

Paragraph (d) provides an exception for lawyers admitted in another U.S. jurisdiction who are employed by the federal government or employed as in-house counsel:

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission and that are provided by an attorney who has received a limited license to practice law pursuant to La. S. Ct. Rule XVII, § 14; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.
Paragraph (e) prohibits certain business relationships among licensed attorneys and attorneys who have been disbarred, suspended, transferred to disability inactive status, or who have permanently resigned from the practice of law in lieu of discipline.

(e)(1) A lawyer shall not:

(i) employ, contract with as a consultant, engage as an independent contractor, or otherwise join in any other capacity, in connection with the practice of law, any person the attorney knows or reasonably should know is a disbarred attorney, during the period of disbarment, or any person the attorney knows or reasonably should know is an attorney who has permanently resigned from the practice of law in lieu of discipline; or

(ii) employ, contract with as a consultant, engage as an independent contractor, or otherwise join in any other capacity, in connection with the practice of law, any person the attorney knows or reasonably should know is a suspended attorney, or an attorney who has been transferred to disability inactive status, during the period of suspension or transfer, unless first preceded by the submission of a fully executed employment registration statement to the Office of Disciplinary Counsel, on a registration form provided by the Louisiana Attorney Disciplinary Board, and approved by the Louisiana Supreme Court.

(2) [Paragraph 2 provides specific guidelines on what must be included in the registration form provided for in Section (e)(1)]

(3) [Paragraph (e)(3) lists activities that constitute “the practice of law” for purposes of Rule 5.5, and is discussed below.]

(4) In addition, a suspended lawyer, or a lawyer transferred to disability inactive status, shall not receive, disburse or otherwise handle client funds.

(5) Upon termination of the suspended attorney, or the attorney transferred to disability inactive status, the employing attorney having direct supervisory authority shall promptly serve upon the Office of Disciplinary Counsel written notice of the termination.
In summary . . .

In Louisiana, a lawyer:

✓ Shall not engage in the unauthorized practice of law in this jurisdiction, and
✓ Shall not assist another in doing so

A lawyer who is not admitted to practice in Louisiana:

✓ Shall not have an office or systematic and continuous presence for the practice of law
✓ Shall not hold himself out as lawyer to the public

✓ Exceptions:
   ▪ Pro hac vice admission
     ▪ Requirements: must associate with local counsel, must be in connection with a pending or potential matter (court proceeding, arbitration, mediation, etc.)
   ▪ In-house counsel
     ▪ Requirements: lawyer must be admitted in another U.S. jurisdiction and not suspended or disbarred in any jurisdiction; legal services must be provided to the lawyer’s employer or its organizational affiliates; the services cannot be those which require pro hac vice admission; lawyer must receive a limited license to practice law pursuant to La. S. Ct. Rule XVII, § 14.
   ▪ Federal work
     ▪ Requirements: the legal services provided must be authorized by federal law or other law of this jurisdiction.
     ▪ (Examples: federal judicial law clerks, U.S. Attorneys)

In addition, Louisiana lawyers may not assist in the unauthorized practice of law by:

✓ Working with disbarred lawyers
   ▪ Cannot employ, in connection with the practice of law (including as a consultant or independent contractor), a disbarred attorney during the period of disbarment
   ▪ Same rule applies for an attorney who has permanently resigned from the practice of law in lieu of discipline

✓ Working with suspended attorneys, or attorneys on disability inactive status, without fulfilling certain requirements
   ▪ Cannot employ, in connection with the practice of law (including as a consultant or independent contractor), a suspended attorney or attorney transferred to disability inactive status UNLESS you first file an employment registration statement to the Office of Disciplinary Counsel (the requirements of which are set forth in Rule 5.5(e)(2)).
The Louisiana Supreme Court has stated that “[i]t is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law.” *Louisiana State Bar Ass’n v. Edwins*, 540 So.2d 294 (La. 1989). Two statutory sources define “the practice of law,” however, for purposes of the prohibition on unauthorized practice. The Louisiana Supreme Court has applied these statutes in numerous disciplinary decisions.

1. **Louisiana Rules of Professional Conduct, Rule 5.5(e)(3)**

   (e)(3) For purposes of this rule, the practice of law shall include the following activities:

   (i) holding oneself out as an attorney or lawyer authorized to practice law;

   (ii) rendering legal consultation or advice to a client;

   (iii) appearing on behalf of a client in any hearing or proceeding, or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, hearing officer, or governmental body operating in an adjudicative capacity, including submission of pleadings, except as may otherwise be permitted by law;

   (iv) appearing as a representative of the client at a deposition or other discovery matter;

   (v) negotiating or transacting any matter for or on behalf of a client with third parties;

   (vi) otherwise engaging in activities defined by law or Supreme Court decision as constituting the practice of law.

