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Shadow Lawyering: Nonlawyer Practice within Law Firms

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SHADOW LAWYERING: NONLAWYER PRACTICE WITHIN LAW FIRMS

*Paul R. Tremblay**

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ABSTRACT

Lawyers commonly associate with nonlawyers to assist in their performance of their lawyering tasks. A lawyer cannot know with confidence, though, whether the delegation of some tasks to a nonlawyer colleague might result in her assisting in the unauthorized practice of law, because the state of the law and the commentary about nonlawyer practice is so confused and incoherent. Some respected authority within the profession tells the lawyer that she may only delegate preparatory matters and must prohibit the nonlawyer from discussing legal matters with clients, or negotiating on behalf of clients. Other authority suggests that the lawyer may delegate a wide array of tasks as long as the lawyer supervises the work of the nonlawyer and accepts responsibility for it. A good faith lawyer reviewing the available commentary would find it difficult to achieve appropriate guidance for her work. This uncertainty affects not only lawyers working with paralegals and law clerks, but firms hiring out of state lateral associates and partners, and law school clinical programs engaged in transactional work.

This Article articulates a framework for assessing delegation choices, a framework which is both coherent and sensible. The framework relies on insights about lawyering judgment and risk assessment, client informed consent, and unauthorized practice of law prophylaxis. Any delegation of work by a lawyer to a nonlawyer involves an exercise of the lawyer's judgment about an appropriate balance of risk and efficiency, along with an eye toward the client's informed choice about how to achieve the goals of the representation most efficiently. The prevailing unauthorized practice of law dogma prevents a client from seeking the most economical representation by only retaining a nonlawyer, but that dogma trusts lawyers to protect a client's interests. With those considerations in place, this Article shows that the profession cannot, and in fact does not, deny the lawyer any categorical options in making delegation choices, except for those involving public court appearances. Aside from sending a nonlawyer to court, a lawyer may responsibly delegate any of her lawyering activities to a nonlawyer associate, subject to the prevailing conceptions of competent representation and subject to the lawyer's retaining ultimate responsibility for the resulting work product and performance.

Some commentary and some court opinions suggest a different answer to the questions addressed here, but those authorities do not withstand careful analysis. This Article shows that a more careful reading of the commentary and the court dicta supports the framework and the thesis offered here. Nonlawyers may not independently engage in activity which equates to the practice of law, if by "independently" we mean without supervision and oversight from a lawyer. That important and uncontroversial limitation, however, is the only categorical restriction on a lawyer's discretion. A supervised

nonlawyer may play a much more active and important role in a lawyer's overall representation of her client than many have claimed. For the client, that is a very good result.

INTRODUCTION

This Article explores an aspect of contemporary legal practice that is the source of considerable confusion within the profession—the limits, if any, on the engagement in legal activity by nonlawyers who are employed by lawyers. Much of the rhetoric from commentators and bar associations warns lawyers that they categorically may not delegate certain activities to their nonlawyer colleagues.¹ Other authoritative sources imply that lawyers may lawfully exercise considerable discretion about how supervised nonlawyers work.² The available substantive law on the topic is scarce and not entirely coherent. This Article represents an effort to accomplish dual objectives—to understand the available substantive law and its lessons about delegation of work to nonlawyers, and to craft a coherent framework for addressing the topic, to guide lawyers and law firms in their practices. To those ends, the Article proposes a workable and practical thesis about nonlawyer practice which is faithful to the spirit of the principles governing how lawyers work.

Nonlawyers, of course, may not practice law in any jurisdiction within the United States,³ subject to some limited exceptions not relevant here.⁴ Established common law and state statutes throughout the United States limit the practice of law to members of the

¹ See, e.g., AMERICAN BAR ASSOCIATION, MODEL GUIDELINES FOR THE UTILIZATION OF PARALEGAL SERVICES (2004) [hereinafter MODEL PARALEGAL GUIDELINES](declaring that paralegals may not provide legal advice to clients). See text accompanying notes *infra* for a discussion of the categorical limits.

² See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 4 (2002) [hereinafter RESTATEMENT] (suggesting lawyer discretion); see text accompanying notes *infra* for a discussion of the discretionary authorities.

³ See MODEL RULES OF PROF'L CONDUCT, R. 5.5(a) (2003) [hereinafter MODEL RULES]; RESTATEMENT *supra* note , at §4; DEBORAH L. RHODE, ACCESS TO JUSTICE 15 (2004) [hereinafter RHODE, ACCESS TO JUSTICE]; *Prohibitions on Practice of Nonlawyers*, 21 ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT REFERENCE MANUAL 8001 (2004) ("Every jurisdiction prohibits the unauthorized practice of law.").

⁴ The exceptions include legal work on matters whose practice is preempted by federal law, such as patent and tax work (see Practice Rules for Representatives of Patent Applicants, 37 C.F.R. § 10.14 (2000); Circular 230 Regulating Practice Before the Treasury, 31 C.F.R. § 10.3 (2002) (governing practice before the Internal Revenue Service); Ted Schneyer, *An Interpretation of Recent Developments in the Regulation of Law Practice*, 30 OKLA. CITY U. L. REV. 559, 570-71 (2005)(discussing both contexts)); appearances before certain administrative agencies (see Marlene M. Remmert, Note, *Representation of Clients before Administrative Agencies: Authorized or Unauthorized Practice of Law*, 15 VAL. U. L. REV. 567, 577 (1981)); and certain other legislative allowances (see Kathleen E. Justice, Note, *There Goes the Monopoly: The California Proposal to Allow Nonlawyers to Practice Law*, 44 VAND. L. REV 179 (1991)). For an overview of the unauthorized practice rules and exceptions, see generally 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, 2 LAW OF LAWYERING § 5.5.201 (3d ed. 2001 & Supp. 2008) [hereinafter HAZARD & HODES]; CHARLES WOLFRAM, MODERN LEGAL ETHICS 824-49 (1986).

bar within the jurisdiction where the legal activity takes place.⁵ While the “unauthorized practice of law” dogma⁶ has many persuasive critics,⁷ its central premise is an essential conceit within the legal profession in this country—that only lawyers, defined as individuals licensed to practice in the jurisdiction, may provide legal services to clients. That otherwise stringent and unyielding dogma, though, historically has allowed nonlawyers to *assist* lawyers in their provision of legal services, so long as the assistance is supervised by a lawyer.⁸ The question we explore here is whether there are forms of assistance that the lawyer may not delegate to a nonlawyer, and that the nonlawyer may not perform even under a lawyer’s supervision. This examination accepts, in a pragmatic way for the purposes of this Article, the inevitability and the persistence of the unauthorized practice of law dogma.⁹

The intriguing questions about the scope of activity permitted to nonlawyers in law firms arise in several practice contexts.¹⁰ It obviously matters to the typical law firm,

⁵ For an overview of the policy and ethics debates about the unauthorized practice of law, see, e.g., DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 800-10 (5th ed. 2009); Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 *CASE W. RES. L. REV.* 531, 567 (1994); Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 *FORDHAM L. REV.* 2581, 2597 (1999); Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 *STAN. L. REV.* 1 (1981). For a historical perspective, see Michael S. Ariens, *American Legal Ethics in an Age of Anxiety*, 40 *ST. MARY’S L.J.* 343 (2008).

⁶ In this Article I refer to the collection of unauthorized practice of law mandates as a “dogma.” My choice of term represents my effort to capture the inflexibility and, at times, unprincipled stubbornness of the arguments underlying the restrictions on nonlawyer practice. See Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 *N.Y.U. REV. L. & SOC. CHANGE* 701, 703, 711-12 (1996) [hereinafter Rhode, *Professionalism*] (unauthorized practice rules promote a monopoly of legal practice for licensed attorneys, which reduces availability of affordable legal services).

⁷ See, e.g., RHODE, *ACCESS TO JUSTICE*, *supra* note 5, at 88-89; Peter S. Margulies, *Protecting the Public Without Protectionism: Access, Competence and Pro Hac Vice Admission to the Practice of Law*, 7 *ROGER WILLIAMS U. L. REV.* 285, 285 (2002) (noting unauthorized practice of law restrictions “impair client access to attorneys of their choice”).

⁸ See *MODEL RULES*, *supra* note 5, at R. 5.3 (“Responsibilities Regarding Nonlawyer Assistants”); *In re Opinion No. 24 of Committee on Unauthorized Practice of Law*, 607 A.2d 962, 966 (N.J. 1992) (acknowledging the importance of nonlawyer assistance to lawyers).

⁹ In other words, this Article is not an inquiry into whether nonlawyers should be permitted greater opportunities to practice law. That topic is well rehearsed elsewhere. See, e.g., RHODE, *ACCESS TO JUSTICE*, *supra* note 5, at 88; George C. Leef, *The Case for a Free Market in Legal Services*, 322 *POLICY ANALYSIS* 1 (1998); Jacqueline M. Nolan-Haley, *Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 *HARV. NEGOT. L. REV.* 235 (2002). The goal in this Article is to test the limits of nonlawyer practice in light of, and respecting, existing unauthorized practice restrictions.

¹⁰ One context which this Article will not address, despite its apparent connection to this project, is the status of suspended or disbarred lawyers working as clerks, paralegals or assistants within law firms. While one might expect that the analyses and critiques developed in this Article would apply naturally to those persons, in fact the jurisprudence treats those individuals more strictly than other nonlawyers. See, e.g., *Crawford v. State Bar of Cal.*, 355 P.2d 490 (Cal. 1960); *The Florida Bar v. Thomson*, 310 So.2d 300 (Fla.1975); *In re Discipio*, 645 N.E.2d 906, 911 (Ill. 1995) (“Without a doubt, a disbarred or suspended attorney should not serve as a law clerk or a paralegal during his disbarment or suspension.”). For an example of a state professional conduct rule limiting the rights of disbarred or suspended lawyers, see N.M. *RULES PROF’L CONDUCT* R. 16-505 (disbarred or suspended lawyers may not be employed as law clerks if

whether a solo practice or a major international organization, where paralegals regularly assist in preparation for every imaginable type of legal work—complex commercial transactions, real estate closings, divorce settlements, pretrial litigation and trial preparation, and the like. Lawyers in those settings ought to understand the kinds of limits that exist on their use of nonlawyer assistants in their practices.¹¹

The question also arises, though, in a more defined and perhaps interesting way in the setting of a large, national law firm which hires lateral partners and associates from law firms in other states.¹² In lateral hiring settings, the new lawyer, who may be exquisitely experienced and valuable as a member of the new firm, and who will likely be offered a handsome salary to join the new firm, remains a nonlawyer until she passes the new state's bar examination or otherwise waives into that state's bar admission.¹³ The new law firm must understand the limits of the lateral's authority to offer her valuable and highly-compensated services to the firm's clients. If the law firm guesses wrong about the contours of the lateral's role, it risks serious consequences.¹⁴ For laterals who are litigators, discrete avenues exist through which to obtain formal permission for her to

prohibited from accepting employment by order of the Supreme Court or the Disciplinary Board). *See also, NFPA Takes Stand on Disbarred, Suspended Attorneys*, 20 No. 5 LEGAL MGMT. 16 (September/October, 2001) (reporting National Federation of Paralegal Associations (NFPA) resolution that "it is unethical for attorneys whose licenses have been revoked or who are under suspension to gain employment and perform legal tasks handled by paralegals").

¹¹ As the discussion below will highlight, trade associations have developed some standards to which lawyers and paralegals may look for guidance. This article critiques those standards in its effort to reconcile some of the inconsistent messages arising from the guides. The most prominent guides include those of the ABA and the National Association of Legal Assistants (NALA). *See* MODEL PARALEGAL GUIDELINES, *supra* note ; NATIONAL ASSOCIATION OF LEGAL ASSISTANTS, CODE OF ETHICS AND PROFESSIONAL RESPONSIBILITY, Canon 3 (1995), at <http://www.nala.org/whatis-Code.htm> (last visited March 6, 2009)[hereinafter NALA CODE OF ETHICS].

¹² Lateral movement among lawyers is a growing phenomenon. *See* Aric Press, *In-House: The Lateral Report*, THE AMERICAN LAWYER (February 01, 2009) at <http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202427749058> (last visited March 6, 2009) ("A record number of Am Law 100 and 200 partners changed firms last year, according to our annual report.") For a discussion of the migrating lawyer phenomenon and the conflict of interest implications of that reality, see Paul R. Tremblay, *Migrating Lawyers and the Ethics of Conflict Checking*, 19 GEO. J. LEGAL ETHICS 489 (2006).

¹³ A lawyer may not simply join a new state's bar at will upon changing residence. *See* Christine R. Davis, *Approaching Reform: The Future of Multijurisdictional Practice in Today's Legal Profession*, 29 FLA. ST. U. L. REV. 1339, 1362 (2002) (28 jurisdictions allow lawyers admitted in another state to practice in the courts of their state; 15 require the state from which the attorney is licensed to allow similar reciprocity to attorneys from their state); Andrew M. Perlman, *A Bar Against Competition: The Unconstitutionality of Admission Rules for Out-of-State Lawyers*, 18 GEO. J. LEGAL ETHICS 135, 137-38 (2004)(critiquing those restrictions).

¹⁴ *See, e.g.,* *Birbrower v. Superior Court*, 949 P.2d 1, 18 (Cal. 1998)(firm violated state unauthorized practice of law statute while serving California client by using attorneys in negotiation settlements and preliminary arbitration arrangements who were not licensed to practice in California). *See generally,* William T. Barker, *Extrajudicial Practice by Lawyers*, 56 BUS. LAW 1501 (2001); Cynthia L. Fountaine, *Have License, Will Travel: An Analysis of the New ABA Multijurisdictional Practice Rules*, 81 WASH. U. L.Q. 737, 738 (2003); H. Geoffrey Moulton, Jr., *Federalism and Choice of Law in the Regulation of Legal Ethics*, 82 MINN. L. REV. 73, 82-83 (1997) (each reviewing *Birbrower* and its implications, and the ABA response to the case).

engage in the practice of law in the new state on discrete matters.¹⁵ If the new lateral is a transactional lawyer, however, the uncertainties addressed here are palpable and trigger serious professional responsibility questions.

The recognition that this question has more importance within corporate and transactional practice than in litigation practice suggests yet another setting where the resolution of the questions addressed here has great importance. In recent years, law schools have begun to offer clinical courses in which law students, for credit, engage in the representation of small businesses and nonprofit corporations under the supervision of a faculty member.¹⁶ In these clinics, students are expected to assume the role of a practicing lawyer with much, and sometimes almost complete, responsibility for the client's representation. That role assumption, indeed, is central to the clinical pedagogical model.¹⁷ In traditional litigation clinics, students may assume that lawyer role without running afoul of unauthorized practice principles by virtue of a "student practice rule" in effect in the state where the law school sits.¹⁸ But, the student practice rules of nearly all states are silent about students' practice in transactional settings.¹⁹ Without a student practice rule in place, students who wish to represent clients in a transactional clinic are effectively nonlawyers. Faculty and students in such clinics therefore must understand confidently the limits of that nonlawyer role.²⁰

¹⁵ Lawyers may appear in court with permission of a judge under a procedure known as "pro hac vice." For a discussion of the pro hac vice accommodation, see note *infra*.

¹⁶ For a description of the emerging clinical movement in transactional and community development work, see Alicia Alvarez, *Community Development Clinics: What Does Poverty Have to Do with Them?*, 34 FORDHAM URB. L. J. 1269 (2007); Susan R. Jones, *Promoting Social and Economic Justice Through Interdisciplinary Work in Transactional Law*, 14 WASH. U. J.L. & POL'Y 249 (2004); Susan R. Jones, *Small Business and Community Economic Development: Transactional Lawyering for Social Change and Economic Justice*, 4 CLINICAL L. REV. 195 (1997)[hereinafter Jones, *Transactional Lawyering for Social Change*]; Shauna I. Marshall, *Mission Impossible?: Ethical Community Lawyering*, 7 CLINICAL L. REV. 147 (2000); Peter Pitegoff, *Law School Initiatives in Housing and Community Development*, 4 B.U. PUB. INT. L.J. 275 (1995).

¹⁷ See, e.g., Russell Engler, *The MacCrate Report Turns 10: Assessing Its Impact and Identifying Gaps We Should Seek to Narrow*, 8 CLINICAL L. REV. 109, 169 (2001); Jennifer A. Gundlach, "This Is a Courtroom, Not a Classroom": So What Is the Role of the Clinical Supervisor?, 13 CLINICAL L. REV. 279 (2006); Peter A. Joy, *The Ethics of Law School Clinic Students as Student Lawyers*, 45 S. TEX. L. REV. 815 (2004); James E. Moliterno, *In-House Live-Client Clinical Programs: Some Ethical Issues*, 67 FORDHAM L. REV. 2377 (1999).

¹⁸ Every state has a student practice rule outlining the requirements under which students may perform lawyering tasks. See David F. Chavkin, *Am I My Client's Lawyer?: Role Definition and the Clinical Supervisor*, 51 SMU L. REV. 1507, Appendix A (1998) (cataloguing student practice rules from all states). See text accompanying notes *infra*.

¹⁹ As we see below, those student practice rules are nearly uniform in their addressing only court representation and litigation contexts; they are silent on the possibilities of students performing work outside of the litigation setting. See Sara B. Lewis, Note, *Rite of Professional Passage: A Case for the Liberalization of Student Practice Rules*, 82 MARQ. L. REV. 205 (1998) (addressing inadequacies in current student practice rules and proposing a better mode of regulation for students in clinical settings). See text accompanying notes *infra*.

