People v. Smith. 10PDJ103. April 20, 2011. Attorney Regulation. Following a hearing, a Hearing Board dismissed the complaint against Matthew Smith (Attorney Registration Number 22681). Respondent was suspended from the practice of law in 2004 and has not been reinstated to the bar. In 2008, Respondent began to work as a paralegal. In that capacity, he drafted letters to opposing counsel concerning post-dissolution decree matters and arguably communicated settlement proposals to opposing counsel. Although the tone of Respondent's letters to opposing counsel was somewhat lawyerly, Respondent was forthcoming about his suspended status, and he worked under the direct supervision of his employer, a licensed attorney. Accordingly, the Hearing Board concluded Respondent did not violate Colo. RPC 3.4(c) or 5.5(a).

SUPREME COURT, STATE OF COLORADO ORIGINAL PROCEEDING IN DISCIPLINE BEFORE THE OFFICE OF THE PRESIDING DISCIPLINARY JUDGE 1560 BROADWAY, SUITE 675 DENVER, CO 80202	
Complainant: THE PEOPLE OF THE STATE OF COLORADO **Respondent:** MATTHEW SMITH	Case Number: **10PDJ103**

DECISION AND ORDER DISMISSING COMPLAINT PURSUANT TO C.R.C.P. 251.19(b)

On February 25, 2011, a Hearing Board composed of Linda S. Kato and John E. Hayes, members of the bar, and William R. Lucero, the Presiding Disciplinary Judge ("the PDJ"), held a one-day hearing pursuant to C.R.C.P. 251.18. April M. McMurrey appeared on behalf of the Office of Attorney Regulation Counsel ("the People"), and Matthew Smith ("Respondent") appeared pro se. The Hearing Board now issues the following "Decision and Order Dismissing Complaint pursuant to C.R.C.P. 251.19(b)."

I. SUMMARY

Respondent was suspended from the practice of law in 2004 and has not been reinstated to the bar. In 2008, Respondent began to work as a paralegal/law clerk. In that capacity, he drafted letters to opposing counsel concerning post-dissolution decree matters and arguably communicated settlement proposals to opposing counsel. Although the tone of Respondent's letters to opposing counsel was somewhat lawyerly, Respondent was forthcoming about his suspended status, and he worked under the direct supervision of his employer, a licensed attorney. The Hearing Board concludes that the People have failed to present clear and convincing evidence that Respondent violated Colo. RPC 3.4(c) or 5.5(a). Accordingly, the Hearing Board dismisses the People's complaint.

II. PROCEDURAL HISTORY

On September 24, 2010, the People filed a complaint in case number 10PDJ103, alleging that Respondent violated Colo. RPC 3.4(c) and 5.5(a).

Respondent filed an answer on October 14, 2010. The PDJ held an at-issue conference on November 3, 2010. During the hearing on February 25, 2011, the Hearing Board heard testimony and considered the People's stipulated exhibits 1-13.

III. FINDINGS OF FACT

The Hearing Board finds the following facts have been established by clear and convincing evidence.

Jurisdiction

Respondent took the oath of admission and was admitted to the bar of the Colorado Supreme Court on May 13, 1993. He is registered upon the official records under attorney registration number 22681 and is thus subject to the jurisdiction of the Colorado Supreme Court and the Hearing Board in these disciplinary proceedings.[1] Respondent's address is 10150 East Virginia Avenue, Bldg. 4-301, Denver, CO 80247.

License Status

Pursuant to a stipulation, Respondent was suspended for one year and one day on June 29, 2004, effective July 31, 2004. While Respondent was serving the suspension, he was suspended again for three years pursuant to another stipulation. The order of suspension was entered on June 6, 2006, and it took effect on July 7, 2006. Respondent has remained suspended since July 31, 2004, and he has not been reinstated to the practice of law.

A reinstatement hearing for Respondent was scheduled for December 1, 2009, but Respondent requested a continuance. The hearing was continued to February 11, 2010. On January 15, 2010, Respondent requested a second continuance of the reinstatement hearing, in part to permit him time to fully repay monies owed to the Colorado Attorneys' Fund for Client Protection. The reinstatement hearing was continued to June 8, 2010. Respondent withdrew his petition for reinstatement after the complaint was filed in this matter.