2. **Louisiana Revised Statutes §§ 37:212 and 37:213**


   A. The practice of law means and includes:

   (1) In a representative capacity, the appearance as an advocate, or the drawing of papers, pleadings or documents, or the performance of any act in connection with pending or prospective proceedings before any court of record in this state; or

   (2) For a consideration, reward, or pecuniary benefit, present or anticipated, direct or indirect;
(a) The advising or counseling of another as to secular law;

(b) In behalf of another, the drawing or procuring, or the assisting in the drawing or procuring of a paper, document, or instrument affecting or relating to secular rights;

(c) The doing of any act, in behalf of another, tending to obtain or secure for the other the prevention or the redress of a wrong or the enforcement or establishment of a right; or

(d) Certifying or giving opinions, or rendering a title opinion as a basis of any title insurance report or title insurance policy as provided in R.S. 22:512(17), as it relates to title to immovable property or any interest therein or as to the rank or priority or validity of a lien, privilege or mortgage as well as the preparation of acts of sale, mortgages, credit sales or any acts or other documents passing titles to or encumbering immovable property.

B. Nothing in this Section prohibits any person from attending to and caring for his own business, claims, or demands; or from preparing abstracts of title; or from insuring titles to property, movable or immovable, or an interest therein, or a privilege and encumbrance thereon, but every title insurance contract relating to immovable property must be based upon the certification or opinion of a licensed Louisiana attorney authorized to engage in the practice of law. Nothing in this Section prohibits any person from performing, as a notary public, any act necessary or incidental to the exercise of the powers and functions of the office of notary public, as those powers are delineated in Louisiana Revised Statutes of 1950, Title 35, Section 1, et seq.

C. Nothing in this Section shall prohibit any partnership, corporation, or other legal entity from asserting or defending any claim, not exceeding five thousand dollars, on its own behalf . . . No partnership, corporation, or other entity may assert any claim on behalf of another entity or any claim assigned to it.

D. Nothing in Article V, Section 24, of the Constitution of Louisiana or this Section shall prohibit justices or judges from performing all acts necessary or incumbent to the authorized exercise of duties as judge advocates or legal officers.

La. R.S. 37:213. Persons, professional associations, professional corporations, and limited liability companies entitled to practice law; penalty for unlawful practice.

A. No natural person, who has not first been duly and regularly licensed and admitted to practice law by the supreme court of this state, no corporation or voluntary association except a professional law corporation . . . and no partnership or limited liability company except one formed for the practice of law and composed of such natural persons, corporations, voluntary associations, or limited liability companies, all of whom are duly and regularly licensed and admitted to the practice of law, shall:
(1) Practice law.

(2) Furnish attorneys or counsel . . . to render legal services.

(3) Hold himself or itself out to the public as being entitled to practice law.

(4) Render or furnish legal services or advice.

(5) Assume to be an attorney at law or counselor at law.

(6) Assume, use, or advertise the title of lawyer, attorney, counselor, advocate or equivalent terms in any language, or any phrase containing any of these titles in such manner as to convey the impression that he is a practitioner of law.

(7) In any manner advertise that he, either alone or together with any other person, has, owns, conducts, or maintains an office of any kind for the practice of law.

B. This Section does not prevent any corporation or voluntary association formed for benevolent or charitable purposes and recognized by law from furnishing an attorney at law to give free assistance to persons without means.

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3. Case Law

In re Thomas, 973 So.2d 686 (La. 1/16/08).

The respondent, Thomas, was permanently disbarred because, while suspended from the practice of law, he continued to counsel clients on legal matters, negotiate settlements, negotiate with a third-party healthcare provider on behalf of his clients, and handled client funds. The Louisiana Supreme Court held, “[u]nder these facts, there can be no doubt that respondent engaged in the unauthorized practice of law, in violation of Rule 5.5(a).” 973 So.2d at 692.

Louisiana State Bar Ass’n v. Edwins, 540 So. 2d 294, 300 (La. 1989).

“The practice of law in this country ... embraces the preparation of pleadings and other papers incident to actions and special proceedings and the management of such actions and proceedings on behalf of clients before judges and courts, and, in addition, conveyancing, the preparation of legal instruments of all kinds, and in general, all advice to clients and all action taken for them connected with the law.” Id. (emphasis added) (quoting Meunier v. Bernich, 170 So. 567, 571 (Ct. App. Orleans 1936), quoting from Ballentine's Law Dictionary; and from In Re Duncan, 83 S.C. 186, 65 S.E. 210, 211, 24 LRA (N.S.) 750, 18 Ann.Cas. 657 (1909), Boykin v. Hopkins, 174 Ga. 511, 162 S.E. 796, 799 (1932); & People v. Title Guarantee & Trust Co., 180 App.Div. 648, 168 N.Y.S. 278, 280 (1917), to similar effect. See also Duncan v. Gordon, 476 So.2d 896 (La.App.2d Cir.1985); Model Code of Professional Responsibility EC 3–5 (1988)).
In re Petal, 30 So.3d 728 (La. 3/26/10).