²⁰ The other increasingly important context in which these questions have direct relevance is that involving the use of foreign lawyers as adjuncts to United States law firm practice. For a discussion of that phenomenon, see Richard Abel, *Transnational Law Practice*, 44 CASE W. RES. L. REV. 737, 750-61 (1994); Michele Gilligan, *Another Effect of Globalization: Role of Foreign Educated Lawyers in Maryland*

This Article will refer to all of those actors as *nonlawyers*, rather than referring to them in the more narrow conception of *paralegal*.²¹ While all paralegals are of course nonlawyers, many nonlawyers, like lateral soon-to-be-partners²² and associates or law students engaged in transactional work in a clinic, are different in important ways from the usual understanding of paralegals. I use a broader term for a substantive reason as well. The thesis developed here is a unified one, applicable to all nonlawyers regardless of their status within a law firm, while by its terms accounting for the difference in skill and experience of the nonlawyers to whom a lawyer has delegated some legal responsibility.

The thesis which this Article will defend emerges from an appreciation of three features central to effective practice as understood by the prevailing law and ethics of lawyering. First, it recognizes the importance of the lawyer's professional practical judgment and risk assessment in accomplishing legal work for a client.²³ Second, the thesis acknowledges the relationship between the lawyer's pragmatic judgments and the client's informed consent.²⁴ And finally, it builds upon the reality of, and the rationales underlying, the unauthorized practice of law prophylaxis.²⁵ Those features understood in concert permit the following thesis to emerge:

A lawyer may delegate to a nonlawyer working in her law firm any lawyering task, except for appearances before tribunals such as courts, so long as the lawyer adequately supervises the nonlawyer and accepts full professional responsibility for the resulting work. The lawyer's delegation decisions remain subject to the competence and malpractice standards generally applicable to lawyering work, as well as the informed buy-in of the lawyer's client.

This thesis does not accommodate categorical, preemptive rules limiting a lawyer's delegation choices, except for the pragmatic categorical exception regarding public tribunals, which acknowledges the practical operation of courts,²⁶ as well as

Practice, 37 U. BALT. L.F. 1, 12 (2006); Darya V. Pollak, "I'm Calling My Lawyer ... In India!": *Ethical Issues in International Legal Outsourcing*, 11 UCLA J. INT'L L. & FOREIGN AFF. 99 (2006); Carole Silver, *The Case of the Foreign Lawyer: Internationalizing the U.S. Legal Profession*, 25 FORDHAM INT'L L.J. 1039 (2002).

²¹ The Model Rules use the term "nonlawyer." See MODEL RULES, *supra* note , at R. 5.3. The ABA standards use the term "paralegals." See MODEL PARALEGAL GUIDELINES, *supra* note .

²² Nonlawyers may not be equity partners in law firms in most jurisdictions. See MODEL RULES, *supra* note , at R. 5.4(b), and discussion at text accompanying notes – *infra*. But see NEW YORK CODE OF PROF'L RESPONSIBILITY, DR 2-102(D)(out of state lawyers may be partners in New York law firms in certain circumstances).

²³ See text accompanying notes *infra*.

²⁴ See text accompanying notes *infra*.

²⁵ See text accompanying notes *infra*.

²⁶ Out of state lawyers typically may appear in courts with the permission of the presiding judge under a scheme known as "pro hac vice." See RESTATEMENT, *supra* note , at §3, cmt. *e* (describing the practice); *cf.* *Leis v. Flynt*, 439 U.S. 438 (1979)(no constitutional right to gain pro hac vice admission). See also Peter S. Margulies, *Protecting the Public Without Protectionism: Access, Competence and Pro Hac Vice Admission to the Practice of Law*, 7 ROGER WILLIAMS U. L. REV. 285 (2002) (describing the pro hac vice

limitations on the management of and ownership in law firms, which are separate matters from the concerns assessed here.²⁷ The thesis is fully consistent with a nuanced appreciation of the available substantive law, although it is arguably inconsistent in some ways with much advisory pronouncement on the topic. As we shall see below,²⁸ one significant categorical topic muddies the thesis—the oft-repeated advisory prohibition against nonlawyers giving legal advice to a client.²⁹ That prohibition, upon reflection and careful review of the available substantive law, is neither sustainable nor coherent. While nonlawyers cannot, in light of the unauthorized practice dogma, offer independent advice or counsel to a client, they may properly communicate supervised legal advice as part of a collaboration with the lawyer responsible for the matter.³⁰

The Article will explore these issues in the following way. It begins in Part I with a story, populated by a lawyer practicing in a law firm with several nonlawyers available to assist him. My intention is to use the story to highlight the various ways in which nonlawyers of differing experience and training might assist in contributing to the resolution of a client’s legal matter. Part II summarizes the substantive law and advisory authority available to an observer looking for guidance on the questions posed here. Part II concludes that the advisory authority’s insistence that certain categorical activity is off limits for nonlawyers is not supported by binding common law, rules or statutes.

Part III develops the thesis just described. It describes the three features central to a thoughtful assessment of nonlawyer participation—lawyering judgment, client autonomy, and unauthorized practice rationales. It then unpacks the justifications for the profession’s acceptance of nonlawyer assistance in the “easy” instances (drafting documents, performing legal research, and investigating facts), and proceeds to show how those justifications presume a lawyer’s exercise of judgment about risk and benefit in her fiduciary role on her client’s behalf. Once unpacked, the risk assessment and lawyering judgment factors operate to support the thesis that there are, or ought to be, no

rules). The court appearance exception is not a principled one, but instead a pragmatic one, recognizing the reality of American litigation practice. It is also noncontroversial, both because of its public character (a judge has control over his court and can decide definitively who may say what words or take what actions in the courtroom) and because lawyers do not struggle with the uncertainties within that sphere that they encounter in their out-of-court or in-office practices.

²⁷ The legal profession closely protects its exclusive ownership and management of law practice. See MODEL RULES, *supra* note , at R. 5.4(a)(lawyers may not share fees with nonlawyers); 5.4(b) (no partnership with nonlawyers), 5.4(d) (no nonlawyer ownership in law firms); RESTATEMENT, *supra* note , at §10. For a sampling of the critique of that protectionist stance (which this Article will not challenge for its purposes), see Mary C. Daly, *Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership*, 13 GEO. J. LEGAL ETHICS 217 (2000); Gillian Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Market*, 60 STAN. L. REV. 1689 (2008); Charles W. Wolfram, *The ABA and MDPs: Context, History, and Process*, 84 MINN. L. REV. 1625 (2000).

²⁸ See text accompanying notes *infra*.

²⁹ See, e.g., VIRGINIA PENINSULA PARALEGAL ASSOCIATION (VAPPA), EDUCATIONAL STANDARDS AND PROFESSIONAL RESPONSIBILITY GUIDELINES FOR PARALEGALS IN THE COMMONWEALTH OF VIRGINIA (1995), at <http://www.vappa.org/guidelines.html> (last visited February 27, 2009) [hereinafter VAPA GUIDELINES] (“paralegal shall not give legal advice or opinions”).

³⁰ See text accompanying notes *infra*.

categorical exceptions to a lawyer's delegation discretion. Part IV then returns to the law firm story, to show how the thesis might operate in context.

I. A LAW FIRM STORY

Any analysis of the limits of nonlawyer practice within a law firm would benefit from some concrete context. Let us, then, imagine the following story:³¹

Essex Legal Services Institute (ELSI) is a state- and foundation-funded legal aid organization offering free legal services to low- and moderate-income persons within Essex County, Massachusetts.³² ELSI has traditionally offered individual litigation services—family law, housing and eviction defense, Social Security disability appeals, and the like—to its individual clients, in addition to performing “impact” litigation on behalf of groups of poor clients.³³ ELSI recently hired Dara Coletta, a community economic development lawyer with four years experience in California, to join its program to establish a new community economic development (CED) project, to offer representation of nonprofits and community-based organizations in an effort to contribute to the asset-building of its constituents.³⁴ Coletta has applied to take the Massachusetts bar, and with luck she will be a Massachusetts lawyer within nine months. Her supervisor at ELSI is Joe Bartholomew, a 22-year veteran of Massachusetts legal services practice but a relative newcomer to the transactional issues which the new CED project will encounter.

³¹ The story chosen here emerges from public interest practice, even though an equally useful story would use a private law firm setting. I choose a legal services organization, though, for a very direct purpose. As the story indicates, it permits the comparison of an experienced lateral lawyer, a certified law student, a non-certified law student, and a novice paralegal intern, to test whether the qualifications and experience of the legal assistant/nonlawyer make a difference in the analysis. Since private law firms cannot use certified law students, the public interest setting offers a better opportunity for comparison. Of course, the assessments of the limits of the unauthorized practice dogma arising in this setting should be fully transferable to the private firm setting.

³² ELSI is entirely fictional, although Essex County, Massachusetts is not. ELSI has appeared before. See Paul R. Tremblay, *Acting “A Very Moral Type of God”: Triage Among Poor Clients*, 67 *FORDHAM L. REV.* 2475, 2483 (1999).

³³ Neighborhood legal services offices have traditionally focused on crisis-driven, litigation-centric services for the poor clients in their communities. For an assessment of the role tensions of such offices, see Marshall J. Breger, *Legal Aid for the Poor: A Conceptual Analysis*, 60 *N.C. L. REV.* 282, 285 & n.14 (1982); Marc Feldman, *Political Lessons: Legal Services for the Poor*, 83 *GEO. L.J.* 1529, 1536-38 (1995); Peter Margulies, *Political Lawyering, One Person at a Time: The Challenge of Legal Work Against Domestic Violence for the Impact Litigation/Client Service Debate*, 3 *MICH. J. GENDER & L.* 493, 497, 502 (1996).

³⁴ Poverty lawyers have an increasing interest in community economic development, rather than the traditional litigation services, as an essential part of community empowerment. See WILLIAM H. SIMON, *THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT: LAW, BUSINESS AND THE NEW SOCIAL POLICY* (2000); Scott L. Cummings, *Community Economic Development as Progressive Politics: Towards a Grassroots Movement for Economic Justice*, 54 *STAN. L. REV.* 399 (2001); Scott Cummings, *Developing Cooperatives as a Job Creation Strategy for Low-income Workers*, 25 *N.Y.U. REV. L. & SOC. CHANGE* 181 (1999); Jones, *Transactional Lawyering for Social Change*, *supra* note ; Marshall, *supra* note .

One of the CED project's first new clients is the Montrose Community Development Corporation (MCDC), which is in the midst of developing 33 units of below-market condominium housing for sale to low- and moderate-income first time home buyers. Coletta agreed with MCDC for ELSI to serve as its counsel in the final development stages, and then in the sale transactions, from the purchase & sale agreements through the final closings to qualified families. Because the condominium development includes deed restrictions (to maintain the affordability of the units over time), the MCDC documents will include special master covenants and other sophisticated tools to achieve the project's mission.³⁵

ELSI assigned three part-time staff members to work with Bartholomew and Coletta on the MCDC project:

- David Dahlstrom is a third-year law student who had been working in ELSI's Housing Unit, defending evictions in court. Dahlstrom has obtained the status of "certified law student" under the Massachusetts Student Practice Rule.³⁶
- Julie Lucia is a second-year law student who had been working in ELSI's Welfare Unit, preparing and attending welfare hearings. Lucia is not a certified law student under the state student practice rule, because the rule does not cover her work in this public interest setting,³⁷ and because she need not be certified as a student lawyer to engage in welfare hearing representation.³⁸
- Mike Newman is a volunteer intern at ELSI. He is a 19 year old sophomore at Tufts University, and he has been assisting ELSI this year with clerical and administrative help.

Coletta, with Bartholomew as her supervisor, intends to use her team to perform all of the legal work for the MCDC transactions, including drafting all of the real estate documents, researching the applicable law governing deed restrictions and zoning requirements, counseling MCDC about its legal options regarding the deed restrictions and covenants to be included in the condominium documents as well as the terms of the sales, negotiating discrete terms with the buyers or the buyers' lawyers, and representing MCDC at each of the closings.

³⁵ For a discussion of this kind of housing program, see CHARLES E. DAY, ET AL., HOUSING AND COMMUNITY DEVELOPMENT 240-43 (1999)(reviewing the HOME Investment and Partnerships Act of 1990). *See also* 42 U.S.C. § 12771 (requiring 15% of HOME funds to be distributed to nonprofits like MCDC).

³⁶ *See* Mass. Sup. Jud. Ct. Rule 3:03. Under the Massachusetts student practice rule, David may appear as a lawyer in the District Courts of Massachusetts, so he may try cases in those courts just as a fully licensed lawyer.

³⁷ *See id.* A second-year student may only be certified in Massachusetts if she is enrolled in a law school clinical program. Rule 3:03(8).

³⁸ *See* Remmert, *supra* note , at .

This story present five individuals working within a proper law firm³⁹ engaged in the representation of a client on a legal matter. This story also described five persons, only two of whom are deemed lawyers licensed to practice law in Massachusetts (Joe Bartholomew and David Dahlstrom). The question is what activities any of these five persons may engage in to represent MCDC. To answer that question, we must canvass the substantive law governing nonlawyer practice within a law firm, as well as the advisory authority on that topic. Because it tends to be clearer (if at times inconsistent), we start with the advisory authority, and then connect those teaching to the binding law on the topic.

II. ADVISORY GUIDANCE AND SUBSTANTIVE LAW REGULATING NONLAWYER PRACTICE

A. Advisory Rhetoric

Only licensed lawyers may represent clients, of course, but all authorities agree that lawyers may delegate tasks to nonlawyers to assist them in that representation. The Restatement of the Law Governing Lawyers⁴⁰ describes the scope of a nonlawyer's role as follows:

For obvious reasons of convenience and better service to clients, lawyers and law firms are empowered to retain nonlawyer personnel to assist firm lawyers in providing legal services to clients. In the course of that work, a nonlawyer may conduct activities that, if conducted by that person alone in representing a client, would constitute unauthorized practice. Those activities are permissible and do not constitute unauthorized practice, so long as the responsible lawyer or law firm provides appropriate supervision (see § 11, Comment *e*), and so long as the nonlawyer is not permitted to own an interest in the law firm, split fees, or exercise management powers with respect to a law practice aspect of the firm (see § 10).⁴¹

Aside from its recognition that lawyers may not assign management, equity and ownership interests to nonlawyers,⁴² the Restatement's proposition does not suggest any

³⁹ A legal services organization is a law firm entitled to practice law, in precisely the same fashion as any private law firm partnership, professional corporation (PC), or limited liability partnership (LLP). *See, e.g.*, MODEL RULES, *supra* note , at R. 1.0(c); RESTATEMENT, *supra* note , at §123(2)(lawyers in a legal services organization treated as members of a law firm).

⁴⁰ RESTATEMENT, *supra* note .

⁴¹ *Id.* at §4, cmt. *g*. The Restatement's citation of Section 11, Comment *e* is perplexing and possibly reflects a clerical error in the Restatement text. Section 11, Comment *f* addresses the lawyer's supervisory responsibility of nonlawyers, while Comment *e* addresses supervising subordinate lawyers. Perhaps, then, the drafters intended to refer to Comment *f* instead of *e*. On the other hand, because Comment *f* states that "[d]uties corresponding to those of a lawyer with respect to other firm lawyers exist with respect to supervising nonlawyers in a law firm," the drafters may have intended to refer the reader to Comment *e* for guidance about supervision obligations generally.

⁴² The exceptions to that conclusion identified within the Restatement are not categorical ones excluding certain lawyering activities, but only address ownership and management functions within the law firm,

categorical exclusions from its basic lesson that, with “appropriate supervision,” lawyers may assign any of their work to nonlawyers. The Restatement’s later discussion of a lawyer’s supervision responsibility confirms that the treatise contemplates that supervised nonlawyers would provide legal advice to a client.⁴³

The Restatement position is entirely sensible, as we shall see below,⁴⁴ and supports the thesis developed in this Article. But the Restatement does not acknowledge, either in its comments or its Reporter’s Notes, a widespread and long-standing contrary assertion—that a lawyer may not delegate certain legal tasks to a nonlawyer, even if the lawyer supervises the nonlawyer and retains full responsibility for the resulting client representation work. An American Bar Association formal ethics opinion introduced the concept of certain categorical exclusions with the following advice to the bar in 1968:

[W]e do not limit the kind of assistants the lawyer can acquire in any way to persons who are admitted to the Bar, so long as the nonlawyers do not do things that lawyers may not do *or do the things that lawyers only may do*.⁴⁵

The highlighted language suggests that some lawyering tasks are beyond delegation, and the opinion makes clear that it refers not to the management, equity interest or ownership considerations that the Restatement carved out.⁴⁶ The opinion identifies two categorical limitations on lawyer delegation to nonlawyers: “counsel[ing] clients about law matters”⁴⁷ and “appear[ing] in court or ... in formal proceedings as part of the judicial process.”⁴⁸

The restrictions suggested by the ABA in 1968 have appeared frequently, and continue to appear, in advisory authorities. The South Carolina Supreme Court has suggested, in dictum, a similar limitation on the scope of the nonlawyer’s role:

The activities of a paralegal do not constitute the practice of law as long as they are *limited to work of a preparatory nature*, such as legal research, investigation, or the composition of legal documents, which enable the licensed attorney-employer to carry a given matter to a conclusion through his own examination, approval or additional effort.⁴⁹

restrictions which are not at all controversial. See note – *supra* (describing the restrictions on lay participation in law firms, and critiques of the restrictions).

⁴³ RESTATEMENT, *supra* note , at §11, cmt. *f*. In Comment *f*, the Restatement warns lawyer to establish supervision protocols to “assure that any advice given [by the nonlawyer] is appropriate.”

⁴⁴ See text accompanying notes *infra*.