Activities as a Paralegal

Respondent began working for Colorado attorney Gary Fielder ("Fielder") as a paralegal/law clerk in October 2008. Fielder practices criminal and family law, and his court appearances keep him out of the office frequently. No other attorneys work in Fielder's office, but from time to time he contracts for the assistance of independent attorneys.

[1] *See* C.R.C.P. 251.1(b).

Respondent recommended to Gary Tisch ("Tisch"), a childhood friend, that he hire Fielder to assist him in resolving post-dissolution decree legal disputes, including issues related to spousal maintenance and child visitation.[2] Tisch hired Fielder's firm in late 2008. Tisch's ex-wife, Susan Ryan ("Ryan") was represented in these matters by Robin Lutz Beattie ("Beattie").

According to Fielder, Tisch used Respondent "as his point person in the office to communicate his position."[3] Respondent testified that Tisch usually called Fielder with questions, but if Fielder was unavailable Tisch would speak with Respondent. Respondent frequently relayed information between Tisch and Fielder. Respondent attended most hearings in Tisch's matter along with Fielder, and in some instances he sat at counsel's table. He never represented to the court that he was an attorney, however, nor did he sign pleadings on Tisch's behalf. Respondent did draft letters to and converse with Beattie, as further detailed below.

Respondent visited Beattie's office on December 22, 2008, to drop off paperwork. Beattie testified that she and Respondent discussed several issues related to a motion Tisch had filed for modification of child support. According to Beattie, she and Respondent discussed the issues of Ryan's future income, parenting time, which payments should be counted as maintenance, and whether a certain agreement superseded another agreement.[4] No resolution on any of these issues was reached. They also talked for a few minutes about personal issues, including the suspension of Respondent's law license.

On January 5, 2009, Respondent mailed Beattie a letter which states:

> We have been requesting from your office for several weeks now the amount that Mr. Tisch owes the school for tuition. We have yet to hear what that amount is. I have told you that my client will issue a check immediately as soon as we know what the amount is. Additionally, it is my understanding there are some unpaid medical expenses that need to be paid. Please advise as to that figure as well . . . . Sincerely, Matthew Smith, Law Clerk to Gary D. Fielder.[5]

Respondent testified that he placed this letter and any other letters he drafted to Beattie on Fielder's desk for his review before they were mailed.[6]

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[2] Respondent previously worked for Tisch, and Tisch loaned Respondent money for his reinstatement process.

[3] Fielder did not testify at the disciplinary hearing, but his affidavit was admitted into evidence as exhibit 10.

[4] Respondent and Beattie provided differing testimony as to the depth of this discussion.

[5] Ex. 1.

[6] Respondent testified that he drafted three letters to Beattie and that Fielder himself drafted all of the other letters his office sent to Beattie.

Fielder and Beattie's relationship became strained, and in March 2009, Fielder advised Beattie he would no longer speak with her in person.[7] Beattie testified that she and Respondent spoke by telephone on August 24, 2009, regarding attorney's fees. Beattie recalls that Respondent stated he had no authority to make an offer, but he asked whether Ryan would accept $8,000.00 rather than $11,000.00 in exchange for Tisch dropping an appeal. According to Beattie, she responded that the offer was not helpful because Tisch's appeal was frivolous. She characterizes the substance of Respondent's communication as a proposal.

In August 2009, Respondent attended a hearing in Tisch's matter along with Richard Martillaro ("Martillaro"), an independent attorney Fielder hired to cover the hearing. On August 31, 2009, Beattie emailed Respondent a proposed order for Fielder's or Martillaro's review.[8] The same day, Respondent responded to Beattie. In that letter, he writes that he and Martillaro had reviewed the proposed order and states: (1) "We believe you need to state the date the hearing took place . . . ."; (2) a motion for review of a magistrate's order should be due on a different date; (3) "I am aware that the judge stated there had been four continuances, [sic] however, I believe it was only continued two times . . . and at any rate, I don't feel it is pertinent to the Magistrate's final order"; and (4) two paragraphs in the proposed order seem like "afterthoughts" that "were not orders of the Court, and should not be included."[9] The letter is signed by Respondent, as "law clerk" to Fielder. At the disciplinary hearing, Respondent explained that he drafted the letter because Martillaro was not the attorney of record and had agreed only to cover the hearing. Respondent and Martillaro both testified that Respondent read the letter aloud to Martillaro over the telephone for his approval before sending it to Beattie.