Petal, a suspended Louisiana attorney, owned property through a limited liability company (LLC). Petal was found to have engaged in the unauthorized practice of law because he appeared in court on behalf of the LLC to prevent foreclosure on his property. In his defense, Petal argued that he was not appearing as a lawyer, but rather was acting in proper person on behalf of his LLC (i.e., acting as a non-lawyer representative of a company in which he held an interest). The Louisiana Supreme Court reviewed the transcript from the hearing and found that, when the district court directed counsel to make their appearances, Petal stated he was “appearing for the plaintiffs.” Petal also did not introduce any evidence to indicate that he was a “duly authorized partner, shareholder, officer, employee, or duly authorized agent or representative” who was permitted to act on behalf of the LLC. The court thus determined that Petal had engaged in the unauthorized practice of law.

Louisiana Claims Adjustment Bureau, Inc. v. State Farm Ins. Co., 38,709 (La. App. 2 Cir. 6/23/04); 877 So.2d 294, writ denied, 2004-1890 (La. 10/29/04); 885 So.2d 595.

A public adjuster that negotiated personal injury claims with insurance companies was found to have engaged in the unauthorized practice of law because its representatives evaluated claims and advised clients of their causes of action. The Louisiana Second Circuit Court of Appeal held that evaluating a claim and determining whether or not it had merit may only be done by a licensed attorney.

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**What Penalties May be Imposed for the Unauthorized Practice of Law?**

- The unauthorized practice of law is a **felony**.¹

- The baseline sanction for a lawyer’s facilitation of the unauthorized practice of law by a non-lawyer is **disbarment**.²

- Bar disciplinary matters fall within the original jurisdiction of the Louisiana Supreme Court,³ and the alleged misconduct must be proven by clear and convincing evidence.⁴

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¹ *See* La. Rev. Stat. § 37:213; *In re E. Eric Guirard*, 11 So.3d 1017, 1026 (La. 5/5/09); *In re Thomas*, 2007-1616 (La. 1/16/08); 973 So.2d 686, 692; *In re Crawford*, 2002-2680 (La. 4/21/03); 843 So.2d 1091, 1096.

² *In re Garrett*, Sup.2009, 12 So.3d 332, 2008-2513 (La. 5/5/09), r’hrg denied (citing State Bar Articelles of Incorporation, Art 16, Rule 5.5, La. Rev. Stat. foll. 37:222; *In re Sledge*, 03–1148 (La.10/21/03), 859 So.2d 671; *In re Brown*, 01–2863 (La.3/22/02), 813 So.2d 325; *Louisiana State Bar Ass'n v. Edwins*, 540 So.2d 294 (La.1989)).

³ La. Const. art. V, §5(B).

⁴ *In re Banks*, 09-1212 (La. 10/2/09); 18 So.3d 57.
According to the Supreme Court, the purpose of disciplinary proceedings is not primarily to punish the lawyer. Rather, “disciplinary proceedings are designed to maintain high standards of conduct, protect the public, preserve the integrity of the profession, and deter future misconduct.”

“The discipline to be imposed depends upon the facts of each case and the seriousness of the offenses involved considered in light of any aggravating and mitigating circumstances.”

Cases Justifying Permanent Disbarment

- **In re Matthews**, 2009-2416 (La. 3/26/10); 30 So.2d 737.
  
  The Louisiana Supreme Court found permanent disbarment appropriate when a disbarred attorney continued to represent himself as an attorney while working as a paralegal. In 1988, Matthews, a Louisiana attorney, had pleaded guilty to five counts of forgery and five counts of felony theft of client funds, after which he filed a petition for consent disbarment, which the court granted. Matthews never sought readmission and thus remained disbarred.

  During his disbarment, he worked as a paralegal. While working for one office, he attended and participated in five depositions as the plaintiff’s representative. During the depositions, he misrepresented himself by allowing others to believe he was a lawyer, and even asked questions of the witnesses. At a subsequent employer, while working as a paralegal and with permission from his supervising attorney, Matthews negotiated several personal injury settlements directly with insurance adjusters on behalf of a client, failing to designate himself as a paralegal or non-attorney. Matthews also handled client funds while working as a paralegal.

  The court found that Matthews had engaged in the unauthorized practice of law, and that his actions warranted permanent disbarment. The disciplinary committee also recommended that any further reports of Matthews representing himself as a lawyer be referred to the appropriate district attorney’s office for investigation.

- **In re Jackson**, 08–2424 (La.2/13/09), 1 So.3d 454.

  In Jackson, the court permanently disbarred a previously suspended attorney who engaged in the unauthorized practice of law during his period of suspension by providing legal advice to clients and by negotiating settlements with insurance adjusters. The suspended attorney also shared legal fees with a licensed attorney who assigned files to him, thereby allowing him to engage in the unauthorized practice of law.

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5 **In re Sledge**, 2003-1148 (La. 10/21/03); 859 So.2d 671, 686.

6 **In re Thomas**, 2011-2012 (La. 11/18/11); 74 So.3d 695 (citing Louisiana State Bar Ass’n v. Reis, 513 So.2d 1173 (La.1987)).

7 Id. (citing Louisiana State Bar Ass’n v. Whittington, 459 So.2d 520 (La.1984)).
Crime and Punishment
Criminal Prosecution for the Unauthorized Practice of Law

- La. R.S. § 37:213(A), as quoted above, legislatively defines what constitutes the “unauthorized practice of law.”