⁴⁵ ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 316 (1968)(emphasis added).

⁴⁶ RESTATEMENT, *supra* note , at §4, cmt. *g*.

⁴⁷ ABA Op. 316, *supra* note .

⁴⁸ *Id.* The opinion does identify a third categorical exclusion, “engag[ing] directly in the practice of law,” *see id.*, but that limitation contributes nothing useful to the inquiry. It begs the question it purports to answer.

⁴⁹ Matter of Easler, 272 S.E.2d 32, 32-33 (S.C. 1980)(emphasis added)(dictum). The South Carolina Supreme Court later, in more dicta, expanded on the *Easler* precedent to claim that nonlawyers may not provide legal advice. Doe v. Condon, 532 S.E.2d 879 (S.C. 2000)(“answering legal questions would constitute the unauthorized practice of law”).

In 2004 the ABA Standing Committee on Paralegals published model guidelines for the use of nonlawyers by lawyers.⁵⁰ One commentator describes the model standards' limitations as covering the following three activities:

The ABA Model Guidelines for the Utilization of Legal Assistant Services delineate three responsibilities a lawyer may not delegate to a legal assistant: establishing an attorney-client relationship, setting the fee to be charged for a legal service, and *rendering a legal opinion to a client*.⁵¹

Like the ABA Model Guidelines, the Code of Ethics and Professional Responsibility of the National Association of Legal Assistants (NALA) advises its members that they may not “give legal opinions or advice.”⁵² Several state bar ethics opinions and guidelines for paralegal practice echo the same categorical exclusion for offering legal advice⁵³ and, some times, for negotiating on behalf of a client.⁵⁴

Of course, none of the sources just quoted or cited represents binding legal authority for any practicing lawyer.⁵⁵ State ethics opinions are advisory and do not carry enforcement authority.⁵⁶ The Restatement also does not represent binding substantive law,⁵⁷ although it enjoys considerable respect within American jurisprudence.⁵⁸

⁵⁰ MODEL PARALEGAL GUIDELINES, *supra* note , at .

⁵¹ Kathleen Maher, *No Substitutions: Legal Aides Are Crucial, But Some Tasks Lawyers Should Not Delegate*, 87-OCT A.B.A. J. 66 (2001)(emphasis added). The author cites to the Model Paralegal Guidelines, *see* MODEL PARALEGAL GUIDELINES, *supra* note , presumably as they existed in 2001. Because Maher refers to the guidelines with a slightly different name (“Legal Assistants” instead of “Paralegals”), the version of the guidelines she interprets may have been different. Her summary fits the 2004 version accurately, however.

⁵² NALA CODE OF ETHICS, *supra* note , at Canon 3. The NALA Canon also includes the restriction for “represent[ing] a client before a court or agency unless so authorized by that court or agency.” *Id.*

⁵³ *See, e.g.*, VAPA GUIDELINES, *supra* note (“paralegal shall not give legal advice or opinions”); State Bar of Michigan, Role of Nonlawyers in Law Practice: Guidelines for Utilization of Legal Assistant Services, Guideline 2, at <http://www.michbar.org/opinions/ethics/utilization.cfm> (last visited February 27, 2009)(nonlawyer may not “convey to persons outside the law firm the legal assistant’s opinion” about legal matters) ; State Bar of Georgia, Advisory Opinion No. 21, September 16, 1977 at http://www.gabar.org/handbook/state_disciplinary_board_opinions/adv_op_21/ (last visited February 27, 2009)(prohibiting “[a]ny contact with clients or opposite counsel requiring the rendering of legal advice of any type”); State Bar of Florida, Ethics Opinion 89-5 (1989) at <http://www.floridabar.org/TFB/TFBETOpin.nsf/ca2dcdaa853ef7b885256728004f87db/c4d872ab4be4c54885256b2f006ca8f3?OpenDocument> (last visited February 27, 2009)(no legal advice); Supreme Court of the State of New Hampshire, Administrative Rule 35, Guidelines for the Utilization by Lawyers of the Services of Legal Assistants under the New Hampshire Rules of Professional Conduct, Comment 1 to Rule 5.3, at <http://www.courts.state.nh.us/rules/scr/scr-35.htm> (last visited February 27, 2009)(no legal advice).

⁵⁴ For negotiation limits, see sources cited at note *infra*.

⁵⁵ The language quoted above from the opinion of the South Carolina Supreme Court was dictum in the case before the court. *See* Matter of Easler, *supra* note , at .

⁵⁶ *See* Peter A. Joy, *Making Ethics Opinions Meaningful: Toward More Effective Regulation of Lawyers’ Conduct*, 15 GEO. J. LEGAL ETHICS 313 (2002) (arguing that the varying levels of authority of ethics opinions in jurisdictions lead to their uncertain authority as a source of advice for lawyers).

⁵⁷ *See* Harold G. Maier, *The Utilitarian Role of a Restatement of Conflicts in a Common Law System: How Much Judicial Deference Is Due to the Restaters or “Who Are These Guys, Anyway?,”* 75 IND. L.J. 541,

B. Authority from Rules or Statutes

A handful of states provide for some guidance to lawyers using nonlawyer assistants, as well as to the nonlawyers themselves, regarding the scope of activity permitted to be delegated. California, perhaps the only state in the country which licenses and regulates the practice of paralegals,⁵⁹ includes in its licensing statute a limitation on a paralegal's offering independent legal advice,⁶⁰ and in that way provides some authoritative substantive law on the topic.⁶¹ Similarly, the Rules of the Supreme Court of the State of New Hampshire offer "Guidelines for the Utilization by Lawyers of the Services of Legal Assistants," and those rules include a Comment which refers to a lawyer's obligation to ensure that legal assistant "does not provide legal advice."⁶² Even that prohibition, which, while labeled as a Comment, likely qualifies as binding substantive law in New Hampshire, strongly implies by its surrounding language that its intent is to prohibit only unsupervised legal advice by a nonlawyer.⁶³ The Rules

548 (2000) (arguing that no restatement has any independent legal force, and can never be more than a guide); Ted Schneyer, *The ALI's Restatement and the ABA's Model Rules: Rivals or Complements?*, 46 OKLA. L. REV. 25, 30 (1993) (arguing that professional ethics law is far from uniform; any attempt to "restate" it must make policy choices, and must pass judgment on the *Model Rules*); Fred C. Zacharias, *Fact and Fiction in the Restatement of Law Governing Lawyers: Should the Confidentiality Provisions Restate the Law?*, 6 GEO. J. LEGAL ETHICS 903, 926 (1993) (individual states have made a conscious choice to address idiosyncratic jurisprudential differences, thus making any attempt to restate the law governing lawyers ineffective); see also Carrie Menkel-Meadow, *The Silences of the Restatement of the Law Governing Lawyers: Lawyering as Only Adversary Practice*, 10 GEO. J. LEGAL ETHICS 631, 669 (1997) (*Restatement* should go further in crafting new "law" for lawyers to emphasize that lawyers should discourage litigation).

⁵⁸ See Lawrence J. Latta, *The Restatement of the Law Governing Lawyers: A View from the Trenches*, 26 HOFSTRA L. REV. 697 (1998) (review of the deliberation and debate); Judith A. McMorrow, *The (F)Utility of Rules: Regulating Attorney Conduct in Federal Court Practice*, 58 SMU L. REV. 3, 37 (2005) (noting that the *Restatement* took 15 years to complete).

⁵⁹ See Susan Mae McCabe, *A Brief History of the Paralegal Profession*, 86-JUL MICH. B.J. 18, 19 (July, 2007) ("Currently, California is the only state that requires paralegals to be licensed.").

⁶⁰ Cal. Bus. & Prof. Code § 6450(b) ("Notwithstanding subdivision (a), a paralegal shall not do the following: (1) Provide legal advice.") Subsection (a) to section 6450 states that "[t]asks performed by a paralegal include, but are not limited to" a list of identified tasks, including "case planning, development, and management; legal research; interviewing clients; fact gathering and retrieving information; drafting and analyzing legal documents" Subsection (a)'s "including but not limited to" language implies that a lawyer may decide in her judgment how to employ a legal assistant, but subsection (b) limits the lawyer's discretion and prohibits delegation of the task of providing client advice.

⁶¹ As we shall see below, the limitation on a nonlawyer's offering *independent* legal advice is consistent with the thesis offered in this Article, and does not imply a ban on giving to a client advice developed under the supervision of and collaboration with a lawyer. See text accompanying notes *infra*.

⁶² Supreme Court of the State of New Hampshire, Administrative Rule 35, Guidelines for the Utilization by Lawyers of the Services of Legal Assistants under the New Hampshire Rules of Professional Conduct, Comment 1 to Rule 5.3, at <http://www.courts.state.nh.us/rules/scr/scr-35.htm> (last visited February 27, 2009).

⁶³ See *id.* Administrative Rule 35 refers its reader to Rule 5.3 of the New Hampshire Rules of Professional Conduct, which mimics Model Rule 5.3. See MODEL RULES, *supra* note , R. 5.3. Rule 35 then include its own "Comment," followed by a set of rules within that Comment. See New Hampshire Supreme Court Administrative Rules, *supra* note , at R. 35, cmt., R. 1. Rule 1 states:

Governing Paralegal Services of the State Bar of New Mexico state that “[a] paralegal shall not ... provide legal advice.”⁶⁴ Like the California and New Hampshire limitations, that prohibition, which appears to have the force of law in New Mexico,⁶⁵ may only apply to unsupervised, independent legal advice.⁶⁶

C. Authority from the Common Law

No court has held that lawyers cannot delegate certain categories of work to nonlawyers.⁶⁷ Many courts have disciplined lawyers for assisting in the unauthorized

It is the responsibility of the lawyer to take all steps reasonably necessary to ensure that a legal assistant for whose work the lawyer is responsible does not provide legal advice or otherwise engage in the unauthorized practice of law; provided, however, that with adequate lawyer supervision the legal assistant may provide information concerning legal matters and otherwise act as permitted under these rules.

The word “otherwise” in the phrase “does not provide legal advice or otherwise engage in the unauthorized practice of law” implies that this rule is aimed at preventing nonlawyers from providing their own, unsupervised advice, and therefore engaging in the practice of law. The final clause, explicitly allowing nonlawyers to communicate legal information (which one infers can include “advice”) to a client, supports strongly the reading that a nonlawyer, if supervised by a lawyer and not acting independently, may offer legal advice to a client.

⁶⁴ State Bar of New Mexico, Rules Governing Paralegal Services, Rule 20-103, at <http://www.nmbar.org/AboutSBNM/ParalegalDivision/PDrulesgovparalegalservices.html> (last visited February 28, 2009).

⁶⁵ The State Bar of New Mexico is an integrated bar with powers delegated from the Supreme Court of New Mexico. The Board of Bar Commissioners of the State Bar is a “bod[y] of the judicial department” New Mexico Statutes 1978, 36-2-9.1 (1979). I infer from that statute that the rules governing the legal profession issued by the State Bar are enforceable. An “integrated bar association” is an “association of attorneys in which membership and dues are required as a condition of practicing law in a State.” *Keller v. State Bar of California*, 496 U.S. 1, 3 (1990). For a discussion of integrated bar associations, *see, e.g.* Elizabeth Chambliss & Bruce A. Green, *Some Realism about Bar Associations*, 57 DEPAUL L. REV. 425 (2008); Bradley A. Smith, *The Limits of Compulsory Professionalism: How the Unified Bar Harms the Legal Profession*, 22 FLA. ST. U.L. REV. 35 (1994).

⁶⁶ *See* State Bar of New Mexico, Rules Governing Paralegal Services, *supra* note , at Rule 20-103, Committee Commentary, which explains the rules “no legal advice” provision as follows:

Some activities which would involve the unauthorized practice of law if undertaken by the paralegal include: (a) independently recommending a course of conduct or a particular action to a client; (b) evaluating for or speculating with a client on the probable outcome of litigation, negotiations or other proposed action; (c) independently outlining rights or obligations to a client; and (d) independently interpreting statutes, decisions or legal documents to a client.

The repeated reference to “independently” implies that the nonlawyer may communicate such information to a client if not done so independently, but instead done under the supervision and monitoring of a licensed lawyer. *See* text accompanying notes *infra*, for a discussion of the best understanding of a nonlawyer’s role in counseling clients.

⁶⁷ Consistent with this observation, the ABA Model Guidelines for Utilization of Paralegal Services, in its Comment to Guideline 3 (“A Lawyer May Not Delegate to a Paralegal: ... (3) Responsibility for a Legal Opinion Rendered to a Client”) does not cite a single court decision or statute to support its seeming ban on a nonlawyer offering legal advice. *See* MODEL PARALEGAL GUIDELINES, *supra* note , at 6-7 (citing certain ethics opinions and the court rules of New Hampshire (discussed above), Kentucky (cited by the Guidelines inappropriately, as Kentucky’s rule explicitly permits supervised nonlawyers to offer legal advice; *see*

practice of law or similar misconduct by improper delegation of legal tasks to nonlawyers,⁶⁸ in violation of the jurisdiction's version of Model Rules 5.3⁶⁹ or 5.5(a)⁷⁰ or some similar professional duty in that jurisdiction. Those courts sometimes include dicta indicating that a lawyer cannot delegate certain sensitive tasks, like the provision of legal advice, to a nonlawyer.⁷¹ But each reported case in which a lawyer found himself or herself in trouble as a result of the use of a nonlawyer involved some variation of a failure of supervision of the nonlawyer.⁷² No reported court decision has disciplined a lawyer or a nonlawyer for competent, supervised activity by the nonlawyer.

Courts do say on occasion that lawyers cannot delegate certain categories of work to nonlawyers. For instance, a Louisiana Supreme Court justice, in an opinion disbarring a lawyer for assisting in the unauthorized practice of law by inappropriate delegation of legal work to a nonlawyer, offered one of the narrowest conceptions of the scope of permissible delegation:

[W]e conclude ... that a lawyer may delegate various tasks to ... non-lawyers; that he or she may not, however, 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; that 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; and that 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.*⁷³

Kentucky Bar Association, Rules of the Supreme Court of Kentucky, S.C.R. 3.700, Sub-Rule 2, at http://www.kybar.org/documents/scr/scr3/scr_3.700.pdf (last visited February 28, 2009)) and New Mexico (discussed above)).

⁶⁸ See, e.g., *People v. Laden*, 893 P.2d 771 (Colo. 1995); *People v. Cassidy*, 884 P.2d 309 (Colo. 1994) (attorney suspended, inter alia, for aiding nonlawyers in preparing and marketing "living trust packages"); *The Florida Bar v. Abrams*, 919 So. 2d 425, 428 (Fla. 2006) (attorney suspended, inter alia, for assisting layperson in practice of law); *The Florida Bar v. Beach*, 675 So. 2d 106 (Fla. 1996) (attorney suspended for assisting layperson in practice of law); *In re Mopsik*, 902 So.2d 991 (La. 2005) (per curiam) (60-day suspension for failing to supervise a paralegal's work on a case, at least some of which work constituted the unauthorized practice of law); *In re Sledge*, 859 So.2d 671 (La. 2003) (per curiam) (lawyer disbarred, in part, for failure to supervise nonlawyer employees).

⁶⁹ MODEL RULES, *supra* note , at R. 5.3.

⁷⁰ MODEL RULES, *supra* note , at R. 5.5(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.").

⁷¹ See, e.g., *The Florida Bar v. Thomson*, 310 So.2d 300 (Fla.1975)("preparatory nature"); *Doe v. Condon*, 532 S.E.2d 879 (S.C. 2000)("answering legal questions would constitute the unauthorized practice of law"); *Matter of Easler*, 275 S.C. 400, 272 S.E.2d 32, 32 (1980)("limited to work of a preparatory nature").

⁷² See Jay M. Zitter, Annotation, *What Constitutes Unauthorized Practice of Law by Paralegal*, 109 A.L.R.5TH 275 (2003 and 2009 Supp.). A review of the many cases collected in this ALR annotation shows no instances where a properly supervised nonlawyer, or the supervising lawyer, faced any sanctions, regardless of the type of work performed by the nonlawyer.

⁷³ *Louisiana State Bar Ass'n v. Edwins*, 540 So.2d 294, 300 (La. 1989) (emphasis added).

This quote, intended perhaps to communicate a binding standard for Louisiana lawyers,⁷⁴ suggests a remarkably narrow scope of permissible delegation of authority from lawyers to nonlawyers. It includes the common prohibition against “giving legal advice to a client,” but proceeds to supplement that ban with an edict forbidding lawyers even from accepting the influence of the nonlawyers with whom they work. That order is as nonsensical as it is unenforceable. It is also, fortunately, dictum.

