

# **Ethically Speaking...**

## **Ethical Issues in Intake©**

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### **1. INTRODUCTION**

Ethical and professionalism concerns begin the minute that a client calls the lawyer's office seeking help and advice. It is important to be aware of and train others in the lawyer's office about the ethical pitfalls that can occur at the beginning of the relationship. Because in many offices the non-lawyer assistant will be the first to speak with the prospective client, it is imperative that both the attorneys and the assistants understand the ethical prohibitions and constraints on the non-lawyer assistant. For elder law attorneys the ethical pitfalls are further complicated by the nature of the practice, the interconnected family relationships, the client's health, economic situation and mental capabilities. This outline will summarize some of the common ethical situations faced by lawyers and non-lawyer assistants when initially contacted by a client or the client's family. It will reference the Model Rules of Professional Conduct for Attorneys and examples from state ethical standards for paralegals which may be applicable to the intake process and will be helpful in answering the questions posed during this multi-media presentation.

### **2. UNAUTHORIZED PRACTICE OF LAW**

Every jurisdiction in the United States prohibits the unauthorized practice of law. The ABA Model Rule 5.5 states that:

**(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.<sup>1</sup>**

Unfortunately the Rules give little guidance to what the "unauthorized practice of law entails. For example, Comment 2 to Rule 5.5 states merely that:

**The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition,**

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<sup>1</sup> American Bar Association Model Rules of Professional Conduct Rule 5.5 Comment 2 (2009).

**limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3<sup>2</sup>**

The comment makes it clear that an attorney can delegate work to a paralegal or non-lawyer, however the attorney must supervise the delegated work and remains responsible for the work. In order, however, to understand what the limitations are on what work a non-lawyer can undertake, one must consider definitions from other states. Here are some examples. In Florida, the most recent definition came from the Supreme Court in 1962, in *State ex rel. The Florida Bar v. Sperry*.<sup>3</sup> It stated,

**It is generally understood that the performance of services in representing another before the courts is the practice of law. But the practice of law also includes the giving of legal advice and counsel to others as to their rights and obligations under the law and the preparation of legal instruments, including contracts, by which legal rights are either obtained, secured or given away, although such matters may not then or ever be the subject of proceedings in a court.**

**We think that in determining whether the giving of advice and counsel and the performance of services in legal matters for compensation constitute the practice of law it is safe to follow the rule that if the giving of such advice and performance of such services affect important rights of a person under the law, and if the reasonable protection of the rights and property of those advised and served requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advice and the performance of such services by one for another as a course of conduct constitute the practice of law.<sup>4</sup>**

The Supreme Court of Illinois stated that:

**"The focus of the inquiry is, in fact, 'whether the activity in question required legal knowledge and skill in order to apply legal principles and precedent' <sup>5</sup> Even where "trial work is not involved but the preparation of legal documents, their interpretation, the giving of legal advice, or the application of legal principles to problems of any complexity, is involved, these activities are still the practice of law."<sup>6</sup>**

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2 American Bar Association Model Rules of Professional Conduct Rule 5.5 Comment 2 (2009).

3 140 So.2d 587(1962).

4 Id at 591.

5 *In re Discipio*, 645 N.E.2d 906, 910 (1994).

6 *Attorney Grievance Commission of Maryland v. Shaw*, 732 A.2d 876, 882 (1999)

In 1991, the American Bar Association adopted the Model Guidelines for the Utilization of Legal Assistance. Those guidelines established three areas that an attorney cannot delegate his responsibilities to a legal assistant. They are:

- (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.<sup>7</sup>**

The rules governing paralegals seem to emphasize the exercise of independent legal judgment as the cornerstone of “practicing law.” So for example in the Code of Professional Conduct for Florida Registered Paralegals, paralegals must not

**“act in matters involving professional legal judgment since the services of an attorney are essential in the public interest whenever the exercise of such judgment is required.”<sup>8</sup>**

Additionally, the rules for paralegals emphasize the requirement that the attorney is the prime decision maker and responsible party. For example, the Florida rules state:

- (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 paralegal;**
- (4) the attorney remains professionally responsible for all work on behalf of the client and assumes full professional responsibility for the work product, including any actions taken or not taken by the paralegal in connection therewith; and**
- (5) the services performed supplement, merge with, and become the attorney's work product.<sup>9</sup>**

Therefore, when non-lawyer assistants are conducting the initial interview with the client as part of the intake process the attorney must be aware of what he is asking the paraprofessional to do and have trained the assistant to refrain from slipping into the unauthorized practice of law.

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7 ABA Standing Committee on Legal Assistants, Model Guidelines for the Utilization of Legal Assistant Services (1991). ABA website: <http://www.abanet.org/legalassts/home.html>

8 Rules Regulating the Florida Bar Florida Registered Paralegal Program, Code of Professional Conduct Rule 20.7.1 (2009) found at [www.floridabar.org/divexertfb.nsf](http://www.floridabar.org/divexertfb.nsf)

9 Id.

### 3. AVOIDING THE ACCIDENTAL CLIENT<sup>10</sup>

In many situations, the initial contact is made by a family member or caregiver for the elder, the caregiver may actually provide transportation and accompanies the elder to the appointment, and in the more extreme situation, is present during the interview. The elder may prefer or insist on the presence of the third party. For the intake professional, it is important that the person calling or involved in a personal intake interview does not believe that they have become a client. Although it would be a highly unusual set of circumstances where the court would find that an attorney/client relationship was formed by the non-lawyer interview, you certainly do not want to be the exceptional case.

The most famous case of the “Accidental Client” was in Minnesota in the case of *Togstad vs. Vesely, Otto, Miller & Keefe*.<sup>11</sup> The *Togstad* case stands for the proposition that there are two theories upon which a client can show that an attorney/client relationship existed for purposes of a malpractice claim. The client can prove the relationship through a contractual theory, that there was an actual offer and acceptance of services, or under a tort theory. Under a tort theory, a relationship is created “whenever a person seeks and receives legal advice from a lawyer under circumstances in which a reasonable person would rely on the advice.”<sup>12</sup> In the *Togstad* case, the court found a relationship based on one meeting where the attorney told the client he did not believe she had a viable medical malpractice claim. When it was later discovered that she did have a claim but the statute of limitations had run, the court found Mr. Vesely and his firm did have a duty to Ms. Togstad.

The issue of the “accidental client” arises even more frequently when the attorney meets with several members of a family at one time and does not spend some time explaining to all of the participants who is the client and who is not the client. Both the attorney and the staff member should be alert to the need to separate the clients and the non-clients in those initial interviews in order to send a clear message as to who is the client, who the attorney owes a duty of loyalty to and whose confidences and wishes are going to be honored.

### 4. SUPERVISING THE NON-LAWYER ASSISTANT

Pursuant to Model Rule 5.3, attorneys have responsibilities to supervise their staff and can be professionally disciplined for the conduct of their staff. The rule states:

#### **RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS**

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<sup>10</sup> This term comes from the article Susan Martyn, *Accidental Clients*, 33 Hofstra L. Rev. 913 (2005).

<sup>11</sup> 291 N.W.2d 686 (Minn.1980).

<sup>12</sup> *Id.* at 693.