- La. R.S. § 37:213(C) and (D) provide the criminal penalties for the unauthorized practice of law:

  C. Any natural person who violates any provision of this Section shall be fined not more than one thousand dollars or imprisoned for not more than two years, or both.

  D. Any partnership, corporation, or voluntary association which violates this Section shall be fined not more than five thousand dollars. Every officer, trustee, director, agent, or employee of a corporation or voluntary association who, directly or indirectly, engages in any act violating any provision of this Section or assists the corporation or voluntary association in the performance of any such violation is subject to the penalties prescribed in this Section for violations by a natural person.

Case Study: State v. Kaltenbach


In State v. Kaltenbach, the defendant, Robert Kaltenbach, a lay person, was convicted by a six-person jury and sentenced to two years in jail for the unauthorized practice of law. His conviction was later reversed by the Louisiana Third Circuit Court of Appeal, which found that, although Mr. Kaltenbach engaged in “dubious practices,” the prosecution had not proven his guilt beyond a reasonable doubt. 587 So.2d at 787.

The defendant was a member and local leader of the Enlightened Patriots Association (“EPA”), a national organization that “advocates learning and use of the common law, God’s law and the United States Constitution, as opposed to civil law.” Id. at 780. The group disapproved of licensing attorneys, believing that attorneys “represented clients rather than justice,” and advocated exercise of the constitutional right of self-representation through pro se litigation. The group also believed that the only legal tender was gold or silver coins, and issued its own gold notes backed by its own gold and silver reserves, which its members used instead of cash in order to make the public aware of their beliefs. The organization offered a law course taught by video tape that purportedly instructed people on how to represent themselves in pro se litigation. The course, titled “The George Gordon School of Common Law,” cost $300 and included study materials and pleading forms. The defendant, Mr. Kaltenbach, assisted
people taking the course. The precise nature and scope of that assistance was the subject of the court’s inquiry in the criminal prosecution of Mr. Kaltenbach.

Mr. Kaltenbach’s testimony regarding the assistance he provided to pro se litigants was somewhat vague. When asked if he prepared pleadings for people to file in court, he replied, “I don’t know. I prepare a lot of documents and give them to a lot of people, and what they do with them afterwards is their own business.” *Id.* When asked if he consulted with people about their legal problems, he explained, “[o]nce a week we have a roundtable meeting in which there’s thirty people, and we discuss everybody’s suits. At that time I participate equal with others.” *Id.* Mr. Kaltenbach repeatedly testified that he was “very careful” about trying not to counsel people “one-on-one,” but he could not say he had never done so.

The prosecution focused largely on a particular case where Mr. Kaltenbach and the EPA allegedly provided legal services to a plaintiff involved in two civil suits and one criminal suit. The plaintiff testified (as part of a plea bargain) that he used “form pleadings” from the course materials, and that EPA members assisted him with his pleadings, but that, in all but one instance, he typed, signed, and filed the pleadings himself. On one occasion, EPA members suggested and prepared a Motion to Recuse for him to file in his criminal suit, but he signed and filed the motion himself. The plaintiff testified that he “donated” over $5,000 to the EPA “in appreciation for the support and assistance rendered to him by the EPA.” *Id.* at 786. But the EPA later used that money to retain an attorney to represent him in the criminal proceeding. Further, the plaintiff testified that Mr. Kaltenbach “always emphasized that he was not a licensed attorney, that he never held himself out as such in any manner, that he never represented anyone other than himself in court and that he never signed pleadings on anyone else’s behalf.” *Id.*

The trial court convicted Mr. Kaltenbach of the unauthorized practice of law and sentenced him to two years in the parish jail. The court of appeal, however, found the evidence insufficient to support the conviction. The court noted that Mr. Kaltenbach did not represent anyone in any proceedings and did not accept any direct or indirect compensation for the advice and assistance he provided to people. The $5,000 “donation” from the plaintiff Mr. Kaltenbach assisted, the court found, was not compensation because it was returned in full when Mr. Kaltenbach provided the plaintiff with money to retain a lawyer. The court thus vacated Mr. Kaltenbach’s conviction and vacated his two-year jail sentence. The court specified that it did not condone the EPA’s “dubious practices;” however, they held, the state had not met its burden of proving guilt beyond a reasonable doubt.
Rule 5.3 of the Rules of Professional Conduct governs the supervision of “nonlawyer assistants,” including paralegals.

Rule 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 . . . 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.

Minimum Requirements:

The Louisiana Supreme Court has articulated some minimum factors which must be present for an attorney’s delegation of responsibility to a non-lawyer to be proper. These factors include: maintaining a direct relationship with the client, supervising the delegated work, and having complete professional responsibility for the work product. In re Sledge, 03–1148 (La.10/21/03).

