Part Two

The Attorney-Client Relationship

Chapter 3

Maintaining Competency, Diligence, and Communications

CHAPTER OBJECTIVES

The student will be able to:

- Discuss the attorney's "competing" duties to both follow the directive of the client and render independent legal judgment
- Define "competency" as it relates to the ability to practice law
- Identify the elements of competency as derived through the ABA standards
- Recognize the importance of diligence in the legal profession and the requirements of prompt communications with the client
- Evaluate a situation that could implicate an attorney and/or a paralegal in a professional malpractice action

This chapter examines the roles and responsibilities of all the parties involved in the attorney-client relationship. HOW can an attorney be sure he is able to render competent representation; WHEN must the attorney respond to the client; WHAT constitutes legal malpractice; and WHO is responsible for the failures and harm that may result from unskilled representation?

Just as the paralegal and the attorney have a working relationship wherein both parties need to respect the roles that each play, so the attorney has a working relationship with the client. The attorney's role is to provide guidance along a complex and sometimes treacherous path in achieving a favorable outcome. It is the client's role to decide what would be a favorable outcome. The client is truly the master of the case; ultimately, the decision making rests with the client. An attorney cannot take any actions that are not approved by the client. However, it is the attorney's ethical duty to try to persuade the client to take the best path to achieve the desired result. Sometimes that involves telling the client that her desired result is not possible.

An attorney must delicately address these two obligations to the client: (1) to follow the client's course, and (2) to render independent judgment, sometimes in spite of the first obligation. The paralegal has a central role in this relationship. Often it is the paralegal that serves as liaison between them. In order to facilitate the relationship, the paralegal should be aware of its boundaries.

RENDERING INDEPENDENT LEGAL JUDGMENT

independent legal judgment
The attorney's determination of the best course to pursue to obtain the client's objectives, based upon the attorney's obligation to rely upon her own professional assessment of the legal situation, without undue influences from outside forces.

ABA Model Rule 2.1 states that the attorney's role is an advisor. This obligation to render **independent legal judgment** is what defines the lawyer. All the years of schooling and practice are essentially to lead her to a true assessment of the situation presented by the client. One must always recall that an attorney's first obligation is to the court and the pursuit of justice. This is true even in a transactional matter that is not pursued in litigation. Fairness to all the parties involved is the goal. A client may be the impetus behind the matter, but it is the lawyer that has the knowledge and skill to strategize and manage the case. It is the attorney's ethical duty to expose all the facts to the client, including the unpleasant ones, and make a fair, honest, and objective assessment of the matter to counsel the client properly.

Additionally, as the law itself is not isolated from the principles of morality, socioeconomics, or politics, so an attorney's advice does not have to be isolated from them either. A strict answer couched in purely legal terms may not be of value to some clients, who may fail to understand the ramifications of a course of action. The relationship between a lawyer and his client is a fiduciary one. That means that the lawyer must look out for the best interests of the client, even if the client isn't sure what those interests are. It would be hard to imagine that the attorney in an adoption or surrogacy arrangement would not be counseling his client using morality and politics as guideposts for assessing the outcome of the court's decisions.

There is a difference in the "exercise of independent professional judgment" that sets the attorney apart from the paralegal. The very definitions of a paralegal and of the unauthorized practice of law makes the paralegal unable to render her legal conclusions and legal opinions *independently* to the client. This does not mean that the paralegal does not or cannot, independently of the attorney and other influences, render a professional opinion regarding the matter. There may be many occasions in which the paralegal is called upon to analyze and plan the best course of action for a client and report the results *to the supervising attorney.* Both NALA and NFPA have identified the significance of maintaining professionalism in their ethical codes; however, they seem to be in conflict at first blush. Figure 3.1 sets forth their rules. It is important to note that NALA prohibits the paralegal from exercising independent professional judgment vis-à-vis the client—not the attorney.

FIGURE 3.1
Use of Paralegals' Professional Judgment

NALA Guideline 3

Legal Assistants may perform services for an attorney in the representation of the client, provided:

1. The services performed by the legal assistant do not require the exercise of independent professional judgment.

NFPA EC 1.6(a)

A paralegal shall act within the bounds of the law, solely for the benefit of the client, and shall be free of compromising influences and loyalties. Neither the paralegal's personal nor business interest, not those of other clients or third persons, should compromise the paralegal's professional judgment and loyalty to the client.

The exercise of professional judgment by the paralegal is essential to his role of assisting the attorney. Forming theories, rendering opinions, and otherwise applying knowledge to the facts is perfectly acceptable where the final product is given to the supervising attorney. The line is drawn where the paralegal attempts to render this advice to the client without the supervision of an attorney. Recall from the previous chapter that rendering legal advice is the practice of law solely retained by attorneys. Why is this "guard" in place? It is the responsibility of the lawyer to create and maintain the relationship with the client, and the attorney is ultimately the person responsible for the outcome of her decisions. The paralegal may properly relay from the attorney to the client information that consists of the attorney's independent professional judgment, but the paralegal may not directly relay his own opinion to the client.

BALANCE OF AUTHORITY BETWEEN ATTORNEY AND CLIENT

Balancing the lawyer's influence over the outcome of the matter is ABA Model Rule 1.2, which specifically allocates the authority in the attorney-client relationship. The key is a **balance of authority** between lawyer and client. The client is the person who directs the course of action to be taken. It may be helpful to think of the relationship in ownership terms. The client owns the case or matter, and the attorney consults with the client to determine the best way to fix it. Just as people bring their cars to expert mechanics to be fixed, a client brings her troubles to the attorney. Most people do not know the best way to fix their cars, but have a certain idea of how far they are willing to go to solve a problem. The mechanic may not agree with the owner's decision to fix it up no matter what the cost, but as long as the mechanic has been honest in the assessment of the problem and in the cost to fix it, then he is obligated to follow the directive of the owner.

balance of authority
The balance between the right of the client to choose the desired outcome of the case and the obligation of the attorney to determine the best legal course to obtain that result.

What happens when the client insists on the less desirable or potentially harmful or more costly course? That is where the attorney may find himself in a bind. When a client decides to take a certain course of action that the attorney disagrees with, it is the duty of the attorney to counsel against it. However, if the client insists on following that course, the attorney must follow those wishes. Specifically, the rule states that the client has full authority over the decision to settle a matter. For example, an attorney was advised by the Pennsylvania Ethics Committee that he would not be prohibited by the ethics rules in allowing a client to enter into a settlement agreement whereby she would give up child support in exchange for her ex-husband's giving up a claim of custody. The committee found that under Rule 1.2, the attorney had to follow the wishes of the client insofar as they were reasonable, were made without coercion, and did not prejudice the children's interests. The attorney was not under any obligation to agree with his client's choice. *See* 2000 WL 1616247 (Pa. Bar. Assn. Comm. Leg. Eth. Prof. Resp.) In criminal cases, the client has final say on the plea to be entered, whether to waive a trial by jury, and whether or not the client will testify.

An attorney may also find herself torn between the law and her client's conduct. When should a client's course of conduct be reported to the appropriate agency? Almost everyone feels a little reluctance when writing out the annual tax check to the government; some clients take this a step further and fail to pay taxes at all. When this fact is discovered, what are a lawyer and a paralegal to do? Neither of them may knowingly assist or counsel a client in furtherance of this plan of tax evasion. For instance, attorneys and paralegals cannot effect a transaction that would result in tax evasion or other fraud to escape tax liability. However, once a past transgression has been discovered in confidence, they are not under an obligation to report it. The

attorney should counsel his client to pay these taxes; otherwise, the client will be clearly in violation of the law. This is a tricky situation, in which the attorney finds himself as a counselor *during* the questionable conduct. *See* LAWYER'S DUTY DURING CLIENT'S FRAUDULENT CONDUCT, 2001 WL 34004974 (Conn. Bar. Assn.). An attorney must insist that his client cease the unlawful conduct and attempt to rectify the situation without compromising the client's position and the attorney's obligation of confidentiality. The affirmative duty to report criminal or fraudulent conduct to the proper authorities only applies prospectively. Attorneys and paralegals must report only on the future conduct of their clients that they know will be unlawful. A full discussion of this obligation will be undertaken in chapter 4 (Confidentiality).

The test, as demonstrated in the above opinions, is whether or not the attorney believes that the client is making a decision that is relatively reasonable under the circumstances, is not made as the result of force or threat, is not made in furtherance of fraud, and/or does not pose a threat to third-party interests that are not protected. The attorney's agreement with the client's decision is not relevant. Her participation may be limited by law or by his own moral compass so that she declines representation or counsels against such conduct, but she is not responsible for the client's ultimate poor decision making.

