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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

May 21, 2003

The Honorable Robert E. Walker
Member, House of Representatives
402-C Blatt Building
Columbia, South Carolina 29211

Re: Independent Paralegals

Dear Representative Walker:

You have requested an opinion from this Office relating to "current rules for paralegal services as a standalone business." Specifically, you ask the following question: "[a]re independent paralegals when retained by an attorney on a project-to-project basis independent contractors or part time employees of the attorney?"

Initially, it should be noted that there are no "rules" dealing specifically with the paralegal profession. To legitimately provide services as a paralegal, however, an individual must work in conjunction with a licensed attorney. See State v. Robinson, 321 S.C. 286, 468 S.E.2d 290 (1996). The Court in Robinson stated that "[w]hile there are no regulations dealing specifically with paralegals, requiring a paralegal to work under the supervision of a licensed attorney ensures control over his or her activities by making the supervising attorney responsible... ." 468 S.E.2d at 289. I can locate no rule, regulation or opinion of the Court which makes it necessary that, in order for an attorney to properly supervise a paralegal, that paralegal must be an employee of the attorney rather than an independent contractor.

The question of whether a person is an independent contractor or an employee is a question of fact. In determining if one is an employee or an independent contractor, the test is one of control over the person doing the work. In determining control, it is not the actual control exercised by the employer but, "whether there exists the right and authority to control and direct the particular work or undertaking, as to the manner and means of its accomplishment; the principal factors showing right of control are (1)direct evidence of right or exercise of control, (2) method of payment, (3) furnishing of equipment and (4) right to fire." Todd's Ice Cream, Inc. v. South Carolina Employment Security Commission, 315 S.E.2d 373, 375 (1984). See also Op. S.C. Atty Gen., dated October 10, 2000. An independent contractor is one who contracts to do a piece of work according to his or her own methods without being subject to the control of his employer except as to the result of the work performed. One who performs work for another that represents the will of the employer, not only as

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to the result but also to the means and method by which the result is accomplished, is not an independent contractor but an employee. Id.

This Office has also cited the United States Court of Appeals as setting forth a relevant test to be used in examining the independent contractor/employee issue. In the Sixth Circuit, the following nine factor test has been utilized to determine whether a worker is an employee or an independent contractor:

> (a) Control, skill and permanency of the relationship;
> (b) whether or not the one employed is engaged in a distinct occupation or business;
> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
> (d) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
> (e) the length of time for which the person is employed;
> (f) the method of payment, whether by the time or by the job;
> (g) whether or not the work is part of the regular business of employer;
> (h) whether or not the parties believe they are creating the relation of master and servant; and
> (i) whether the principal is or is not in business.

Lanigan Storage & Van Co. v. United States, 389 F.2d 337, 342 (6th Cir. 1968). "The contract entered into by the parties must be considered in determining the nature of their relationship and has considerable weight. Todd's Ice Cream, Inc. v. South Carolina Employment Security Commission, supra. However, neither of the parties control the legal effect of the contract by the language used therein." Id. Citing Young v. Warr, 252 S.C. 179, 165 S.E.2d 797 (1969).

The above factors should be applied in determining whether a paralegal is an independent contractor for or an employee of the attorney for whom he or she is working. The necessary nature of the attorney-paralegal relationship, as expressed by our Supreme Court in State v. Robinson, supra, may also be relevant in the determination as well. Attorneys are subject to the Rules of Professional Conduct which have been promulgated by our Court. Specifically, Rule 5.3, Rules of Professional Conduct, SCACR Rule 407 requires attorneys to exercise a certain level of supervision over non-lawyer assistants. The official Comments to Rule 5.3 are enlightening and provide:

> Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer should give such assistants appropriate instruction

> and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

In certain circumstances, ethical standards may dictate that an attorney exercise such a level of control over the work of a paralegal that, regardless of the intended nature of the agreement to provide services, the paralegal would be considered an employee rather than an independent contractor.

Sincerely,

David K. Avant
Assistant Attorney General