Like virtually all of the matters reviewed by state courts in this area, the facts of the matter before the Louisiana Supreme Court did not even come close to a lawyer having delegated supervised activity to a nonlawyer assistant, or accepting some insights from the nonlawyer. The story of *Louisiana State Bar Association v. Edwins* is one of grossly unauthorized practice by a nonlawyer with no supervision by a lawyer, and with a heady dose of malpractice thrown in. Rallie C. Edwins, a Baton Rouge lawyer, agreed to take over the business of one Rob Robertson, who had been “operat[ing] a free lance paralegal service in New Iberia[, Louisiana] under the name of Prepaid Legal Services, Inc.”⁷⁵ Edwins changed the name of Robertson’s office to his law firm name, but retained his own law office in Baton Rouge. Robertson then independently met a man in his New Iberia office who had a personal injury claim, told the man he was a lawyer, filed suit in Edwins’s name on the man’s behalf, and soon settled the case for a \$1000 net payment to the man, without obtaining the man’s informed consent or providing him any advance notice of the terms of the settlement.⁷⁶

Not surprisingly, the Louisiana Supreme Court justice was not amused. He found “an ongoing relationship in which Edwins allowed Robertson to perform legal tasks without supervision and to exercise professional judgment properly reserved only for attorneys.”⁷⁷ The justice imposed a sanction of disbarment.⁷⁸

The *Edwins* matter, while perhaps a bit extreme in the level of malfeasance and lack of supervision, is actually typical of the cases in which courts discuss the limits of nonlawyer assistance. The courts employ language indicating categorical and often narrow limits on a lawyer’s discretion to delegate activity to an assistant, but the facts of the matters being decided always demonstrate a flagrant absence of supervision and oversight. Ignoring the dicta, then, we can conclude confidently from the common law authority the following insight—lawyers may not, on penalty of assisting unauthorized practice, delegate unsupervised activity to nonlawyers. That is the only lesson available

⁷⁴ See *id.*, at 299-300 (“[T]he supreme authority resides in this court to define, by formal rules or by adjudication of cases, the acts or courses of conduct which constitute the practice of law. ... In defining the practice of law for purposes of interpreting DR 3-101(A) [the disciplinary rule applicable to this matter], this court may consider as persuasive, but not binding, pertinent legislative expressions.”).

⁷⁵ *Id.*, at 297. Under any relevant legal standard, a nonlawyer offering prepaid legal services would be engaged unlawfully in the unauthorized practice of law. See *Florida Bar v. Brumbaugh*, 355 So.2d 1186 (Fla. 1978).

⁷⁶ *Edwins*, *supra* note , at 297. A lawyer may not settle a client’s matter without obtaining the client’s informed consent. See MODEL RULES, *supra* note , at R. 1.2(a); RESTATEMENT, *supra* note , at §22(1); WOLFRAM, *supra* note , at .

⁷⁷ *Edwins*, *supra* note , at 301.

⁷⁸ *Id.*, at 302.

from the common law authority. The lesson tells us nothing about the limits of responsible, supervised delegation.

D. Insights from the Attorney-Client Privilege Cases

While no court has expressly declared (aside from *in dictum*) that a lawyer may not delegate certain categories of legal activity to her nonlawyer assistant, neither has any court expressly held that such delegation of the most commonly cited forbidden activity—providing legal advice to a client—is in fact proper. No reported decision appears, for instance, where a court has reviewed a disciplinary matter against a lawyer charged with assisting unauthorized practice of law by delegating a supervised legal counseling task to a nonlawyer, and then proceeded to find the delegation proper.⁷⁹ On that specific question within the realm of professional discipline, no discrete common law authority exists on either side of the matter. Several courts, though, have implicitly concluded that a lawyer’s delegation to a nonlawyer of the task of communicating legal advice is indeed proper, in cases reviewing claims of privilege.

In reviewing assertions of attorney-client privilege⁸⁰ in circumstances involving communications between clients and paralegals working for an attorney, several courts have concluded that legal advice communicated by a nonlawyer to a client is within the scope of the attorney-client privilege if the nonlawyer was acting under the supervision of the licensed lawyer.⁸¹ Consistent with that principle, courts have denied the claim of privilege after concluding that the nonlawyer was acting independent of the lawyer’s supervision, and not as an integral part of the lawyer’s provision of legal services.⁸² In both instances, the relevant consideration is whether the nonlawyer was offering independent advice unconnected to the lawyer’s work and supervision, or whether the nonlawyer’s advice was essentially “a conduit”⁸³ for the lawyer’s judgment.⁸⁴

⁷⁹ See note *supra* (noting the lessons from the most comprehensive annotation of nonlawyer unauthorized practice of law cases).

⁸⁰ The attorney-client privilege is a common law doctrine protecting communications between a lawyer and a client made for purposes of obtaining or providing legal assistance. See 8 WIGMORE ON EVIDENCE 554 §2292 (McNaughton ed. 1961); RESTATEMENT, *supra* note , at §§68-82.

⁸¹ See, e.g., *Stryker Corp. v. Intermedics Orthopedics, Inc.*, 145 F.R.D. 298, 305 n. 3 (E.D.N.Y.1992); *Foseco International Limited v. Fireline, Inc.*, 546 F.Supp. 22, 25 (N.D. Ohio 1982).

⁸² See, e.g., *HPD Laboratories, Inc. v. Clorox Co.*, 202 F.R.D. 410, (D.N.J., 2001)(paralegal offered her own independent counsel); *Byrnes v. Empire Blue Cross Blue Shield*, No. 98 Civ. 8520, 1999 WL 1006312, at *4 (S.D.N.Y. Nov.4, 1999) (noting that the privilege does not “cover communications between a non-attorney and a client that involve the conveyance of legal advice offered by the non-attorney ...”); *John Labatt Ltd. v. Molson Breweries*, 898 F.Supp. 471, 477 (E.D.Mich.1995) (finding privilege inapplicable because legal employee did not act as a conduit to and from counsel); *United States v. United Shoe Machinery Corp.*, 89 F.Supp. 357, 360-61 (D.Mass.1950) (finding that privilege did not apply to patent department employees rendering their own legal and business advice).

⁸³ See *HPD Laboratories, Inc. v. Clorox Co.*, 202 F.R.D. at ; *John Labatt Ltd. v. Molson Breweries*, 898 F.Supp. at 477 (employing the “conduit” concept).

⁸⁴ See *Occidental Chem. Corp. v. OHM Remediation Servs. Corp.*, 175 F.R.D. 431, 435 (W.D.N.Y.1997) (no privilege absent proof that non-attorney was hired to assist counsel); *Stryker Corp. v. Intermedics Orthopedics, Inc.*, 145 F.R.D. at 305 (“constructive employee” theory); *Nat’l Hockey League Players’ Assoc. v. Bettman*, 1994 WL 38130, at *12 (S.D.N.Y. Feb. 4, 1994)(same); *Foseco Intern, Ltd. v. Fireline, Inc.*, 546 F.Supp. 22 (N.D. Ohio 1982)(“direction and control”); *Hercules, Inc. v. Exxon Corp.*, 434

The courts addressing the privilege question accept that nonlawyers will meet with clients and discuss the law. As one federal District Court judge wrote, “There is nothing wrong with Clorox employees [the law firm’s clients] using Ms. Peeff [a law firm paralegal] as a legal resource”⁸⁵ If the legal information communicated by the nonlawyer represents her transmission of advice crafted with the lawyer’s supervision and under the lawyer’s responsibility, the privilege will apply, even if the attorney does not speak the words to the client.⁸⁶ By contrast, if the nonlawyer communicates her own independent and unapproved legal advice, the claim of privilege fails.⁸⁷

Of course, decisions interpreting the scope of the attorney-client privilege are not directly dispositive on the questions surrounding the unauthorized practice of law. They do, however, offer constructive support for the proposition that supervised nonlawyers may, under the right circumstances, provide legal advice to clients. The attorney-client privilege only applies to communications related to the provision of legal advice.⁸⁸ The case law, as we just saw, holds that a nonlawyer’s communications to a client about legal matters will fall within the scope of the privilege if the nonlawyer is supervised by a lawyer and is communicating to the client as part of a lawyer’s representation of the client. That common law authority refutes the broad claims from the advisory sources and court dicta that nonlawyers may not offer legal advice to a client. It also permits us to understand better the contextual nature of the ban on giving legal advice. That ban only makes sense when applied to entirely *independent* legal advice, unsupervised by a lawyer and reliant entirely on the skill and judgment of the nonlawyer. A prohibition on that activity is a sensible one, assuming again the validity of the unauthorized practice of law dogma.⁸⁹

F.Supp. 136, 146 (D.Del.1977)(“working at the direction of and under the supervision of an attorney”); Burlington Industr. v. Exxon Corp., 65 F.R.D. 26, 39 (D.Md.1974) (noting that documents prepared at lawyer’s direction may be protected); Congoleum Industries, Inc. v. G.A.F. Corp., 49 F.R.D. 82 (E.D.Pa.1969), *aff’d*, 478 F.2d 1398 (3 Cir. 1973) (same).

Cf. United States v. Nobles, 422 U.S. 225, 238-39 (1975)(work product doctrine “protect[s] materials prepared by agents for the attorney”); United States v. Adlman, 68 F.3d 1495, 1499 (2d Cir.1995) (recognizing that “the privilege ... can extend to shield communications to others when the purpose of the communication is to assist the attorney in rendering advice to the client”); United States v. Kovel, 296 F.2d 918 (2d Cir.1961) (same); 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S EVIDENCE ¶ 503(a)(3)[01] at 503-26 to 27 (1990)(privilege protects communications to attorney’s agents).

⁸⁵ HPD Laboratories, Inc. v. Clorox Co., 202 F.R.D. at 415.

⁸⁶ *Id.* at 416 (privilege applies if the nonlawyers “pass on that attorney’s advice to the client,” citing John Labatt Ltd., 898 F.Supp. at 477, or “advice formulated ‘under the supervision and at the direction of an attorney,’” quoting Byrnes, 1999 WL 1006312 at *4).

⁸⁷ “Courts do not, however, safeguard advice that paralegals develop and disseminate on their own. Cf. United States v. United Shoe Machinery Corp., 89 F.Supp. 357, 360-61 (D.Mass.1950) (finding that privilege did not apply to patent department employees that rendered their own legal and business advice).” HPD Laboratories, Inc. v. Clorox Co., 202 F.R.D. at 416.

⁸⁸ See United States v. Ackert, 169 F.3d 136, 139 (2d Cir. 1999)(“the privilege protects communications between a client and an attorney, not communications that prove important to an attorney’s legal advice to a client.”); NATHAN M. CRYSTAL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION 265-67 (4th ed. 2008).

⁸⁹ See text accompanying note – *supra*.

III. A CONCEPTUAL FRAMEWORK FOR UNDERSTANDING DELEGATION TO NONLAWYERS

A. Introduction to and Overview of the Framework

Up to this point we have seen that much of the advisory authority from bar associations and professional associations warns attorneys about categorical limits on what tasks they may permissibly and lawfully delegate to the nonlawyers with whom they work, and those authorities most often declare that an attorney may not delegate to a nonlawyer the responsibility of giving legal advice. Occasionally, those authorities also include negotiation as a non-delegable task.⁹⁰ We have also seen, though, that there is no binding legal authority establishing such a categorical proscription. No lawyer has ever been disciplined or charged criminally, and no nonlawyer has ever been charged criminally, for supervised, responsible work performed by a nonlawyer as part of a lawyer's representation. We may conclude, then, that the state of the law in this area is, at best, uncertain and confusing.

In this part I respond to that uncertainty and confusion. I propose a conceptual framework for guiding lawyers in their delegation decisions. The framework I will describe is fully consistent with the slim available substantive law, and in fact is consistent as well with most of the advisory authority, once interpreted through a lens of practical lawyering judgment. The conceptual framework I suggest understands the lawyer's delegation of work to a nonlawyer as essentially a question of risk management, appraised by the lawyer's practical wisdom and subject to her client's informed consent. Understood as such, a practicing attorney could accept comfortably the thesis introduced at the beginning of this Article—a thesis that rejects categorical exclusions in favor of a discretionary standard governed by professional competence and fiduciary duty of care considerations.

To develop this conceptual framework, I first describe briefly the roles that risk management and client-centered decisionmaking play in ordinary lawyering practice, and connect those normative constructs to the prevailing understanding of unauthorized practice dogma. I then build upon that understanding to evaluate the activity categories which the authorities reviewed above consistently recognize as properly delegable to nonlawyers—document drafting, legal research, and fact investigation and client interviewing. Each such permissive activity category, we shall see, obtains its justification because of a perceived, underlying risk/benefit assessment supported by an assumed or explicit client buy-in. Having unpacked those permissive categories, we then examine one purported forbidden activity, legal counseling. We shall see that an

⁹⁰ *See, e.g.*, Fla. Ethics Op. 74-35 (negotiating with insurance adjusters “always involve[s] the exercise of the lawyer's professional judgment”); THE FLORIDA BAR, FLORIDA ETHICS GUIDE FOR PARALEGALS AND ATTORNEYS WHO UTILIZE PARALEGALS, Part III (2006) (“A nonlawyer who engages in negotiations risks committing [unauthorized practice of law]”); *cf.* The Florida Bar v. Neiman, 816 So.2d 587 (Fla. 2002)(nonlawyer improperly negotiated, but no supervision); State ex rel. Oregon State Bar v. Lenske, 584 P.2d 759, 764 (1978) (implying negotiation would be improper for a nonlawyer, but no unauthorized practice of law because of presence of lawyer).

application of the same risk management and informed consent heuristics, with an appreciation of the unauthorized practice rationales, would not categorically deny a lawyer the opportunity to delegate a counseling task to a properly supervised and talented nonlawyer if in the lawyer's judgment the result would be competent and efficient legal work for which the lawyer remains fully responsible.

B. Risk Assessment, Informed Consent, and Unauthorized Practice Rationales

In this Subpart I describe briefly three readily-accepted lawyering conceptions, all of which are essential to an understanding of the subject of delegation to nonlawyers.

1) *Risk Assessment and Practical Judgment*

Competent lawyering always, and inevitably, involves responsible assessment of risk, and appreciation of the cost/benefit probabilities inherent in any course of legal activity on a client's behalf.⁹¹ A lawyer representing a client must always exercise her professional judgment to discern when she has done enough legal work, what form that legal work will take, and when to proceed to the next step in her plan.⁹² Except in the most banal or routine of matters,⁹³ a lawyer can never be certain that her lawyering activity will achieve the result she seeks, but she uses her experience and her wisdom to proceed in a way that maximizes the likelihood of reaching her goal.⁹⁴ Exercising sound

⁹¹ See, e.g., GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* 202-304 (1978)(one of the earliest, and one of the best, explorations of strategic planning in lawyering); AMERICAN BAR ASSOCIATION, SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, *LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP* (1992) 141-150 [hereinafter *THE MACCRATE REPORT*] (discussing “problem solving”); Alexander Scherr, *Lawyers and Decisions: A Model of Practical Judgment*, 47 *VILL. L. REV.* 161 (2002)(connecting lawyering judgment to understanding risk considerations).

⁹² See, e.g., ROY STUCKEY ET AL., *BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP* 149 (2007)(“practical wisdom”); WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 115-20 (2007) (“wisdom of practice”).

⁹³ One can imagine purely routine, technical legal matters where a lawyer need not exercise judgment in order to accomplish a desired result for a client. As both the legal realists and the critical legal studies scholars have taught us, the legal process is seldom that mechanical. See Scherr, *supra* note , at (developing the connection between lawyering judgment and the indeterminacy recognized by realists and critical legal studies adherents). For a discussion of realists and CLS thinkers, see Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 *J. LEGAL EDUC.* 518, 559 (1986) (rejecting argument “that the only permissible course of action for a judge confronting a conflict between the law and how he wants to come out is always to follow the law”); Benjamin C. Zipursky, *Practical Positivism Versus Practical Perfectionism: The Hart-Fuller Debate at Fifty*, 83 *N.Y.U. L. REV.* 1170 (2008)(reviewing the history).

⁹⁴ See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 16 (1993)(developing the notion of practical wisdom, with in Aristotle's teachings, as the soul of good lawyering); Mark Neal Aaronson, *We Ask You to Consider: Learning About Practical Judgment in Lawyering*, 4 *CLINICAL L. REV.* 247, 252-56 (1998)(practical judgment); David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 *GEO. J. LEGAL ETHICS* 31, 58-64 (1995)(same).

lawyering judgment—with appreciation for and careful calculation of the available risks—is the hallmark of wise and competent lawyering.⁹⁵

Consider the simplest of examples. Imagine that a client, Barbara, has retained a lawyer, Shawn, to represent her in a dispute with a contractor, Jeffrey, who has abandoned and not completed the agreed-upon work on her kitchen for which Barbara has paid him. In this straightforward breach of contract matter, Shawn might engage in the following tasks: He would interview Barbara, perform some legal research, develop a strategy, contact Jeffrey informally and then formally through a demand letter, file a lawsuit in the state trial court, perform discovery and file pretrial motions, negotiate with Jeffrey's lawyer, counsel Barbara about settlement possibilities, and conduct the trial. For any one of the tasks just identified, Shawn must make calculated predictions and assessments about how to proceed, using his developed lawyering judgments. In his interview, for instance, Shawn might spend an hour with Barbara, asking both open-ended questions and narrow, focused inquiries.⁹⁶ He will end the interview without knowing for certain whether he has learned everything relevant to the matter at hand. He could interview Barbara for days, asking every question imaginable, but he will not do so, even if doing so is objectively safer for his information-gathering goals.⁹⁷ Similarly, he will conduct some research, but after some effort he will stop that task as well, believing (but without complete certainty) that he has an adequate grasp of the substantive law. We could repeat this analysis for any one of the tasks on the above list.⁹⁸

The point is that lawyers develop professional, practical judgment which permits them to assess and manage risks and uncertainty.⁹⁹ Clients hire lawyers in large part for this talent. But, at the same time, lawyers facing known risks cannot presume that their

⁹⁵ See Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 814 (1989)(pragmatism, the intellectual companion to realism, “is the implicit working theory of most good lawyers”); Scherr, *supra* note , at .

⁹⁶ See DAVID A. BINDER, PAUL BERGMAN, SUSAN C. PRICE & PAUL R. TREMBLAY, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (2d ed. 2004)[hereafter *LAWYERS AS COUNSELORS*](describing methods of interviewing).

⁹⁷ See KENNEY F. HEGLAND, *TRIAL AND PRACTICE SKILLS IN A NUTSHELL* 32-33 (3rd ed. 2002) (explaining the tendency to “fill” when hearing incomplete stories).

