

## **Legal Assistant Utilization May Optimize Client Services in Litigation Practice**

To get the most from an experienced and trained legal assistant<sup>1</sup> in litigation practice, an attorney may need to open their practice to the pain of change. This will however lead to the benefits of change. The benefits are many. The most prevalent is an optimization of two valuable resources in litigation law practice - Cost-Savings and Efficiency. Cost-saving and efficient task delegation to accomplish the law firm's goals are for the benefit of client services. While cost-savings and efficiency are improved, economic and service benefits are realized by your clients.<sup>2</sup> Incidental to the process of improving client services is an increase in the law firm's bottom line of potential earnings.

For the attorney-legal assistant team, the evolution to figure out what tasks may be delegated to the legal assistant is a path to professional achievement and personal growth. The team can take the path slowly or can expedite it. I recommend a middle-of-the-road rate that leaves ample opportunity to reflect about the positive or negative result of each change that is worked on. Adjustments will need to be made as part of the process.

It is most important to work to prevent any adverse compromise of client service in the process of delegation. It is unusual for negative results to occur, however and preventing it must be foremost in the minds of each team member - attorney and legal assistant.

The delegation may consist of tasks that are known to be the responsibility of the legal assistant in all of the cases that are handled. Some may be on a case-by-case basis. It is typical to have a combination of both. This shouldn't be difficult. With no two cases being exactly alike, we are already accustomed to dealing in both styles (common tasks and case-specific tasks). Those in litigation practice are already adept "skilled multitaskers."

Let's start with what may or may not be delegated. To emphasize the importance of not aiding in the unauthorized practice of law, I will first provide authority for those areas that you "may not" delegate to a non lawyer assistant:

A lawyer may not delegate to a legal assistant:

- (a) Responsibility for establishing an attorney-client relationship.
- (b) Responsibility for establishing the amount of a fee to be charged for a legal

service.

(c) Responsibility for a legal opinion rendered to a client.

ABA Model Guidelines for the Utilization of Legal Assistant Services Guideline 3 (1991)<sup>3</sup>

Legal work that may be delegated consists of any task that is performed by the lawyer, so long as it is not otherwise prohibited by law:

Provided the lawyer maintains the responsibility for the work product, a lawyer may delegate to the legal assistant any task normally performed by the lawyer except those tasks proscribed to one not licensed as a lawyer by statute, court rule, administrative rule or regulation, controlling authority, the ABA Model Rules of Professional Conduct, or these Guidelines.

See *id.* Guideline 2.

Specific legal work that is generally unlawful to delegate according to the ABA, consist of: Court Appearances, Appearing as the Client Representative at Depositions, Signing Pleadings, Rendering Legal Advice to Clients, and Negotiating Settlements on behalf of Clients.<sup>4</sup>

With all of this said about what may be delegated and what may be prohibited from delegation, let's move onto specific areas that are commonly known to be delegated to legal assistants in the immediate community. The categories for delegation of litigation tasks that will be used for purposes of organization in this writing are: (1) Case Intake, (2) Investigation, (3) Initial Discovery, (4) Fact Discovery, (5) Expert Discovery, (6) Deposition Practice, (7) Motion Practice, (8) Pre-Trial Preparation, (9) Trial Work, and (10) Alternative Dispute Resolution.<sup>5</sup>

## 1. Case Intake

Gathering of case facts and immediate concerns of the client in a meeting after the attorney has accepted the case.

Fact determination through review and analysis of case documents.

Procedural legal research.

Substantive legal research depending upon the training and experience of the legal assistant, firm policy with regard to law clerks, and the level of comfort (or discomfort) regarding a non lawyer performing such research. Formal legal assistant

training prepares a legal assistant to perform such research, but the training it is not as comprehensive as a lawyer receives in law school.

Draft the Settlement Brochure/Demand Package.

Draft the Complaint.

Draft the Answer.

Draft special appearance pleadings, such as motion for change of venue.

## 2. Investigation

Gather facts from witnesses through interviews.

Analyze facts and information to determine witnesses and areas of investigation to be conducted.

