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Paralegal Puzzle

FOCUS COLUMN

By Stacey Hunt and Michael R. Jencks

Attorneys who employ paralegals and bill clients for their time should sit up and take notice of three recent decisions out of the Eastern District of California. The cases - *Sanford v. GMRI Inc. dba Red Lobster*, 04-1535 (E.D. Cal. Nov. 11, 2005), *White v. GMRI Inc. dba Red Lobster*, 04-0620 (E.D. Cal. Jan. 19, 2006), and *Martinez v. G. Maroni Co., dba Church's Chicken* #948, S06-1399 (E.D. Cal. May 1, 2007), - are some of the first in the state to deny or reduce paralegal fees for the paralegals's failure to comply with the requirements of Business and Professions Code Section 6450, et seq. Attorneys who are not ensuring that the paralegals they hire are qualified under the code are exposing themselves to potentially serious financial and ethical consequences.

The Regulations

In the old days, paralegals did not need any formal education or training in order to use the title "paralegal" or "legal assistant"; anyone could be given the designation. Law firms sometimes rewarded long-term employees with a promotion of sorts by calling them paralegals, and the title was often used as a catch-all for nonattorney staff for which no other nomenclature applied. Further, some of the purported paralegal schools that bestowed certificates of completion offered questionable programs at best, often bragging that students could become paralegals after a few weekends of study.

In 2000, Gov. Gray Davis signed into law AB 1761, which was codified as Business and Professions Code Section 6450, et seq, and became effective Jan. 1, 2001. Among other things, the law (1) established qualifications for people to practice as paralegals and made it unlawful for any person to identify himself or herself as a paralegal without meeting those qualifications, (2) set forth minimum standards for what could be considered a qualifying course of paralegal study and (3) required minimum continuing legal education for paralegals, both in either general or specialized law and in legal ethics, which could be satisfied by taking California State Bar-approved courses.

In order for a person to use the paralegal or legal assistant title, he or she must possess one of the following: (1) a certificate of completion of a paralegal program approved by the ABA; (2) a certificate of completion from a paralegal program or a degree from a postsecondary institution that requires the successful completion of at least 24 semester units or the equivalent in law-related courses. The program must be accredited by a national or regional accrediting organization or approved by the Bureau for Private Postsecondary and Vocational Education; or (3) a baccalaureate or higher degree, plus a minimum of one year of law-related experience under the supervision of an attorney who has practiced in California for at least three years, as evidenced by a written declaration by the supervising attorney. Business and Professions Section 6450(a-c).

A grandfather clause that allowed for the possession of a high-school diploma and three years of law-related experience, as evidenced by a declaration signed by a supervising attorney, expired on Jan. 1, 2004. Business and Professions Section 6450(d).

Although the law has been in effect for six years, many attorneys are not aware of these requirements and are blithely billing their clients for employees who are not qualified under the law. When a savvy opposing counsel challenges a motion for attorney fees, the incautious attorney could be in for some trouble.

Enter the 'Lobster'

The plaintiffs in the *Sanford* and *White* cases brought suits against GMRI Inc., dba Red Lobster Inc., for violations of Title III of the Americans with Disabilities Act. The parties in both cases entered into settlements which awarded the plaintiffs monetary damages and required the defendant to remove

architectural barriers to its facilities. Because the plaintiffs in both cases were considered the prevailing parties, motions were brought for attorney fees, including fees billed by paralegals employed by the plaintiffs' counsel. The recovery of paralegal fees at market rates had long been allowed by the courts. *Missouri v. Jenkins*, 491 U.S. 274 (1989); *Guinn v. Dotson*, 23 Cal.App.4th 262 (1994). However, until the passage of AB 1761, no one had defined exactly who or what a paralegal was.

In the *Sanford* case (later followed by *Martinez*), Red Lobster challenged the plaintiff's claimed paralegal fees. The court ruled that the plaintiff failed to meet its burden of proof that the paralegals were qualified under the statute. One of the purported paralegals had not received her certificate of completion from a qualified paralegal school. A second paralegal did not have either a paralegal certificate or a baccalaureate degree, and the plaintiff was unable to show that she could be grandfathered in under Business and Professions Code Section 6450(c)(4). Two of the plaintiff's other paralegals had baccalaureate degrees but had not completed their one year of law-related experience under the supervision of a California attorney as required by Section 6450(c)(3). Because of this failure to qualify under the code, the court reduced from \$1,680 to \$225 the paralegal fees claimed by Sanford for these individuals.