COMPETENCY

An attorney is responsible for the establishment of the general parameters of representation and the explanation of the roles that he will play in the relationship with the client. Resting squarely on the shoulders of the attorney is the responsibility of determining whether he is competent to represent that particular client in the matter at hand. Competency is also reflected through the general office of the attorney. This means that the attorney must ensure the competency level of his paralegals, including verifying that the work performed by paralegals under his supervision is performed satisfactorily.

Competence
The ability and possession of expertise and skill in a field that is necessary to do the job.

ABA Model Rule 1.1 is not particularly specific with regard to **competence**. It merely asserts that an attorney must possess the legal knowledge and skill to handle the matter, and must be thorough and prepared in the representation. The paralegal codes are no more elucidating than those concerning attorneys; they are set forth in Figure 3.2.

Through cases, ethics opinions, and commentary, the rule becomes more clear. The most enlightening source, however, is the record of malpractice suits. Incompetency not only makes an attorney liable in ethics; it also gives rise to a professional malpractice suit if the plaintiff (former client) can prove the elements of that tort. Competency applies to both attorneys and paralegals, and so will be discussed in both contexts. Indeed, an attorney can be held responsible for the incompetency of her paralegal, and a paralegal may be independently sued for negligence in the execution of his duties. For this reason, the ABA has also written the *Guide for the Utilization of Paralegal Services.*

FIGURE 3.2
A "Competent" Paralegal

NALA Guideline 4

In supervision of a legal assistant, consideration should be given to (1) designating work assignments that correspond to the legal assistant's abilities, knowledge, training and experience.

NFPA EC 1.1(a)

A paralegal shall achieve competency through education, training, and work experience.

What does it mean to be *competent?* Generally speaking, it means that the lawyer or paralegal has the right skills and appropriate knowledge to handle the matter presented. These skills and this knowledge are acquired a number of ways. First, the person's basic legal education should prepare her for the general role of either attorney or paralegal. The educational requirements for both have already been discussed, in chapter 1. But formal education is not the only means of acquiring knowledge; indeed, in the law it is not even adequate. Actual practice on the job is necessary in order to understand the complexities of the legal system, manage the law office, and handle opposing counsel and clients. Furthermore, the law is always changing and evolving; new laws are created constantly to keep pace with societal influences. Even the ways in which lawyers practice law change to reflect new technologies. For this reason, most (40 out of 50) states require that attorneys acquire a certain number of **continuing legal education (CLE)** credits per year after they have been admitted to the bar of those states.

continuing legal education (CLE)
Continued legal competence and skills training required of practicing professionals.

Keeping apace of developments in the law and its practice is so critical to the proper, competent rendering of legal services that in 1986, the ABA promulgated a Model Rule regarding mandatory or minimum continuing legal education as a requisite to practice. It is the ABA's desire that all the states will put these minimums into place so that there is a consistency and assurance of competency across the board. The Model Rule would require 15 hours of CLE each year. This could be satisfied by attending approved CLE courses, teaching, writing for CLE, receiving in-office training, and using other modes, as long as the educational efforts meet conditions set forth in later sections of the Model Rule for CLE. Further, the attorneys must report their CLE credits in order to assure compliance with the minimum requirements. In those states that do have CLE requirements, failure to meet the minimum standards will result in the denial of the right to practice in that jurisdiction where the attorney is delinquent. *See Kentucky Bar Association CLE Commission v. McIntyre,* 937 S.W.2d 708 (Ky. 1997). In this matter, the attorney did not comply with the state's CLE requirements, despite having received several deficiency notices. "The failure to maintain licensing requirements constitutes a serious charge for which suspension is an appropriate remedy for non-compliant members."

Acquiring and maintaining new skills is vital not only for attorneys. The national paralegal associations have also set forth minimum continuing legal education credits required each year for paralegals. As membership in these associations is voluntary, the requirements are not binding on paralegals in general. However, for those paralegals who hold one of the certification designations (CLA/CP, PACE, ALS, PLS, PPC, AACP), the organizations do require CLE credits to be reported by the paralegals in order to maintain their status. NALA requires evidence of completion of 50 hours, of which 5 must be on the subject of legal ethics, of continuing legal education every 5 years. To maintain NFPA's PACE credential, a paralegal must complete 12 hours of continuing legal or specialty education every 2 years, with at least 1 hour in legal ethics. NALS requires 75 hours every 5 years, with at least 5 hours devoted to legal ethics. The newest national certifying body, AAPI, which also requires higher education, mandates 18 hours, of which 2 must be in ethics. The continuing legal education requirement time frames coincide with the organizations' certification renewal periods.

IN CLASS DISCUSSION

What minimum requirements, if any, for paralegal continuing legal education should be required in your state? Do you think that CLE is necessary for practicing paralegals? Why? Does your state offer CLE seminars specifically for paralegals? What types of topics are offered; what topics would you like to see addressed?

In its definition, the ABA identifies two components of competency:

1. Knowledge and skill
2. Thoroughness and preparation

What does each of these elements encompass, and how does one know if they have been satisfied?

Knowledge

It is impossible to assert that every attorney or paralegal knows everything about the law. Even specialists cannot know everything about their particular field. Increasingly, attorneys and the paralegals who work for them are becoming specialized in one field, because the law is becoming more complex. Many attorneys now cross-refer clients to these specialists when they cannot handle the matter competently. Relying on memory of the law is actually an ethical violation! It is imperative that an attorney be certain of the current state of the law, and the only way to do this is to perform the necessary research. Researching is one of the tasks commonly assigned to a paralegal. NALA's Guideline 5 specifically lists research as one of the tasks properly delegated to a paralegal and for which paralegals have competency. Failure to research has been found to be a sanctionable ethical offense by many courts and ethical boards. The requisite knowledge that an attorney or paralegal must have is the knowledge of how to apply the law once it has been found. Knowing how courts are likely to rule given the state of the law and applying it to the particulars of the matter at hand is the test of competency. Knowing *how* to find the answer, not already having the answer, is the essence of proper lawyering.

What this means in practical terms is that an attorney does not necessarily have to have experience in handling a matter in a particular area of law in order to handle that matter. Law schools expose their students to many areas of law in order to assure a certain level of familiarity with the issues involved in the diverse areas of law. General practitioners, those whose offices take on a variety of matters, may often face issues they have never dealt with before. Legal practice is much like a continuing education process, as the law in an attorney's area of concentration may change. The practice of law does not require specialization, and therefore, these attorneys are fully competent to handle the matter as long as they acquire the requisite knowledge during the course of the client's matter. An assessment of the attorney's ability to do the research and analysis will determine whether the case can be undertaken. A more complex specialty or fact pattern of a particular matter may require that the attorney refer the case to another with the relevant competency.

SPOT THE ISSUE

Natalie is a general practitioner with her own office. She has handled various kinds of cases over the ten years since she graduated law school, but has never drafted a will with a spendthrift trust provision. Natalie recalls how much she liked her estates professor in law school, so she consults her notebooks and casebook from that class to help her draft the will. The client seems pleased with the will, and it is properly executed in Natalie's office.

Has Natalie fulfilled her ethical requirements in taking on this new matter? Why or why not? What details would change your decision? What if Natalie had had her paralegal thoroughly research the issue and draft the will instead of consulting her former coursework?

Skills

An attorney must be able to execute, or follow through with, the knowledge acquired in order to properly represent a client. Knowing how to do something is not quite the same as doing it well. This is where the skill of an attorney becomes relevant with regard to his competency level. Knowing how to perform research is merely the starting point. The skill is in finding the relevant law, identifying the legal issues involved, analyzing the legal ramifications of the legal authority, applying the law to the current fact pattern, composing a viable argument, and writing the necessary documents accurately and persuasively. Further, an attorney is skilled in making decisions as to how best to proceed in a legal matter. A skillful attorney strategizes on if, when, and how to negotiate and how to conduct the trial.

These are finely honed skills that are (or should be) continually improved upon as an attorney practices. They are nebulous, as each matter requires different handling and finesse. While paralegals develop and hone skills complementary to those of attorneys, at its base, a paralegal's skill set is more easily definable. A paralegal should also be able to perform research, draft preliminary documents in legal style, accurately and concisely summarize information, identify material facts, and handle procedure both in the office and with the courts. Perhaps the trademark skills of a paralegal are (or should be) impeccable organization and the ability to manage multiple assignments effectively. As seen in Figure 3.3, NALA lists the basic skills of a paralegal in its ethical guidelines.

NALA's emphasis on the supervision of an attorney underscores the importance of the paralegal's knowledge of the ethical mandates for attorneys. The list is not all inclusive. Both the attorney and the paralegal are responsible for ascertaining the proper delegation of work. Not only must they each know their own limits of competency, they must also understand each other's limitations. It is a cooperative effort.