Penalties for Failure to Supervise

When a suspended or disbarred lawyer is employed as a paralegal and engages in the unauthorized practice of law, not only will the paralegal be subject to discipline for unauthorized practice, but the supervising attorney may also be disciplined for facilitating the unauthorized practice of law.
Case examples:

- **In re Comish**, 04–1453 (La.12/13/04), 889 So.2d 236 (supervising attorney suspended for three years, with all but one year and one day of the suspension deferred, for, among other things, failing to properly supervise disbarred attorney he employed as paralegal and facilitating in the unauthorized practice of law by allowing disbarred attorney to negotiate personal injury settlements directly with insurance adjusters, deposit client fees into his personal account, and represent himself as an attorney to opposing counsel).

- **In re Cave**, 02–DB–020 (1/21/03) (public reprimand appropriate for attorney who facilitated the unauthorized practice of law by hiring disbarred attorney as a paralegal and allowing disbarred attorney to attend and participate in five depositions as counsel for the plaintiff).

- **In re Wilson**, 04–1734 (La.9/24/04), 882 So.2d 547 (supervising attorney consented to permanent disbarment for, among other things, facilitating a suspended attorney’s unauthorized practice of law and improperly sharing attorney’s fees with the suspended attorney).

- **Louisiana State Bar Ass’n v. Edwins**, 540 So.2d 294 (La. 1989) (supervising attorney permanently disbarred for knowingly assisting paralegal in the unauthorized practice of law (including drafting and filing legal pleadings without supervision), improperly turning client settlement funds over to paralegal, and neglecting a legal matter, where the court found no mitigating factors and several aggravating factors, including attorney’s prior suspension from the practice of law).

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**Walking the Line**

**What Tasks May Law Clerks and Other Non-Lawyers Perform?**

Law firms and other organizations providing legal services must be cognizant of the limits imposed on two types of non-lawyers: first, law students and recent law school graduates, who are often employed in law offices before their admission to the bar; and second, legal support staff, primarily paralegals and office managers. The primary difference between the two groups is that disciplinary complaints relating to the unauthorized practice of law by law students and graduates are relatively infrequent when compared to complaints relating to paralegals, office managers, and the like -- despite the fact that the same rules apply to both groups.

One possible reason for this difference is the well-accepted and deeply entrenched practice of law students and recent graduates working in the legal field as summer law clerks, interns, and, later, as associates pending bar passage, sometimes performing tasks similar to those performed by newly-admitted lawyers. Some commentators have postulated that this custom has led to the tacit acceptance of these future lawyers taking a more substantial role in legal matters. Despite this tacit acceptance, practitioners must remember that non-lawyers --
even those who have graduated law school and have taken the Louisiana bar – are nonetheless prohibited from engaging in any activities that could be construed as “the practice of law.”

**Guidelines for Law Students and Graduates**

The Louisiana Supreme Court has commented on the proper delegation of responsibility to law students employed in law offices:

“*A lawyer cannot delegate his professional responsibility to a law student employed in his office.* He may avail himself of the assistance of the student in many of the fields of the lawyer's work, *‘[b]ut the student is not permitted, until he is admitted to the Bar, to perform the professional functions of a lawyer, such as conducting court trials, giving professional advice to clients or drawing legal documents for them.* The student in all his work must act as agent for the lawyer employing him, who must supervise his work and be responsible for his good conduct.”

*Louisiana State Bar Ass'n v. Edwins*, 540 So. 2d 294, 299 (La. 1989) (citing ABA Comm. on Professional Ethics, Op. 85 (1932)). The supervising attorney, therefore, must take responsibility for the un-admitted lawyer’s work and ensure that his conduct adheres to the Rules of Professional Conduct. Further, the supervising attorney must *supervise* the non-lawyer’s work and guard against situations where the non-lawyer might be in a position to give legal advice or prepare legal documents without proper supervision.

The Louisiana Supreme Court has also had occasion to discipline practicing lawyers for failing to supervise recent law school graduates who are employed in a law office pending admission to the bar.

**Case Study: In re Wilkinson**

*In re Wilkinson*, 2001-2310 (La. 1/15/02); 805 So.2d 142.

In *In re Wilkinson*, the court imposed a sixty-day suspension from the practice of law based on a lawyer’s failure to supervise a recent law school graduate working as a law clerk in his office. Mr. Wilkinson, a Louisiana lawyer, hired Paul Stewart as a law clerk in the summer of 1996. Mr. Stewart had graduated law school and had taken the Louisiana bar examination in July 1996. In August 1996, prior to Mr. Stewart’s admission to practice law, Mr. Wilkinson was approached by a client requesting help with a succession matter. Mr. Wilkinson was unable to take the case, but referred it to his law clerk, Mr. Stewart, to handle the preliminary matters in the case under Mr. Wilkinson’s supervision, and then assume full representation following his admission to the Louisiana bar. Mr. Wilkinson reportedly cautioned Mr. Stewart not to provide any legal advice to the client before his admission to the bar.

Mr. Wilkinson signed two letters to the client regarding the succession matter, but thereafter had no further involvement with the case, did not supervise Mr. Stewart’s work, and did not follow up on the file after Mr. Stewart left his employ seven months later. He later discovered that Mr. Stewart had given erroneous legal advice to the client, resulting in nearly
$10,000 in losses to the client due to foreclosure on certain succession property. The client later filed a complaint with the ODC regarding Mr. Stewart’s conduct. Because Mr. Stewart was not admitted at the time of the misconduct, however, the ODC opened an investigation into Mr. Wilkinson’s conduct.