Beattie and Respondent next communicated in a telephone call on September 16, 2009, in which Respondent told Beattie that Ryan had not made a mortgage payment in September and had made her August payment late.[10] Beattie and Respondent also spoke by telephone two days later. According to Beattie, Respondent informed her about maintenance and house payment issues and he asked if Tisch could pay the mortgage directly. Beattie advised Respondent that Ryan would object to the timeliness of expert disclosures. They also discussed the reasonableness of attorney's fees awarded to Ryan.

On September 24, 2009, Respondent sent Beattie a two-page letter regarding Ryan's mortgage payments.[11] The letter opens: "This is a follow-up

[7] Ex. 3.
[8] Ex. 6.
[9] Ex. 5.
[10] Tisch and Ryan had agreed in their divorce to share responsibility for the mortgage payments for Ryan's new house.
[11] Ex. 8.

to the conversation you had with me earlier this week. It is my understanding that despite the fact that Mr. Tisch deposited the money in her account on August 13 or 14, 2009, the August payment for the house was not made until September 10, 2009." The letter goes on to explain that Ryan's late payments negatively affected Tisch's credit rating. Respondent then sets forth a remedy proposed by Tisch, whereby Tisch would make the entire mortgage payment and deduct Ryan's portion from his maintenance and child support payment to Ryan. In addition, Respondent raises issues concerning Tisch's payment of Ryan's health insurance and attorney's fees. Respondent closes the letter by asking Beattie to call Fielder's office to discuss these matters.

The next communication between Beattie and Respondent occurred in February 2010. According to Beattie, Respondent informed her that his law license would be reinstated on February 11, 2010, and thereafter they would be in court together "mano a mano." She further claims Respondent said his knowledge of the case was superior to that of other attorneys, so Ryan's legal efforts would be less likely to succeed in the future. Finally, according to Beattie, Respondent suggested that they should sit down to negotiate, provided Ryan was in a "compromising mood." Beattie's testimony is partially reflected in an email she sent to Ryan on February 10, 2010, stating: "Matt Smith says he will have his license reinstated tomorrow and wants to sit down and negotiate here. Supposedly Gary is ready to compromise."[12] Respondent contests Beattie's recollections on this issue. He only recalls telling Beattie that he had a reinstatement hearing scheduled in February 2010.

Ryan subsequently contacted the People and discovered that Respondent had not been reinstated. Beattie advised Ryan that she could file a complaint against Respondent, which Ryan did.[13] Beattie and Respondent never communicated again, and Tisch subsequently hired a different attorney.

Beattie readily concedes that Respondent was forthcoming about his status as a suspended attorney from the outset of their relationship. She admits she has no knowledge of the frequency of Respondent's communications with Fielder regarding the Tisch matter or the degree to which Fielder supervised Respondent's work. Although she perceived Respondent's actions as inappropriate for a law clerk, particularly because of what she viewed as his attempts to negotiate on Tisch's behalf, she did not alert the People to her concerns.[14] In Beattie's view, Respondent's involvement in the case cost Ryan more money because Beattie felt obliged to write letters to

[12] Ex. 9.

[13] Testimony presented at the disciplinary hearing suggests that Ryan was motivated in part to file a complaint because she believed that Respondent's actions were adding to her legal fees, since Beattie needed to spend time communicating with both Respondent and Fielder.

[14] Beattie testified that she did not report her concerns to the People because she did not want to get Respondent into trouble and because Tisch hired another attorney shortly after one of the incidents that caused her concern regarding Respondent's conduct.

Fielder confirming that he was aware of the content of her communications with Respondent. Beattie concedes, however, that it is generally her practice to write confirmatory letters even when she has spoken directly to an attorney.

Fielder provided an affidavit in which he explains that Respondent

> continuously and constantly updates [him] on the Tisch matter. . . . I have never seen [Respondent] act outside of his capacity. [Respondent] is not authorized to advise Mr. Tisch or negotiate on his behalf . . . . All correspondence drafted by [Respondent], as well as his participation in any communication and conferences with opposing counsel were done at my direction and review.

Tisch also supplied an affidavit dated March 31, 2010, in which he attests that he is aware of Respondent's suspended status, he understands that Fielder alone is his lawyer, and Respondent had advised him that any information Respondent was providing to him had originated with Fielder.