NALA Guideline 5

Except as otherwise provided by statute, court rule or decision, administrative rule or regulation, or the attorney's rules of professional responsibility, and within the preceding parameters and proscriptions, a legal assistant may perform any function delegated by an attorney, including, but not limited to the following:

1. Conduct client interviews and maintain general contact with the client after the establishment of the attorney-client relationship, so long as the client is aware of the status and function of the legal assistant, and the client contact is under the supervision of the attorney.
2. Locate and interview witnesses, so long as the witnesses are aware of the status and function of the legal assistant.
3. Conduct investigations and statistical and documentary research for review by the attorney.
4. Conduct legal research for review by the attorney.
5. Draft legal documents for review by the attorney.
6. Draft correspondence and pleadings for review by and signature of the attorney.
7. Summarize depositions, interrogatories and testimony for review by the attorney.
8. Attend executions of wills, real estate closings, depositions, court or administrative hearings and trials with the attorney.
9. Author and sign letters providing the legal assistant's status is clearly indicated and the correspondence does not contain independent legal opinions or legal advice.

FIGURE 3.3
Basic Skills of a Competent Paralegal

REEL TO REAL

In *The Verdict* (1982), Paul Newman's character, Frank Galvin, is an alcoholic attorney on the brink of destroying his career. He struggles with his situation during his one last chance to prove his competency as an attorney in a medical malpractice defense matter. How does this attorney overcome his difficulties? Would it be ethical for him to take on this matter or for his firm to give him responsibility for it based upon his demonstrated competency level? Why or why not? If you were his paralegal, what would or should you do? Would it be ethical for you to assist him, knowing about his condition? Why or why not?

Thoroughness

Not only must attorneys and paralegals acquire the requisite knowledge and skills; they also must perform thoroughly the tasks related to them. It is not enough to have *some* of the information; it is vital to have *all* of it. The practice of law is detail oriented. Cases turn on very specific facts; materiality is not necessarily dependent upon the amount of information available. In other words, size doesn't matter in determining the importance of a fact or an issue. It may be easy to overlook an element of the case without a thorough review of the file materials; it may be easy to miss the defining case without thorough research; it may be easy to miss an argument without a thorough examination of the issues; and it may be easy to miscalculate the probable or possible outcomes without a thorough analysis of the relevant law. Truly, "God is in the details" (Ludwig Mies van der Rohe, German Architect 1886–1969). The real challenge for legal professionals is to accomplish the level of thoroughness required in the most efficient manner possible. This is why competency in all skill sets is so important as it relates to time management. A paralegal must learn to manage the amount of time spent on a task while still being thorough. It is a delicate balance between efficiency and thoroughness.

Preparation

After all the preliminary work is done and it's show time for the attorney, she must be prepared. All information must be at her fingertips, accessible and comprehensible.

SURF'S UP

A survey by the ABA finds that many lawyers are not using technology to its best advantage. Many lawyers are too busy to learn new technologies, or they distrust them to do what they need. This is where paralegals may come in very useful.

Read the following article:

Ed Polls, *Do You Commit Malpractice. . . . When It Comes to Technology?,* MASSACHUSETTS LAWYERS WEEKLY, Nov. 20, 2006, http://www.lawbiz.com/coachs_corner_11-20-06.html

The Polls article contends that lawyers who are not using technology may not be competent and that they are not conforming to the standard of care established in the local legal community.

Visit the above Web site and read the Polls article. How do you think paralegals can support lawyers in realizing their ethical responsibilities as they relate to technology?

For more information:

Technology can be used to better serve clients and enhances a lawyer's level of competency. For this reason the ABA has created its Legal Technology Resource Center. It can be accessed at

http://www.abanet.org/tech/ltrc/home.html

Catherine Sanders Reach, MLIS, *Make Technology Part of Your CLE!,* ABA TECHNOLOGY RESOURCE CENTER, August 2004, is an interesting article about technology and continuing legal education. Please visit http://www.abanet.org/tech/ltrc/publications/techtrain.html

It is usually a matter of teamwork, and the attorney relies on her team to have her prepared to face any situation or contingency. It is not enough to have competently, skillfully, and thoroughly prepared only the client's side of the issues. An attorney must be prepared for what the opposing side will counterargue. Courts have little patience or tolerance for ill-prepared attorneys. Indeed, a Vermont attorney was indefinitely suspended from the practice of law until he could prove that he was fit to practice; in other words, the court found him incompetent. In that case, a judge filed a complaint with the ethics board regarding the attorney's inadequate preparation of legal submissions to the court.

> *All members of the Board agreed with the hearing panel's finding that between 1985 and 1992 respondent repeatedly submitted legal briefs to this Court that were generally incomprehensible, made arguments without explaining the claimed legal errors, presented no substantiated legal structure to the arguments, and devoted large portions of the narrative to irrelevant philosophical rhetoric. The briefs contained numerous citation errors that made identification of the cases difficult, cited cases for irrelevant or incomprehensible reasons, made legal arguments without citation to authority, and inaccurately represented the law contained in the cited cases. All members of the Board also agreed with the hearing panel's conclusions that respondent's briefs were not competently prepared and fell below the minimum standard for brief-writing expected of a practicing attorney.…*

In re Shepperson, 164 Vt. 636, 674 A.2d 1273, 1274 (1996).

Clearly, the justice system does not usually tolerate those who "wing it," or have a "good enough" attitude; inadequate preparation is obvious and inexcusable. This applies not only to the substance of the preparation, but also to the adherence to technical requirements of a submission. To adequately prepare, the paralegal should consult all local rules of court with regard to the particulars of documents and appearances, and sufficient time should be allocated in order to comply with those requirements. Competent preparation takes time. Time and paralegal support is apparently what the lawyers in *Bradshaw v. Unity Marine Corp.,* 147 F.Supp.2d 668 (S.D. Tex. 2001), did not have. Both lawyers apparently submitted their pleadings *"entirely in crayon on the back sides of gravy-stained paper place mats."* The full text of the case appears at the end of this chapter and is well worth the read, simply for the humor of its author, Judge Kent.

DILIGENCE

diligence
Acting within the legally proscribed time or promptly responding to a client's or party's request.

Connected to the definition of competency is the exercise of **diligence** in pursuing a matter for the client. Having legal knowledge and skill is of no use unless the attorney takes prompt action upon it to preserve his client's interests in the matter. ABA Model Rule 1.3 simply states that an attorney needs to be reasonably diligent and prompt when representing a client, and, as Figure 3.4 illustrates, the paralegal's mandate is no clearer.

The paralegal code is no more elucidating than the ABA Model Rule. This again underscores that the interpretation of reasonable actions and time frames must be determined in light of a particular matter. Each matter must be individually evaluated to determine the boundaries of ethical behavior for diligence.

With rare exception, all matters are subject to deadlines. Delay can cause anything from minor inconvenience, such as the rescheduling of a real estate closing, to annihilation of a claim, such as the lapse of the Statute of Limitations. Diligence relates

NFPA EC 1.1(c)
A paralegal shall perform all assignments promptly and efficiently.

FIGURE 3.4
The Diligent Paralegal

not only to legally required time limits but also to the general progress of the matter as it develops in the law office. Procrastination is unacceptable in the practice of law. There are many clients' needs that must be addressed and they often, if not always, overlap. Difficulties and delays will invariably arise; the fact of a delay does not automatically indicate that there has been a lapse in diligence. The most diligent and conscientious paralegals and attorneys find themselves behind schedule and affected by postponements; there are circumstances beyond their control. Diligence does not require that the delays be avoided entirely—only that the paralegal and attorney have put forth their best efforts to facilitate and expedite the matter.

pervasive neglect
Continued disregard for matters pending in the law office, deadlines, and other obligations that seriously impacts clients' interests and indicates an utter lack of diligence.

In a "snowball effect" case, an attorney was found to have violated the ethics rules relating to diligence and promptness. *Attorney Grievance Commission of Maryland v. Ficker,* 349 Md. 13, 706 A.2d 1045 (Ct. App. 1998). The constant "putting off" of matters and dealing in a very high volume of cases resulted in an utter collapse of the entire practice. This is what is described as **pervasive neglect**. The court discussed eight separate cases in which the attorney had failed to exercise diligence in pursuit of his clients' interests. Perhaps taken one by one, they would not have had the same impact as all of the transgressions viewed at once. The attorney was in the habit of interviewing clients and then assigning them to either himself or an associate. The problem with this habit was that the assignment came the day before trial. There was no way that either Ficker or his associates could prepare to appear and represent their clients. Failure to file proper motions on the theory that the request could be made in person on the court date was violative of the duty of diligence, in that it subjected the clients, the court, and other attorneys to unanticipated circumstances and further delay. The attorney was found lacking in diligence in almost every aspect of his practice, including following through with reasonable investigation of his clients' claims. A diligent attorney checks facts before cavalierly assuming that the matter is a simple one. *Id.* at 28.