**With respect to a nonlawyer employed or retained by or associated with a lawyer:**

**(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make 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;**

**(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and**

**(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:**

**(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or**

**(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.<sup>13</sup>**

It is important that the supervising attorney explains to the assistant, who will be part of the intake process, the importance of the rules of confidentiality. The ABA Guidelines for Utilization of Paralegals states that “a lawyer is responsible for taking reasonable measures to ensure that all client confidences are preserved by a paralegal.”<sup>14</sup> ABA Model Rule 1.6 defines what is confidential very broadly it states:

#### **RULE 1.6 CONFIDENTIALITY OF INFORMATION**

**(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).**

**(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:**

**(1) to prevent reasonably certain death or substantial bodily harm;**

**(2) to secure legal advice about the lawyer's compliance with these Rules;**

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<sup>13</sup> ABA Model Rule of Professional Conduct Rule 1.6 (2009).

<sup>14</sup> ABA Standing Committee on Legal Assistants, Model Guidelines for the Utilization of Legal Assistant Services (1991). ABA website: <http://www.abanet.org/legalassts/home.html>.

- (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or**
- (4) to comply with other law or a court order.<sup>15</sup>**

It is particularly important for all to understand that anything the client says even prior to the formal contractual representation beginning is confidential and that everyone in the office needs to understand that.

Issues of confidentiality arise in many ways. Of course, the common and obvious issue of confidentiality arises when there is a third person involved in the initial intake conversation. Perhaps not as obvious, but still as problematic is the situation where the caregiver or adult child of the client acts as the “go-between” or runner for the elder, delivering documents and conveying information to the attorney as well as taking documents and conveying information from the attorney to the client---and even being entrusted with documents for execution by the client. Less obvious but still a confidentiality issue is those well meaning individuals (relatives or neighbors) who contact the attorney with concerns about the elder’s well-being and seeks information or advice on actions to take.

Additionally, a paraprofessional involved in the initial intake should also be aware of the rules regarding prospective clients. Because not every person who speaks to an attorney’s office will ultimately become a client it is important that procedures be set in place to allow the office to take future clients that may be adverse to a prospective client. If the participants in the intake process understand the constraints of ABA Model Rule 1.18 they can avoid conflicts with future clients. Rule 1.18 states:

#### **RULE 1.18 DUTIES TO PROSPECTIVE CLIENT**

**(a) Prospective Client.** A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

**(b) Confidentiality of Information.** Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as rule 4-1.9 would permit with respect to information of a former client.

**(c) Subsequent Representation.** A lawyer subject to subdivision (b) shall not represent a client with interests materially adverse to those

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<sup>15</sup> ABA Model Rule of Professional Conduct Rule 1.6 (2009).

**of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be used to the disadvantage of that person in the matter, except as provided in subdivision (d). If a lawyer is disqualified from representation under this rule, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in subdivision (d).**

**(d) Permissible Representation. When the lawyer has received disqualifying information as defined in subdivision (c), representation is permissible if:**

**(1) both the affected client and the prospective client have given informed consent, confirmed in writing; or**

**(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and**

**(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and**

**(ii) written notice is promptly given to the prospective client.<sup>16</sup>**

As the Model Guidelines recognize

**a lawyer is responsible for all of the professional actions of a paralegal performing services at the lawyer's direction and should take reasonable measures to ensure that the paralegal's conduct is consistent with the lawyer's obligations under the rules of professional conduct of the jurisdiction in which the lawyer practices.<sup>17</sup>**

Therefore, the attorney must train the assistants in his office to comply with the ethical rules for both assistants and lawyers.

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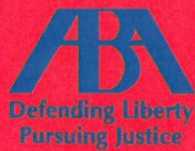
<sup>16</sup> ABA Model Rule of Professional Conduct Rule 1.18 (2009).

<sup>17</sup> ABA Standing Committee on Legal Assistants, Model Guidelines for the Utilization of Legal Assistant Services, Guideline 1 (1991). ABA website: <http://www.abanet.org/legalassts/home.html>.

ABA Model

# Guidelines

*for the  
Utilization of Paralegal Services*



American Bar Association  
Standing Committee on Paralegals

**ABA Model**  
**Guidelines**  
*for the*  
*Utilization of Paralegal Services*

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*ISBN: 1-59031-388-7*

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Produced by the ABA Standing Committee on Paralegals.



**ABA MODEL GUIDELINES**  
*for the*  
*Utilization of Paralegal Services*

***Preamble***

The Standing Committee on Paralegals of the American Bar Association drafted, and the ABA House of Delegates adopted, the ABA Model Guidelines for the Utilization of Legal Assistant Services in 1991. Most states have also prepared or adopted state-specific recommendations or guidelines for the utilization of services provided by paralegals.<sup>1</sup> All of these recommendations or guidelines are intended to provide lawyers with useful and authoritative guidance in working with paralegals.

This 2003 revision of the Model Guidelines is intended to reflect the legal and policy developments that have taken place since the first draft in 1991 and may assist states in revising or further refining their own recommendations and guidelines. Moreover, the Standing Committee is of the view that these and other guidelines on paralegal services will encourage lawyers to utilize those services effectively and promote the continued growth of the paralegal profession.<sup>2</sup>

The Standing Committee has based these 2003 revisions on the American Bar Association's Model Rules of Professional Conduct but has also attempted to take into account existing state recommendations and guidelines, decided authority and contemporary practice. Lawyers, of course, are to be first directed by Rule 5.3 of the Model Rules in the utilization of paralegal services, and nothing contained in these Model Guidelines is intended to be inconsistent with that rule. Specific ethical considerations and case law in particular states must also be taken into account by each lawyer that reviews these guidelines. In the commentary after each Guideline, we have attempted to identify the basis for the Guideline and any issues of which we are aware that the Guideline may present. We have also included selected references to state and paralegal association guidelines where we believed it would be helpful to the reader.

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<sup>1</sup> In 1986, the ABA Board of Governors approved a definition for the term "legal assistant." In 1997, the ABA amended the definition of legal assistant by adopting the following language: "A legal assistant or paralegal is a person qualified by education, training or work experience who is employed or retained by a lawyer, law office, corporation, governmental agency or other entity who performs specifically delegated substantive legal work for which a lawyer is responsible." To comport with current usage in the profession, these guidelines use the term "paralegal" rather than "legal assistant," however, lawyers should be aware that the terms legal assistant and paralegals are often used interchangeably.

<sup>2</sup> While necessarily mentioning paralegal conduct, lawyers are the intended audience of these Guidelines. The Guidelines, therefore, are addressed to lawyer conduct and not directly to the conduct of the paralegal. Both the National Association of Legal Assistants (NALA) and the National Federation of Paralegal Associations (NFPA) have adopted guidelines of conduct that are directed to paralegals. *See* NALA, "Code of Ethics and Professional Responsibility of the National Association of Legal Assistants, Inc." (adopted 1975, revised 1979, 1988 and 1995); NFPA, "Affirmation of Responsibility" (adopted 1977, revised 1981).

**GUIDELINE 1: A LAWYER IS RESPONSIBLE FOR ALL OF THE PROFESSIONAL ACTIONS OF A PARALEGAL PERFORMING SERVICES AT THE LAWYER'S DIRECTION AND SHOULD TAKE REASONABLE MEASURES TO ENSURE THAT THE PARALEGAL'S CONDUCT IS CONSISTENT WITH THE LAWYER'S OBLIGATIONS UNDER THE RULES OF PROFESSIONAL CONDUCT OF THE JURISDICTION IN WHICH THE LAWYER PRACTICES.**

**Comment to Guideline 1**

The Standing Committee on Paralegals ("Standing Committee") regards Guideline 1 as a comprehensive statement of general principle governing the utilization of paralegals in the practice of law. As such, the principles contained in Guideline 1 are part of each of the remaining Guidelines. Fundamentally, Guideline 1 expresses the overarching principle that although a lawyer may delegate tasks to a paralegal, a lawyer must always assume ultimate responsibility for the delegated tasks and exercise independent professional judgment with respect to all aspects of the representation of a client.