Identify/gather records and documents from witnesses, governmental agencies, etc.

Identify, gather and preserve tangible items that may be evidentiary in nature.

Analyze whether expert consultation or opinion may become necessary to fully establish facts.

## 3. Initial Discovery

Assist to assure Attorney Planning Meeting (ATP Meeting) is conducted.

Meet with the attorney in preparation for the ATP Meeting to analyze results of investigation conducted, the potential for settlement, and fact/expert discovery to be accomplished.

Participate in the ATP Meeting to know the position and posture of all parties, potential for settlement, and fact/expert discovery that all parties anticipate will be conducted.

Where required, draft the Stipulation and Order RE: ATP Meeting.

Supervise calendaring of all dates set in the ATP Meeting.

Timely draft Initial Disclosures. If it is the practice of the attorney to produce documents identified in the Initial Disclosures at the time of the disclosure, then prepare the production.

Draft Interrogatories and Requests for Production of Documents.

Identify documents and records to be gathered through subpoena duces tecum and release authorizations.

Identify the possessor of the documents and records sought.

Assure that the Subpoena duces tecum and release authorizations are prepared in compliance with prevailing law and procedure for the particular type of document sought.

Assure the above are served or sent in compliance with prevailing law and procedure regulating the particular type of document sought.

Where necessary, work with providers of the above information to fulfill their individual requirements for release of the documents and records sought.

#### 4. Fact Discovery

Review and summarize Interrogatory Answers and Responses to Requests for Production of Documents.

Request additional documents and records per discovery answers.

Conduct additional fact gathering interviews of witnesses per discovery answers.

Analyze and make recommendations of fact witnesses to depose.

Review, analyze, and summarize factual documents and records.

Meet with client regarding answering discovery served.

Draft Answers to Interrogatories and Responses to Requests for Production of Documents, identifying and preparing documents that are responsive to the Requests.

Recommend additional formal discovery requests to be served, and draft the same where applicable.

Be prepared to accomplish fact discovery deadlines per ATP Meeting stipulation and order. Where not possible, make recommendations regarding extending deadlines. Where applicable, communicate with other counsel regarding extensions of deadlines and draft correspondence or pleadings reflecting the same.

## 5. Expert Discovery

Analyze case facts and legal issues to make recommendations regarding retention of expert witnesses.

Locate appropriate expert witnesses.

Collect background information regarding expert witnesses pursuant to court rules regarding the same.

Make initial contact with expert witnesses to determine their availability and share brief facts regarding the case.

Where required, identify and prepare documents and records for expert review.

See that any inspections, evaluations, or examinations by experts are scheduled.

In preparation for inspections, evaluations, or examinations identify and prepare documents and records required to be reviewed by experts.

Preserve tangible items in a non altered state. Where required that alteration of any item need take place, work with other counsel to arrange opportunity of all parties to be present.

Analyze and make recommendations regarding depositions to be taken of experts of other parties.

Analyze and make recommendations regarding Requests for Admissions for service on adverse parties.

Draft Responses to Requests for Admissions when they have been served on your client.

## 6. Deposition Practice

Communicate with all parties and witnesses to arrange depositions of parties, fact witnesses, and expert witnesses.

Prepare notices of depositions, subpoenas, and notice of acceptance of service of witness depositions, where required. (Assure that there is a system in place with secretarial staff to arrange for a conference room and court reporter, etc.)

Attend and participate with the attorney in the client pre deposition meetings.

Identify and prepare documents and records required for the attorney's review in preparation for depositions.

Identify and prepare exhibits to depositions.

Where preferred by the attorney, the management of many documents is necessary, or the legal assistant has particular information regarding the case, attend the depositions.

Read the deposition transcript. Be prepared to summarize, outline, or index where necessary.

## 7. Motion Practice

Analyze case issues and facts and make recommendations regarding potential motions to be made during discovery (motion to compel, etc.) and in preparation for trial (motion in limine, etc.).

Draft the fact section of memorandum in support of motion, citing to authority for each fact.

If conducting substantive legal research for the memorandum, then draft the argument and analysis sections.