> *Ficker essentially operated his practice like a taxicab company. . . . What he apparently, and inexcusably, failed to realize is that, while perhaps any competent taxi driver can transport a passenger from one point to another on a moment's notice, legal services cannot routinely be dispensed on that basis with an acceptable degree of competence. As the direct result of Ficker's practices, not only was the court inconvenienced but [the client] was faced with the unacceptable prospect of either falling on his sword or going to trial with a lawyer he never hired and who knew little or nothing about his case.*

Id. at 32.

RESEARCH THIS

Find a case or ethical opinion in your jurisdiction that addresses the issue of "pervasive neglect" culminating in a sanctionable offense violating the duty of diligence.

Additionally, the court noted that the entire office was lacking in any method of tracking cases and clients. Attorneys have a duty to remain diligent, to review cases periodically to ensure that no dates are missed, and that the other parties are current in their obligations in the matter. The directives as far as timing of an attorney's actions can also come from the client. If a client instructs an attorney to take certain steps on her behalf or in connection with a matter, the attorney must do so in as prompt a manner as possible, as much as the attorney may not want to. Failure to abide by a client's directives in a prompt manner is also violative of the duty of diligence. *See In re Caldwell,* 715 N.E.2d 362 (Ind. 1999).

FIGURE 3.5
Docketing and Calendaring

Missing a filing deadline or court appearance can be extremely damaging to a client as well as causing embarrassment and a potential malpractice claim for you. Each firm member should maintain an individual calendar in addition to a master calendar for the entire firm. Answer the following questions to determine how well you are doing in this area.

	Yes	No	N/A
Do we keep individual calendars, i.e., attorney and secretary/paralegal?			
Does your calendar include (as applicable):			
a) statutes of limitations?			
b) all court appearances?			
c) client and other appointments?			
e) real estate closing dates?			
g) all self-imposed, discretionary deadlines (i.e., promises made to others, promises made to you and work deadlines you have set for yourself?)			
Do we maintain a master calendar? Do we have a good system for updating and maintaining each calendar in case of scheduling changes?			
Do we use reminder slips (tickler slips) to draw the attorney's attention to an upcoming deadline?			
If the calendar is maintained on the computer, do we frequently print out a copy to use in case of power failures or other computer problems?			

Diligence is perhaps the area where paralegals can help most in the law office. Having the procedural knowledge of court schedules and deadlines, the paralegal can "calendar" important dates. Factual knowledge of the firm's caseload will enable the paralegal to appropriately monitor the status of cases and alert the responsible attorney. There is a great deal of information to keep track of in the law office. The Colorado Bar has created a checklist, set forth in Figure 3.5, for analyzing whether dates or information are falling through the cracks.

One of the most effective tools in use by paralegals and other professionals is the "tickler file system." A tickler file is designed to tickle your memory so that tasks do not get forgotten in the onslaught of activity at work. It keeps track of assignments that need to get done on a certain day and lets you put reminders on a date. Tasks are grouped not only by project, but also by day and month. The system is flexible and lets you re-file tasks as deadlines or priorities change. Essentially, you need a folder or compartment for each day of the month, and then a folder for each subsequent month. In the morning, the folder for that day is taken out; assignments and reminders are already in place so that they can be tackled without resorting to mere memory. At the end of the day, either all tasks are completed and the folder is empty, or an uncompleted task remains and can then be placed in the front of the next day's folder. Color-coding by kind of project or matter and filing the supporting materials with the task can add dimension to the file so that all the information is readily accessible.

CYBER TRIP

Good "how-to" explanations are located at these sites:

http://www.lifehack.org/articles/productivity/the-tickler-action-file.html (The Lifehack site offers many different organizational and productivity discussions.)

http://www.addresources.org/article_tickler_roehl.php.

A virtual system is available for a small monthly fee at www.myticklerfile.com.

COMMUNICATIONS WITH THE CLIENT

Lastly, in order to assert that one is competent, the legal professional has to keep the lines of **communication** open between himself and his client. Recall that the matter really "belongs" to the client. In order for a client to make decisions regarding the

communication
The obligation of an attorney to keep his client informed of the status of the matter, and to respond promptly to the client's requests for information in a candid manner.

FIGURE 3.6
Paralegals' Duty to Communicate

NALA Guideline 5

[A] legal assistant may perform any function delegated by an attorney, including but not limited to: (1) . . . maintain general contact with the client after the establishment of the attorney-client relationship, so long as the client is aware of the status and function of the legal assistant, and the client contact is under the supervisions of the attorney.

handling of the matter, he must be informed as to the status of the matter and the legal ramifications of his decisions. Further, in order to satisfy the demands for diligence, an attorney must promptly answer the inquiries of his client. Attorneys, just like other professionals are very busy, but, unlike other professionals, they can be sanctioned for failing to respond to their clients. Additionally, attorneys, in helping to steer the ship must adequately explain the legal process and how the client's matter fits within it. The general public is not aware of the intricacies of the legal system and particulars of the laws in their jurisdiction; if they were there would be little need for lawyers!

ABA Model Rule 1.4 sets forth the requirements for communicating with clients. It requires that the attorney consult with the client regarding the means to achieve the client's objectives and other pertinent matters, and to keep the client informed about the status of the matter. NALA has recognized the vital supportive role of the paralegal in keeping the lines of communication open. See Figure 3.6.

These communications must also be made openly and forthrightly. Concealment and falsity are unacceptable as well. It is not good enough just to be talking; that exchange must be made in good faith and support the fiduciary nature of the relationship. While most people do not like to be the bearers of bad news, it is a requirement for attorneys to speak candidly about any issues that have arisen in the course of the matter. It may also be necessary for a paralegal to be that bearer of news as well.

It cannot be stressed enough that the client is in charge of the direction of the matter. It is the client's objectives that must be met or at least attempted, not necessarily the best or most reasonable or most achievable objectives in the estimation of the attorney. The end and the means to the end are the prerogative of the client; the attorney counsels, advises, and in some cases warns, but does not take action without the authority of the client. In a strange manifestation of diligence, an attorney cannot make decisions unilaterally, of her own accord, even if the issue is urgent and time is short. She must communicate with the client and make her best efforts at securing the client's consent. An absent or evasive client simply cannot be helped, even if it is in his best interest to take a specific action.

For example, *In re Samai,* 706 N.E.2d 146 (Ind. 1999) dealt with an attorney who was representing a client in an automobile personal injury matter. Having contacted the insurance company and set a medical examination of his client, the attorney attempted to contact the client again and again. He was unable to locate her and had no further contact. However, being diligent and perhaps not wanting to prejudice his client and to keep the matter moving along, the attorney sent a demand letter for a $5,000 settlement of the claim. The insurance company counteroffered $2,000, which the attorney accepted on behalf of his client. This would have been bad enough, but the attorney aggravated the situation by then using the settlement proceeds to his own benefit. The failure to communicate coupled with the "selfish motive" warranted an 18-month suspension from the practice of law.

It is vital that these communications emanate from the responsible attorney. While it is true that paralegals play a vital role in keeping clients current in the progress of their matters, it is not their role to substitute for the required consultations with the attorney. Further, the attorney and paralegal should maintain communications so as not to mislead the client. In *People v. Milner,* 35 P.3d 670 (Colo. 2001), the attorney's paralegal took over communications with the client and made certain representations and misrepresentations regarding the progress of the case that did not come to fruition due to the lack of diligence of the attorney. The attorney was not affirmatively contacting the client and not affirmatively supervising the paralegal's contact with the client. There was a litany of charges in a variety of individual matters brought against this attorney and paralegal team. Essentially, it was determined that the attorney abandoned her clients, causing serious or potentially serious harm. This was aggravated by her failure to properly supervise the communications between her paralegal and her clients. It should come as no surprise that Milner was disbarred. To avoid such missed or faulty communications, the Colorado Bar's checklist for Client Relations is included as Figure 3.7.

As in any relationship, honest and candid communication is vital. An attorney cannot perform his tasks without input from the client; therefore, the client should be kept informed of all elements of the matter, and it is the task of the attorney to educate the client as to the status of the law and how it will impact the client in order for the client to make the choices necessary to keep the matter going forward. A competent attorney diligently communicates with his client, adverse parties, and the tribunal. While these ethical standards as they are applied are fact specific, there are certain acts or omissions that are clearly violative of the attorney's duties in the attorney-client relationship. Perhaps the best way to evaluate an attorney's conduct is to determine what another responsible attorney would do in the same situation. Reasonable actions are gauged by how most attorneys act in or react to the specific circumstances.