Under principles of agency law and the rules of professional conduct, lawyers are responsible for the actions and the work product of the nonlawyers they employ. Rule 5.3 of the Model Rules of Professional Conduct ("Model Rules")<sup>3</sup> requires that supervising lawyers ensure that the conduct of nonlawyer assistants is compatible with the lawyer's professional obligations. Ethical Consideration 3-6 of the Model Code encourages lawyers to delegate tasks to paralegals so that legal services can be rendered more economically and efficiently. Ethical Consideration 3-6, however, provides that such delegation is only proper if the lawyer "maintains a direct relationship with his client, supervises the delegated work, and has complete professional responsibility for the work product." The adoption of Rule 5.3, which incorporates these principles, reaffirms this encouragement.

To conform to Guideline 1, a lawyer must give appropriate instruction to paralegals supervised by the lawyer about the rules governing the lawyer's professional conduct, and require paralegals to act in accordance with those rules. *See* Comment to Model Rule 5.3; *see also* National Association of Legal Assistant's Model Standards and Guidelines for the Utilization of Legal Assistants, Guidelines 1 and 4 (1985, revised 1990, 1997) (hereafter "NALA Guidelines"). Additionally, the lawyer must directly supervise paralegals employed by the lawyer to ensure that, in every circumstance, the paralegal is acting in a manner consistent with the lawyer's ethical and professional obligations. What constitutes appropriate instruction and supervision will differ from one state to another and the lawyer has the obligation to make adjustments accordingly.

<sup>3</sup> The Model Rules were first adopted by the ABA House of Delegates in August of 1983. To date, some 43 states and two jurisdictions have adopted the Model Rules to govern the professional conduct of lawyers licensed in those states. However, because several states still utilize a version of the Model Code of Professional Responsibility ("Model Code"), these comments will refer to both the Model Rules and the predecessor Model Code (and to the Ethical Considerations and Disciplinary Rules found under the canons in the Model Codes). In 1997, the ABA formed the Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission") to undertake a comprehensive review and revision of the Model Rules. The ABA House of Delegates completed its review of the Commission's recommended revisions in February 2002. Visit [www.abanet.org/cpr/jclr/jclr\\_home.html](http://www.abanet.org/cpr/jclr/jclr_home.html) for information regarding the status of each state supreme court's adoption of the Ethics 2000 revisions to the Model Rules.



**GUIDELINE 2: PROVIDED THE LAWYER MAINTAINS RESPONSIBILITY FOR THE WORK PRODUCT, A LAWYER MAY DELEGATE TO A PARALEGAL ANY TASK NORMALLY PERFORMED BY THE LAWYER EXCEPT THOSE TASKS PROSCRIBED TO A NONLAWYER BY STATUTE, COURT RULE, ADMINISTRATIVE RULE OR REGULATION, CONTROLLING AUTHORITY, THE APPLICABLE RULE OF PROFESSIONAL CONDUCT OF THE JURISDICTION IN WHICH THE LAWYER PRACTICES, OR THESE GUIDELINES.**

### **Comment to Guideline 2**

The essence of the definition of the term “legal assistant” first adopted by the ABA in 1986<sup>4</sup> and subsequently amended in 1997<sup>5</sup> is that, so long as appropriate supervision is maintained, many tasks normally performed by lawyers may be delegated to paralegals. EC 3-6 under the Model Code mentioned three specific kinds of tasks that paralegals may perform under appropriate lawyer supervision: factual investigation and research, legal research, and the preparation of legal documents. Various states delineate more specific tasks in their guidelines including attending client conferences, corresponding with and obtaining information from clients, witnessing the execution of documents, preparing transmittal letters, and maintaining estate/guardianship trust accounts. *See, e.g.*, Colorado Bar Association Guidelines for the Use of Paralegals (the Colorado Bar Association has adopted guidelines for the use of paralegals in 18 specialty practice areas including civil litigation, corporate law and estate planning); NALA Guideline 5.

While appropriate delegation of tasks is encouraged and a broad array of tasks is properly delegable to paralegals, improper delegation of tasks will often run afoul of a lawyer’s obligations under applicable rules of professional conduct. A common consequence of the improper delegation of tasks is that the lawyer will have assisted the paralegal in the unauthorized “practice of law” in violation of Rule 5.5 of the Model Rules, DR 3-101 of the Model Code, and the professional rules of most states. Neither the Model Rules nor the Model Code defines the “practice of law.” EC 3-5 under the Model Code gave some guidance by equating the practice of law to the application of the professional judgment of the lawyer in solving clients’ legal problems. This approach is consistent with that taken in ABA Opinion 316 (1967) which states: “A lawyer . . . may employ nonlawyers to do any task for him except counsel clients about law matters, engage directly in the practice of law, appear in court or appear in formal proceedings as part of the judicial process, so long as it is he who takes the work and vouches for it to the client and

<sup>4</sup> The 1986 ABA definition read: “A legal assistant is a person, qualified through education, training or work experience, who is employed or retained by a lawyer, law office, governmental agency, or other entity, in a capacity or function which involves the performance, under the ultimate direction and supervision of an attorney, of specifically-delegated substantive legal work, which work, for the most part, requires a sufficient knowledge of legal concepts that, absent such assistant the attorney would perform the task.”

<sup>5</sup> In 1997, the ABA amended the definition of legal assistant by adopting the following language: “A legal assistant or paralegal is a person qualified by education, training or work experience who is employed or retained by a lawyer, law office, corporation, governmental agency or other entity who performs specifically delegated substantive legal work for which a lawyer is responsible.”

becomes responsible for it to the client.”

As a general matter, most state guidelines specify that paralegals may not appear before courts, administrative tribunals, or other adjudicatory bodies unless the procedural rules of the adjudicatory body authorize such appearances. *See, e.g.*, State Bar of Arizona, Committee on the Rules of Prof’l Conduct, Opinion No. 99-13 (December 1999) (attorney did not assist in unauthorized practice of law by supervising paralegal in tribal court where tribal court rules permit non-attorneys to be licensed tribal advocates).<sup>6</sup> Additionally, no state permits paralegals to conduct depositions or give legal advice to clients. *E.g.*, Guideline 2, Connecticut Bar Association Guidelines for Lawyers Who Employ or Retain Legal Assistants (the “Connecticut Guidelines”); Guideline 2, State Bar of Michigan Guidelines for Utilization of Legal Assistants; State Bar of Georgia, State Disciplinary Board Advisory Opinion No. 21 (September 16, 1977); *Doe v. Condon*, 532 S.E.2d 879 (S.C. 2000) (it is the unauthorized practice of law for a paralegal to conduct educational seminars and answer estate planning questions because the paralegal will be implicitly advising participants that they require estate planning services). *See also* NALA Guidelines II, III, and V.

