CHAPTER 2

Ethics and Professional Responsibility

DIGITAL RESOURCES

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  - Disclosure of Status
  - Confidentiality Issue: Family Exception?
  - Confidentiality Issue: Public Information
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LEARNING OBJECTIVES

After studying this chapter, you should be able to:

1. Understand the difference between the attorney’s rules of ethics and the paralegal’s rules of ethics and the obligations of each profession.
2. Analyze a situation to determine if it involves the unauthorized practice of law.
3. Understand the concept of confidentiality of client communications and the attorney–client privilege.
4. Understand the concept of conflict of interest for the legal profession and methods to protect client confidentiality.
5. Explain the difference between attorney–client privilege and the work-product doctrine.
6. Explain the issues in making inadvertent disclosure of confidential information.

Morality cannot be legislated, but behavior can be regulated. Judicial decrees may not change hearts, but they can restrain the heartless.”

Martin Luther King, Jr.

Paralegals at Work

Kelsey and Kathryn became friends when they were studying to be paralegals. Kathryn now works for a large national law firm while Kelsey does freelance paralegal work. They have over the years met frequently for lunch to discuss office issues and client cases. Kelsey asks Kathryn to meet for lunch at a crowded sandwich shop in the office building where she works to discuss a recent office issue. Kathryn can see that something is troubling her friend. After getting a seat at the lunch counter they order lunch and Kelsey begins to confide in Kathryn.

Kelsey regularly does freelance work for two lawyers—one who specializes in intellectual-property issues and one who does mostly personal injury work. Both are working on the same case and both have asked Kelsey to work on the file. One lawyer represents the plaintiff, a close family friend, and the other lawyer represents the defendant. Both lawyers want Kelsey to interview the clients, witnesses, and generally handle the file. Kelsey is wondering if she should be working “both sides of the fence.” Kelsey describes to Kathryn the clients and the case in detail while they wait for their lunch to be served.

Kelsey explains that she often does most of the work on the plaintiff lawyer’s cases not related to intellectual property, including settling the cases with insurance company adjusters or the lawyers representing the defendants. Kelsey knows the adjuster on this case and he has revealed to her that the insurance company for the defendant wants to settle the case quickly and avoid a trial. Kelsey asks Kathryn for advice.

Consider the issues involved in this scenario as you read the chapter.
INTRODUCTION TO ETHICS AND PROFESSIONAL RESPONSIBILITY

Professions such as law and medicine are regulated for the protection of the public. It may be by licensing or other regulation. Every profession develops a set of guidelines for those in the profession to follow. These may be codes of conduct or ethical guidelines, such as the ABA Model Rules of Professional Conduct for lawyers. With only a few exceptions, most states have adopted some form of the current or former version of the American Bar Association’s Model Rules of Professional Conduct. This provides a high degree of consistency in the ethical guidelines for the legal profession across the country.

Members of national paralegal associations, such as NALA, the National Association of Legal Assistants, and NFPA, the National Federation of Paralegal Associations, have ethics guidelines. These organizations require members to conduct themselves in accordance with these guidelines, observance of which by its members is a condition of continued membership in the organization.

These codes typically set forth the minimum in ethical behavior—the very least each professional should do. In the field of law, these rules are referred to as “the rules of ethics” or “the rules of professional responsibility.” Each state controls the right to practice law and, therefore, each state has adopted its own “rules of ethics.” The supreme court or legislature of each state has a committee or board that is authorized to enforce state rules of professional responsibility. States typically use a “bar association” to receive and investigate complaints against lawyers.

Regulation of the Practice of Law

Just as the practice of medicine and other professions is regulated, the practice of law is regulated by state government and court rule in an attempt to protect the public from incompetent and unscrupulous practitioners. To protect the public, certain occupations and professions, such as law, require obtaining a license as a method of regulating and monitoring those who offer services to the public. Obtaining a license may be as simple as completing a form and providing proof that the required education and or experience requirements have been satisfied. The profession of law, in most cases, requires taking a qualifying examination after proving that the required educational background has been obtained. This has not always been the case. In the past, admission was possible by satisfying the court that one had studied or, as it was called, “read” the law and had worked under the supervision of a lawyer.

In some states, prior admission for a required period of time allowed admission to the new jurisdiction without taking the examination. Today’s rules generally have eliminated these alternative methods of admission to the practice of law. Even seasoned attorneys seeking admission to other states such as California and Florida must retake the examination for that state as a condition for admission.

This examination is generally called the “bar exam.” The term “bar” in bar exam has been attributed to the custom of separating the public by a bar from those allowed to pass the bar and approach the judge or court. Most modern courtrooms continue the tradition with a barrier separating the area where spectators sit from where the lawyers, judges, and juries sit. The bar examination tests the applicant’s basic legal knowledge and attempts to assure a minimum standard of competency.

Passing the bar exam is the first step in “getting admitted to practice.” Admission usually is a ceremonial swearing-in by the court to which the person is “admitted to practice” upon the recommendation of the state or local bar examiners and
the introduction and motion for admission by an existing member of the bar of that court.

