

Ethical Issues in Intake Procedures



Goals of Session

- Consider the important ethical issues that arise in the intake process.
- Discuss the obligations of an attorney supervising non-lawyer staff .
- Understand the danger of the “accidental client” issue.
- Explore the boundaries of the unauthorized practice of law.
- “Fun”

Who is your favorite sports team?

1. Colorado Buffaloes
2. Florida Gators
3. Miami Hurricanes
4. FSU Seminoles
5. None, and by the way I hate stupid questions



Resources

- ◉ **Model Rules of Professional Conduct (2010)**
 - www.abanet.org/cpr/mrpc/home.html/ and State Rules
- ◉ **NAELA – Aspirational Standards for the Practice of Elder Law**
 - www.naela.org/Applications/News-app/Files/112105final.pdf
- ◉ ***ACTEC Commentaries on MRPC***
 - www.actec.org/private/freeform/page.asp?PageID=489
- ◉ ***ACTEC Engagement Letters***
 - www.actec.org/pubInfoArk/comm/engltrtoc.htm
- ◉ ***National Federation of Paralegal Associations Model Code of Ethics and Professional Responsibility***
 - www.paralegals.org/associations/2270/files/Model_Code_of_Ethics_09_06.pdf (example of State adoption of model code, www.floridabar.org/divexe/rtrfb.nsf)

What do you do in the law firm?

1. Paralegal
2. Law clerk but not an assistant
3. Legal Secretary
4. Attorney
5. I don't work I just wandered in for the free food.



Ethical Issues for the Paralegal/non-lawyer staff

- 20-7.1(c) Paralegal should understand the attorney's Rules of Professional Conduct and this code in order to avoid any action that would involve the attorney in a violation of the rules or give the appearance of professional impropriety.
- Unauthorized practice of law
- Unintentionally creating an attorney/client relationship for purposes of malpractice

Ethical Issues for the Attorney supervising

- ◉ Rule 5.3—supervising non-lawyer assistance
- ◉ Rule 5.5—Unauthorized practice of law
- ◉ Rule 1.7 and 1.9 conflict of interest
- ◉ Rule 1.6 Confidentiality
- ◉ Rule 8.4—Misconduct through the acts of another

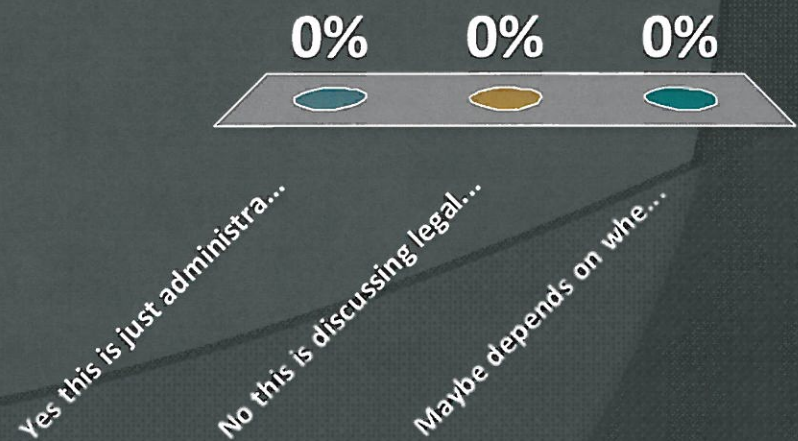
Hypothetical

Non-lawyer assistant is the first person the prospective client actually talks to.

Which of the following things can the non-lawyer talk to the client about

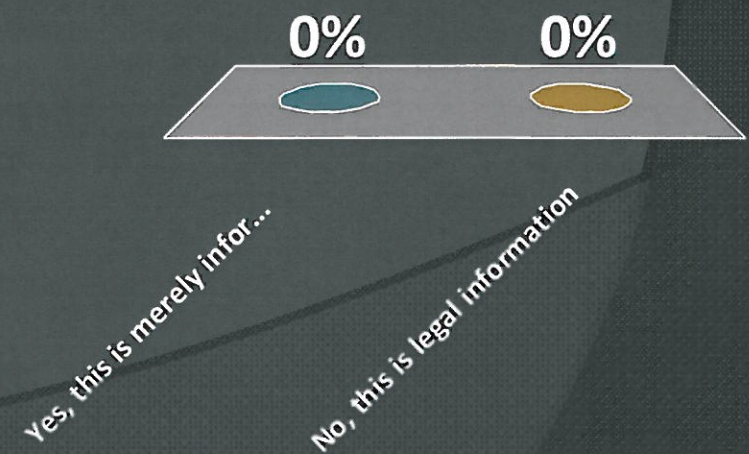
The amount charged by the lawyer?