Ultimately, apart from the obvious tasks that virtually all states argue are proscribed to paralegals, what constitutes the “practice of law” is governed by state law and is a fact specific question. *See, e.g.*, Louisiana Rules of Prof’l Conduct Rule 5.5 which sets out specific tasks considered to be the “practice of law” by the Supreme Court of Louisiana. Thus, some tasks that have been specifically prohibited in some states are expressly delegable in others. *Compare*, Guideline 2, Connecticut Guidelines (permitting paralegal to attend real estate closings even though no supervising lawyer is present provided that the paralegal does not render opinion or judgment about execution of documents, changes in adjustments or price or other matters involving documents or funds) *and* The Florida Bar, Opinion 89-5 (November 1989) (permitting paralegal to handle real estate closing at which no supervising lawyer is present provided, among other things, that the paralegal will not give legal advice or make impromptu decisions that should be made by a lawyer) *with* Supreme Court of Georgia, Formal Advisory Opinion No. 86-5 (May 1989) (closing of real estate transactions constitutes the practice of law and it is ethically improper for a lawyer to permit a paralegal to close the transaction). It is thus incumbent on the lawyer to determine whether a particular task is properly delegable in the jurisdiction at issue.

Once the lawyer has determined that a particular task is delegable consistent with the professional rules, utilization guidelines, and case law of the relevant jurisdiction, the key to Guideline 2 is proper supervision. A lawyer should start the supervision process by ensuring that the paralegal has sufficient education, background and experience to handle the task being assigned. The lawyer should provide adequate instruction when assigning projects and should also monitor the progress of the project. Finally, it is the lawyer’s obligation to review the completed project to ensure that the work product is appropriate for the assigned task. *See* Guideline 1, Connecticut Guidelines; *See also, e.g.*, *Spencer v. Steinman*, 179 F.R.D. 484 (E.D. Penn. 1998) (lawyer sanctioned under Rule 11 for paralegal’s

<sup>6</sup> It is important to note that pursuant to federal or state statute, paralegals are permitted to provide direct client representation in certain administrative proceedings. While this does not obviate the lawyer’s responsibility for the paralegal’s work, it does change the nature of the lawyer’s supervision of the paralegal. The opportunity to use such paralegal services has particular benefits to legal services programs and does not violate Guideline 2. *See generally* ABA Standards for Providers of Civil Legal Services to the Poor Std. 6.3, at 6.17-6.18 (1986).

failure to serve subpoena duces tecum on parties to the litigation because the lawyer “did not assure himself that [the paralegal] had adequate training nor did he adequately supervise her once he assigned her the task of issuing subpoenas”).

Serious consequences can result from a lawyer’s failure to properly delegate tasks to or to supervise a paralegal properly. For example, the Supreme Court of Virginia upheld a malpractice verdict against a lawyer based in part on negligent actions of a paralegal in performing tasks that evidently were properly delegable. *Musselman v. Willoughby Corp.*, 230 Va. 337, 337 S.E. 2d 724 (1985). See also C. Wolfram, *Modern Legal Ethics* (1986), at 236, 896. Disbarment and suspension from the practice of law have resulted from a lawyer’s failure to properly supervise the work performed by paralegals. See *Matter of Disciplinary Action Against Nassif*, 547 N.W.2d 541 (N.D. 1996) (disbarment for failure to supervise which resulted in the unauthorized practice of law by office paralegals); *Attorney Grievance Comm’n of Maryland v. Hallmon*, 681 A.2d 510 (Md. 1996) (90-day suspension for, among other things, abdicating responsibility for a case to paralegal without supervising or reviewing the paralegal’s work). Lawyers have also been subject to monetary and other sanctions in federal and state courts for failing to properly utilize and supervise paralegals. See *In re Hessinger & Associates*, 192 B.R. 211 (N.D. Cal. 1996) (bankruptcy court directed to reevaluate its \$100,000 sanction but district court finds that law firm violated Rule 3-110(A) of the California Rules of Professional Conduct by permitting bankruptcy paralegals to undertake initial interviews, fill out forms and complete schedules without attorney supervision).

Finally, it is important to note that although the attorney has the primary obligation to not permit a nonlawyer to engage in the unauthorized practice of law, some states have concluded that a paralegal is not relieved from an independent obligation to refrain from illegal conduct and to work directly under an attorney’s supervision. See *In re Opinion No. 24 of the Committee on the Unauthorized Practice of Law*, 607 A.2d 962, 969 (N.J. 1992) (a “paralegal who recognizes that the attorney is not directly supervising his or her work or that such supervision is illusory because the attorney knows nothing about the field in which the paralegal is working must understand that he or she is engaged in the unauthorized practice of law”); Kentucky Supreme Court Rule 3.7 (stating that “the paralegal does have an independent obligation to refrain from illegal conduct”). Additionally, paralegals must also familiarize themselves with the specific statutes governing the particular area of law with which they might come into contact while providing paralegal services. See, e.g., 11 U.S.C. § 110 (provisions governing nonlawyer preparers of bankruptcy petitions); *In Re Moffett*, 263 B.R. 805 (W.D. Ky. 2001) (nonlawyer bankruptcy petition preparer fined for advertising herself as “paralegal” because that is prohibited by 11 U.S.C. § 110(f)(1)). Again, the lawyer must remember that any independent obligation a paralegal might have under state law to refrain from the unauthorized practice of law does not in any way diminish or vitiate the lawyer’s obligation to properly delegate tasks and supervise the paralegal working for the lawyer.



**GUIDELINE 3: A LAWYER MAY NOT DELEGATE TO A PARALEGAL:**

- (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.**

**Comment to Guideline 3**

Model Rule 1.4 and most state codes require lawyers to communicate directly with their clients and to provide their clients information reasonably necessary to make informed decisions and to effectively participate in the representation. While delegation of legal tasks to nonlawyers may benefit clients by enabling their lawyers to render legal services more economically and efficiently, Model Rule 1.4 and Ethical Consideration 3-6 under the Model Code emphasize that delegation is proper only if the lawyer “maintains a direct relationship with his client, supervises the delegated work and has complete professional responsibility for the work product.” The National Association of Legal Assistants (“NALA”), Code of Ethics and Professional Responsibility, Canon 2, echoes the Model Rule when it states: “A legal assistant may perform any task which is properly delegated and supervised by an attorney as long as the attorney is ultimately responsible to the client, maintains a direct relationship with the client, and assumes professional responsibility for the work product.” Most state guidelines also stress the paramount importance of a direct attorney-client relationship. *See* Ohio EC 3-6 and New Mexico Rule 20-106. The direct personal relationship between client and lawyer is critical to the exercise of the lawyer’s trained professional judgment.

Fundamental to the lawyer-client relationship is the lawyer’s agreement to undertake representation and the related fee arrangement. The Model Rules and most states require lawyers to make fee arrangements with their clients and to clearly communicate with their clients concerning the scope of the representation and the basis for the fees for which the client will be responsible. Model Rule 1.5 and Comments. Many state guidelines prohibit paralegals from “setting fees” or “accepting cases.” *See, e.g.,* Pennsylvania Eth. Op. 98-75, 1994 Utah Eth. Op. 139. NALA Canon 3 states that a paralegal must not establish attorney-client relationships or set fees.