FIGURE 3.7
Client Relations

The relationship with the client is a critical consideration for law office management. Everything that happens in a law firm has a direct or indirect effect on the client. The way a law firm conducts its business will also influence its relationship with its clients.

Law firms are often set up so that the critical element of administrative support is service to the attorney. The attorney, in turn, serves the client. Today, a client-centered law firm involves all personnel directly serving the client. The attorney is a team member involved in providing overall service to the client.

Examine your client relation efforts by asking the following questions:

	Yes	No	N/A
Do we return clients' phone calls and emails within 24–48 hours?			
Do we perform all the work we told the client we would?			
Do we send follow-up letters after a meeting or telephone conversation in which new decisions have been reached?			
Do we complete the work in a timely fashion?			
Do we follow up with clients at least every six weeks even when their cases are inactive?			
Do we acknowledge staff members for good client relations?			
Do we ask the client for feedback as the matter moves along?			

SPOT THE ISSUE

Albert has recently taken on many new cases. This increased workload has caused him to rely more heavily on his staff, consisting of both a paralegal and a secretary. He has told his paralegal to prepare seven new bankruptcy petitions, four wills and five complaints, and to file them with the courts. He then instructs his secretary to call the clients to tell them that everything is taken care of. This pattern of behavior continues for the next several months, as Albert is simply swamped with his caseload.

The clients are, in general, receiving information from Albert's secretary regarding the filing of the necessary papers. One client has called several times to speak with Albert, but has been unable to get him in the office. The paralegal has offered to help answer this client's questions and has sent letters regarding the next court dates. However, this client is not happy that he has not been able to speak with Albert directly, although all his questions have been answered. Albert is pleased, as the office appears to be running relatively smoothly. Can you foresee any problems with this way of running the office and handling cases? While the paralegal appears to be competent, is the paralegal acting ethically in managing the entire office and communicating with the clients?

LEGAL MALPRACTICE

legal malpractice
A civil cause of action wherein a client may sue his attorney for failures in the representation that caused the client actual harm. The client may be entitled to money damages and possibly punitive damages in excess of actual pecuniary loss if the attorney's conduct was egregious.

ethical complaint
A report of suspected unethical activity on the part of an attorney, to the ethical committee of the state bar association or other appropriate tribunal. The committee may investigate to determine if an ethics violation has, indeed, occurred.

Lack of competency, diligence, or communication can also give rise to a civil lawsuit with separate and additional penalties: the malpractice claim brought by a client against the attorney. While some of the elements of these two claims are the same, there are different standards of proof required in order to recover for malpractice. In both an **ethical complaint** and a malpractice suit, the claimant needs to prove that *the relationship itself does exist,* and, therefore, the attorney owes the client a duty to protect her interests. Without the relationship, there can be no duty towards that person. The claimant is without a cause of action at that point. Secondly and also similarly, the client must show that *the attorney acted unreasonably* by failing to have (or acquire) the requisite knowledge, and failed to exercise the ordinary skill of a practicing attorney. There is a difference between malpractice and errors in professional judgment that end in an unsuccessful outcome.

> *There can be no liability for acts and omissions by an attorney in the conduct of litigation which are based on an honest exercise of professional judgment. This is a sound rule. Otherwise every losing litigant would be able to sue his attorney if he could find another attorney who was willing to second guess the decisions of the first attorney with the advantage of hindsight. . . .*

Clary v. Lite Machines Corporation, 850 N.E.2d 423, 431 (Ind. 2006).

The court also determined that an attorney is liable for mistakes in legal research, a task that is often delegated to paralegals.

The difference between the ethical complaint and the malpractice suit is found in the last two elements of a civil cause of action: the attorney must be the *proximate cause* (the third element) of *actual harm to the client* (the fourth and last element). In order to show that he was harmed by the attorney, the client needs to show that he would have been successful in the underlying action. In other words, his loss in the matter must be attributable to the attorney. If the client would have lost no matter how incompetent the attorney, then there is no harm. While the defense of the malpractice suit can assert "no harm, no foul," the ethical boards are equally as concerned with the impact on the client as they are with the actual violation. The fact of the violation is enough to warrant a sanction. No harm to the client needs to be proven in order to bring the attorney before the ethical board; the harm is presumed to be against the profession itself.

PARALEGAL MALPRACTICE

The way legal malpractice suits contrast with lawsuits against paralegals is still relatively uncharted territory. Paralegals *are* practicing law inside the law office, and while they should be held to the standard of care applicable in their jurisdiction, ultimately, they do not have a direct, independent relationship with the client as the attorney does. This is the primary hurdle that generally cannot be overcome in order to hold paralegals liable for legal malpractice. The cause of action requires the fiduciary relationship, which is generally absent in the case of a paralegal. It is absent not because the paralegal does not have a relationship with the client, but because the primary responsibility for that relationship rests with the attorney. *See In re Estate of Divine,* 263 Ill. App. 3d 799, 809, 635 N.E.2d 581, 588 (1994). (The court "refuse[d] to find that [the paralegal] owed [the client] a fiduciary duty simply because she worked for [the] attorney, and we refuse to hold that paralegals are fiduciaries to their employers' clients as a matter of law.")

Attorneys are held responsible for the actions or inactions of their paralegals that cause harm to the clients, under the doctrine of respondeat superior ("let the superior answer"). This means that the supervising attorney is held liable for the malpractice of the paralegal. Essentially, the attorney is in a position to review the paralegal's actions and direct the course of the conduct, and therefore is in a position to avoid the mistake.

> *The label "paralegal" is not in itself a shield from liability. A factual investigation is necessary to distinguish a paralegal who is working under an attorney's supervision from one who is actually practicing law. A finding that a paralegal is practicing law will not be supported merely by evidence of infrequent contact with the supervising attorney. As long as the paralegal does in fact have a supervising attorney who is responsible for the case, any deficiency in the quality of the supervision or in the quality of the paralegal's work goes to the attorney's negligence, not the paralegal's.*

Tegman v. Accident & Medical Investigations, Inc., 107 Wash. App. 868, 876, 30 P.3d 8, 13 (2001).

This vicarious responsibility for the actions of the paralegal is understood by the malpractice insurance carriers covering attorneys. The policies generally also cover the errors of employees, as long as the employees were acting within the scope of their employment. Problems arise where there is no supervising attorney to hold responsible. Paralegals who are directly working for and representing individuals can and should be held to a certain standard of care for which they can be held liable for breaches of their duty. *See Busch v. Flangas,* 108 Nev. 821, 837 P.2d 438 (1992). (The Court determined that if the paralegal held himself out as having the legal ability to competently prepare all the necessary documents and protect the client's legal interests, he should be subject to a legal malpractice claim for negligent provision of legal services.) Other courts have decided that paralegals could not be held liable for legal malpractice because they are not attorneys and therefore cannot enter into the requisite attorney-client relationship that gives rise to the duty of care. *See Palmer v. Westmeyer,* 48 Ohio App. 3d 296, 303, 549 N.E.2d 1202, 1209 (1988). However, a caveat to that generalization exists when the non-lawyer holds herself out as an attorney. In that case, courts have found that the non-lawyer, by misrepresenting herself, opened herself up to a viable legal malpractice claim. This uses the same line of reasoning as *Busch*. *See Pytka v. Hannah,* 15 Mass. L. Rptr. 451, 2002 WL 31862712 (Mass. Super. 2002) (not reported in N.E.2d). The court found that all of the facts necessary to uphold a cause of action for legal malpractice were satisfied as against the non-lawyer except for the fact that he was not a member of the bar subject to that particular charge. However, "the allegations still f[e]ll well within charges of negligence,

deceit, misrepresentation and breach of contract." *Id.* at 8. The non-attorney defendant was found liable for the client's losses and punitive damages were further assessed. In total, almost one million dollars in damages were assessed against him, and the plaintiff was further granted interest, fees, and costs to be added to that judgment. The unauthorized practice of law can be very costly for those disregarding the rules.

Paralegals, according to the definition of their role in the law office, cannot establish an attorney-client relationship. However, where liability may not attach for legal malpractice, it certainly may lie in an action for the unauthorized practice of law. Any paralegal holding himself out as capable of providing direct services, and therefore outside the scope of an attorney's vicarious liability under malpractice, can be sued for the damages incurred as a result of the unauthorized practice of law.

Summary

An attorney must maintain a working relationship between herself and her client. There are two competing obligations in performing this duty: to follow her own independent legal judgment and to follow the desired course of the client. This requires that the authority and control over the matter must be shared between the attorney and the client.