In the *White* case, the court found that one of the plaintiff's paralegals was not qualified under California law because, although she claimed to have been grandfathered in under the provisions of Section 6450(c)(4), she failed to provide a written declaration by the attorney from whom her three years of law-related experience was gained. The court, therefore, granted the defendant's request to strike all hours attributed to this paralegal's work.

In both the *Sanford* and *White* cases, the court drew a distinction between paralegals as being qualified under the law, and legal assistants, who the court believed were not qualified. In fact, Business and Professions Code Section 6454 provides that "paralegal" and "legal assistant" are synonymous terms. Law firms should not bestow the legal-assistant title on secretaries or other people who are not compliant with Section 6450.

Maintaining Compliance

You do not want to be put into a position of having to write off large paralegal fees billed to a client because you were unable to recover them from an opposing party. Even worse would be exposing yourself to ethical issues by misrepresenting to a client that your employees are qualified paralegals and billing them as such when, in fact, they are not.

When hiring a paralegal, you should ask to see the certificate that they earned upon completing their course of study. Be certain that the program the paralegal attended was either through an ABA-approved school or a properly accredited postsecondary institution that offered at least 24 semester units of law-related study. A paralegal with only an associates degree but no paralegal certificate does not qualify under this category unless the degree is from a paralegal studies program. A directory of ABA-approved paralegal education programs can be found on the ABA's Web site at www.abanet.org/legalservices/paralegals/directory.

If the paralegal has a bachelor's or master's degree (or a law degree), confirm that he or she has worked under the supervision of a California attorney for at least one year. Ask to see a written declaration to that effect from a prior employer. If the paralegal has been working in another state, it doesn't matter how long the person has been employed by law firms. The paralegal does not qualify until he or she has been working for an attorney in California for at least a year.

If the paralegal has neither a degree nor a certificate, the person must have a high-school diploma and must have completed three years of law-related experience under the supervision of a California attorney on or before Jan. 1, 2004. Ask to see the paralegal's written declaration regarding this experience. Make sure that all three years are covered. If the paralegal had multiple employers, make sure that you have declarations from each of them covering the necessary period.

Ask to see the California State Bar certificates of completion for the paralegal's continuing education. Before Jan. 1, 2007, the paralegal must have completed four hours of legal ethics training every three years and four hours of general or specialized law training every two years. Beginning in 2007, the requirement for legal ethics was raised to four hours every two years.

For existing employees, keep a file for each paralegal with copies of paralegal-school certificates of completion or degrees, any necessary declarations from prior employers, and certificates of MCLE completion. You will be ready to establish your paralegals' credentials quickly. In fact, knowledgeable public entities and corporations have begun asking law firms to prove that their paralegals are compliant under the law before they agree to pay fees billed by the paralegals. You also should make sure that your paralegals receive the required number of hours of CLE.

Another good practice is to review your firm's fee schedules and retainer agreements to ensure that employees identified as paralegals or legal assistants are qualified to be billed as such. If not, another title should be created for these employees. Although a firm and a client can agree to bill the client for all types

of personnel, such as administrative assistants and case managers, the client should be aware that, unlike attorneys and paralegals, the charges for these employees are considered by the courts to be general office overhead that may not be reimbursable in a fee motion.

Challenging Motions

If you are the recipient of a motion for attorney fees, review the declarations carefully to make sure opposing counsel has provided the evidence necessary to qualify any paralegals for whom fees are being sought. If you are in the least bit unsatisfied or suspicious, you can either informally request the necessary proof before raising the issue in your opposition or simply claim a failure of compliance in your papers and let the opposing counsel rehabilitate the paralegals in the reply brief.

Run through the four tests of compliance in Section 6450(a-d). If you are uncertain of the qualifications of a local paralegal school, ask your own paralegals. Often, they know which schools are compliant and which are not. The California Alliance of Paralegal Associations (www.caparalegal.org) is also a good source of information about paralegal schools within the state.

Although complying with paralegal regulation does require some additional administrative effort, attorneys and their clients reap the benefits by having much more educated and properly trained employees assisting in the delivery of legal services.

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