⁹⁸ Consider one further example of this point. Shawn might file a motion to compel discovery after Jeffrey's lawyer objects to a request for production of documents. See, e.g., FED. R. CIV. P. 37 (the federal rule permitting such a motion and imposing sanctions for failure to respond to proper discovery). In his choice to file the motion, Shawn engages in a risk/benefit assessment—will the tactic succeed at a reasonable cost? Even his drafting of the motion involves calculation of risk. He could file a two page motion or a four page motion (or, conceivably, a 250 page motion). He may make certain arguments but not others. He will make those choices by assessing, usually implicitly, the costs and benefits of the available choices. See THOMAS A. MAUET, *PRETRIAL* 293, §6.15 (5th ed. 2002) (“always consider *not* moving to compel discovery”)(emphasis in original).

⁹⁹ See *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* (Amos Tversky, Paul Slovic & Daniel Kahneman eds. 1982)[hereafter *JUDGMENT UNDER UNCERTAINTY*]; Susan Bryant & Elliot Milstein, *Rounds: A “Signature Pedagogy” for Clinical Education?*, 14 CLINICAL L. REV. 195, 208 (2007) (“professional work involves exercising practical judgments under conditions of uncertainty”).

clients' risk aversion is the same as theirs.¹⁰⁰ For this reason, the exercise of lawyering judgment is constrained by a powerful factor—the buy-in from the client. To that topic we now turn.

2) *Informed Consent*

Lawyers are agents; their clients, principals. Lawyers act for, and at the behest of, their clients.¹⁰¹ While the lawyer develops the intricacies of the strategies and provides most of the expertise in lawyering practice, the client ultimately decides the fate of the collaborative work, and the course of the representation.¹⁰² This statement is both a truism and an overstatement. In light of the preceding discussion about risk management,¹⁰³ it is impossible for a lawyer to include her client in all of the cost/benefit decisions she must make on a daily basis.¹⁰⁴ But on matters which may be identified as representing important risk-driven junctures in a matter, the lawyer ought to ensure that the client decides, because it is the client's comfort with risk that matters, not the lawyer's.¹⁰⁵ This recognition is the essence of client-centeredness.¹⁰⁶

Lawyers, then, may accept whatever level of risk-taking or risk-aversion the client chooses. Together, the lawyer and client may collaborate about the measures the lawyer will take to accomplish the client's goals, including the cost/benefit assessment of delegation of some important tasks to a nonlawyer. The substantive law of lawyering does not limit the lawyer and her client in that collaborative enterprise except in two ways. First, the law prohibits a lawyer from counseling her client to engage in illegal conduct, even if the client is willing to take the risk of avoiding detection.¹⁰⁷ Second, the law prohibits a client, even a sophisticated and fully informed client, to accept the risk of

¹⁰⁰ See *LAWYERS AS COUNSELORS*, *supra* note , at 7, 296 (suggesting lawyers explore their client's risk aversion scales). See also JOHN S. HAMMOND, RALPH L. KEENEY & HOWARD RAIFFA, *SMART CHOICES: A PRACTICAL GUIDE TO MAKING BETTER DECISIONS* (1999); THOMAS GILOVICH, *HOW WE KNOW WHAT ISN'T SO: THE FALLIBILITY OF HUMAN REASON IN EVERYDAY LIFE* (1991).

¹⁰¹ See *RESTATEMENT*, *supra* note , at §16, cmt. b ("A lawyer is a fiduciary").

¹⁰² *MODEL RULES*, *supra* note , at R. 1.2; *RESTATEMENT*, *supra* note , at §§21, 22. See William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 MD. L. REV. 213, 225 (1991)(examining the usual assumptions about client control and autonomy).

¹⁰³ See text accompanying note *supra*.

¹⁰⁴ See *LAWYERS AS COUNSELORS*, *supra* note , at 275-80; Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 43 (1979)(substantive decisions must be shared with client).

¹⁰⁵ *LAWYERS AS COUNSELORS*, *supra* note , at 296; see also ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, *INTERVIEWING COUNSELING AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION* 26-27 (1990)(citing CARL ROGERS, *CLIENT-CENTERED THERAPY* (1951)); ROBERT F. COCHRAN, JOHN M.A. DIPIPPA & MARTHA M. PETERS, *THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING* 203-21 (1999); Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990).

¹⁰⁶ See *LAWYERS AS COUNSELORS*, *supra* note , at 7-8; Dinerstein, *supra* note , at . For an insightful application of that concept in the context of representation of immigrants, see Christine N. Cimini, *Ask, Don't Tell: Ethical Issues Surrounding Undocumented Workers' Status in Employment Litigation*, 61 STAN. L. REV. 355, 409 (2008).

¹⁰⁷ See *MODEL RULES*, *supra* note , at R. 1.2(d); Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545 (1993).

proceeding in her legal case with the representation of a nonlawyer alone.¹⁰⁸ That paternalistic¹⁰⁹ stance forms the basis for the unauthorized practice of law dogma.

3) *Unauthorized Practice Rationales*

The final subject we must review briefly to complete the backdrop for the nonlawyer delegation framework is that of unauthorized practice of law. The unauthorized practice dogma is premised on a purely prophylactic sentiment—that consumers and client will receive the best legal services and the best protection if their choice for representation is limited, by law, to members of the bar.¹¹⁰ Its adherents would readily accept that the unauthorized practice dogma is overbroad, as all prophylactic provisions are.¹¹¹ In some instances it will be true that some nonlawyer would know far better than some lawyer how to proceed to obtain the best results for a client.¹¹² In general, though, lawyers will better serve clients, and because it will be difficult or even impossible to ascertain which nonlawyers might be better qualified than a given lawyer, the policy underlying unauthorized practice dogma insists upon its dogmatic, bright line test to assure, as a reliable proposition, the best service to clients.¹¹³

Two other realities of the unauthorized practice dogma deserve mention for our purposes. First, it is obvious that the unauthorized practice laws favor lawyers' professional and business interests, and are supported most strongly by the organized bar.¹¹⁴ It is an anticompetitive social policy, one that tends to inflate lawyers' incomes.¹¹⁵ Second, unauthorized practice laws manifest a deep trust in lawyers and their wise judgments about their own competence. The dogma's lack of nuance—its explicit assumption that, as a rule, any lawyer will be a better representative of a client than any nonlawyer, regardless of the latter's expertise and experience—imposes upon lawyers a fiduciary duty to recognize when they are not competent to accept representation of a client. That manifestation of trust ought to play an important role in understanding the proper scope of a lawyer's delegation discretion.

¹⁰⁸ See CRYSTAL, *supra* note , at 480 (summarizing the unauthorized practice dogma's argument that "lay people are unable to evaluate the competency of nonlawyers").

¹⁰⁹ See Rhode, *Policing the Professional Monopoly*, *supra* note , at 98-99 (unauthorized practice as "paternalism"); Jonathan Rose, *Unauthorized Practice of Law in Arizona: A Legal and Political Problem that Won't Go Away*, 34 ARIZ. ST. L.J. 585, 600 (2002) (policy is "paternal");

¹¹⁰ CRYSTAL, *supra* note , at 480; RHODE, ACCESS TO JUSTICE, *supra* note , at .

¹¹¹ The unauthorized practice dogma is an example of the use of a rule, with clear dividing lines, instead of a standard, with discretion available. The rules/standards dichotomy is a long-standing one in legal regimes. See, e.g., Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 571 (1992); Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985).

¹¹² See Thomas R. Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?* 40 HASTINGS L.J. 577, 621 (1989)(unauthorized practice rules as "prophylactic"); Judith L. Maute, *Pre-Paid and Group Legal Services: Thirty Years After the Storm*, 70 FORDHAM L. REV. 915, 929 (2001) (noting unauthorized practice doctrine as "prophylactic").

¹¹³ Andrews, *supra* note , at ; Margulies, *supra* note , at ; Maute, *supra* note , at .

¹¹⁴ See Rhode, *Professionalism in Perspective*, *supra* note , at 711-12; WOLFRAM, *supra* note , at 833-34.

¹¹⁵ See Nathan M. Crystal, *Core Values: False and True*, 70 FORDHAM L. REV. 747, 764-65 (2001)(noting that the ABA has ignored the suggestions of its Commission on Nonlawyer Practice); Deborah Rhode, *The Delivery of Legal Services by Non-lawyers*, 4 GEO. J. LEGAL ETHICS 209, 232-33 (1990).

C. The Nonlawyer Delegation Framework as an Alchemy of Risk Management, Informed Consent, and Unauthorized Practice Prophylaxis

1) *The Alchemy*

Consideration of the three factors I have just examined establishes that lawyers ought to have discretion to delegate to nonlawyers any tasks which, in the lawyer's professional judgment and subject to the informed consent of the client, will provide the best and most efficient legal services to the client. Any substantive law constraint depriving a lawyer of the discretion to delegate certain categories of activity would be inconsistent with the practice philosophies accepted within the legal profession. The lawyer discretion model builds upon the trust that lawyers will recognize competence gaps and will manage risk responsibly, and only if the lawyer's client has bought in to any significant risk-taking. For reasons of economy and efficiency, a client is likely to buy in if the lawyer oversees the delegation and vouches for its soundness.

A lawyer who elects to use a nonlawyer assistant to complete some legal tasks frequently does so for the benefit of the client. Any task assigned to a nonlawyer assistant could, of course, be performed by the lawyer, but at a higher price. The use of nonlawyers provides a more efficient delivery of legal services at a lower price than if the lawyer acted alone;¹¹⁶ the resort to the use of nonlawyer services is thus financially adverse to the lawyer's interests. A client might prefer that arrangement for the same reasons that a client might prefer to hire a lay advocate instead of a lawyer in order to save money;¹¹⁷ in this instance, contrary to the request for a lay advocate, the law permits a client to make that choice, because the client has a lawyer available to monitor the work. The lawyer will only choose to employ the nonlawyer assistance when it makes sense for the client's case, given the client's economic needs and the client's risk aversion.¹¹⁸ A client will only agree to nonlawyer assistance when he trusts the lawyer's

¹¹⁶ Of course, a lawyer cannot charge a client her hourly rate for work performed by a nonlawyer (although some have been caught doing so). See Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659 (1990); Douglas R. Richmond, *For a Few Dollars More: The Perplexing Problems of Unethical Billing Practices by Lawyers*, 60 S.C. L. REV. 63 (2008); William G. Ross, *The Ethics of Hourly Billing by Attorneys*, 44 RUTGERS L. REV. 1 (1991).

¹¹⁷ See Rhode, *Policing the Professional Monopoly*, *supra* note , at .

¹¹⁸ In some instances, a lawyer may benefit financially by her use of the nonlawyer's assistance, if she is offering services at a flat rate and not through a billable hour arrangement. For a sampling of the critique of hourly billing, see, e.g., Susan Saab Fortney, *Professional Challenges in Large Firm Practices Article The Billable Hours Derby: Empirical Data On The Problems And Pressure Points*, 33 FORDHAM URB. L.J. 171 (2005); Lawrence J. Fox, *End Billable Hour Goals ... Now*, 17 No. 3 PROF. LAW. 1 (2006); Lerman, *supra* note , at ; Richmond, *supra* note , at ; Ross, *supra* note , at . In those settings, the lawyer and her firm benefit if much of the work is performed by lower-priced nonlawyers. That apparent conflict of interest is mitigated by two factors, however. First, a lawyer ought to obtain the informed consent of the client before delegating any substantial tasks to a nonlawyer. See LAWYERS AS COUNSELORS, *supra* note , at 275-80 (arguing that clients control all substantive decisions in the representation); Spiegel, *supra* note , at 43 (same). Second, because the lawyer remains responsible for the ultimate product and must achieve competent work, the lawyer has little or no incentive to exploit any seeming conflict by employing shoddy, cheap labor.

judgment, accepts the risk, and welcomes the cost savings. The unauthorized practice dogma has no complaint, both because the nonlawyer's work will be evaluated and monitored in accordance with the lawyer's professional judgment (which the dogma trusts), and because the scheme does not present anticompetitive threats to the legal profession.

We thus envision the following confluence: A lawyer who, against her economic interests perhaps, opts to generate a more efficient work product by the judicious delegation of tasks to a competent nonlawyer; and a client who, understanding the fiduciary responsibility of his lawyer to protect his interests and desirous to obtain the most inexpensively responsible legal services from the lawyer and her firm, accepts his lawyer's delegation of tasks to the supervised nonlawyer; and the legal profession which, trusting the lawyer's judgment and fearing little anticompetitive threat from the use of nonlawyers, sees no basis to ban the concept of delegation. Those collective actors with those overlapping interests ought to support a lawyer's delegation authority and discretion. Those actors would be challenged to justify a categorical ban preventing a lawyer from choosing to delegate certain selected tasks.

2) *A Taxonomy: Drafting, Legal Research, Fact Investigation, Legal Counseling*

A nonlawyer employed by a lawyer to assist in her practice performs important tasks which the lawyer, because of her delegation to the nonlawyer, will not perform herself. I refer to the tasks as *important* because they are essentially that—without those tasks, the lawyering would not achieve its ends, or would be incomplete.¹¹⁹ Someone must perform those tasks; in the settings we are exploring, it is the nonlawyer, and not the lawyer, who performs them. The lawyer of course must *supervise* the performance of the tasks by the nonlawyer, but supervision cannot mean, and does not mean, that she must accompany the nonlawyer and observe his performance of the tasks. No reasonable understanding of supervision contemplates that close monitoring, and any such proposal would be an absurd understanding of the use of legal assistants. Nor must the lawyer repeat the work of the nonlawyer to ensure its accuracy or soundness, for the same obvious reasons.

Supervision, then, will mean something different from constant monitoring or replicating the nonlawyer's work. If supervision has any substantive meaning, it must mean that the lawyer, who is the only person on the team who may orchestrate the lawyering work in its final form, must be confident, within the realm of reason,¹²⁰ that

¹¹⁹ See, e.g., *Pincay v. Andrews*, 351 F.3d 947 (9th Cir. 2003), reh'g en banc granted, opinion vacated, 367 F.3d 1087 (9th Cir. 2004) (“the delegation of [attending to court deadlines] to specialized, well-educated non-lawyers may well ensure greater accuracy in meeting deadlines than a practice of having each lawyer in a large firm calculate each filing deadline anew”).

¹²⁰ The use of non-lawyers within law firms invites inevitable risk, risk that the practice schemes accept as a worthwhile compromise, if only because of the cost effectiveness of using non-lawyers instead of lawyers for certain tasks. See, e.g., *In re Opinion No. 24 of Committee on Unauthorized Practice of Law*, 607 A.2d 962, 966 (N.J. 1992) (noting the importance of paralegal use in saving clients money).

the nonlawyer has gotten the task right. Consider four examples of tasks which a lawyer might choose to delegate to a nonlawyer: drafting motions; performing legal research; performing factual research; and advising clients about the state of the law and the options available to them. As we have seen above,¹²¹ the advisory authority often sanctions a lawyer's delegation of the first of these three, but often prohibits a lawyer from delegating the last, the offering of legal advice. A comparison of these four tasks will help us to understand the function, and the limitations, of the concept of "supervision." It will also show us that acceptance of the propriety of the first three activities' delegation requires acceptance of the propriety of the last activity's delegation.

a) Document drafting

The first example, that of drafting a legal document such as a pleading, might serve as an easy beginning example. It is a task categorically permitted to be delegated to a nonlawyer by virtually all authorities,¹²² and its acceptability may be understood by reference to the risk assessment heuristic. Consider, then, a lawyer who delegates to a nonlawyer the task of drafting a standard motion using templates available within the law firm. The lawyer will be able to evaluate with a high degree of confidence whether the resulting product reads properly and includes the language, the clarity, and the elements necessary for the motion to achieve its purpose. The lawyer likely saves time by delegating the task to a nonlawyer, but the quality of the resulting work may be perfectly evaluated by the lawyer. The risk management by the lawyer is cabined and easily assessed.

For other documents, however, the risks of delegation may be more pronounced or unclear. A lawyer who delegates to a nonlawyer to choose among a selection of sample templates, or perhaps to create a first draft of a pleading without employing any template, may not be able to assess with the same level of confidence whether the resulting document achieves its purpose as well as if the lawyer had drafted the pleading herself. Nevertheless, some lawyers might ask a nonlawyer to create such a document in an exercise of her lawyering judgment, to save time for the lawyer and money for the client. The lawyer will accept some small possibility that the resulting work will fail to achieve its purposes, but that risk assumption is an ongoing enterprise for the lawyer.¹²³

¹²¹ See text accompanying note *supra*.

¹²² See, e.g., Ct. Bar. Ass'n., *Guidelines for Lawyers Who Employ or Retain Legal Assistants*, at <http://www.ctbar.org/article/view/197/1/57> (last visited March 7, 2009) [hereinafter "Ct. Bar. Guidelines"] ("drafting legal documents" permitted); S.C. Bar Ethics Adv. Comm., Op. 02-12 (2002) ("composition of legal documents"); Utah St. Bar Ethics Advisory Op. Comm., Op. 99-02 (1999) ("nonlawyers may perform a wide array of services, including ... drafting documents or pleadings"). No court has ever suggested that nonlawyers may not draft documents, except when the drafting occurs without lawyer oversight. See, e.g., *United Sates v. Hardy*, 681 F.Supp. 1326 (N.D.Ill.1988) (drafting simple documents that require some degree of legal knowledge is practice of law); *Lynch v. Cannatella*, 122 F.R.D. 195, 198-99 (E.D.La.1987) (attorney could not allow a legal secretary to prepare, sign, and file an amended complaint), *aff'd*, 860 F.2d 651 (5th Cir.1988).