Colo. RPC 3.4(c) and 5.5(a)

The People allege that Respondent violated Colo. RPC 5.5(a), which bars a lawyer from practicing without a license unless specifically authorized to do so. The People further claim that Respondent's unauthorized practice of law violated his order of suspension and thereby violated Colo. RPC 3.4(c), which prohibits a lawyer from knowingly disobeying an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists.

In the People's view, Respondent engaged in the unauthorized practice of law by attempting to advocate and negotiate on Tisch's behalf in conversations with Beattie and by sending Beattie letters in which he presented legal issues, such as how court orders should be interpreted, what should be included in a proposed order, and what issues needed to be addressed in Tisch's case. The People find it particularly troubling that Respondent presented information to Beattie that might have elicited a settlement offer. In addition, the People argue that the activities of a suspended lawyer require more restrictions than those of an individual who has never been licensed to practice law because a suspended lawyer will be more tempted to overstep boundaries. Finally, the People argue that even if none of Respondent's actions alone constitutes the unauthorized practice of law, the actions collectively amount to the unauthorized practice of law.

Respondent stresses that from the outset he informed all relevant persons—including Fielder, Tisch, Beattie, and Martillaro—that his law license was suspended. He acknowledges that it would have been better practice for him to write letters that were less "lawyerly" in tone, but he denies that drafting

those letters constituted the unauthorized practice of law. He explains that use of the term "my client" in his letter of January 5, 2009, was accidental. Further, he argues that each letter he drafted to Beattie was subject to the review of Fielder or Martillaro and that he discussed substantive issues with Fielder before relaying information concerning those issues to Beattie.

A determination of whether Respondent engaged in the unauthorized practice of law requires an understanding of what activities constitute the practice of law and what supervision is required of a suspended lawyer acting as a paralegal. The primary rule under which Respondent is charged here, Colo. RPC 5.5(a), does not define the practice of law. The Hearing Board, however, draws guidance from Colo. RPC 5.5(b), which prohibits a licensed lawyer from employing a disbarred or suspended lawyer to perform the following tasks:

> (1) render legal consultation or advice to the client;
> (2) appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer;
> (3) appear on behalf of a client at a deposition or other discovery matter;
> (4) negotiate or transact any matter for or on behalf of the client with third parties;
> (5) otherwise engage in activities that constitute the practice of law; or
> (6) receive, disburse or otherwise handle client funds.[15]

The Colorado Supreme Court has defined the practice of law in several cases, as summarized in the *Shell* decision:

> We previously have defined the "practice of law" as acting "in a representative capacity in protecting, enforcing, or defending the legal rights and duties of another and in counselling, advising and assisting him in connection with these rights and duties . . . ." Applying this definition, we have held that an unlicensed person engages in the unauthorized practice of law by offering legal advice about a specific case, drafting or selecting legal pleadings for another's use in a judicial proceeding without the supervision of an attorney, or holding oneself out as the representative of another in a legal action. . . . [W]e have attempted to avoid any doubt about the activities that constitute the "practice of law" by enacting C.R.C.P. 201.3, which provides a thorough "definition of what

[15] The People argue that Respondent's actions fit within the fourth and fifth categories of this list.

constitutes the practice of law which is supported by long-standing case authority . . . ."[16]

C.R.C.P. 201.3(2)(b)(i) & (ii) provide that the "practice of law," for purposes of classifying applicants for bar admission, means "[f]urnishing legal counsel, drafting documents and pleadings, and interpreting and giving advice with respect to the law, and/or [p]reparing, trying or presenting cases before courts, executive departments, [or] administrative bureaus or agencies . . . ."

Even if a suspended lawyer's activities as a paralegal constitute the practice of law, as they often may,[17] those activities do not necessarily amount to the *unauthorized* practice of law.[18] The comments to Colo. RPC 5.5 state that a licensed lawyer may employ a suspended lawyer "to perform services that a law clerk, paralegal or other administrative staff may perform so long as the lawyer directly supervises the work."[19] In particular, a suspended lawyer may have contact with the licensed lawyer's clients, as long as the clients receive written notice that the suspended lawyer may not practice law.[20]

The Hearing Board looks for guidance to the American Bar Association's *Model Guidelines for the Utilization of Paralegal Services* ("ABA *Paralegal Guidelines*"), which indicates that a licensed attorney may delegate work to paralegals if the licensed attorney maintains a direct relationship with the client, supervises the delegated tasks, and retains professional responsibility for the work product.[21] The ABA *Paralegal Guidelines* state that a lawyer should not delegate to a paralegal responsibility for establishing an attorney-