EC 3-5 states: “[T]he essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client; and thus, the public interest will be better served if only lawyers are permitted to act in matters involving professional judgment.” Clients are entitled to their lawyers’ professional judgment and opinion. Paralegals may, however, be authorized to communicate a lawyer’s legal advice to a client so long as they do not interpret or expand on that advice. Typically, state guidelines phrase this prohibition in terms of paralegals being forbidden from “giving legal advice” or “counseling clients about legal matters.” *See, e.g.,* New Hampshire Rule 35, Sub-Rule 1, Kentucky SCR 3.700, Sub-Rule 2. NALA Canon 3 states that a paralegal must not give legal opinions or advice. Some states have more expansive wording that prohibits paralegals from engaging in any activity that would require the exercise of independent legal judgment. *See, e.g.,* New Mexico Rule



20-103. Nevertheless, it is clear that all states and the Model Rules encourage direct communication between clients and a paralegal insofar as the paralegal is performing a task properly delegated by a lawyer. It should be noted that a lawyer who permits a paralegal to assist in establishing the attorney-client relationship, in communicating the lawyer's fee, or in preparing the lawyer's legal opinion is not delegating responsibility for those matters and, therefore, is not in violation of this guideline.

**GUIDELINE 4: A LAWYER IS RESPONSIBLE FOR TAKING REASONABLE MEASURES TO ENSURE THAT CLIENTS, COURTS, AND OTHER LAWYERS ARE AWARE THAT A PARALEGAL, WHOSE SERVICES ARE UTILIZED BY THE LAWYER IN PERFORMING LEGAL SERVICES, IS NOT LICENSED TO PRACTICE LAW.**

**Comment to Guideline 4**

Since, in most instances, a paralegal is not licensed as a lawyer, it is important that those with whom the paralegal communicates are aware of that fact. The National Federation of Paralegal Associations, Inc. ("NFPA"), Model Code of Professional Ethics and Responsibility and Guidelines for Enforcement, EC 1.7(a)-(c) requires paralegals to disclose their status. Likewise, NALA Canon 5 requires a paralegal to disclose his or her status at the outset of any professional relationship. While requiring the paralegal to make such disclosure is one way in which the lawyer's responsibility to third parties may be discharged, the Standing Committee is of the view that it is desirable to emphasize the lawyer's responsibility for the disclosure under Model Rule 5.3 (b) and (c). Lawyers may discharge that responsibility by direct communication with the client and third parties, or by requiring the paralegal to make the disclosure, by a written memorandum, or by some other means. Several state guidelines impose on the lawyer responsibility for instructing a paralegal whose services are utilized by the lawyer to disclose the paralegal's status in any dealings with a third party. *See, e.g.*, Kentucky SCR 3.700, Sub-Rule 7, Indiana Guidelines 9.4, 9.10, New Hampshire Rule 35, Sub-Rule 8, New Mexico Rule 20-104. Although in most initial engagements by a client it may be prudent for the attorney to discharge this responsibility with a writing, the guideline requires only that the lawyer recognize the responsibility and ensure that it is discharged. Clearly, when a client has been adequately informed of the lawyer's utilization of paralegal services, it is unnecessary to make additional formalistic disclosures as the client retains the lawyer for other services.

Most guidelines or ethics opinions concerning the disclosure of the status of paralegals include a proviso that the paralegal's status as a nonlawyer be clear and that the title used to identify the paralegal not be deceptive. To fulfill these objectives, the titles assigned to paralegals must be indicative of their status as nonlawyers and not imply that they are lawyers. The most common titles are "paralegal" and "legal assistant" although other titles may fulfill the dual purposes noted above. The titles "paralegal" and "legal assistant" are sometimes coupled with a descriptor of the paralegal's status, e.g., "senior paralegal" or "paralegal coordinator," or of the area of practice in which the paralegal works, e.g., "litigation paralegal" or "probate paralegal." Titles that are commonly used to identify lawyers, such as "associate" or "counsel," are misleading and inappropriate. *See, e.g.*, Comment to New Mexico Rule 20-104 (warning against the use

of the title “associate” since it may be construed to mean associate-attorney).

Most state guidelines specifically endorse paralegals signing correspondence so long as their status as a paralegal is clearly indicated by an appropriate title. *See* ABA Informal Opinion 1367 (1976).

#### **GUIDELINE 5: A LAWYER MAY IDENTIFY PARALEGALS BY NAME AND TITLE ON THE LAWYER’S LETTERHEAD AND ON BUSINESS CARDS IDENTIFYING THE LAWYER’S FIRM.**

#### **Comment To Guideline 5**

Under Guideline 4, above, a lawyer who employs a paralegal has an obligation to ensure that the status of the paralegal as a nonlawyer is fully disclosed. The primary purpose of this disclosure is to avoid confusion that might lead someone to believe that the paralegal is a lawyer. The identification suggested by this guideline is consistent with that objective while also affording the paralegal recognition as an important member of the legal services team.

ABA Informal Opinion 1527 (1989) provides that nonlawyer support personnel, including paralegals, may be listed on a law firm’s letterhead and reiterates previous opinions that approve of paralegals having business cards. *See also* ABA Informal Opinion 1185 (1971). The listing must not be false or misleading and “must make it clear that the support personnel who are listed are not lawyers.”

All state guidelines and ethics opinions that address the issue approve of business cards for paralegals, so long as the paralegal’s status is clearly indicated. *See, e.g.*, Florida State Bar Ass’n. Comm. on Prof’l Ethics, Op. 86-4 (1986); Kansas Bar Ass’n, Prof’l Ethical Op. 85-4; State Bar of Michigan Standing Comm. on Prof’l and Judicial Ethics, RI-34 (1989); Minnesota Lawyers’ Prof’l Responsibility Bd., Op. 8 (1974). Some authorities prescribe the contents and format of the card or the title to be used. *E.g.*, Georgia Guidelines for Attorneys Utilizing Paralegals, State Disciplinary Board Advisory Op. No. 21 (1977); Iowa State Bar Ethical Guidelines for Legal Assistants in Iowa, Guideline 4; South Carolina Bar Ethics Op. 88-06; and Texas General Guidelines for the Utilization of the Services of Legal Assistants by Attorneys, Guideline VIII. All agree the paralegal’s status must be clearly indicated and the card may not be used in a deceptive way. Some state rules, such as New Hampshire Supreme Court Rule 7, approve the use of business cards noting that the card should not be used for unethical solicitation.

Most states with guidelines on the use of paralegal services permit the listing of paralegals on firm letterhead. A few states do not permit attorneys to list paralegals on their letterhead. *E.g.*, State Bar of Georgia Disciplinary Board Opinion Number 21 “Guidelines for Attorneys Utilizing Paralegals,” 1(b); New Hampshire Supreme Court Rule 35, Sub-Rule 7; New Mexico Supreme Court Rule 20-113 and South Carolina Bar Guidelines for the Utilization by Lawyers of the Services of Legal Assistants Guideline VI. These states rely on earlier ABA Informal Opinions 619 (1962), 845 (1965), and 1000 (1977), all of which were expressly withdrawn by ABA Informal Opinion 1527. These earlier opinions interpreted the predecessor Model Code DR 2-102 (A), which, prior to *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), had strict limitations on the information that could be listed on letterheads. In light of the United States Supreme Court opinion in



*Peel v. Attorney Registration and Disciplinary Comm'n of Illinois*, 496 U.S. 91 (1990), it may be that a restriction on letterhead identification of paralegals that is not deceptive and clearly identifies the paralegal's status violates the First Amendment rights of the lawyer.