1. Yes, this is just administrative.
2. No, this is discussing legal fees.
3. Maybe depends on whether she is a paralegal or not.



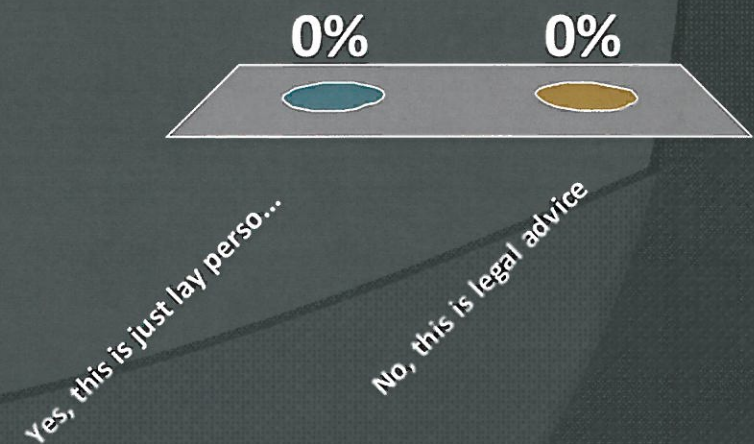
What is the procedure for probating a will?

1. Yes, this is merely information
2. No, this is legal information



Whether the person needs a lawyer for what they want to do?

1. Yes, this is just lay person opinion
2. No, this is legal advice



What else might come up on
the phone?

Ethical Issues for Non-lawyer Assistants

Prohibited Conduct

- (1) not establish attorney-client relationships, accept cases, set legal fees, give legal opinions or advice, ...
- (2) not engage in, encourage, or contribute to any act that could constitute the unlicensed practice of law;
- (3) not engage in the practice of law;
- (4) not perform any of the duties that attorneys only may perform nor do things that attorneys themselves may not do;
or
- (5) not act in matters involving professional legal judgment.

Ethical Issues for Non-lawyer Assistants

Permitted Service

- (1) services that do not require the exercise of independent professional legal judgment on the part of the assistant;
- (2) the attorney is responsible for the client, maintains a direct relationship with the client, and maintains control of all client matters;
- (3) the attorney supervises the assistant;
- (4) the attorney remains professionally responsible for all work on behalf of the client
- (5) the services performed supplement, merge with, and become the attorney's work product.

Unauthorized Practice of Law

- ⦿ Create an attorney/client relationship
- ⦿ Set legal fees
- ⦿ Act in matters involving professional legal judgment

The assistant tells the person
on the phone that they cannot
do Medicare planning.

Could the managing partner be held responsible for any damages that occur if this is wrong ?

1. No, he was not there when the assistant said it.
2. Yes, if he did not supervise her phone calls
3. No, she said this on her own.
4. Yes, unless he has trained her properly



ABA Model Rule 5.3

- Management of the firm --Reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
- Supervisor--- Reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- Any lawyer ---
 - (1) Orders or ratifies the conduct involved; or
 - (2) as supervisor knows of the conduct and fails to take reasonable steps to fix it.

Malpractice Liability

- ⦿ Elements of Malpractice claim
 - Attorney/client relationship (duty)
 - Fell below standard of care (breach)
 - Proximate cause
 - Damages
- ⦿ Probably cannot form a relationship with an assistant BUT

Accidental Client Issue for Attorneys in Intake

- Togstad v. Vesely et al. 291 N.W.2d 686, 692 (Minn.1980).
- Relationship exists whenever a person seeks and receives legal advice from a lawyer under circumstances in which a reasonable person would rely on the advice. (Tort theory)

Questions--Comments

“The first problem
for all of us
is not to learn,
but to unlearn.”

Thank you for Your Attention