¹²³ Drafting tasks are the easiest assignments to justify using the risk assessment benchmark, because the lawyer supervising the assignment sees the complete product generated by the nonlawyer. The risks still exist, though, in at least two ways. First, by not drafting the pleading herself, the lawyer's thought process has changed, and she may miss in reviewing a completed document some considerations she would have

b) *Legal research*

Contrast the motion drafting task with the next example—performing legal research, another task categorically permitted by the advisory authorities.¹²⁴ For legal research, the lawyer’s confidence in the resulting work product may be high (the results can fit comfortably within the lawyer’s understanding of the substantive law as she has understood it), but it simply cannot be as high as in the first motion example above. If the lawyer’s case requires legal research, a task for which the client will be charged and which the lawyering responsibilities require, the necessary assumption is that the lawyer does not know for sure what the law is without looking it up. Few lawyers know the law perfectly without looking it up, and even those few do so only in narrow and frequently repeated contexts.¹²⁵ When a nonlawyer performs legal research, then, the *supervision* by the lawyer means that the lawyer uses her best legal judgment—the legal judgment she has acquired by her membership in the profession and her practice experience—that the results of the research as reported by the nonlawyer are sufficiently reliable that the lawyer may use the results in moving ahead with her strategic development, advocacy, and negotiation. Like with the drafting task, the ultimate question for the lawyer is whether the quality of the work product is sufficiently high to permit her to use it in her ongoing work.

c) *Fact investigation*

The next example—factual research—demonstrates a potentially higher level of risk, but risk whose magnitude the lawyer might reasonably assess and account for in her work. Once again, performing fact investigation, and interviewing clients, are responsibilities regularly understood as permissible activities for a lawyer to delegate to her nonlawyer colleagues.¹²⁶ For fact investigation, the lawyer’s confidence in the resulting product must necessarily be less than in either of the first two examples just

discerned if she engaged in the creative drafting herself. See Linda L. Berger, *Applying the New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context*, 49 J. LEGAL EDUC. 155 (1999) (“writing is a process for constructing thought”); Philip C. Kissam, *Thinking (By Writing) About Legal Writing*, 40 VAND. L. REV. 135 (1987); Teresa G. J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35, 45 (1994) (“writing is an integral part of thinking and cognitive development”). Second, drafting is essentially entwined with legal research; the drafter creates with a legal theory in mind, and ensures that the pleading sufficiently satisfies the elements of that theory. See MARILYN J. BERGER ET AL., *PRETRIAL ADVOCACY: PLANNING, ANALYSIS, AND STRATEGY* 161 (2007) (“strategic pleading” as a “goal-oriented approach”). Since legal research is a riskier endeavor, as we see immediately below, drafting shares some of the peril accompanying the delegation of research.

¹²⁴ See, e.g., Ky. Bar Ass’n, Ethics Op. KBA E-12 (1976) (“legal research” permitted); Utah St. Bar Ethics Advisory Op. Comm., Op. 99-02 (1999) (“nonlawyers may perform a wide array of services, including ... conducting legal research”); Matter of Easler, 272 S.E.2d 32, 32 (1980) (“legal research” permitted).

¹²⁵ Some lawyers qualify as legal specialists, usually under a state certification scheme. For a discussion of the specialization issue, see RHODE & LUBAN, *supra* note , at 795-96; see also Peel v. Attorney Reg. & Disc. Comm., 496 U.S. 91 (1990) (lawyer had first amendment right to advertise as specialist).

¹²⁶ See, e.g., Matter of Easler, 272 S.E.2d 32, 32 (1980). Indeed, some texts train nonlawyers how to engage in fact investigation. See, e.g., ELLEN J. WOLTER ET AL., *FACTFINDING ON A SHOESTRING FOR THE PARALEGAL: INVESTIGATIVE TECHNIQUES FOR GATHERING INFORMATION* (Mass. CLE 1996).

described. While some of the nonlawyer's factual research may produce uncontrovertibly reliable results—a witness statement notarized by the witness, for instance, or a certified copy of a publicly recorded document¹²⁷—not all factual research permitted to be performed by nonlawyers would satisfy that description. The lawyer might reasonably rely, using her legal and professional judgment, on the reports of her investigators and other nonlawyer staff about events, accounts, observations, medical histories, etc., when she develops her strategy and completes her final lawyering activity.¹²⁸

Like with each example discussed here, the lawyer's performance herself of the tasks would decrease the risk of distortion or error or sloppiness, but her performance would increase, and perhaps dramatically so, the cost of her services. The lawyer, her clients, and the legal profession have opted to accept this minimal additional risk in return for the benefits of cost saving and efficiency. They do so, it is safe to assume, because the resulting risk from the delegation is extremely small, because of the oversight and supervision of the experienced lawyer with judgment to guide her assessments.¹²⁹

In each of the examples described so far (drafting, legal research, and fact investigation), the nonlawyer's work *could possibly be wrong*. The nonlawyer's drafting of a motion might omit a critical element of the motion's argument, leaving it fatally flawed.¹³⁰ The nonlawyer's legal research could overlook a critical new development

¹²⁷ Even in these most safe examples, the lawyer's delegation of a task to a nonlawyer involves an added element of risk, since the lawyer has not obtained the resulting papers herself. The nonlawyer may have forged the witness document, or the witness may not be who he claims to be. Such risks are extremely unlikely, of course, but nevertheless represent an inevitable element of delegation, and that, indeed, is the point of this entire discussion.

¹²⁸ A lawyer who understands that she has authority to assign, say, a document preparation task to a nonlawyer must nevertheless exercise judgment and discretion about what documents to assign the nonlawyer to prepare, given the importance, complexity and subtlety of the document and the skill and experience of the nonlawyer. So, for example, a lawyer may ask an experienced real estate paralegal to prepare a HUD-1 settlement statement as part of an uncomplicated residential real estate closing, understanding that the experienced paralegal is very likely to fill the form out correctly. *See, e.g., Committees of the Florida Bar*, 80-JUN Fla. B.J. 30 (2006) (“many real estate practitioners rely on paralegals and computer software to complete certain real estate documents and settlement statements”). The same lawyer ought not, and would not, ask a volunteer college student intern to draft a Petition for Certiorari to the United States Supreme Court on a deeply complicated antitrust dispute. The concept of “document preparation,” therefore, does not offer any helpful answer to the question about the propriety of assignment of tasks to a nonlawyer. The only true consideration is an assessment of the risks and benefits to the client of the assignment, and the combined likelihood of the nonlawyer being wrong and the case or matter suffering as a result.

¹²⁹ Note that this understanding of the use of nonlawyers as a risk-management device is not only applicable to the lawyer's delegation choices. Same kind of risk/benefit assessment occurs on a daily basis within the lawyer's own work and her own practice. Even without using assistants, at some point in her work the lawyer finds herself satisfied that she has completed enough factual and legal research, enough redrafting of documents, enough consulting with experts, to proceed to a final product for her client. She always could spend more time at greater cost to the client, but she exercises her judgments about when to stop. That same set of heuristics operates in her assessment of the reliability of her assistants' contributions.

¹³⁰ It is a tricky analytical question—but perhaps an irrelevant one for our purposes—whether the faulty motion ought to be considered a *drafting* error or a *legal research* error. We noted above that the lawyer

eviscerating the strength of the authorities located and reported to the lawyer. The nonlawyer's factual research might be sloppy, incomplete or distorted for any number of reasons.¹³¹ Of course, a lawyer's performance of any of those very same tasks *could also be wrong*, although the odds of that happening are seemingly lower than in the case of the nonlawyer's work, especially if we accept (as we do for the sake of this Article) the premises of the unauthorized practice dogma.¹³² The lawyer's supervision of the nonlawyer's work decreases the risk of error, but it cannot eliminate it.

Clients, though, should and in fact do accept the just-described use of nonlawyers as a reasonable trade-off which will reduce the cost of legal services with minimal effect on the quality of the services rendered. In assessing the wisdom of a lawyer's use of nonlawyer services to assist in her work for her clients, that matrix is the ultimate standard by which the profession ought to evaluate this scheme—is a client sufficiently protected by the lawyer's delegation of some tasks to others? Put another way, should the profession permit a client to elect to retain a lawyer who will delegate some of her tasks to supervised nonlawyers? So long as the lawyer, exercising her judgment about the complicated practice world in which she operates and accepting the ultimate responsibility for the results of the risks involved, concludes that the work performed by the nonlawyer is reasonably close to what the lawyer would achieve at a significantly higher cost to the client, then the profession ought to permit an informed client to accept those minimal risks. It is, in other words, a sensible thing for the profession to allow, and for an informed and understanding client to choose.¹³³

reviewing the final product of the motion should recognize drafting mistakes, but may not recognize research errors, if the reason for the research in the first place was the lawyer's need to learn some part of the law that she did not already know by rote memory.

¹³¹ The behavioral economists teach us that observations and understandings are seldom "objective" and value neutral. Individuals are subject to a wide range of biases and "cognitive illusions" which distort their perceptions. *See, e.g.*, DAN ARIELY, *PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS* (2008); MAX H. BAZERMAN, *JUDGMENT IN MANAGERIAL DECISION MAKING* (5th ed. 2002). Because lawyers are equally subject to the same cognitive processes and biases, it is an intriguing question whether a lawyer would be more or less capable of approaching an "objective," undistorted understanding of factual issues compared to a lawyer's assistant. *See, e.g.*, Linda Babcock, Henry S. Farber, Cynthia Fobia & Eldar Shafir, *Forming Beliefs about Adjudicated Outcomes: Perceptions of Risk and Reservation Values*, 15 INT'L REV. L. & ECON. 289, 293-94 (1995)(negotiators reach very different assessments about the value of a case when given identical information); Linda Babcock, George Loewenstein & Samuel Issacharoff, *Creating Convergences: Debiasing Biased Litigants*, 22 L. & SOC. INQUIRY 913 (1997)(showing plausible debiasing efforts).

¹³² *See* text accompanying notes *supra*.

¹³³ Note here an apparent underlying construct—that a client could choose, and lawyer seemingly would be bound by that choice, to pay a lawyer her higher billing rate to perform all of the tasks the lawyer might otherwise delegate to a non-lawyer. This construct treats the use of a non-lawyer assistant as a lawyering option for which the client must provide informed consent. While that construct makes powerful sense conceptually (*see, e.g.*, *LAWYERS AS COUNSELORS*, *supra* note , at 296 (describing an orientation in which most substantive decisions remain for the client to decide)), it does not appear in the literature addressing the professional ethics of legal assistants or of lawyers using legal assistants. *See, e.g.*, *MODEL PARALEGAL GUIDELINES*, *supra* note , at (no suggestion of informed consent to use of nonlawyer); *MODEL RULES*, *supra* note , at R. 5.3 (no suggestion that use of nonlawyer is negotiable with client).

d) *Legal advising and counseling—a categorical exclusion?*

We now reach our fourth example, that of providing legal advice to a client, the assignment most frequently identified by the advisory authorities as nondelegable.¹³⁴ If the advisory authorities' description of the lawyer's duties is accurate, and if we accept a literal and not a nuanced interpretation of that description, then lawyers possess no discretion to delegate to a nonlawyer the task of providing to a client some legal advice, while possessing lawful discretion to delegate to the nonlawyer the responsibilities of drafting documents, performing legal research, and conducting fact investigation. We saw above that the literal reading of that prohibition was not supported by any fair reading of available substantive law.¹³⁵ We see here why any such literal reading would be incoherent. Applying the same matrix of risk management, informed consent and unauthorized practice prophylaxis, we see lawyers must possess the same discretion to delegate to a supervised nonlawyer the assignment of providing some legal advice.

Lawyers who assign document preparation, legal research, and fact investigation tasks to nonlawyers risk malpractice if the nonlawyers perform the tasks incompetently.¹³⁶ Because any performer of legal services, lawyer or nonlawyer, risks committing malpractice if her work happens to be sloppy or in error, the question for the lawyer remains one of assessment of the acceptable level of risk, and accepting responsibility to indemnify the harmed client if errors occur and result in malpractice damages.¹³⁷

The difficulty with applying a *categorical* test which would bar lawyers from delegating to a nonlawyer discrete lawyering activities like "counseling" is apparent. The underlying justifications for use of nonlawyers as part of an efficient, client-centered law practice apply equally as well to some forms of counseling as they do to some forms of document preparation, legal research or fact development. To understand why, we return to the concept of *supervision*. All nonlawyer work must be properly supervised, whatever its nature.¹³⁸ The critical question is what constitutes effective supervision.¹³⁹

¹³⁴ See, e.g., MODEL PARALEGAL GUIDELINES, *supra* note , at ; NALA CODE OF ETHICS , *supra* note , at ; Ct. Bar. Guidelines, *supra* note ("legal advice may not be given" during client interviews); S.C. Bar Ethics Adv. Comm., Op. 02-12 (2002)("well settled that a paralegal may not give legal advice"); Doe v. Condon, 532 S.E.2d 879 (S.C. 2000)("answering legal questions would constitute the unauthorized practice of law").

¹³⁵ See text accompanying note *supra*.

¹³⁶ See, e.g., Christine Beck Lissitzyn, *What's in a Name? Should Paralegals be Liable for Legal Malpractice?*, 77 CONN. B. J. 86 (2003), 15 No. 4 PROF. LAW. 2 (2005)(describing when the lawyer, and when the nonlawyer, would be liable for malpractice damages to an injured client); VLT, Inc. v. Lucent Technologies, Inc., 54 Fed.R.Serv.3d 1319, 2003 WL 151399 (D. Mass. 2003)(paralegal's mistake waives privilege); Amgen Inc. v. Hoechst Marion Roussel, Inc., 190 F.R.D. 287 (D.Mass. 2000)(same).

¹³⁷ See RESTATEMENT, *supra* note , at §49; WOLFRAM, *supra* note , at 206-26; Lissitzyn, *supra* note , at .

¹³⁸ RESTATEMENT, *supra* note , at §4.

¹³⁹ Supervision is central to the role of clinical legal education, and has received much attention in that realm. See, e.g., Gerald J. Clark, *Supervising Judicial Interns: A Primer*, 36 SUFFOLK U. L. REV. 681 (2003); Gundlach, *supra* note ; Richard K. Neumann, Jr., *Donald Schon, The Reflective Practitioner, and the Comparative Failures of Legal Education*, 6 CLIN. L. REV. 401, 414 (2000), William P. Quigley,

As we noted above,¹⁴⁰ supervision of a subordinate, whether a lawyer or a nonlawyer, cannot mean and does not mean that the supervising lawyer must observe every action the supervisee takes.¹⁴¹ It cannot mean and does not mean that the supervising lawyer must reprise the work performed by the supervisee, to ensure its accuracy.¹⁴² Instead, a practical understanding of supervision shows it to consist of measures by the lawyer which offer assurance that the delegated work will be performed competently.¹⁴³ It is a risk management concept—it cannot guarantee competent service, any more than the lawyer’s doing the work herself could guarantee that result.¹⁴⁴

A lawyer may delegate to a nonlawyer the responsibility to communicate legal advice to a client in the same manner, and employing the same risk management and supervision skills, as the lawyer would delegate a legal research or document drafting task. A lawyer who knows that her nonlawyer colleague—assume, for the moment, an experienced lateral who is not a member of the bar and is not practicing “temporarily” in the state¹⁴⁵—understands a client’s legal issues with depth and sophistication and can discuss those issues with clarity and nuance can, consistent with the lawyer’s fiduciary duties to her client, suggest that the nonlawyer meet with the client and advise the client about his rights. That delegation would be an essential part of the lawyer’s representation of the client, for which the lawyer would remain ultimately responsible. The client would understand that the advice has been communicated by a nonlawyer, and by implication (or perhaps expressly so) consents to the use of a less expensive device to further the client’s case.¹⁴⁶ No unauthorized practice of law worry results, both because the client is the beneficiary of the purported special skill of the lawyer¹⁴⁷ and because the nonlawyer presents no threat to the lawyer’s livelihood, since the lawyer has full control over the use of that practice option.¹⁴⁸

Introduction to Clinical Teaching for the New Clinical Law Professor: A View from the First Floor, 28 AKRON L. REV. 463, 477-481 (1995).

¹⁴⁰ See text accompanying note *supra*.

¹⁴¹ The cases where a court determines that delegation was proper tend to involve fee disputes. See, e.g., *Missouri v. Jenkins*, 491 U.S. 274 (1989); *In re Jastrem*, 224 B.R. 125, 131 (Bkrcty. E.D. Cal. 1998)(paralegal fees appropriate). See also *In re* Opinion No. 24 of Committee on Unauthorized Practice of Law, 607 A.2d 962, 966 (N.J. 1992)(acknowledging the many proper tasks for nonlawyer assistance to lawyers).

¹⁴² MODEL PARALEGAL GUIDELINES, *supra* note , at 4, Guideline 2, Comments (lawyer must provide adequate instruction and monitor progress); Opinion No. 24, *supra*, at 969 (affirming practice of using “independent paralegals” not employed by a law firm).

¹⁴³ See RESTATEMENT (THIRD) OF AGENCY § 7.05(1), cmt. *d* (2006) (responsible supervision a function of risks to third parties and burdens of precautions).

¹⁴⁴ I use the term “guarantee” to mean that the lawyer will be absolutely certain that no mistakes will be made. If we understood “guarantee” to mean an indemnification or compensation if the resulting work is not competent, then in both scenarios in the text the lawyer would “guarantee” the result.