More than 20 states have rules or opinions that explicitly permit lawyers to list names of paralegals on their letterhead stationery, including Arizona, Connecticut, Florida, Illinois, Indiana, Kentucky, Michigan, Mississippi, Missouri, Nebraska, New York, North Carolina, Oregon, South Dakota, Texas, Virginia, and Washington.

The Model Code of Ethics and Professional Responsibility of the National Federation of Paralegal Associations indicates that the paralegal's "title shall be included if the paralegal's name appears on business cards, letterheads, brochures, directories, and advertisements." Canon 6, EC-6.2. NFPA Informal Ethics and Disciplinary Opinion No. 95-2 provides that a paralegal may be identified with name and title on law firm letterhead unless such conduct is prohibited by the appropriate state authority.

**GUIDELINE 6: A LAWYER IS RESPONSIBLE FOR TAKING REASONABLE MEASURES TO ENSURE THAT ALL CLIENT CONFIDENCES ARE PRESERVED BY A PARALEGAL.**

**Comment to Guideline 6**

A fundamental principle in the client-lawyer relationship is that the lawyer must not reveal information relating to the representation. Model Rule 1.6. A client must feel free to discuss whatever he/she wishes with his/her lawyer, and a lawyer must be equally free to obtain information beyond that volunteered by his/her client. The ethical obligation of a lawyer to hold inviolate the confidences and secrets of the client facilitates the full development of the facts essential to proper representation of the client and encourages laypersons to seek early legal assistance. EC 4-1, Model Code. "It is a matter of common knowledge that the normal operation of a law office exposes confidential professional information to nonlawyer employees of the office. . . this obligates a lawyer to exercise care in selecting and training employees so that the sanctity of all confidences and secrets of clients may be preserved." EC 4-2, Model Code.

Model Rule 1.6 applies not only to matters communicated in confidence by the client, but also to all information relating to the representation, whatever its source. Pursuant to the rule, a lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. Further, a lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or "other persons who are participating in the representation of the client or who are subject to the lawyer supervision." Model Rule 1.6, Comment 15. It is therefore the lawyer's obligation to instruct clearly and to take reasonable steps to ensure that paralegals preserve client confidences.

Model Rule 5.3 requires a lawyer having direct supervisory authority over a paralegal to make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer. Comment 1 to Model Rule 5.3 makes it clear that a lawyer must give "such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to the representation of the client, and should be

responsible for their work product.” Disciplinary Rule 4-101(D) under the Model Code provides that: “A lawyer shall exercise reasonable care to prevent his employees, associates and others whose services are utilized by him from disclosing or using confidences or secrets of a client. . . .” Nearly all states that have guidelines for utilization of paralegals require the lawyer “to instruct legal assistants concerning client confidences and to exercise care to ensure the legal assistants comply with the Code in this regard.” *See, e.g.* New Hampshire Rule 35, Sub-Rule 4; Kentucky Supreme Court Rule 3.700, Sub-Rule 4; Indiana Rules of Prof’l Responsibility, Guideline 9.10.

Model Rule 5.3 further extends responsibility for the professional conduct of paralegals to a “partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm.” Lawyers with managerial authority within a law firm are required to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that paralegals in the firm act in a way compatible with the relevant rules of professional conduct. Model Rule 5.3(a), Comment 2.

The NFPA Model Code of Professional Ethics and Responsibility and Guidelines for Enforcement, EC-1.5 states that a paralegal “shall preserve all confidential information provided by the client or acquired from other sources before, during, and after the course of the professional relationship.” Further, NFPA EC-1.5(a) requires a paralegal to be aware of and abide by all legal authority governing confidential information in the jurisdiction in which the paralegal practices and prohibits any use of confidential information to the disadvantage of a client. Likewise, the NALA Code of Ethics and Professional Responsibility, Canon 7 states that, “A legal assistant must protect the confidences of the client and must not violate any rule or statute now in effect or hereafter enacted controlling the doctrine of privileged communications between a client and an attorney.” Likewise, NALA Guidelines state that paralegals should “preserve the confidences and secrets of all clients; and understand the attorney’s code of professional responsibility and these guidelines in order to avoid any action which would involve the attorney in a violation of that code, or give the appearance of professional impropriety.” NALA Guideline 1 and Comment.

## **GUIDELINE 7: A LAWYER SHOULD TAKE REASONABLE MEASURES TO PREVENT CONFLICTS OF INTEREST RESULTING FROM A PARALEGAL’S OTHER EMPLOYMENT OR INTERESTS.**

### **Comment to Guideline 7**

Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client. Model Rule 1.7, comment 1. The independent judgment of a lawyer should be exercised solely for the benefit of his client and free from all compromising influences and loyalties. EC 5.1. Model Rules 1.7 through 1.13 address a lawyer’s responsibility to prevent conflicts of interest and potential conflicts of interest. Model Rule 5.3 requires lawyers with direct supervisory authority over a paralegal and partners/lawyers with managerial authority within a law firm to make reasonable efforts to ensure that the conduct of the paralegals they employ is compatible with their own professional obligations, including the obligation to prevent conflicts of interest. Therefore, paralegals should be



instructed to inform the supervising lawyer and the management of the firm of any interest that could result in a conflict of interest or even give the appearance of a conflict. The guideline intentionally speaks to “other employment” rather than only past employment because there are instances where paralegals are employed by more than one law firm at the same time. The guideline’s reference to “other interests” is intended to include personal relationships as well as instances where the paralegal may have a financial interest (i.e., as a stockholder, trust beneficiary, or trustee, etc.) that would conflict with the clients in the matter in which the lawyer has been employed.

“Imputed Disqualification Arising from Change in Employment by Non-Lawyer Employee,” ABA Informal Opinion 1526 (1988), defines the duties of both the present and former employing lawyers and reasons that the restrictions on paralegals’ employment should be kept to “the minimum necessary to protect confidentiality” in order to prevent paralegals from being forced to leave their careers, which “would disserve clients as well as the legal profession.” The Opinion describes the attorney’s obligations (1) to caution the paralegal not to disclose any information and (2) to prevent the paralegal from working on any matter on which the paralegal worked for a prior employer or respecting which the employee has confidential information.

Disqualification is mandatory where the paralegal gained information relating to the representation of an adverse party while employed at another law firm and has revealed it to lawyers in the new law firm, where screening of the paralegal would be ineffective, or where the paralegal would be required to work on the other side of the same or substantially related matter on which the paralegal had worked while employed at another firm. When a paralegal moves to an opposing firm during ongoing litigation, courts have held that a rebuttable presumption exists that the paralegal will share client confidences. *See, e.g., Phoenix v. Founders*, 887 S.W.2d 831, 835 (Tex. 1994) (the presumption that confidential information has been shared may be rebutted upon showing that sufficient precautions were taken by the new firm to prevent disclosure including that it (1) cautioned the newly-hired paralegal not to disclose any information relating to representation of a client of the former employer; (2) instructed the paralegal not to work on any matter on which he or she worked during prior employment or about which he or she has information relating to the former employer’s representation; and (3) the new firm has taken reasonable measures to ensure that the paralegal does not work on any matter on which he or she worked during the prior employment, absent the former client’s consent). But, adequate and effective screening of a paralegal may prevent disqualification of the new firm. Model Rule 1.10, comment 4. Adequate and effective screening gives a lawyer and the lawyer’s firm the opportunity to build and enforce an “ethical wall” to preclude the paralegal from any involvement in the client matter that is the subject of the conflict and to prevent the paralegal from receiving or disclosing any information concerning the matter. ABA Informal Opinion 1526 (1988). The implication of the ABA’s informal opinion is that if the lawyer, and the firm, do not implement a procedure to effectively screen the paralegal from involvement with the litigation, and from communication with attorneys and/or co-employees concerning the litigation, the lawyer and the firm may be disqualified from representing either party in the controversy. *See In re Complex Asbestos Litigation*, 232 Cal. App. 3d 572, 283 Cal. Rptr. 732 (1991) (law firm disqualified from nine pending asbestos cases because it failed to screen paralegal that possessed attorney-client confidences from prior employment by opposing counsel).