After an investigation and hearing, the Supreme Court found there was not clear and convincing evidence that Mr. Wilkinson had facilitated the unauthorized practice of law. The court found, however, that Mr. Wilkinson violated Rules 5.1(b) and 5.3(b) of the Rules of Professional Conduct by failing to properly supervise Mr. Stewart while he was working as his non-lawyer assistant and later, his subordinate attorney.

The hearing committee noted several facts in Mr. Wilkinson’s favor, including: (1) Mr. Wilkinson made it clear to all involved that he would not be handling the succession matter, and that Mr. Stewart would handle the preliminary issues pending his admission to the bar; (2) Mr. Wilkinson specifically instructed Mr. Stewart not to provide legal advice; and (3) Mr. Wilkinson did not know, and had no reason to know, that Mr. Stewart had given the client legal advice.

The committee also noted, however, that Mr. Wilkinson: (1) knew that Mr. Stewart had met with the client in his absence, yet made no attempt to determine whether he had given the client legal advice at that meeting; (2) made no attempt to supervise Mr. Stewart’s work in the succession matter, either before or after Mr. Stewart’s admission to the bar; and (3) negligently breached his duty to the client by failing to review the succession file in its entirety. Mr. Wilkinson indicated that he was not aware of any ethical problem, nor was he aware of any problems with the case, until the ethical complaint was filed.

The baseline sanction for Mr. Wilkinson’s misconduct was a reprimand. However, the disciplinary board recommended an upward deviation to a brief suspension, due to Mr. Wilkinson’s “complete indifference to the matter and the significant injury to his client.” The court agreed, noting that Mr. Wilkinson had substantial experience in the practice of law and failed to acknowledge the wrongful nature of his misconduct. The court thus imposed a sixty day suspension from the practice of law.

**Guidelines for Other Non-Lawyers**

The Louisiana Supreme Court has also provided guidance on delegating tasks to non-lawyers generally in law offices:

A lawyer can employ lay secretaries, lay investigators, lay detectives, lay researchers, accountants, lay scriveners, nonlawyer draftsmen or nonlawyer researchers. In fact, he may employ nonlawyers to do any task for him except counsel clients about law matters, engage directly in the practice of law, appear in court or appear in formal proceedings as part of the judicial process, so long as it is he who takes the work and vouches for it to the client and becomes responsible to the client.

*   *   *

a lawyer may delegate various tasks to paralegals, clerks, secretaries and other non-lawyers [but may not] delegate to any such person the lawyer's role of
appearing in court in behalf of a client or of giving legal advice to a client . . . he or she must supervise closely any such person to whom he or she delegates other tasks, including the preparation of a draft of a legal document or the conduct of legal research. . . . the lawyer must not under any circumstance delegate to such person the exercise of the lawyer's professional judgment in behalf of the client or even allow it to be influenced by the non-lawyer's assistance.


### The Consequences of Carelessness
#### A Cautionary Tale

*In re Thomas, 2011-2012 (La. 11/18/11); 74 So.3d 695.*

In *In re Thomas*, the respondent, Thomas, became ineligible to practice law because she failed to complete her mandatory CLE hours and failed to pay her bar dues and disciplinary assessment. In addition, because Thomas had failed to update her address with the Louisiana State Bar Association, she did not receive notices of ineligibility and was therefore unaware that she was ineligible to practice law. As a result, she remained ineligible to practice law for over two years.

During her period of ineligibility, Thomas represented several clients in different matters. In one personal injury matter, Thomas failed to disburse funds owed to the physician who treated her clients, despite having withheld those funds from the client’s settlement. Thomas converted the withheld funds to her own use, planning to pay the physician in monthly installments from her own funds, but thereafter became financially unable to continue the monthly payments. Thomas also failed to maintain a client trust account to safeguard her clients’ fees and failed to timely return unearned fees to one of her clients.

When Thomas was brought before the Office of Disciplinary Counsel, the hearing committee and disciplinary board acknowledged multiple mitigating factors in her case, finding that Thomas was inexperienced in the practice of law (admitted in 2001), lacked a mentor, and was found to have personal or emotional problems due to her mother’s death in 2000. Further, Thomas was unaware that she was ineligible to practice law and took corrective action once she became aware of it. Thomas had no prior disciplinary record, was found to have no dishonest or selfish motive, was cooperative in the ODC investigation, and showed remorse. The disciplinary board and the Louisiana Supreme Court both found that Thomas’s “misconduct was largely the result of her inexperience in the practice of law and her poor law office management skills rather than the result of any dishonest or selfish motive.” *Id.* at 702-03.

The Louisiana Supreme Court ruled that Thomas be suspended from the practice of law for two years, with one year deferred, followed by one year of supervised probation. During the probationary period, Thomas was required to attend the LSBA's Ethics School and Trust Accounting School. Thomas was also required to make restitution to the physician whose fees she withheld and to return the unearned fees to her former client.
Are Institutional Clients Usurping the Role of Lawyers through the Use of Intrusive Billing Guidelines?