Identify, work with potential witnesses, and draft affidavits required to support the memorandum.

Identify and prepare exhibits to the memorandum.

Calendar due dates for objections to motion (and reply when appropriate).

Where objecting to motion, any or all of the same steps identified for the memorandum may be delegated to a legal assistant.

Draft notice to submit for decision.

Prior to the hearing, make contact with the court regarding the procedure pertaining to courtesy copies for the judge.

Prepare the courtesy copies for the judge pursuant to their procedure and policy. Identify and prepare all motion pleadings, additional documents and information required in order to prepare for a hearing.

## 8. Pre-Trial Preparation

Review and analyze the case materials to identify potential admissible evidence that is relevant to the remaining issues.

Make recommendations regarding potential motions in limine.

Make recommendations regarding potential fact witnesses to testify at trial.

Make recommendations regarding potential expert witnesses to testify at trial.

Communicate with the witnesses identified to discuss trial procedure, pre-trial preparation, and to arrange for the trial appearance of each.

Subpoena the trial witnesses, where required.

Attend to deadlines regarding motions in limine, jury instructions (whether to be agreed and if so how objections are to be handled), exhibits exchange, etc.

Draft the jury instructions.

Prepare the trial exhibit list.

Prepare the trial exhibits and supervise the arrangements for demonstrative exhibits.

Determine the presentation materials that are required for the court room (video tape or audio player, easels, enlarged documents, etc.) and supervise the arrangements for the same.

Participate in any pre-trial meetings.

## 9. Trial Work

Assist with the jury selection process.

Assist with the pre testimony fact witnesses.

Assist with the pre testimony expert witnesses.

Assist to track the exhibits of all parties.

Assist with the exhibit handling for your case.

Assist with making recommendations for areas of cross-examination of witnesses.

Assist with special equipment to be utilized.

## 10. Alternative Dispute Resolution

### Arbitration:

Any of the above tasks may be delegated to a legal assistant in a case that is to be resolved through arbitration.

Be responsive to the deadlines for submitting arbitration position papers or briefs.

Be responsive to any other deadlines that are set by the arbitrator.

Draft the arbitration position paper or brief.

Identify and prepare the exhibits to the arbitration position paper or brief.

Prepare the exhibits to be used during the arbitration hearing.

Attend and assist the attorney at the arbitration hearing with the witnesses and exhibits.

### Mediation:

Track deadlines set by the mediator for submitting position paper or brief.

Be responsive to any other deadlines set by the mediator.

Draft the mediation position paper or brief.

Identify and prepare the exhibits to the mediation position paper or brief.

Prepare the exhibits to be used during the mediation.

Attend the mediation where assistance is required.

## Conclusion

Necessary elements to attain optimized utilization includes creativity of the attorney-legal assistant team in analysis of your litigation practice goals, a "recrafting" of your practice to better serve your clients, and a high level of confidence in the experience, education and training of the legal assistant. The arrangement is most beneficial when you can meet the goals of cost-saving and efficient methods to accomplish client work to ensure that your clients reap economic benefit. Increased delegation should free you (at least more free than you are now) to accomplish the goals that you may wish to set to allow you to increase your client base or range of services.

## Footnotes

1.The term "Legal Assistant" as used in this article refers also to those known as a "Paralegal." Although there is no distinction between the two in our community, others may make a distinction.

2.J. Robyn Dotterer, The Dollars and Sense of Utilization of Legal Assistants, 16 Utah Bar Journal No. 3 (2003).

3.Determined by The Standing Committee on Legal Assistants of the American Bar Association, Guidelines for the Utilization of Legal Assistant Services (1991).

4.Except for statutory authority to the contrary within certain administrative agency proceedings.

5.All delegated tasks listed are to be supervised by the attorney. See also Utah Rules of Professional Conduct Rule 5.3, Responsibilities regarding nonlawyer assistants. Tasks identified are discretionary and are not delegated to legal assistants in all law firms nor in all of the cases that are accepted by the attorney. There are tasks that may be delegated by attorneys to legal assistants that are not listed here.

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