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[16] *People v. Shell*, 148 P.3d 162, 171 (Colo. 2006) (quoting and citing *Denver Bar Ass'n v. Pub. Util. Comm'n,* 154 Colo. 273, 279, 391 P.2d 467, 471 (1964); *Unauthorized Practice of Law Comm. v. Grimes,* 654 P.2d 822, 823 (Colo. 1982); *Unauthorized Practice of Law Comm. v. Prog,* 761 P.2d 1111, 1115 (Colo. 1988)). The Colorado Supreme Court has noted that "[t]here is no wholly satisfactory definition as to what constitutes the practice of law; it is not easy to give an all-inclusive definition." *Denver Bar Ass'n,* 154 Colo. at 279, 391 P.2d at 471. But a common theme among activities constituting the practice of law is the "exercise of legal discretion or judgment, on behalf of another." *People v. Adams*, 243 P.3d 256, 266 (Colo. 2010).

[17] *See In re Opinion No. 24 of Comm. on Unauthorized Practice of Law*, 607 A.2d 962, 966 (N.J. 1992) ("There is no question that paralegals' work constitutes the practice of law."). We note there are some semantic differences in the use of the term "practice of law." Some authorities indicate that a paralegal's activities may never appropriately be characterized as the practice of law, which is reserved to licensed attorneys. Other authorities use the term more broadly and indicate that paralegals may engage in the practice of law subject to supervision.

[18] As noted in the *Shell* decision, "an unlicensed person engages in the unauthorized practice of law by . . . drafting or selecting legal pleadings for another's use in a judicial proceeding *without the supervision of an attorney* . . . ." 148 P.3d at 171 (emphasis added).

[19] Colo. RPC 5.5 cmt. 3.

[20] Colo. RPC 5.5 cmt. 5.

[21] American Bar Association Standing Committee on Paralegals, *ABA Model Guidelines for the Utilization of Paralegal Services* (2004) at 2; *see also In re Opinion No. 24*, 607 A.2d at 969 (same); *La. State Bar Ass'n v. Edwins*, 540 So.2d 294, 300 (La. 1989) (stating that a lawyer may not delegate the exercise of professional judgment).

client relationship, for setting a legal fee, or for a legal opinion provided to a client.[22] Paralegals may, however, relate a lawyer's legal advice to a client, provided they do not "interpret or expand on that advice."[23]

We also draw guidance from the guidelines for paralegal use that the Colorado Bar Association has developed for various practice areas ("Colorado *Paralegal Guidelines*").[24] The guidelines for family law outline a wide variety of tasks that paralegals may perform under the direction and supervision of a licensed attorney.[25] Those tasks include conducting an initial interview with a client to obtain information for pleadings;[26] preparing pleadings; drafting correspondence with clients, courts, and attorneys; assisting in settlement negotiations; attending hearings; communicating settlement proposals and counter-offers to clients and opposing counsel; and preparing decrees, support orders, and permanent orders.[27]

Case law makes clear that the determination of whether a respondent has engaged in the unauthorized practice of law requires a fact-specific analysis.[28] Several broad principles emerge from the case law, however. First, a licensed attorney must directly supervise the activities of a paralegal.[29] Where a paralegal counsels clients under the purported supervision of a licensed attorney, but in fact the licensed attorney does not directly supervise the paralegal, the paralegal has engaged in the unauthorized practice of law.[30]