Both attorneys and paralegals must be competent to handle each type of case presented to them. This means that they have the requisite knowledge and skill and have approached the matter with thoroughness and preparation. These efforts must also be made with diligence; the matter must be pursued promptly in order to preserve the client's interests in the case. In order for the client to make the decisions regarding the case, the attorney needs to maintain communications with the client in a timely manner.

An attorney lacking in any of the above-mentioned attributes may find himself the subject of a legal malpractice action. The private action initiated by the client is separate and in addition to any ethical sanctions and penalties to be imposed by the relevant ethical board. Paralegals, although they are not subject to their own ethical boards with sanction powers, can be sued individually for their lapse in the standard of care attributable to the paralegal profession.

Key Terms and Concepts

Balance of authority
Communication
Competence
Continuing legal education (CLE)
Diligence
Ethical complaint
Independent legal judgment
Legal malpractice
Pervasive neglect

Review Questions

MULTIPLE CHOICE

Choose the best answer(s) and please explain WHY you choose the answer(s).

1. A "competent" attorney has which of the following attributes?
   a. Legal research skills
   b. Knowledge of her ethical obligations
   c. Specialized training in a particular area of law
   d. Excellent oral advocacy skills

e. A and B
f. B and C
g. All of the above

2. Diligence requires that an attorney
   a. Return all phone calls of the client himself
   b. Keep the client informed of the particulars of the case
   c. Write letters to the client once a week
   d. File motions on the due date
3. "Pervasive neglect" means that the attorney
   a. does nothing on a case
   b. has a habit of putting things off until the last minute
   c. has repeatedly failed to maintain diligence in a number of cases
   d. assigns all the work on a matter to her paralegal

EXPLAIN YOURSELF

All answers should be written in complete sentences. A simple yes or no is insufficient.

1. Explain the meaning of "competency." How does a paralegal know whether he is competent to handle a matter?
2. Describe the elements of proper communication with the client (it is more than just returning phone calls!)
3. What does it mean to be thorough and prepared with respect to a legal matter?
4. Do you think paralegals should be held responsible for their supervising attorneys' ethical infractions? Why or why not? Could this cut down on malpractice lawsuits overall? Would that be a benefit to paralegals? How?
5. What are the most important skills of a paralegal?

FAULTY PHRASES

All of the following statements are FALSE. State why they are false and then rewrite each one as a true statement, without just making the statement negative by adding the word "not."

1. In order for an attorney to take on a new kind of matter that she has not previously handled in practice, she must have studied that particular area of law in school.
2. An attorney must always follow the instructions of the client with regard to the handling of the case.
3. An attorney must personally answer all the requests for information from the client.
4. Diligence requires that the attorney or paralegal find all the cases in the jurisdiction that answer the question presented in the matter.
5. As long as the paralegal in the office is keeping the clients happy, the attorney is doing his job.
6. Paralegals cannot be sued for malpractice because their supervising attorneys are responsible for all their work.
7. Paralegals are held responsible for their supervising attorneys' ethical violations under the theory of *respondeat superior*.

PORTFOLIO ASSIGNMENT

Write Away

Compare the following scenarios and write a letter in response to each client. Assume you are a paralegal at a general practice firm and have been given three files to review:

- Client A is getting a divorce and his wife is trying to obtain sole custody of the children.
- Client B wishes to write her will.
- Client C is involved in a complex litigation that is currently in the discovery phase.

You have read all the relevant facts of these cases.

- Client A asks how many times women get custody of the children in these kinds of matters and what his chances are to obtain sole custody.
- Client B asks whether she can have her sister sign as a witness to the will and whether she should set up a trust for her children.
- Client C wants to know how much time is left for submitting answers to interrogatories served on him by the defendant and what his chances are at getting the counterclaim against him dismissed.

United States District Court, S.D. Texas, Galveston Division.
John W. BRADSHAW, Plaintiff,
v.
UNITY MARINE CORPORATION, INC.; Coronado, in rem; and Phillips Petroleum Company, Defendants.
No. CIV. A. G-00-558.
June 27, 2001.
KENT, District Judge.

Plaintiff brings this action for personal injuries sustained while working aboard the M/V CORONADO. Now before the Court is Defendant Phillips Petroleum Company's ("Phillips") Motion for Summary Judgment. For the reasons set forth below, Defendant's Motion is **GRANTED.**

Plaintiff John W. Bradshaw claims that he was working as a Jones Act seaman aboard the M/V CORONADO on January 4, 1999. The CORONADO was not at sea on January 4, 1999, but instead sat docked at a Phillips' facility in Freeport, Texas. Plaintiff alleges that he "sustained injuries to his body in the course and scope of his employment." The injuries are said to have "occurred as a proximate result of the unsafe and unseaworthy condition of the tugboat CORONADO and its appurtenances while docked at the Phillips/Freeport Dock." Plaintiff's First Amended Complaint, which added Phillips as a Defendant, provides no further information about the manner in which he suffered injury. However, by way of his Response to Defendant's Motion for Summary Judgment, Plaintiff now avers that "he was forced to climb on a piling or dolphin to leave the vessel at the time he was injured." This, in combination with Plaintiff's Complaint, represents the totality of the information available to the Court respecting the potential liability of Defendant Phillips. [FN omitted]

Defendant now contends, in its Motion for Summary Judgment, that the Texas two-year statute of limitations for personal injury claims bars this action. *See* Tex. Civ. Prac. & Rem. Code § 16.003 (Vernon Supp.2001). Plaintiff suffered injury on January 4, 1999 and filed suit in this Court on September 15, 2000. However, Plaintiff did not amend his Complaint to add Defendant Phillips until March 28, 2001, indisputably more than two years after the date of his alleged injury. Plaintiff now responds that he timely sued Phillips, contending that the three-year federal statute for maritime personal injuries applies to his action. *See* 46 U.S.C. § 763a.

Before proceeding further, the Court notes that this case involves two extremely likable lawyers, who have together delivered some of the most amateurish pleadings ever to cross the hallowed causeway into Galveston, an effort which leads the Court to surmise but one plausible explanation. Both attorneys have obviously entered into a secret pact—complete with hats, handshakes and cryptic words—to draft their pleadings entirely in crayon on the back sides of gravy-stained paper place mats, in the hope that the Court would be so charmed by their child-like efforts that their utter dearth of legal authorities in their briefing would go unnoticed. Whatever actually occurred, the Court is now faced with the daunting task of deciphering their submissions. With Big Chief tablet readied, thick black pencil in hand, and a devil-may-care laugh in the face of death, life on the razor's edge sense of exhilaration, the Court begins.

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). When a motion for summary judgment is made, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Therefore, when a defendant moves for summary judgment based upon an affirmative defense to the plaintiff's claim, the plaintiff must bear the burden of producing some evidence to create a fact issue some element of defendant's asserted affirmative defense. *See Kansa Reinsurance Co., Ltd. v. Congressional Mortgage Corp. of Texas,* 20 F.3d 1362, 1371 (5th Cir.1994); *F.D.I.C. v. Shrader & York,* 991 F.2d 216, 220 (5th Cir.1993).

Defendant begins the descent into Alice's Wonderland by submitting a Motion that relies upon only one legal authority. The Motion cites a Fifth Circuit case which stands for the whopping proposition that a federal court sitting in Texas applies the Texas statutes of limitations to certain state and federal law claims. *See Gonzales v. Wyatt,* 157 F.3d 1016, 1021 n. 1 (5th Cir.1998). That is all well and good—the Court is quite fond of the *Erie* doctrine; indeed there is talk of little else around both the Canal and this Court's water cooler. Defendant, however, does not even cite to *Erie,* but to a mere successor case, and further fails to even begin to analyze why the Court should approach the shores of *Erie.* Finally, Defendant does not even provide a cite to its desired Texas limitation statute. [FN omitted] A more bumbling approach is difficult to conceive—but wait folks, There's More!