Admission to practice before one court does not automatically authorize practice before other courts. Each state has its own rules and standards. Generally, admission to the highest court of the state confers admission to all of the other state and municipal and minor judiciary courts of that state. The right to practice before the various federal courts requires separate application and admission to practice. Admission to federal court is generally granted upon motion of an existing member of the court bar upon submission of proof of admission to practice before the highest court of the state of admission and proof of good character.

For the lawyer, the rules that must be followed in the practice of law are found in the individual code of professional responsibility or canons of ethics, such as the Model Rules of Professional Conduct of the American Bar Association, as adopted by the individual state’s highest court. The rules of conduct or ethics are enforced by disciplinary committees and their recommendation to the court for sanctions against offending attorneys. Complaints about breaches of ethical behavior normally are referred to a committee for investigation. In some states, minor infractions can subject the lawyer to private reprimand, public reprimand or censure, or in serious cases, temporary or permanent loss of the license to practice law, usually called disbarment.

Breaches of unauthorized practice of law complaint generally are referred to the state attorney or local prosecutor for criminal prosecution as a violation of statute and not a breach of the court rules of ethical behavior. It should be noted that some ethical breaches also may be violations of statute. Attorneys who breach a client’s trust by taking the client’s fund are guilty of violating an ethical rule and a criminal act of theft.

An appreciation for the system of admission and monitoring of those who seek to practice law can be found in the Preamble to the Illinois Supreme Court Rules of Professional Conduct:

The practice of law is a public trust. Lawyers are the trustees of the system by which citizens resolve disputes among themselves, punish and deter crime, and determine their relative rights and responsibilities toward each other and their government. Lawyers therefore are responsible for the character, competence and integrity of the persons whom they assist in joining their profession; for assuring access to that system through the availability of competent legal counsel; for maintaining public confidence in the system of justice by acting competently and with loyalty to the best interests of their clients; by working to improve that system to meet the challenges of a rapidly changing society; and by defending the integrity of the judicial system against those who would corrupt, abuse or defraud it.

To achieve these ends, the practice of law is regulated by the following rules. Violation of these rules is grounds for discipline. No set of prohibitions, however, can adequately articulate the positive values or goals sought to be advanced by those prohibitions. This preamble therefore seeks to articulate those values in much the same way as did the former canons set forth in the Illinois Code of Professional Responsibility. Lawyers seeking to conform their conduct to the requirements of these rules should look to the values described in this preamble for guidance in interpreting the difficult issues which may arise under the rules.

The policies which underlie the various rules may, under certain circumstances, be in some tension with each other. Wherever feasible, the rules themselves seek to resolve such conflicts with clear statements of duty. For example, a lawyer must disclose, even in breach of a client confidence, a client’s intent to commit a crime involving a serious risk of bodily harm. In other cases, lawyers must carefully weigh conflicting values, and make decisions, at the peril of violating one or more of the following rules. Lawyers are trained to make just such decisions, however, and should not shrink from the task. To reach correct ethical decisions, lawyers must be sensitive to the duties imposed by these rules and, whenever practical, should discuss particularly difficult issues with their peers.
The Paralegal and Licensing

There are, with a few exceptions, no state licensing requirements for one to work as a paralegal—unlike the procedures that lawyers must follow to practice law. Some states, such as California, Maine, and North Carolina, have enacted legislation establishing licensure to perform certain functions frequently performed by paralegals. Generally, these are attempting to regulate the unsupervised performance by freelance or independent paralegals, such as document-completion services.

At best, these laws carve out a small part of the practice of law that can be performed by nonlawyers without risking the performance of acts that constitute the unlawful practice of law. But none allow anyone other than a lawyer properly admitted to practice in the jurisdiction to give legal advice or opinions. Even the selection of the correct form is considered a lawyer’s function. (See the California Business Code on the next page.) The client must select the forms.

There is a fine line between lawful activity and unlawful practice of law. Recommending or selecting a form that may impact on a person’s legal rights is more likely than not to be treated as practicing law and therefore subject the unlicensed person to a charge of UPL. The dilemma for the paralegal is knowing when giving advice or helping someone fill in blank forms is the Unauthorized Practice of Law (UPL).

Although each state is free to define the practice of law differently, the statutes have certain elements in common. Typical of the various states’ definitions of the Practice of Law is that of Rule 31, Rules of the Supreme Court of Arizona.

A. “Practice of law” means providing legal advice or services to or for another by:

1. preparing any document in any medium intended to affect or secure legal rights for a specific person or entity;
2. preparing or expressing legal opinions;
3. representing another in a judicial, quasi-judicial, or administrative proceeding, or other formal dispute resolution process such as arbitration and mediation;
4. preparing any document through any medium for filing in any court, administrative agency or tribunal for a specific person or entity; or
5. negotiating legal rights or responsibilities for a specific person or entity . . .