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[22] ABA *Paralegal Guidelines* at 6; *see also In re Comish*, 889 So.2d 236, 245 n.8 (La. 2004).
[23] ABA *Paralegal Guidelines* at 6.
[24] Colorado Bar Association, *Guidelines for the Utilization of Paralegals* (May 17, 2008). The Colorado *Paralegal Guidelines* were drafted by members of the Colorado Bar Association Paralegal Committee and were reviewed by attorneys in the applicable practice area and by the People.
[25] *Id.*
[26] We note that not all jurisdictions permit a suspended or disbarred lawyer to have contact with clients. *See In re Jones*, 241 P.3d 90, 102-03 (Kan. 2010); *Matter of Frabizzio*, 508 A.2d 468, 469 (Del. 1986).
[27] Colorado *Paralegal Guidelines*.
[28] *See In re Discipline of Lerner*, 197 P.3d 1067, 1073 (Nev. 2008) ("[T]he practice of law definition is not susceptible to a bright-line, broadly stated rule. Courts throughout the country agree that what constitutes the practice of law must be decided on the facts and in the context of each individual case.").
[29] *See In re Comish*, 889 So.2d at 245 (finding that where a licensed lawyer hired a disbarred attorney as a paralegal and gave him "a free hand to meet with clients, handle legal fees, correspond with attorneys and insurance adjusters, render legal opinions, and negotiate settlements," while simply remaining "available" to speak with the paralegal by telephone regarding these matters, the licensed lawyer failed to adequately supervise the paralegal).
[30] *In re Scott*, 739 N.E.2d 658, 659-60 (Ind. 2000); *see also Comish*, 889 So.2d at 245 ("The key to appropriate delegation is proper supervision by the lawyer, which includes adequate instruction when assigning projects, monitoring of the progress of the project, and review of the completed project."); *Matter of Bright*, 171 B.R. 799, 805 (Bkrtcy. E.D. Mich. 1994) ("The lawyer is not adequately supervising the non-lawyer if the lawyer does not know about the existence or content of the meetings between the non-lawyer and the debtor, if the lawyer relies solely on the non-lawyer as intermediary, neglecting to meet directly with the client, or if the lawyer fails

Second, a paralegal may not serve as the sole point of contact in a law firm for clients.[31] Third, certain elements of the practice of law—namely, appearing in court as counsel of record, negotiating settlements on behalf of clients, and giving independent legal advice to clients—may not be performed by a paralegal, even subject to supervision of a licensed attorney.[32] Fourth, a paralegal engages in the unauthorized practice of law by falsely leading clients, opposing counsel, or judges to believe that he or she is a licensed attorney.[33] Finally, courts apply more stringent scrutiny to the activities of a suspended or disbarred lawyer than to the activities of a paralegal who has never held a law license.[34] Not only is a suspended or disbarred lawyer subject to the Rules of Professional Conduct, but the public may place more value on the opinion of a trained lawyer, and the public expects a suspension or disbarment to meaningfully restrict a lawyer's activities.[35]

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to use his independent professional judgment to determine which documents prepared by the non-lawyer should be communicated outside the law office.") (citations omitted).

[31] *See People v. Stewart*, 892 P.2d 875, 877 (Colo. 1995) (holding that, where non-lawyer alone met with and provided legal advice to clients, his employer had aided in the unauthorized practice of law); *People v. Fry*, 875 P.2d 222, 223 (Colo. 1994) (finding that licensed lawyer had allowed a paralegal to engage in the unauthorized practice of law, where the paralegal appeared to be the sole contact for clients and the paralegal advised the clients to file for Chapter 13 bankruptcy); *Lerner*, 197 P.3d at 1074 (holding that, where a lawyer licensed in another state performed initial client consultations and decided whether his employer should accept representation of clients, negotiated claims, including by making legal arguments in support of clients' positions, and was the law firm's sole contact for clients, the lawyer engaged in the unauthorized practice of law); *Fla. Bar v. Beach,* 675 So.2d 106, 109 (Fla. 1996) (holding that licensed lawyer assisted paralegal in the unauthorized practice of law by permitting paralegal to act as a "conduit for giving legal advice by obtaining and relaying, without supervision, case-specific information to persons whom [the licensed lawyer] never actually met or consulted").

[32] *See People v. Kargol*, 854 P.2d 1267, 1268 (Colo. 1993) (finding that suspended lawyer engaged in the unauthorized practice of law by appearing as counsel of record in judicial proceedings); *Disciplinary Action against Ray*, 452 N.W.2d 689, 693 (Minn. 1990) (finding that suspended attorney engaged in the unauthorized practice of law by negotiating with client's insurer and advising client to reject insurer's offer); *La. State Bar Ass'n v. Edwins*, 540 So.2d 294, 300 (La. 1989) (stating that a lawyer may not delegate to a paralegal the role of appearing in court on a client's behalf or giving a client legal advice).