Plaintiff responds to this deft, yet minimalist analytical wizardry with an equally gossamer wisp of an argument, although Plaintiff does at least cite the federal limitations provision applicable to maritime tort claims. *See* 46 U.S.C. § 763a. Naturally, Plaintiff also neglects to provide any analysis whatsoever of why his claim versus Defendant Phillips is a maritime action. Instead, Plaintiff "cites" to a single case from the Fourth Circuit. Plaintiff's citation, however, points to a nonexistent Volume "1886" of the Federal Reporter Third Edition and neglects to provide a pinpoint citation for what, after being located, turned out to be a forty-page decision. Ultimately, to the Court's dismay after reviewing the opinion, it stands simply for the

bombshell proposition that torts committed on navigable waters (in this case an alleged defamation committed by the controversial G. Gordon Liddy aboard a cruise ship at sea) require the application of general maritime rather than state tort law. *See Wells v. Liddy,* 186 F.3d 505, 524 (4th Cir.1999) (What the. . .)?! The Court cannot even begin to comprehend why this case was selected for reference. It is almost as if Plaintiff's counsel chose the opinion by throwing long range darts at the Federal Reporter (remarkably enough hitting a nonexistent volume!). And though the Court often gives great heed to dicta from courts as far flung as those of Manitoba, it finds this case unpersuasive. There is nothing in Plaintiff's cited case about ingress or egress between a vessel and a dock, although counsel must have been thinking that Mr. Liddy *must* have had *both* ingress and egress from the cruise ship at some docking facility, before uttering his fateful words.

Further, as noted above, Plaintiff has submitted a Supplemental Opposition to Defendant's Motion. This Supplement is longer than Plaintiff's purported Response, cites more cases, several constituting binding authority from either the Fifth Circuit or the Supreme Court, and actually includes attachments which purport to be evidence. However, this is all that can be said positively for Plaintiff's Supplement, which does *nothing* to explain why, on the facts of *this* case, Plaintiff has an admiralty claim against Phillips (which probably makes some sense because Plaintiff doesn't). Plaintiff seems to rely on the fact that he has pled Rule 9(h) and stated an admiralty claim versus the vessel and his employer to demonstrate that maritime law applies to Phillips. This bootstrapping argument does not work; Plaintiff must properly invoke admiralty law versus each Defendant discretely. *See Debellefeuille v. Vastar Offshore, Inc.,* 139 F.Supp.2d 821, 824 (S.D.Tex.2001) (discussing this issue and citing authorities). Despite the continued shortcomings of Plaintiff's supplemental submission, the Court commends Plaintiff for his vastly improved choice of crayon—Brick Red is much easier on the eyes than Goldenrod, and stands out much better amidst the mustard splotched about Plaintiff's briefing. But at the end of the day, even if you put a calico dress on it and call it Florence, a pig is still a pig.

Now, alas, the Court must return to grownup land. As vaguely alluded to by the parties, the issue in this case turns upon which law–state or maritime--applies to each of Plaintiff's potential claims versus Defendant Phillips. And despite Plaintiff's and Defendant's joint, heroic efforts to obscure it, the answer to this question is readily ascertained. The Fifth Circuit has held that "absent a maritime status between the parties, a dock owner's duty to crew members of a vessel using the dock is defined by the application of state law, not maritime law." *Florida Fuels, Inc. v. Citgo Petroleum Corp.,* 6 F.3d 330, 332 (5th Cir.1993) (holding that Louisiana premises liability law governed a crew member's claim versus a dock which was not owned by his employer); *accord Forrester v. Ocean Marine Indem. Co.,* 11 F.3d 1213, 1218 (5th Cir.1993). Specifically, maritime law does not impose a duty on the dock owner to provide a means of safe ingress or egress. *See Forrester,* 11 F.3d at 1218. Therefore, because maritime law does not create a duty on the part of Defendant Phillips *vis-a-vis* Plaintiff, any claim Plaintiff does have versus Phillips must necessarily arise under state law.[FN omitted] *See id.; Florida Fuels,* 6 F.3d at 332–34.

The Court, therefore, under *Erie,* applies the Texas statute of limitations. Texas has adopted a two-year statute of limitations for personal injury cases. *See* Tex. Civ. Prac. & Rem.Code § 16.003. Plaintiff failed to file his action versus Defendant Phillips within that two-year time frame. Plaintiff has offered no justification, such as the discovery rule or other similar tolling doctrines, for this failure. Accordingly, Plaintiff's claims versus Defendant Phillips were not timely filed and are barred. Defendant Phillips Motion for Summary Judgment is **GRANTED** and Plaintiff's state law claims against Defendant Phillips are hereby **DISMISSED WITH PREJUDICE.** A Final Judgment reflecting such will be entered in due course.

II.

After this remarkably long walk on a short legal pier, having received no useful guidance whatever from either party, the Court has endeavored, primarily based upon its affection for both counsel, but also out of its own sense of morbid curiosity, to resolve what it perceived to be the legal issue presented. Despite the waste of perfectly good crayon seen in both parties briefing (and the inexplicable odor of wet dog emanating from such) the Court believes it has satisfactorily resolved this matter. Defendant's Motion for Summary Judgment is **GRANTED.**

At this juncture, Plaintiff retains, albeit seemingly to his befuddlement and/or consternation, a maritime law cause of action versus his alleged Jones Act employer, Defendant Unity Marine Corporation, Inc. However, it is well known around these parts that Unity Marine's lawyer is equally likable and has been writing crisply in ink since the second grade. Some old-timers even spin yarns of an ability to type. The Court cannot speak to the veracity of such loose talk, but out of caution, the Court suggests that Plaintiff's lovable counsel had best upgrade to a nice shiny No. 2 pencil or at least sharpen what's left of the stubs of his crayons for what remains of this heart-stopping, spine-tingling action.[4]

IT IS SO ORDERED.

[4] In either case, the Court cautions Plaintiff's counsel not to run with a sharpened writing utensil in hand—he could put his eye out.

Supreme Court of North Dakota.
In the Matter of the Application for REINSTATEMENT OF Cheryl L. ELLIS.
Cheryl L. Ellis, Petitioner
v.
Disciplinary Board of the Supreme Court of the State of North Dakota, Respondent.
No. 20060081.
Sept. 13, 2006.

Background: Attorney who had been suspended from the practice of law filed petition seeking reinstatement.

Holdings: The Supreme Court held that:
(1) attorney was eligible for reinstatement to the practice of law;
(2) attorney was required to retake and pass the bar examination as a condition of reinstatement; and
(3) attorney was required to pay the costs of reinstatement proceedings as a condition of reinstatement.

Reinstatement granted with conditions.

Application for Reinstatement.

John T. Goff, Montgomery, Goff and Bullis, Fargo, N.D., for petitioner.

Paul W. Jacobson, Disciplinary Counsel, Bismarck, N.D., for respondent.

REINSTATEMENT GRANTED WITH CONDITIONS

PER CURIAM.

[¶ 1] Cheryl Ellis petitioned for reinstatement to the bar, and Disciplinary Counsel filed objections to the report of a hearing panel of the Disciplinary Board which recommended Ellis be reinstated. We order that Ellis be reinstated to practice law in this state upon the condition she pass the bar examination and pay the costs of the reinstatement proceedings, and we remand to the hearing panel for a determination of those costs.

I

[¶ 2] In 1989, Ellis was suspended from the practice of law for two years, with imposition of all but the first 90 days of the suspension stayed for a one-year probationary period. Ellis was allowed to return to the practice of law after the initial 90 days of her suspension under the supervision of another licensed attorney, and she was ordered to pay costs of the disciplinary proceedings. *See In re Ellis,* 439 N.W.2d 808 (N.D.1989). When Ellis failed to timely pay the ordered costs, the remainder of the two-year suspension was imposed.

[¶ 3] In 1993, further disciplinary proceedings were brought and Ellis was suspended from the practice of law for six months. *See In re Ellis,* 504 N.W.2d 559 (N.D.1993). Ellis was also ordered to pay costs and attorney fees, and was ordered to take the Multistate Professional Responsibility Examination and achieve a score of at least 80.

[¶ 4] In 1994, further disciplinary proceedings were commenced, alleging Ellis had engaged in the unauthorized practice of law in 1992 while her license was suspended. The hearing panel in that proceeding issued a private reprimand to Ellis, but specifically recommended the reprimand not be considered as a "deterring factor" if Ellis later petitioned for reinstatement.

[¶ 5] In September 2005, Ellis petitioned for reinstatement, claiming she had complied with all of the conditions imposed in the prior disciplinary orders, including service of all suspension time imposed, payment of all ordered costs and fees, and successful completion of the Multistate Professional Responsibility Examination. The Disciplinary Board appointed a hearing panel to consider Ellis's petition for reinstatement. Following a hearing, the hearing panel recommended that Ellis be reinstated and that she not be assessed costs of the reinstatement proceedings. Disciplinary Counsel filed objections to the hearing panel's report, alleging Ellis had failed to demonstrate she met the criteria for reinstatement, challenging the recommendation that Ellis not be assessed costs, and challenging the hearing panel's failure to require Ellis to retake and pass the bar examination as a condition of reinstatement.