Some courts hold that paralegals are subject to the same rules governing imputed

disqualification as are lawyers. In jurisdictions that do not recognize screening devices as adequate protection against a lawyer's potential conflict in a new law firm, neither a "cone of silence" nor any other screening device will be recognized as a proper or effective remedy where a paralegal who has switched firms possesses material and confidential information. *Zimmerman v. Mahaska Bottling Company*, 19 P.3d 784, 791-792 (Kan. 2001) ("[W]here screening devices are not allowed for lawyers, they are not allowed for non-lawyers either."); *Koulisis v. Rivers*, 730 So. 2d 289 (Fla. Dist. Ct. App. 1999) (firm that hired paralegal with actual knowledge of protected information could not defeat disqualification by showing steps taken to screen the paralegal from the case); Ala. Bar R-02-01, 63 Ala. Law 94 (2002). These cases do not mean that disqualification is mandatory whenever a nonlawyer moves from one private firm to an opposing firm while there is pending litigation. Rather, a firm may still avoid disqualification if (1) the paralegal has not acquired material or confidential information regarding the litigation, or (2) if the client of the former firm waives disqualification and approves the use of a screening device or ethical wall. *Zimmerman*, 19 P.3d at 822.

Other authorities, consistent with Model Rule 1.10(a), differentiate between lawyers and nonlawyers. In *Stewart v. Bee Dee Neon & Signs, Inc.*, 751 So. 2d 196 (Fla. Dist. Ct. App. 2000) the court disagreed with the *Koulisis* rule that paralegals should be held to the same conflicts analyses as lawyers when they change law firms. In *Stewart*, a secretary moved from one law firm to the opposing firm in mid-litigation. While Florida would not permit lawyer screening to defeat disqualification under these circumstance, the *Stewart* court emphasized that "it is important that non-lawyer employees have as much mobility in employment opportunity as possible" and that "any restrictions on the non-lawyer's employment should be held to the minimum necessary to protect confidentiality of client information." *Stewart*, 751 So. 2d at 203 (citing ABA Informal Opinion 1526 (1988)). The analysis in *Stewart* requires the party moving for disqualification to prove that the nonlawyer actually has confidential information, and that screening has not and can not be effectively implemented. *Id.* at 208. In *Leibowitz v. The Eighth Judicial District Court of the State of Nevada*, 79 P.3d 515 (2003), the Supreme Court of Nevada overruled its earlier decision in *Ciaffone v. District Court*, 113 Nev. 1165, 945 P.2d 950 (1997), which held that screening of nonlawyer employees would not prevent disqualification. In *Leibowitz*, the court held that when a firm identifies a conflict, it has an absolute duty to screen and to inform the adversarial party about the hiring and the screening mechanisms. The Court emphasized that disqualification is required when confidential information has been disclosed, when screening would be ineffective, or when the affected employee would be required to work on the case in question.

Still other courts that approve screening for paralegals compare paralegals to former government lawyers who have neither a financial interest in the outcome of a particular litigation, nor the choice of which clients they serve. *Smart Industries Corp. v. Superior Court County of Yuma*, 876 P.2d 1176, 1184 (Ariz. App. 1994) ("We believe that this reasoning for treating government attorneys differently in the context of imputed disqualification applies equally to nonlawyer assistants . . ."); accord, *Hayes v. Central States Orthopedic Specialists, Inc.*, 51 P.3d 562 (Okla. 2002); Model Rule 1.11(b) and (c).

Comment 4 to Model Rule 1.10(a) states that the rule does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a paralegal. But, paralegals "ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that



both the nonlawyers and the firm have a legal duty to protect.” *Id.*

Because disqualification is such a drastic consequence for lawyers and their firms, lawyers must be especially attuned to controlling authority in the jurisdictions where they practice. *See generally*, Steve Morris and Christina C. Stipp, Ethical Conflicts Facing Litigators, ALI SH009ALI-ABA 449, 500-502 (2002).

To assist lawyers and their firms in discharging their professional obligations under the Model Rules, the NALA Guidelines require paralegals “to take any and all steps necessary to prevent conflicts of interest and fully disclose such conflicts to the supervising attorney” and warns paralegals that any “failure to do so may jeopardize both the attorney’s representation and the case itself.” NALA, Comment to Guideline 1. NFPA Model Code of Professional Ethics and Responsibility and Guidelines for Enforcement, EC-1.6 requires paralegals to avoid conflicts of interest and to disclose any possible conflicts to the employer or client, as well as to the prospective employers or clients. NFPA, EC-1.6 (a)-(g).

#### **GUIDELINE 8: A LAWYER MAY INCLUDE A CHARGE FOR THE WORK PERFORMED BY A PARALEGAL IN SETTING A CHARGE AND/OR BILLING FOR LEGAL SERVICES.**

#### **Comment to Guideline 8**

In *Missouri v. Jenkins*, 491 U.S. 274 (1989), the United States Supreme Court held that in setting a reasonable attorney’s fee under 28 U.S.C. § 1988, a legal fee may include a charge for paralegal services at “market rates” rather than “actual cost” to the attorneys. In its opinion, the Court stated that, in setting recoverable attorney fees, it starts from “the self-evident proposition that the ‘reasonable attorney’s fee’ provided for by statute should compensate the work of paralegals, as well as that of attorneys.” *Id.* at 286. This statement should resolve any question concerning the propriety of setting a charge for legal services based on work performed by a paralegal. *See also*, Alaska Rules of Civil Procedure Rule 79; Florida Statutes Title VI, Civil Practice & Procedure, 57.104; North Carolina Guideline 8; Comment to NALA Guideline 5; Michigan Guideline 6. In addition to approving paralegal time as a compensable fee element, the Supreme Court effectively encouraged the use of paralegals for the cost-effective delivery of services. It is important to note, however, that *Missouri v. Jenkins* does not abrogate the attorney’s responsibilities under Model Rule 1.5 to set a reasonable fee for legal services, and it follows that those considerations apply to a fee that includes a fee for paralegal services. *See also*, South Carolina Ethics Advisory Opinion 96-13 (a lawyer may use and bill for the services of an independent paralegal so long as the lawyer supervises the work of the paralegal and, in billing the paralegal’s time, the lawyer discloses to the client the basis of the fee and expenses).

It is important to note that a number of court decisions have addressed or otherwise set forth the criteria to be used in evaluating whether paralegal services should be compensated. Some requirements include that the services performed must be legal in nature rather than clerical, the fee statement must specify in detail the qualifications of the person performing the service to demonstrate that the paralegal is qualified by education, training or work to perform the assigned work, and evidence that the work performed by

the paralegal would have had to be performed by the attorney at a higher rate. Because considerations and criteria vary from one jurisdiction to another, it is important for the practitioner to determine the criteria required by the jurisdiction in which the practitioner intends to file a fee application seeking compensation for paralegal services.