¹⁴⁵ See MODEL RULES, *supra* note , at R. 5.5(c)(1) and cmts. [6] and [8] (permitting an out of state lawyer to practice in the jurisdiction temporarily if associated with a lawyer who is licensed).

¹⁴⁶ See text accompanying note *supra* (discussing the informed consent component of the conceptual framework).

¹⁴⁷ See CRYSTAL, *supra* note , at (noting that professed underpinning of unauthorized practice rules).

¹⁴⁸ See RHODE, ACCESS TO JUSTICE, *supra* note , at (noting the importance of that threat to the unauthorized practice dogma).

Recall that a nuanced reading of the seeming categorical ban on nonlawyer's offering legal advice supports this conclusion.¹⁴⁹ The authorities which repeat that generalized prohibition often qualify it with some version of the "conduit" notion,¹⁵⁰ approving a nonlawyer's communication to the client of the lawyer's ideas.¹⁵¹ It is critical, however, not to read the conduit conception in too crabbed and narrow a fashion. The narrow conduit version would approve a nonlawyer's providing legal advice only as a script reader, one who has heard the lawyer's legal conclusions and transmits those ideas to the client by rote. By that understanding, a reasonably talented high school intern could accomplish that task.

A more sensible, and in fact the only sensible, understanding of the conduit idea goes much farther than the script reading function. The better understanding approves of the nonlawyer's engaging the client in a spirited dialogue about the client's legal rights and duties, so long as the lawyer is confident that the nonlawyer may perform that task competently and effectively.¹⁵² The assistant still serves as a "conduit" for the lawyer's judgment and her skill at reading complexity and nuance. Because the lawyer is certain that the nonlawyer has the ability to manage the interaction, that judgment (and that risk assessment) controls. The lawyer is using the nonlawyer as one useful component of her lawyering toolkit.¹⁵³

The richer conduit conception just described suggests some possible limits, however. Its trusting of the lawyer's assessment about the nonlawyer's skill might imply more liberty on the part of the lawyer than even an expansive reading of the unauthorized practice of law dogma would tolerate. For instance, a lawyer might *accurately* trust her nonlawyer colleague's abilities so much (imagine, again, an experienced lateral associate) that the lawyer would confidently choose to assign the nonlawyer to handle a client's matter from beginning to end without any oversight by the lawyer at all—indeed, the lawyer may never even know of the client's existence, except perhaps to approve formally the creation of an attorney-client relationship with the law firm.¹⁵⁴ By all of the criteria we have employed above—the risk management responsibilities of the lawyer, the informed consent of the client (who, we may assume, has assented to the nonlawyer's

¹⁴⁹ See text accompanying note *supra*.

¹⁵⁰ See *HPD Laboratories, Inc. v. Clorox Co.*, 202 F.R.D. 410, 415 (D.N.J. 2001)(approving the conduit metaphor); *John Labatt Ltd. v. Molson Breweries*, 898 F.Supp. 471, 477 (E.D.Mich.1995)(same); *The Florida Bar v. Beach*, 675 So. 2d 106, 109 (Fla. 1996) (nonlawyer a "conduit" for the lawyer, but without supervision; lawyer suspended).

¹⁵¹ See, e.g. MODEL PARALEGAL GUIDELINES, *supra* note , at ; NH Rule 35, *supra* note ("with adequate lawyer supervision the legal assistant may provide information concerning legal matters").

¹⁵² See Chavkin, *supra* note , at . While Chavkin applies his arguments to students who are provisionally licensed to practice law under a state's student practice rule, his insights have relevance to nonlawyers to whom lawyers delegate tasks as part of the lawyer's practice. See also Bryant & Milstein, *supra* note , at 208 (noting the importance of students' abilities to exercise judgment amidst uncertainty).

¹⁵³ Cf. Daniel A. Farber, *The Supreme Court, the Law of Nations, and Citations of Foreign Law: The Lessons of History*, 95 CALIF. L. REV. 1335, 1348 (2007)("foreign and international law" serve as "part of the lawyer's toolkit"); McGowan, *supra* note , at 1094 ("rational actor game-theoretic analysis ... is fundamental to a lawyer's analytical toolkit").

¹⁵⁴ See RESTATEMENT, *supra* note , at . See text accompanying notes *infra* (discussing this concept).

role), and the unauthorized practice prophylaxis—that arrangement should pass muster. Given the lawyer’s ultimate responsibility and her judgment about the depth and breadth of the nonlawyer’s talent, there is no *conceptual* difference between that delegation and the lawyer’s assigning the nonlawyer to draft a pleading. Nevertheless, despite the logic of this proposition, a lawyer using her nonlawyer assistant in this way proceeds at her peril.¹⁵⁵

We now see that a categorical exclusion of “counseling” or “advice-giving” from the activities permitted to be delegated to a nonlawyer would be hard to defend and difficult to apply. The only conceivable justification for such a categorical treatment of that activity would be a purely prophylactic one. A creator of guidelines governing nonlawyer practice supervised by a lawyer might claim that the risks of harm to a client are so great from a nonlawyer’s advice giving that even a wise and experienced lawyer ought never be permitted to delegate a counseling activity to a nonlawyer colleague, regardless of the comfort level of the lawyer with the nature of the task and the qualifications of the nonlawyer. That argument, though, is a remarkably weak one, as we have just seen. Risk abounds in assigning any task to a nonlawyer, just as risks abound (albeit presumably lower ones overall) in the lawyer’s doing the work herself. Some advice-giving tasks will objectively carry far less risk than some legal research tasks. The guideline creator’s prophylactic arguments would perhaps support a categorical ban on the use of legal assistants entirely, but not to carve out categorical distinctions within the panoply of activities that a lawyer engages in while representing a client.

We need not rehearse the similar arguments that would apply to a categorical exclusion of “negotiation” from the acceptable roles of nonlawyers in law firms.¹⁵⁶ All of the same arguments would apply to that category as would apply to counseling. There may, however, be other categories where some bright-line distinctions might be justified. Those categories have less to do with protecting client interests and limiting malpractice

¹⁵⁵ Cf. *State of Florida v. Foster*, 674 So.2d 747, 754 (Fla. App. 1996). In *Foster*, an independent paralegal conducted depositions without the supervision from or association with an attorney. In affirming a finding of unauthorized practice of law, the Florida Court of Appeal wrote that “we hold that the non-lawyer appellees’ active participation in questioning witnesses in depositions, without the presence and immediate guidance and supervision of a licensed practitioner ... constitutes the unauthorized practice of law” *Id.* at 753. In response to a motion to clarify its opinion, the court amended the preceding language to bar deposition questioning by nonlawyers “*even under the immediate guidance and supervision of a licensed attorney.*” *Id.* at 754 (emphasis added).

That amended language in *Foster*, if it happened to constitute the substantive law in Florida (which it seemingly does not, as it was simply dictum in the matter before the court), would undercut the broad conduit concept developed in the text. Besides its status as dictum, though, the court’s proposition is also of more limited value because of the close relationship between depositions and court testimony. This Article has acknowledged from the beginning that nonlawyers cannot participate in court proceedings. See text accompanying note *supra*. A deposition is, in many substantive respects, a preliminary version of court testimony. See FED. R. CIV. PRO. 30, 32 (preserving objections during depositions); FED. R. EVID. 804(b)(1) (using depositions at trial); cf. MODEL RULES, *supra* note , at R. 3.3 cmt. [1] (including a deposition as a proceeding before a “tribunal” for purposes of the rule prohibiting false statements made to a tribunal).

¹⁵⁶ See State Bar of New Mexico, Rules Governing Paralegal Services, *supra* note , at Rule 20-103; sources cited at note , *supra*.

risk, and more with recognizing the existence of the attorney-client relationship itself. As long as this discussion accepts for present purposes the reality of unauthorized practice limitations, it would be sensible to conclude that a nonlawyer could not, on his own, establish an attorney-client relationship.¹⁵⁷ Because only a lawyer may represent a client, only a lawyer may create the relationship. Similarly, only the lawyer may decide to terminate the relationship.¹⁵⁸ She may not delegate that responsibility to a nonlawyer colleague, regardless of his competence and experience. Even accepting that categorical limitation on nonlawyer practice within a law firm, a lawyer may still assign to a nonlawyer tasks which implement each of those goals. So, for instance, a nonlawyer to interview a prospective client, and, having reported to the lawyer the facts of the matter and having received the lawyer's authority to accept the matter for representation, the nonlawyer may present the retainer agreement to the client for signature.

IV. APPLYING THE CONCEPTUAL FRAMEWORK TO THE ELSI STAFF

In this Part, I apply the framework I have just outlined to the story of the CED Project within Essex Legal Services Institute (ELSI), the Massachusetts legal services office.¹⁵⁹ The ELSI CED Project included one Massachusetts lawyer, Joe Bartholomew, whose familiarity with community economic development law was limited; an out of state lawyer, Dara Coletta, who knew national community economic development law extremely well from her practice in California; two law students, David Dahlstrom, who was a certified law student licensed to practice under the Massachusetts student practice rule, and Julie Lucia, who was not eligible to be certified under that rule; and a college intern, Mike Newman, a sophomore at Tufts University. A crude understanding of the nonlawyer practice guidelines would conclude that any one of the unlicensed persons in the Project could assist Bartholomew in some preparatory tasks, subject of course to his supervision. A more contextual and refined understanding of the guidelines will permit Bartholomew to assign work in a more principled fashion. Let us review the opportunities available for each member of the team in light of the framework developed above.

Joe Bartholomew, the lawyer: Bartholomew is a lawyer licensed in Massachusetts, so his is the easiest example for our consideration. Bartholomew may provide all of the legal services to the client MCDC,¹⁶⁰ but he must be sure that he is competent to do so. As a long-time litigator, Bartholomew is not yet familiar with many of the laws, schemes, practices and regulations surrounding affordable housing development and real estate closings. He may still represent MCDC, subject to his

¹⁵⁷ Not surprisingly, much advisory authority notes that limitation. See, e.g., MODEL PARALEGAL GUIDELINES, *supra* note , at .

¹⁵⁸ See Of course, once a lawyer has decided to end a relationship (for example, when all work has been completed satisfactorily), the lawyer may delegate to a nonlawyer the responsibility to communicate that fact to the client by letter or telephone call. See, e.g., In Re Marino, 229 N.E.2d 23 (N.Y.App. 1967)(permissible for nonlawyer to communicate to prospective client lawyer's decision to decline matter). The decision to end the relationship may be a collaborative one, in which the lawyer relies upon the insights of her knowledgeable assistant, so long as the triggering decision belongs to the lawyer.

¹⁵⁹ For the CED Project description, see text accompanying note *supra*.

¹⁶⁰ See text accompanying note *supra*.

client's informed consent,¹⁶¹ if he is capable of achieving the necessary competence through study¹⁶² or "through the association of a lawyer of established competence in the field in question."¹⁶³

Bartholomew's role in the CED Project does raise two questions. First, may he obtain his competence by associating with Dara Coletta, the unlicensed lawyer from California who knows the community economic development law extremely well? And second, as a novice at the new transactional work of the CED project, might he nevertheless supervise nonlawyers and assign them tasks? The response to both questions is yes.

Model Rule 1.1 permits Bartholomew to become competent "through necessary study . . . [and] through the association of a lawyer of established competence in the field in question."¹⁶⁴ His intention at ELSI is to become competent by associating with Coletta, the expert from California, and learning from her. If we assume for the moment that Coletta possesses the expertise to understand the federal affordable housing schemes as they operate in Massachusetts,¹⁶⁵ Bartholomew may use her as his source of education. If she is not qualified as a "lawyer" with whom Bartholomew has "associate[d]," she still qualifies as a resource for Bartholomew's "necessary study."

¹⁶¹ A client should understand the competence level of his lawyer, and should provide informed consent if that the lawyer's expertise is still developing. See RESTATEMENT, *supra* note , at § 52, cmt. *d* (noting that a client might choose to hire a lawyer without expertise); Alexis Anderson, Arlene Kanter & Cindy Slane, *Ethics in Externships: Confidentiality, Conflicts, and Competence Issues in the Field and in the Classroom*, 10 CLINICAL L. REV. 473, 536 (2004) (discussing law student competence); Christopher Sabis & Daniel Webert, *Understanding the "Knowledge" Requirement of Attorney Competence: A Roadmap for Novice Attorneys*, 15 GEO. J. LEGAL ETHICS 915, 927 (2002) (noting importance of a client's understanding of competence).

¹⁶² MODEL RULES, *supra* note , at R. 1.1, Cmt. [2] ("A lawyer can provide adequate representation in a wholly novel field through necessary study."). (While the ELSI story takes place in Massachusetts, I will refer to the Model Rules instead of the Massachusetts version of those rules in order to maintain consistency with the analyses from earlier parts of this Article. The Massachusetts rules would not differ in any substantive way from the Model Rules.) Because ELSI does not charge its clients, Bartholomew does not confront the complicated question of whether he can charge his clients for the time he needs to achieve competence. See *In the Matter of Fordham*, 668 N.E.2d 816 (Mass. 1996) (suspending an experienced lawyer who charged excessive fees while preparing a novel type of case); *Robert L. Wheeler, Inc. v. Scott*, 777 P.2d 394, 396-97 (Okla. 1989) (cannot pass on learning costs to client).

¹⁶³ MODEL RULES, *supra* note , at R. 1.1, cmt. [2].

¹⁶⁴ *Id.*

¹⁶⁵ This is a necessary assumption for the proceeding analysis, and not an unreasonable one. Much funding for affordable housing connects to federal statutory and financing schemes. See, e.g., SIMON, *supra* note , at 19-26; Julianne Kurdila & Elisa Rindfleisch, *Funding Opportunities for Brownfield Redevelopment*, 34 B.C. ENVTL. AFF. L. REV. 479, 479-80 (2007); Peter W. Salsich, Jr., *Saving Our Cities: What Role Should the Federal Government Play?*, 36 URB. LAW. 475 (2004).

Coletta's expertise in an area exclusively governed by federal law would not permit her to establish an office in a state where she was not licensed, even if she only practiced her federal work. See *Kennedy v. Bar Ass'n of Montgomery County*, 561 A.2d 200 (Md. 1989); *Cleveland Bar Ass'n v. Moore*, 722 N.E.2d 514 (Ohio 2000); *Ginsburg v. Kovrak*, 139 A.2d 889 (Pa. 1958) (cannot establish an office to offer only legal services based upon federal law).

The fact that Bartholomew is a novice in the field of affordable housing and community economic development does not preclude him from using nonlawyers to assist him. As a licensed lawyer he may still supervise the nonlawyer assistants, subject to his overarching fiduciary duties and his strategic judgment about the case. This conclusion follows from the baseline unauthorized practice dogma described and explored above.¹⁶⁶ The dogma assumes a generalized level of competence as a result of a lawyer's passing the bar.¹⁶⁷ The dogma trusts lawyers in ways that it cannot trust nonlawyers, by virtue of that bar admission status. Therefore, as a matter of substantive law, Bartholomew may work with his team of nonlawyers on the MCDC matter, subject to his professional judgment about the competence of his team to accomplish the work for which MCDC has retained ELSI. A significant factor in his achieving competence, of course, is the presence on the team of Dara Coletta.

Dara Coletta, the out of state lawyer: Coletta is a lawyer in California, but in Massachusetts she is a nonlawyer, because she has not yet taken the Massachusetts bar. She therefore cannot practice in Massachusetts.¹⁶⁸ She is not eligible to practice in her new state under the safe harbor provision of Model Rule 5.5(c)(1), which permits out of state lawyers to “provide legal services on a temporary basis ... that (1) are undertaken in association with a lawyer who is admitted in this jurisdiction and who actively participates in the matter,”¹⁶⁹ because under any reasonable interpretation of that provision, Coletta is not practicing “temporarily” in Massachusetts.¹⁷⁰ Any legal services

¹⁶⁶ See text accompanying note *supra*.

¹⁶⁷ See JAMES E. MOLITERNO, *ETHICS OF THE LAWYER'S WORK* 146 (2d ed. 2003). See also HAZARD & HODES, *supra* note , at § 3.2, 3-3 (noting the profession's assumption that bar passage and satisfaction of other entrance criteria provide per se evidence of competence to practice); Jeffrey M. Duban, *The Bar Exam as a Test of Competence: The Idea Whose Time Never Came*, 63 N.Y. ST. B.J. 34, 35 (1991) (noting the claim that “the Bar Exam, as a test of ‘minimum competence,’ serves to ‘protect the public against unqualified lawyers and promote public confidence in the legal profession’”).

¹⁶⁸ MODEL RULES, *supra* note , at R. 5.5. For a discussion of out of state lawyers and their practice opportunities, see Gillian Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Market*, 60 STAN. L. REV. 1689 (2008); Pamela A. McManus, *Have Law License; Will Travel*, 15 GEO. J. LEGAL ETHICS 527 (2002).

¹⁶⁹ MODEL RULES, *supra* note , at R. 5.5(c)(1).

¹⁷⁰ The term “temporary” receives no definition in the Model Rules, but Comment 6 to Rule 5.5 implies a broad scope of the term: “There is no single test to determine whether a lawyer's services are provided on a single ‘temporary basis’ in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be ‘temporary’ even though the lawyer provides services in this jurisdiction on a recurring basis, over an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation of litigation.” *Id.*, at cmt. [6]. Despite that broad reading, it seemingly cannot apply to a lawyer who has made a permanent career change to the new state, and whose work for her clients is permanent work for a stable, in-state law firm. The example from the comment, a “single lengthy negotiation,” supports that conclusion. The ABA's Commission on Multijurisdictional Practice, which developed the language in Rule 5.5, interpreted the “temporary” qualifier not to apply to a lawyer like Coletta. See ABA CTR. FOR PROF'L RESPONSIBILITY, CLIENT REPRESENTATION IN THE 21ST CENTURY: REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE 25, n.36 (2002), available at <http://www.abanet.org/cpr/mjp/home.html> (last visited March 8, 2009) (“Rule 5.5(c) often will not apply to an extended residence in a law office in a jurisdiction in which those lawyers are not licensed, because the intended presence in the jurisdiction will not be ‘temporary’”).