Of primary importance among Louisiana’s Rules of Professional Conduct is Rule 1.1(a)’s directive that “[a] lawyer shall provide competent representation to a client.” The rule specifies that “[c]ompetent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

Institutional clients are imposing increasingly restrictive and onerous billing guidelines on attorneys representing their interests. These billing guidelines, sometimes called “litigation management” programs, purportedly serve to contain costs and promote efficiency and quality in representation by requiring attorneys to obtain pre-approval for a multitude of legal activities, while denying payment entirely for other legal tasks. The guidelines are typically imposed unilaterally on a “take it or you don’t get the work” basis. With the proliferation of such policies and guidelines among institutional clients, attorneys face increasing pressure to either accept the restrictive guidelines or lose potentially lucrative work.

These billing guidelines present ethical dilemmas, however, when they impinge on an attorney’s independent professional judgment in representing the client. Counsel must be wary of institutional clients crossing the line from “litigation management” into the unauthorized practice of law. And although institutional clients have some right to monitor and direct the course of representation, the Rules of Professional Conduct require Louisiana lawyers to competently represent their clients and, in doing so, to carefully preserve, protect, and exercise their independent professional judgment in determining how to properly represent the client.

The Billing Guidelines

Generally, an institutional client’s billing guidelines are submitted to their counsel at the beginning of the litigation, whereupon counsel is asked to agree to abide by the guidelines. The guidelines, drafted by the institutional client, spell out in great detail what the client will and will not pay for, as well as conditions for payment.

Such billing guidelines may, for example, contain directives:

- Forbidding summarizing depositions;
- Mandating that trial preparation be deferred until trial is imminent;
- Refusing to pay for proof reading, revisions, or edits to written materials, including pleadings;
- Refusing to pay for inter-office meetings of lawyers working on files;
- Requiring pre-approval for scheduling depositions, conducting legal research, writing motions, and employing experts;
- Refusing to pay for, or requiring pre-approval of, the attendance of more than one attorney at depositions, hearings, or trials; and
- Dictating the use and type of discovery that may be utilized.

Billing guidelines may restrict what tasks may be performed, who may perform them, and how much time counsel may bill for them:

- “Routine, computerized pleadings (‘boiler plate’) should be billed at .10 hours or actual preparation time, whichever is less.”
- “Time and expenses allocated to . . . internal consults . . . and interoffice conferences should not be charged.”
- “We should not be charged for routine legal research. Legal research concerning matters of common knowledge among reasonable experienced counsel in the locale is considered to be routine and elementary and, therefore, is non-chargeable.”
- “It is expected that paralegals or junior associates will be utilized in research matters.”
- “Local travel, defined as travel less than 100 miles roundtrip [is] a cost integral to running a law firm. It is therefore overhead.”
- “You must have approval prior to initiating any of the following:
  1. All discovery including depositions, interrogatories, requests to produce and requests for admissions;
  2. All motions;
  . . .
  5. All legal research requiring more than 1/2 hour . . .”

In addition, when these billing guidelines are written by insurance companies to govern the activities of defense counsel representing an insured, the guidelines often provide that an insurance claims professional will work jointly with the defense counsel in “managing” the case. These guidelines generally have the dual goal of reducing litigation costs and ensuring insurer control.

Given the breadth of these types of restrictions, it is impossible to deny or ignore the profound impact such billing guidelines have on an attorney’s representation of a client.
What is the Effect of Such Billing Guidelines?

Attorneys may feel pressured to tolerate these types of “take-it-or-leave-it” billing guidelines, as refusal to abide by the guidelines could result in a loss of valuable and continued business from the insurer or other institutional client. Many have argued that the guidelines create financial disincentives for thorough legal representation, as the threat of receiving no compensation for certain legal activities can deter attorneys from performing appropriate legal tasks for the client. Ultimately, the guidelines may violate ethical rules by interfering with a lawyer’s exercise of independent professional judgment.

It is also important to remember that the institutional client often has legitimate, justified concerns in implementing such billing guidelines. The client has a legitimate interest in controlling the costs of litigation. In the case of insurance companies, the insurer also has a valid interest both in controlling costs and in approving or disapproving the actions taken by defense counsel in its representation of the insured. After all, an insurer’s interests are often aligned with the insured’s, as when the insurer has tendered unconditional coverage and defense and will be ultimately responsible for any judgment against its insured. Bearing these factors in mind, litigation management by the insurer, although restrictive, may be justifiable and even necessary.

Billing Guidelines vs. The Rules of Professional Conduct

Lawyers must be cognizant of the ethical limits with respect to the practice of law. When institutional clients closely monitor and direct the course of litigation, all parties must ensure that the client does not cross the ethical line into the practice of law.

Rule 5.5: In accordance with the statutes and rules discussed above, including Rule 5.5 of the Louisiana Rules of Professional Conduct, non-lawyers, including insurance claims professionals or other representatives of an institutional client, should be prohibited from drafting pleadings, providing legal advice to the insured-client, and appearing on behalf of the client at hearings or other judicial proceedings – any of which may constitute the unauthorized practice of law. The fine line between “litigation management” by a client and the practice of law has yet to be addressed directly by Louisiana ethics opinions or the Louisiana Supreme Court.