**GUIDELINE 9: A LAWYER MAY NOT SPLIT LEGAL FEES WITH A PARALEGAL NOR PAY A PARALEGAL FOR THE REFERRAL OF LEGAL BUSINESS. A LAWYER MAY COMPENSATE A PARALEGAL BASED ON THE QUANTITY AND QUALITY OF THE PARALEGAL'S WORK AND THE VALUE OF THAT WORK TO A LAW PRACTICE, BUT THE PARALEGAL'S COMPENSATION MAY NOT BE CONTINGENT, BY ADVANCE AGREEMENT, UPON THE OUTCOME OF A PARTICULAR CASE OR CLASS OF CASES.**

### **Comment to Guideline 9**

Model Rule 5.4 and DR 3-102(A) and 3-103(A) under the Model Code clearly prohibits fee “splitting” with paralegals, whether characterized as splitting of contingent fees, “forwarding” fees, or other sharing of legal fees. Virtually all guidelines adopted by state bar associations have continued this prohibition in one form or another. *See, e.g.*, Connecticut Guideline 7, Kentucky Supreme Court Rule 3.700, Sub-Rule 5; Michigan Guideline 7; Missouri Guideline III; North Carolina Guideline 8; New Hampshire Rule 35, Sub-Rules 5 and 6; R.I. Sup. Ct. Art. V. R. 5.4; South Carolina Guideline V. It appears clear that a paralegal may not be compensated on a contingent basis for a particular case or be paid for “signing up” clients for representation.

Having stated this prohibition, however, the guideline attempts to deal with the practical consideration of how a paralegal may be compensated properly by a lawyer or law firm. The linchpin of the prohibition seems to be the advance agreement of the lawyer to “split” a fee based on a pre-existing contingent arrangement.<sup>7</sup> *See, e.g., Matter of Struthers*, 877 P.2d 789 (Ariz. 1994) (an agreement to give to nonlawyer all fees resulting from nonlawyer's debt collection activities constitutes improper fee splitting); *Florida Bar v. Shapiro*, 413 So. 2d 1184 (Fla. 1982) (payment of contingent salary to nonlawyer based on total amount of fees generated is improper); State Bar of Montana, Op. 95-0411 (1995) (lawyer paid on contingency basis for debt collection cannot share that fee with a nonlawyer collection agency that worked with lawyer).

There is no general prohibition against a lawyer who enjoys a particularly profitable period recognizing the contribution of the paralegal to that profitability with a discretionary bonus so long as the bonus is based on the overall success of the firm and not the fees generated from any particular case. *See, e.g.*, Philadelphia Bar Ass'n Prof. Guidance Comm., Op. 2001-7 (law firm may pay nonlawyer employee a bonus if bonus is not tied to fees generated from a particular case or class of cases from a specific client); Va. St. Bar St. Comm. of Legal Ethics, Op. 885 (1987) (a nonlawyer may be paid based on the

<sup>7</sup> In its Rule 5.4 of the Rules of Professional Conduct, the District of Columbia permits lawyers to form legal service partnerships that include non-lawyer participants. Comments 5 and 6 to that rule, however, state that the term “nonlawyer participants” should not be confused with the term “nonlawyer assistants” and that “[n]onlawyer assistants under Rule 5.3 do not have managerial authority or financial interests in the organization.”



percentage of profits from all fees collected by the lawyer). Likewise, a lawyer engaged in a particularly profitable specialty of legal practice is not prohibited from compensating the paralegal who aids materially in that practice more handsomely than the compensation generally awarded to paralegals in that geographic area who work in law practices that are less lucrative. Indeed, any effort to fix a compensation level for paralegals and prohibit great compensation would appear to violate the federal antitrust laws. *See, e.g., Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

In addition to the prohibition on fee splitting, a lawyer also may not provide direct or indirect remuneration to a paralegal for referring legal matters to the lawyer. *See* Model Guideline 9; Connecticut Guideline 7; Michigan Guideline 7; North Carolina Guideline 8. *See also, Committee on Prof'l Ethics & Conduct of Iowa State Bar Ass'n v. Lawler*, 342 N.W. 2d 486 (Iowa 1984) (reprimand for lawyer payment of referral fee); *Trotter v. Nelson*, 684 N.E.2d 1150 (Ind. 1997) (wrongful to pay to nonlawyer five percent of fees collected from a case referred by the nonlawyer).

#### **GUIDELINE 10: A LAWYER WHO EMPLOYS A PARALEGAL SHOULD FACILITATE THE PARALEGAL'S PARTICIPATION IN APPROPRIATE CONTINUING EDUCATION AND PRO BONO PUBLICO ACTIVITIES.**

##### **Comment to Guideline 10**

For many years the Standing Committee on Paralegals has advocated that formal paralegal education generally improves the legal services rendered by lawyers employing paralegals and provides a more satisfying professional atmosphere in which paralegals may work. Recognition of the employing lawyer's obligation to facilitate the paralegal's continuing professional education is, therefore, appropriate because of the benefits to both the law practice and the paralegals and is consistent with the lawyer's own responsibility to maintain professional competence under Model Rule 1.1. *See also* EC 6-2 of the Model Code. Since these Guidelines were first adopted by the House of Delegates in 1991, several state bar associations have adopted guidelines that encourage lawyers to promote the professional development and continuing education of paralegals in their employ, including Connecticut, Idaho, Indiana, Michigan, New York, Virginia, Washington, and West Virginia. The National Association of Legal Assistants Code of Ethics and Professional Responsibility, Canon 6, calls on paralegals to "maintain a high degree of competency through education and training . . . and through continuing education. . . ." and the National Federation of Paralegal Associations Model Code of Ethics and Professional Responsibility, Canon 1.1, states that a paralegal "shall achieve and maintain a high level of competence" through education, training, work experience and continuing education.

The Standing Committee is of the view that similar benefits accrue to the lawyer and paralegal if the paralegal is included in the pro bono publico legal services that a lawyer has a clear obligation to provide under Model Rule 6.1 and, where appropriate, the paralegal is encouraged to provide such services independently. The ability of a law firm to provide more pro bono publico services is enhanced if paralegals are included. Recognition of the paralegal's role in such services is consistent with the role of the paralegal in the contemporary delivery of legal services generally and is also consistent with the lawyer's duty to the legal profession under Canon 2 of the Model Code. Several

state bar associations, including Connecticut, Idaho, Indiana, Michigan, Washington and West Virginia, have adopted a guideline that calls on lawyers to facilitate paralegals' involvement in pro bono publico activities. One state, New York, includes pro bono work under the rubric of professional development. (*See* Commentary to Guideline VII of the New York State Bar Association Guidelines for the Utilization by Lawyers of the Service of Legal Assistants, adopted June 1997.) The National Federation of Paralegal Associations Model Code of Ethics and Professional Responsibility and Guidelines for Enforcement, Canon 1.4, states that paralegals "shall serve the public interest by contributing to the improvement of the legal system and delivery of quality legal services, including pro bono publico legal services." In the accompanying Ethical Consideration 1.4(d), the Federation asks its members to aspire to contribute at least 24 hours of pro bono services annually.



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