[33] *See People v. Zimmermann*, 960 P.2d 85, 86-87 (Colo. 1998) (determining that a suspended attorney engaged in the unauthorized practice of law, in part due to his failure to inform his client and opposing counsel of his suspension); *People v. Wilson*, 832 P.2d 943, 944 (Colo. 1992) (same); *In re Discipline of Jorissen,* 391 N.W.2d 822, 826 (Minn. 1986) (sanctioning a suspended attorney for appearing on behalf of clients at hearings and failing to correct the impression of the judge and opposing counsel that he was an attorney); *In re Cadwell*, 543 P.2d 257, 260 (Cal. 1975) (determining that suspended attorney, who was employed as law clerk, engaged in the unauthorized practice of law by conducting initial interview with client, who formed the impression that the suspended attorney was an attorney in good standing and was representing him, and by negotiating with opposing counsel, who also believed he was an attorney in good standing).

[34] *See Jorissen,* 391 N.W.2d at 825; *In re Mitchell,* 901 F.2d 1179, 1185 (3d Cir. 1990); *Application of Christianson*, 215 N.W.2d 920, 925-26 (N.D. 1974).

[35] *See In re Chavez,* 1 P.3d 417, 425 (N.M. 2000); *Mitchell,* 901 F.2d at 1185.

In considering the application of the foregoing legal principles to the facts of this matter, we are also cognizant of the goals of the rules prohibiting the unauthorized practice of law. On the one hand, these rules are designed to protect the public by ensuring that clients receive competent legal representation.[36] On the other hand, the rules are not meant to broadly bar paralegals from performing work that otherwise might be performed by a licensed attorney. The use of paralegals can reduce legal fees for clients, which is an important consideration given the rising cost of legal representation and the inadequacy of legal assistance programs to meet the burgeoning need for reduced fee or pro bono legal services.[37]

Whether Respondent engaged in the unauthorized practice of law in this disciplinary matter is a close question. Respondent may have engaged in the practice of law, as defined in C.R.C.P. 201.3(2)(b)(i) & (ii), by drafting legal documents on Tisch's behalf. But the drafting of legal documents does not constitute the *unauthorized* practice of law if done under the supervision of a licensed attorney. Here, Fielder and Respondent both affirm that Respondent acted at all times under supervision. Beattie does not controvert that assertion, nor have the People presented any evidence showing that Fielder failed to supervise Respondent. Accordingly, we assume for purposes of the following analysis that the contested actions by Respondent were subject to Fielder's direct supervision.

We find that it was not the unauthorized practice of law for Respondent to serve as Tisch's primary contact in Fielder's office. Tisch was aware that Respondent was not a licensed attorney, it was natural, given their friendship, for Tisch to regularly communicate with Respondent, and there is no evidence that Respondent provided independent legal advice to Tisch.

We also find Respondent's alleged statements to Beattie that he would soon have his license reinstated do not constitute the unauthorized practice of law. Assuming *arguendo* that Beattie correctly related their conversation, it is permissible for a suspended attorney to predict to opposing counsel, albeit inaccurately, when his license will be reinstated. Respondent's statements in this regard amounted to unwise speculation, but not to a rule violation.

Respondent's other conversations with Beattie also do not appear to have constituted the unauthorized practice of law, particularly given Fielder's decision not to speak directly to Beattie. The People agree that it is appropriate for a paralegal to convey factual information to opposing counsel, and Respondent's and Beattie's discussions appear to have largely consisted of factual updates and questions. We also do not find that it was improper for Respondent to have asked Beattie on August 24, 2009, whether Ryan would

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[36] *Adams*, 243 P.3d at 266.

[37] *See In re Houston*, 985 P.2d 752, 755 (N.M. 1999); *Bright*, 171 B.R. at 805-06.

accept $8,000.00 in attorney's fees in exchange for Tisch agreeing to drop an appeal. As Beattie acknowledges, Respondent stated he had no authority to make an offer. Even if Respondent's statement did represent an offer, the Colorado *Paralegal Guidelines* deem it appropriate for a paralegal to communicate settlement proposals to opposing counsel when the paralegal is subject to the supervision of a licensed attorney.[38]

The closest questions about the unauthorized practice of law are presented by the letters Respondent sent to Beattie on January 5, 2009, August 31, 2009, and September 24, 2009.

The letter of January 5, 2009, is concerning because Respondent uses the phrases "my client" and "it is my understanding." But Respondent signs the letter as "law clerk" to Fielder, and it is not improper for a paralegal or other members of a lawyer's staff to view a lawyer's client in some sense as the client of the office of a whole. Viewed in this light and given that Respondent had informed Beattie that he was not a licensed lawyer, Respondent's use of the phrase "my client" should not be viewed as an attempt on Respondent's part to hold himself out as an attorney. Neither does the use of the phrase "my understanding" in reference to facts concerning unpaid medical expenses amount to the unauthorized practice of law.