For an overview of the multijurisdictional issues leading to the recent amendments to Rule 5.5, see 2 HAZARD & HODES, *supra* note , at § 46.3; Stephen Gillers, *Lessons from the Multijurisdictional Practice*

she provides to ELSI clients, then, are as a nonlawyer under the supervision of Bartholomew.

The framework developed above, including the refined understanding of the conduit conception, would conclude that Bartholomew possesses the discretion to delegate to Coletta considerable latitude in performing many of the legal tasks necessary for MCDC's representation. Under that framework, Bartholomew will represent MCDC as effectively as he can with the resources available to him, and the most valuable resource in his "toolkit" would be Coletta. With Bartholomew exercising his judgment about her effectiveness and retaining responsibility for the final lawyering product, Coletta may interview constituents of MCDC or other persons with knowledge about the housing development, draft documents such as affordable housing covenants and deed restrictions,¹⁷¹ deeds,¹⁷² mortgages, etc., and conduct legal research, both within the federal law about which she has expertise but also on state and local law implications.¹⁷³

Coletta may also meet with constituents of MCDC, who serve as the organizational client agents for the representation purposes,¹⁷⁴ and explain the law about the affordable housing projects and development. She may only do so, however, as a conduit of Bartholomew, as his agent communicating the legal conclusions he is satisfied are reliable. In the setting described here, where Bartholomew has developed his competence through Coletta's expertise,¹⁷⁵ the role configurations are delicately arranged. Because we accept the unauthorized practice dogma's assertion that Coletta may not practice law directly, Coletta cannot offer her own *independent* advice to the MCDC constituents. To do so would constitute commission of a crime in Massachusetts,¹⁷⁶ as in every state.¹⁷⁷ But if we accept the refined conception of the conduit within the framework developed above, Coletta may provide that advice if Bartholomew employs her nonlawyer services as part of *his* representation of MCDC. If

Commission: The Art of Making Change, 44 ARIZ. L. REV. 685, 686 (2002); Carol A. Needham, *Multijurisdictional Practice Regulations Governing Attorneys Conducting a Transactional Practice*, 2003 U. ILL. L. REV. 1331, 1339 (2003).

¹⁷¹ For a discussion of deed restrictions to ensure the continuation of the affordable quality of the housing being developed, see SIMON, *supra* note , at 143-60 ("constrained property").

¹⁷² See *Matter of Easler*, 272 S.E.2d 32, 32-33 (S.C. 1980)(holding that drafting of deeds permissible with lawyer's supervision).

¹⁷³ We saw above that paralegals often conduct legal research, and the advisory authority uniformly supports that delegation. See text accompanying notes *supra*. If paralegals, most of whom have not attended law school, may perform legal research as part of a lawyer's work for a client, it is readily apparent that Coletta, an expert and experienced lawyer in community economic development, may engage in legal research about that topic in a new jurisdiction. See *Att'y. Grievance Comm'n. v. Hallmon*, 681 A.2d 510, 514 (Md. App. 1996).

¹⁷⁴ See MODEL RULES, *supra* note , at R. 1.13(a) (lawyer represents an organization through its duly authorized constituents). For a discussion of the difficulties at times in discerning which constituents speak for the entity client, see MILTON C. REGAN, JR. & JEFFREY D. BAUMAN, *LEGAL ETHICS AND CORPORATE PRACTICE* 76-96; William H. Simon, *Whom (or What) Does the Organization's Lawyer Represent?: An Anatomy of Intraclient Conflict*, 91 CALIF. L. REV. 57 (2003).

¹⁷⁵ See text accompanying notes *supra*.

¹⁷⁶ Mass. General Laws c. 221, § 46A (prohibiting an "individual, other than a member, in good standing, of the bar of this commonwealth," from practicing law).

¹⁷⁷ See notes *supra*.

Bartholomew's representation is competent because of his team's collective work under his supervision, and if he assumes full responsibility and liability exposure for the representation, then Coletta's activities are proper.

That same analysis would apply to Coletta's negotiation, for instance, with a lender about the terms of a federal loan package, even if Bartholomew is not present during the negotiation,¹⁷⁸ as long as the persons with whom she negotiates do not misunderstand her role or her status.¹⁷⁹ Her signature on documents could bind the law firm and thus the firm's client.¹⁸⁰ If certain documents require the signature of a lawyer, then of course Coletta could not sign those papers. And, while the example offered here is entirely transactional, if a dispute ended up in court, Coletta could not appear on behalf of MCDC in court absent *pro hac vice* permission from the court.¹⁸¹

David Dahlstrom and Julie Lucia, the two law students: We recall that Dahlstrom and Lucia are each law students working within the CED Project, but Dahlstrom is a "certified law student" under the state's student practice rule,¹⁸² while Lucia is not. Before we examine what Bartholomew might delegate to a law student as a generic matter, we need to understand the effect of Dahlstrom's certification. If Dahlstrom's status as a certified law student makes him effectively a lawyer, then he and Bartholomew are essentially to be treated the same, and Dahlstrom would in fact have more authority in Massachusetts to practice law than Coletta possesses.¹⁸³

In fact, in Massachusetts, like many other states,¹⁸⁴ the student practice rule has very unclear applicability to transactional practice, and by its literal terms has unclear applicability to out-of-court legal work by a student representing a client in a litigation matter. The Massachusetts rule allows a law student working with a legal services organization, among other settings,¹⁸⁵ to "appear" in court in various contexts, on behalf

¹⁷⁸ We saw above that supervision does not contemplate monitoring or constant observation, but instead envisions systems and other indicia offering the supervisor reasonable and reliable assurance that the work will be performed adequately. See RESTATEMENT OF AGENCY, *supra* note , at §7.05(1).

¹⁷⁹ See, e.g., DeVaux v. American Home Assurance Co., 444 N.E.2d 355, 359 (1983)(secretary's actions created an attorney-client relationship by the client's reliance); Rodriguez v. Montalvo, 337 F.Supp.2d 212, 218 (D. Mass. 2004)(paralegal's interaction with a client sufficient to trigger former client conflict of interest); *Developments in the Law—Lawyers' Responsibilities and Lawyers' Responses*, 107 HARV. L. REV. 1557, 1561 (1994).

¹⁸⁰ RESTATEMENT OF AGENCY, *supra* note , at 2.03, cmt. e (agents may bind principals).

¹⁸¹ RESTATEMENT, *supra* note , at .

¹⁸² Mass. Sup. Jud. Ct. Rule 3:03.

¹⁸³ See Anderson et al., *supra* note , at ; Chavkin, *supra* note , at .

¹⁸⁴ See, e.g., Ariz. Sup. Ct. R. 38(d) ("may appear in any court or before any administrative tribunal"); Colo. Rev. Stat. Ann. §§ 12-5-116.1 to -116.4 (West 2003) ("appear and participate in any civil proceeding"); Ga. Sup. Ct. Rules, Rule 91 ("assist in proceedings"); Ky. SCR Rule 2.540 ("appear in any proceeding in any court"); N.Y. Comp. Codes R. & Regs. tit. 22, § 805.5 (referring to civil and criminal court proceedings); *but see* Ill. ILCS S. Ct. Rule 711 ("may counsel with clients, negotiate in the settlement of claims, and engage in the preparation and drafting of legal instruments").

¹⁸⁵ Third year students are within the rule's ambit if they work for the Commonwealth of Massachusetts, a municipality, a public defender office, or a legal aid office. Mass. Rule 3:03(1); Order Implementing Supreme Judicial Court Rule 3:03. The rule applies to a second year student who is enrolled in a law school clinical program. *Id.*, R. 3:03(8).

of indigent clients.¹⁸⁶ The rule is silent about the proper role of the law student on behalf of a client apart from the court appearance itself,¹⁸⁷ and the rule says nothing at all about law students representing clients in matters which have no relationship to a court proceeding, like in transactional community economic development matters.¹⁸⁸

Given the narrow applicability of the student practice rule, Dahlstrom and Lucia are situated identically in their status within the ELSI CED Project. (In the litigation units of ELSI, of course, Dahlstrom would have the status of a licensed lawyer for his clients.) Dahlstrom and Lucia, while law students, have the same status as any paralegal in any law office. The “law clerk” status provides them no special rights or privileges by virtue of that station. In fact, Dahlstrom and Lucia have the same *conceptual* status as Mike Newman, the college sophomore who serves as a volunteer intern for ELSI. Let us introduce him into the mix, and compare how Bartholomew might use Newman’s volunteer services in comparison to the services of the two law students.

Mike Newman, the college sophomore intern: Newman has volunteered at ELSI for this academic year. He is a sophomore at Tufts University, and he is 19 years old. Unlike all of the other members of the CED Project team, he has no legal training. He is, however, a nonlawyer assistant, and Bartholomew possesses discretion to assign to him certain discrete tasks in his best judgment as his client’s fiduciary.

This array of third-year law student Dahlstrom, second-year law student Lucia, and college sophomore Newman presents to Bartholomew an opportunity to understand contextually his responsibilities as a supervising lawyer using nonlawyers within his toolkit. The best that the profession and its substantive law can say to Bartholomew is that he has discretion to assign to nonlawyers some of the units of work and activity that he would complete on his own if he had no assistance at all. That discretion is cabined in critical ways by Bartholomew’s judgments about effective risk management and maintenance of competent practice, as well as the extent of his client’s buy-in. It is extremely unlikely that Bartholomew would assign to Newman the task of drafting an affordable housing covenant, the complex document which when recorded binds future purchasers of the affordable units to maintain the unit’s affordable character.¹⁸⁹ It is

¹⁸⁶ *Id.* Some settings, such as the state’s District Court and the Probate and Family Court, are covered automatically; other courts, such as the Superior Court and the courts of appeal, are open to student appearances at the discretion of the judge or justice hearing the matter. The rule also does not define indigence for its purposes.

¹⁸⁷ *Id.* By the clearest of implications, the rule authorizes students who may appear in court on behalf of an indigent client to engage in all aspects of the practice of law on behalf of that client outside of the courtroom.

¹⁸⁸ Virtually all states’ student practice rules share the narrow litigation focus found in the Massachusetts rule. *But see* Tenn. Sup. Ct. R. X, § 10.03, at http://www.tncourts.gov/OPINIONS/TSC/RULES/TNRulesOfCourt/06supct1_9.htm#6 (last visited March 8, 2009)(law students may “provide legal services to ... any person or entity financially unable to afford counsel”).

¹⁸⁹ For a discussion of affordable housing covenants, see, e.g., Cal. Health & Safety Code § 33334.6(e)(7) (requiring that certain affordability covenants run with the land); Julian Gross, *Community Benefits Agreements: Definitions, Values, and Legal Enforceability*, 17-WTR J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 35 (2007-08).

difficult to conceive of that delegation qualifying as an exercise of wise judgment on Bartholomew's part, given Newman's lack of experience and legal training. Using the same metric, Bartholomew might ask Newman to locate the legal description of a property from the registry of deeds, and then to create a first draft of a deed for that unit, using the previous deed as a template.¹⁹⁰

Bartholomew might assign Dahlstrom, a third year law student who is licensed to represent clients in complicated housing litigation,¹⁹¹ to work on the affordable housing covenant that Bartholomew would not assign to Newman. Bartholomew might also assign Dahlstrom to offer advice to the clients, depending on his comfort level with Dahlstrom's mastery of the material and his judgments about how his best representation of the client.¹⁹² (Again, Dahlstrom would have lawful permission to counsel clients down the hall in ELSI's Housing Unit. Bartholomew could surely conclude that this talented law student has the capacity to advise the MCDC constituents about certain aspects of the law as it applies to the organization.)

Of course, Julie Lucia, as a second year student who is not a certified law student, falls somewhere in between Newman and Dahlstrom in her experience. Bartholomew

¹⁹⁰ See note *supra* (citing authority for deed drafting with supervision).

¹⁹¹ Students may represent tenants in contested trials in Massachusetts under the state's student practice rule. See *Darmetko v. Boston Housing Authority*, 393 N.E.2d 395, 400 (Mass. 1979)(example of student representation at eviction trial). Students also conduct criminal trials while practicing under a student practice rule. See, e.g., *Washington v. Moore*, 421 F.3d 660, 662-63 (8th Cir. 2005) (law student "conducted bulk of" jury trial); *Washington v. Glenn*, 935 P.2d 679, 680-81 (Wash. App. 1997)(student conducted trial).

¹⁹² Bartholomew has no obligation to offer to his clients the best services with the least risk exposure. That statement may seem striking, but it must be true, or else the use of nonlawyers would disappear. It is true, by and large, that lawyers will be more competent than nonlawyers, and that nondelegation would imply less risk for the client than delegation. Lawyers frequently delegate, though, and delegation is an acceptable component of competent representation. For clients paying by the billable hour, the answer to the riddle may be quite simple—the client would choose to save valuable fees if the risk exposure is minimal. But nonlawyer practice appears in settings in which the client is not paying by the hour, as in contingency fee contexts or in fee for service representation. See Ashby Jones, *More Law Firms Charge Fixed Fees for Routine Jobs*, WALL ST. J., May 2, 2007 (describing pressure from corporate clients to limit hourly fees). It simply must be true that lawyers have permission to develop a mix of resources which together achieve competent service, even if some other efforts might minimally increase, at great cost, the opportunity for benefit to the client. The standard of care for lawyers reflects common and ordinary practice, not the best practice possible. See 2 RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* § 20.2, 1306 (2009 ed.) (describing the standard of care for lawyers as relative to lawyers in similar circumstances); see also *Wood v. McGrath*, 589 N.W.2d 103, 108 (Neb. 1999) ("whether the attorney exercised the same skill, knowledge, and diligence as attorneys of ordinary skill and capacity commonly possess and exercise in the performance of all other legal tasks"); *Wooten v. Heisler*, 847 A.2d 1040, 1043 (Conn. App. Ct. 2004) ("exercise [of] that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession").

In the setting of free legal services, the clients have less autonomy rights regarding the allocation of the firm's resources, because of the firm's fiduciary responsibility to spread its finite resources over many clients. I have examined that phenomenon in the past. See, e.g., Tremblay, *supra* note ; Paul R. Tremblay, *Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy*, 43 *Hastings L.J.* 947, 962-63 (1992); Paul R. Tremblay, *Toward a Community-Based Ethic for Legal Services Practice*, 37 *UCLA L. REV.* 1101, 1110-14 (1990).

will use her services in the same contextual way, discerning how she can assist in the endeavor in a responsible and competent way. She might, after all, show as much innate skill and talent as the third-year student Dahlstrom, and Bartholomew may use her in a much more elaborate way.¹⁹³

CONCLUSION

Lawyers commonly associate with nonlawyers to assist them in their performance of their lawyering tasks. A lawyer cannot know with confidence, though, whether the delegation of some tasks to a nonlawyer colleague might result in her assisting in the unauthorized practice of law, because the state of the law and the commentary about nonlawyer practice is so confused and incoherent. Some respected authority within the profession tells the lawyer that she may only delegate preparatory matters and must prohibit the nonlawyer from discussing legal matters with clients, or negotiating on behalf of clients. Other authority suggests that the lawyer may delegate a wide array of tasks as long as the lawyer supervises the work of the nonlawyer and accepts responsibility for it. A good faith lawyer reviewing the available commentary would find it difficult to achieve appropriate guidance for her work. This uncertainty affects not only lawyers working with paralegals, but firms hiring out of state lateral associates and partners, and law school clinical programs engaged in transactional work.

This Article has sought to articulate a framework for assessing delegation choices which is both coherent and sensible. It has shown that any sort of delegation of work by a lawyer to a nonlawyer involves an exercise of the lawyer's judgment about an appropriate balance of risk and efficiency, along with an eye toward the client's informed choice about how to achieve the goals of the representation most efficiently. The prevailing unauthorized practice of law dogma prevents a client from seeking an economical representation by only retaining a nonlawyer, but that dogma trusts lawyers to protect a client's interests. With those considerations in place, this Article has concluded that the profession cannot, and in fact does not, deny the lawyer any categorical options in making delegation choices, except for those involving public court appearances. Aside from sending a nonlawyer to court, a lawyer may responsibly delegate any of her lawyering activities to a nonlawyer associate, subject to the prevailing conceptions of competent representation and subject to the lawyer's retaining ultimate responsibility for the resulting work product and performance.

Some commentary and some court opinions suggest a different answer to the questions posed here, but those authorities do not withstand careful analysis. This Article has shown that a more careful reading of the commentary and the court dicta supports the

¹⁹³ Experienced clinical teachers report that second year law students frequently demonstrate as much talent and effectiveness as student lawyers as third year students, and sometimes more. For some empirical support for that sentiment, see Stefan H. Krieger, *The Effect of Clinical Education on Law Student Reasoning: An Empirical Study*, 35 WM. MITCHELL L. REV. 359, 369 (2008)(only slight differences between second and third year students on certain empirical test measures).

framework and the thesis offered here. Nonlawyers may not independently engage in activity which equates to the practice of law, if by “independently” we mean without supervision and oversight from a lawyer. That important and uncontroversial limitation, however, is the only categorical restriction on a lawyer’s discretion. A supervised nonlawyer may play a much more active and important role in a lawyer’s overall representation of her client than many have claimed. For the client, that is a very good result.