II

[¶ 6] A court which has the power to suspend or disbar an attorney also has the power to reinstate upon proper and satisfactory proof that the attorney has become a fit and proper person to be entrusted with the office of an attorney. *In re Hoffman,* 2005 ND 171, ¶ 5, 704 N.W.2d 810; *In re Christianson,* 202 N.W.2d 756, Syllabus No. 1 (N.D.1972); *see* N.D.R. Lawyer Discipl. 4.5. Reinstatement following suspension is not a matter of right, and the suspended attorney has the burden of establishing the averments of her petition for reinstatement by clear and convincing evidence. *Hoffman,* at ¶ 5; *In re Montgomery,* 2001 ND 127, ¶ 5, 612 N.W.2d 278. The petitioner's proof must be of sufficient weight to overcome the former adverse judgment of her character. *Hoffman,* at ¶ 5; *Montgomery,* at ¶ 5.

[¶ 7] We review disciplinary proceedings against attorneys, including reinstatement proceedings, de novo on the record. *Hoffman,* 2005 ND 171, ¶ 5, 704 N.W.2d 810; *Montgomery,* 2001 ND 127, ¶ 5, 612 N.W.2d 278. However, when reviewing a petition for reinstatement we will accord due weight to the

findings, conclusions, and recommendations of the hearing panel. *Hoffman,* at ¶ 5; *Montgomery,* at ¶ 5. Each disciplinary case must be judged on its own facts and merits. *Hoffman,* at ¶ 5; *Montgomery,* at ¶ 5.

III

[¶ 8] Disciplinary Counsel requests that we reject the recommendation of the hearing panel to reinstate Ellis to the practice of law, based upon her conduct in 1992 while under suspension and her failure to acknowledge the 1992 violation in her petition for reinstatement.

[¶ 9] In 1992, while under suspension, Ellis worked as a legal assistant to a licensed attorney on a complex bankruptcy matter. An application for discipline was filed alleging Ellis's conduct violated the rules against unauthorized practice of law. The matter was considered by a hearing panel, which went to great lengths to emphasize that Ellis's conduct was in almost all instances appropriate. The hearing panel did find, however, that Ellis committed a technical violation of the rules by meeting face-to-face with the client. The hearing panel noted that, although Ellis did have direct contact with the client, this direct contact was "necessary" because the client was particularly difficult and demanding. The panel therefore concluded that, although Ellis had technically violated the rule against unauthorized practice when she met with the client, there were mitigating circumstances and Ellis did not willfully violate the order suspending her from the practice of law. The hearing panel recommended a private reprimand, but specifically stated: "We recommend that this private reprimand not be a deterring factor in Ellis petition for reinstatement." The hearing panel in this case summarized the circumstances of the 1992 incident:

The Panel found that she performed services in the rol[e] of a "paralegal," that her work was diligent and resulted in substantial benefit to the client, that the client was aware she was not a licensed attorney, that she did not act independently of attorney Sheppard, that she had a good faith belief her services did not constitute the practice of law, and that there was no harm, but instead a benefit to the client.

[¶ 10] Disciplinary Counsel seeks to characterize Ellis's conduct while suspended in 1992 as a serious violation which, 14 years later, continues to demonstrate her unfitness to practice law. Ellis has already faced disciplinary proceedings for this conduct, and the hearing panel at that time emphasized Ellis's appropriate and beneficial conduct, stressing the technical nature of the violation. Most importantly, the hearing panel in the 1992 incident expressly recommended that the private reprimand not be a factor in any subsequent petition for reinstatement. We conclude, as did the hearing panel, this single, unintentional, and relatively minor violation of the rules against unauthorized practice, which occurred 14 years ago, does not preclude Ellis's reinstatement.

[¶ 11] Disciplinary Counsel further argues Ellis's failure to disclose the private reprimand for the 1992 violation in her petition for reinstatement demonstrates Ellis is currently unfit to practice law. Addressing this contention, the hearing panel found:

The hearing in that matter occurred some eleven years prior to the December 22, 2005 [petition] for reinstatement. When confronted with the Panel's recommendation at the hearing, apparently for the first time, Ellis recalled the hearing but did not recall the outcome. She testified that she had diligently searched the Supreme Court records relating to previous hearings or suspensions. In so doing she would not have come across the files above referenced which are kept in the offices of the Disciplinary Board.

[¶ 12] We agree with the hearing panel that Ellis's failure to disclose the private reprimand in her petition for reinstatement does not preclude her reinstatement. The conduct in question had occurred more than 13 years earlier, and the hearing on the matter had occurred 11 years earlier, at a time when Ellis suffered from severe depression. Furthermore, there was no potential for prejudice from her nondisclosure, inasmuch as the private reprimand would have been included in her disciplinary file and was readily available to Disciplinary Counsel and the hearing panel.

[¶ 13] Ellis has served the entire terms of her previously ordered suspensions, has met all conditions placed upon her by those orders, and has presented evidence that her clinical depression, which was a major factor in her prior disciplinary violations, has been successfully treated. The hearing panel heard the witnesses and determined that Ellis has demonstrated her qualifications for reinstatement by clear and convincing evidence. The hearing panel expressly stated that Ellis's testimony at the reinstatement hearing was "credible and persuasive." This Court will accord due weight to the hearing panel's ability to assess the credibility of witnesses. *Hoffman,* 2005 ND 171, ¶ 5, 704 N.W.2d 810; *Montgomery,* 2001 ND 127, ¶ 5, 612 N.W.2d 278. We conclude Ellis has established her eligibility for reinstatement.

IV

[¶ 14] Disciplinary Counsel requests that, if Ellis is found to be eligible for reinstatement, she be required to pass the bar examination as a condition of reinstatement.

[¶ 15] The primary purpose of the disciplinary process is to protect the public and the integrity of the profession. *In re Korsmo,* 2006 ND 148, ¶ 6, 718 N.W.2d 6. Accordingly, when ordering reinstatement of a suspended attorney the Court may impose conditions upon the petitioner's reinstatement when the Court "reasonably believes that further precautions should be taken to ensure that the public will be protected upon the petitioner's return to practice." N.D.R. Lawyer Discipl. 4.5(H). The Court may therefore require proof of competency, "including certification by the bar examiners of the successful completion of an examination for admission to practice administered subsequent to the order for reinstatement." N.D.R. Lawyer Discipl. 4.5(H)(3).

[¶ 16] We share Disciplinary Counsel's concern that the lengthy period of time since Ellis last practiced law requires precautions to ensure the public's protection. The situation in this case is analogous to relicensure of an attorney who has been on inactive status for a lengthy period of time. In that instance, Admission to Practice R. 7(C) provides:

If the Board determines that the applicant's legal experience during the nonlicensure does not demonstrate sufficient competency in the practice of law, it shall require the applicant to take an attorney's examination.

[¶ 17] In this case, there was no evidence Ellis has practiced law since 1992, or that she thereafter worked regularly in

a position utilizing her legal training and experience. Under these circumstances, further proof of competency is required to ensure the public will be protected upon Ellis's return to the practice of law. *See* N.D.R. Lawyer Discipl. 4.5(H). We therefore order that Ellis retake and pass the bar examination as a condition of reinstatement.

V

[¶ 18] Disciplinary Counsel objects to the hearing panel's recommendation that Ellis not be required to pay the costs of the reinstatement proceedings.

[¶ 19] Payment of all or part of the costs of reinstatement proceedings may be imposed as a condition of reinstatement. N. D.R. Lawyer Discipl. 4.5(H)(1). Costs and expenses of disciplinary proceedings are generally assessed against the disciplined attorney. *See* N.D.R. Lawyer Discipl. 1.3(D); *In re Swanson,* 2002 ND 6, ¶ 13, 638 N.W.2d 240. This Court explained the rationale for imposing costs of disciplinary proceedings against the involved attorney in *In re Larson,* 485 N.W.2d 345, 351 (N.D.1992):

The disciplinary system is necessary because some attorneys are unable to conform their conduct to the minimum ethical standards of the profession. It is only fair that attorneys whose unethical conduct creates the need for a disciplinary system contribute their direct share of the costs of maintaining that system.

[¶ 20] While we commend Ellis on the positive changes she has made to reestablish her eligibility to practice law, we are also mindful that it was Ellis's past misconduct which necessitated this entire process. Accordingly, we order that Ellis be required to pay the costs of the reinstatement proceedings as a condition of reinstatement.

VI

[¶ 21] We order that Ellis be reinstated to practice law in this state upon the condition she pass the bar examination and pay the costs of these proceedings, and we remand to the hearing panel for a determination of those costs.

[¶ 22] GERALD W. VANDE WALLE, C.J., DANIEL J. CROTHERS, MARY MUEHLEN MARING, CAROL RONNING KAPSNER, and DALE V. SANDSTROM, JJ., concur.