Rule 5.4: Closely linked to the unauthorized practice of law, and perhaps more directly implicated by client billing guidelines, is Rule 5.4 of the Louisiana Rules of Professional Conduct. Rule 5.4(c) requires that a lawyer maintain and exercise his independent professional judgment in rendering legal services to clients. The rule provides: “A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.”

Rule 5.4 clearly applies to the tripartite relationship between an insurer, its insured, and retained defense counsel in insurance defense litigation. As such, lawyers are directed to guard against insurers (who employ and pay the lawyer to render legal services for the insured) directing or regulating the lawyer’s professional judgment in representing the insured. State
ethics opinions and the courts have provided scant advice on how to practically avoid such ethical pitfalls.

**Guidance from State Ethics Opinions**

Various ethics opinions have found that intrusive insurance billing guidelines may unethically interfere with a lawyer’s exercise of independent professional judgment. The basis of such opinions is that the “guidelines” allow the insurer to exert undue control over the representation and the professional judgment of defense counsel.


A recent Texas ethics opinion also prohibits Texas attorneys retained by insurance companies to defend the insured from allowing an insurance company to interfere with their exercise of independent judgment on behalf of the insured through the use of overly invasive litigation guidelines. Tex. Comm. on Prof'l Ethics, Op. 533.

The ABA, in an opinion entitled “Ethical Obligations of a Lawyer Working Under Insurance Company Guidelines” has stated that attorneys “must not permit the [insurer] ... to require compliance with litigation management guidelines the lawyer reasonably believes will compromise materially the lawyer's professional judgment or result in his inability to provide competent representation ...” ABA Formal Opinion 01-421.

Such opinions, however, provide little useful guidance for attorneys caught in this ethical dilemma. Many advise that a lawyer simply withdraw from representation if the lawyer believes that his independent professional judgment is being compromised. Withdrawal, however, is a serious step with complex consequences.


Although many courts have not embraced the opportunity to rule on this ethical issue, the Montana Supreme Court’s decision in 2000 tackled this complex dilemma at a time when the controversy was reaching a fever pitch.
The Montana Supreme Court was the first court to directly address the legality of the billing guidelines that some insurers were imposing upon outside counsel retained to defend insureds. The case -- *In re Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures* – garnered national attention. Dozens of amicus briefs were filed, and several national insurers were given copies of the lawsuit, including Allstate Insurance Co., Zurich Insurance Co., and National Farmers Union. The court reviewed over 1000 pages of billing guidelines and practice rules from different insurers practicing in Montana.

The petitioners, seeking declaratory relief, argued that insurer billing guidelines and practice rules violated Montana’s Rules of Professional Conduct because they (1) unduly restricted and/or controlled the scope and extent of representation and (2) required attorneys to submit detailed legal bills to outside auditors without first obtaining the client’s consent to disclose such information. The court, in reviewing this issue, considered the billing guidelines submitted by the St. Paul Insurance Companies. Those billing guidelines expressly required prior approval before defense counsel could schedule depositions, conduct research, employ experts, or prepare motions.

The court’s decision focused on several Montana Rules of Professional Conduct, including Rule 1.1 (competence), Rule 1.8 (prohibiting conflicts of interest), and Rules 2.1 and 5.4 (mandating the exercise of independent professional judgment).

In a unanimous decision, the Montana Supreme Court held that insurer-imposed billing rules and procedures violated Montana’s Rules of Professional Conduct. Key to its decision was the court’s determination that the insured is the sole client of the defense attorney, and that the insurer is not a co-client. The court held, *inter alia*, that “defense counsel in Montana who submit to the requirement of prior approval violate their duties under the Rules of Professional Conduct to exercise their independent judgment and to give their undivided loyalty to insureds.” The court explained that the pre-approval requirements interfered with the exercise of an attorney’s independent judgment, as required by the Rules of Professional Conduct, and created a “substantial appearance of impropriety in its suggestion that it is insurers rather than defense counsel who control the day to day details of a defense.” This decision was significant, as it was the first to determine the legality of insurance policies that impose such cost guidelines on defense attorneys.

**Final Comments on Billing Guidelines**

The pervasive presence and necessity of liability insurance in all aspects of society has led to inevitable confrontation with the complex tripartite relationship among the lawyer, the insurance company, and the insured. The rising cost of insurance litigation has led insurers to adopt the restrictive billing guidelines we see today. Whether such “litigation management” by insurance companies comports with an attorney’s ethical obligations is clearly a factual question, dependent on the particular case and the extent and scope of the insurer’s restrictions. The determination also turns on whether the insurer is viewed as a co-client with the insured, a mere

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9 *Id.* at 815.
third-party payor, or something in between. Clearly, more definitive guidance is needed from the Louisiana Supreme Court and/or the Louisiana Rules of Professional Conduct to help guide defense counsel in managing litigation under the direction of insurers while adhering to the ethical rules.