The letter of August 31, 2009, also raises concerns. Respondent writes, "I am aware that the judge stated there had been four continuances, however, I believe it was only continued two times . . . and at any rate, I don't feel it is pertinent to the Magistrate's final order." The first comment is appropriate, since Respondent attended the hearing to take notes on what should be placed in the order and he made a factual assertion regarding the number of continuances. The second comment sounds more like an expression of legal judgment, as does the comment that two paragraphs in the proposed order were "afterthoughts" rather than "orders of the Court." But given that Martillaro approved this letter and that Beattie understood Respondent was sending this letter in his capacity as a paralegal, this phrasing does not persuade us that Respondent engaged in the unauthorized practice of law.

Finally, in the letter of September 24, 2009, Respondent states it is his understanding that Ryan made a late mortgage payment, explains that Ryan's late payment could negatively affect Tisch, and suggests a remedy that Tisch proposed whereby Tisch would make direct mortgage payments. As in the

[38] Beattie characterizes some of Respondent's communications with her as attempts to negotiate on Tisch's behalf, while Respondent claims that their discussions were brief and factual in nature. Neither Beattie nor Respondent produced contemporaneous notes of a sufficient level of detail to clearly establish the depth of those discussions. Although the evidence suggests that Respondent made at least one settlement offer to Beattie, we cannot find clear and convincing evidence showing that Respondent engaged in any give-and-take negotiations with Beattie.

letters above, Respondent adopts a lawyerly tone. In addition, he arguably communicates a settlement offer to opposing counsel. But as discussed above, communicating a settlement proposal does not constitute the unauthorized practice of law under the Colorado *Paralegal Guidelines*, when subject to attorney supervision. Given our understanding that Fielder supervised the drafting of this letter, we cannot find that this letter represents a rule violation.

We give serious consideration to the People's argument that Respondent's actions collectively amount to the unauthorized practice of law. But we also assign great weight to two facts in particular: (1) the breakdown in Fielder and Beattie's relationship thrust Respondent into the role of communicating with Beattie, and (2) no one was misled as to Respondent's suspended status. A paralegal's use of terms such as "my client" in some instances might represent the unauthorized practice of law; in this case, however, Beattie was aware from the outset that Respondent was suspended, and Respondent signed his letter as a "law clerk." Moreover, the evidence is uncontroverted that Fielder or Martillaro reviewed all of Respondent's letters to Beattie, and there are no allegations that Respondent was the sole point of contact for Tisch, that he appeared in court as counsel of record, or that he gave Tisch independent legal advice. While Respondent may have presented settlement offers to Beattie, there is not clear and convincing evidence that he engaged in a give-and-take negotiation on Tisch's behalf. Finally, although the lawyerly tone in Respondent's letter calls into question Respondent's judgment, it does not amount to the unauthorized practice of law. In sum, we cannot find by clear and convincing evidence that Respondent violated Colo. RPC 5.5(a) or 3.4(c).

IV. CONCLUSION

Colorado law permits a suspended attorney to work as a paralegal when supervised by a licensed attorney. Such employment can help a suspended attorney to demonstrate in a reinstatement hearing that he or she has been rehabilitated. In addition, the use of paralegals—including suspended attorneys—enables licensed attorneys to charge clients lower legal fees. Here, Respondent adopted an ill-advised tone in his letters to opposing counsel, and he failed to make clear that his letters were written at an attorney's direction. But Respondent clearly communicated his suspended status, he was supervised by a licensed attorney, and he did not engage in any activities that a suspended attorney is barred from performing. Accordingly, the Hearing Board determines that the People failed to meet their burden of proof to show by clear and convincing evidence that Respondent engaged in the unauthorized practice of law.

V. ORDER

The Hearing Board therefore **DISMISSES** the People's complaint pursuant to C.R.C.P. 251.19(b)(1).

DATED THIS 20th DAY OF APRIL, 2011.

_____
WILLIAM R. LUCERO
PRESIDING DISCIPLINARY JUDGE

_____
LINDA S. KATO
HEARING BOARD MEMBER

_____
JOHN E. HAYES
HEARING BOARD MEMBER

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