Penalties for the Unauthorized Practice of Law

States such as Pennsylvania have specifically addressed the issue of unauthorized practice of law by paralegals and legal assistants. The Pennsylvania statute on the unauthorized practice of law makes it a misdemeanor for “any person, including, but not limited to, a paralegal or legal assistant who within this Commonwealth, shall practice law . . . ” 42 Pa. C.S.A. § 2524.

The Pennsylvania statute seems to address concerns that the general public will misinterpret the title of paralegal or legal assistant as denoting a person admitted to practice law in the commonwealth. An unresolved issue in Pennsylvania, and in other states, is to define what specific conduct the courts will hold to be the practice of law. Because the interpretation will vary from state to state, the paralegal must be aware of the local requirements and limitations that define the unauthorized practice of law within that jurisdiction.

In those states that have enacted legislation regulating paralegal activity some guidance is offered by the defined activity that is permitted. For example, California has included within its Business and Professional Code, licensing of persons as “Unlawful Detainer Assistant” and “Legal Document Assistant” and defining the activity permitted.

Chapter 5.5. Legal Document Assistants and Unlawful Detainer Assistants


6400(a) “Unlawful detainer assistant” means any individual who for compensation renders assistance or advice in the prosecution or defense of an unlawful detainer claim or
action, including any bankruptcy petition that may affect the unlawful detainer claim or action.

(b) “Unlawful detainer claim” means a proceeding, filing, or action affecting rights or liabilities of any person that arises under Chapter 4 (commencing with Section 1159) of Title 3 of Part 3 of the Code of Civil Procedure and that contemplates an adjudication by a court.

(c) “Legal document assistant” means:

(1) Any person who is not exempted under Section 6401 and who provides, or assists in providing, or offers to provide, or offers to assist in providing, for compensation, any self-help service to a member of the public who is representing himself or herself in a legal matter, or who holds himself or herself out as someone who offers that service or has that authority. This paragraph does not apply to any individual whose assistance consists merely of secretarial or receptionist services.

Avoiding UPL: Holding Oneself Out

With so much uncertainty in what constitutes the unauthorized practice of law the question for every paralegal must be “How Do I Avoid UPL?” Some general guidelines should be followed. A common thread in the law of UPL is the prohibition of holding oneself out as a lawyer when not admitted to practice law. The Florida statute was amended recently to read:

Any person not licensed or otherwise authorized to practice law in this state who practices law in this state or holds himself or herself out to the public as qualified to practice law in this state, or who willfully pretends to be, or willfully takes or uses any name, title, addition, or description implying that he or she is qualified, or recognized by law as qualified, to practice law in this state, commits a felony of the third degree. . . .

Chapter 2004-287, Senate Bill 1776.

California, in the Business and Professional Code mentioned above, reinforces the concept of not misleading the public into thinking one is a lawyer when not admitted to practice law. The Florida statute was amended recently to read:

(4) The statement: “I am not an attorney” and, if the person offering legal document assistant or unlawful detainer assistant services is a partnership or a corporation, or uses a fictitious business name, “(name) is not a law firm. I/we cannot represent you in court, advise you about your legal rights or the law, or select legal forms for you.”

For the paralegal, the first rule must be to inform the parties with whom they are dealing that they are not lawyers. Paralegals must not hold themselves out as being anything more than a paralegal. Parties with whom the paralegal has contact must know the limited role the person plays as a paralegal on the legal team. Other lawyers, members of the legal team, and courthouse staff are put on notice by being informed of the person’s status as paralegal. This may be by oral comment, written statement, such as a letter signed using the title “paralegal,” or presentment with a business card clearly showing the title of paralegal.

Advising clients, witnesses, and other members of the general public of the role of the paralegal is not as easy. Those who are not properly educated in the role of the paralegal may believe that a paralegal is someone with advanced training and knowledge who can perform some of the functions normally performed by lawyers, including giving legal advice and opinions. The safest course is to be certain the other party is not misled about the role of the paralegal. Use of the statement from the California Business Code above is a start: “I am not an attorney” . . . “I . . . cannot represent you in court, advise you about your legal rights or the law, or select legal forms for you.”

Even this may have its peril when the individual is not aware of the differences in our legal system in the functions of members of the legal team. Some members of the
community may come from backgrounds where the distinctions are not clear—for example, those coming from other countries where the legal systems are different and the roles of people in the system are different or where different terms are used for those who perform legal-type functions such as notaries.

For non-native English-speaking people, translation also may play a role in the misunderstanding. To some clients, the paralegal is the “face” or main contact with the law firms. The paralegal may be the first point of contact and the one through whom all documents and information is communicated by the lawyers in the firm.

Paralegals must make it clear that they are paralegals and not lawyers. In a first meeting with anyone—client, witness, opposing counsel, or court personnel—the wisest course of action is to advise them of your position as a paralegal. A short, “I am Miss Attorney’s paralegal” may be sufficient to put the other party on notice. Business cards and letterhead, where permitted, should clearly state the title of paralegal. Correspondence always should include the title as part of the signature block.

Never allow the other party to think you are anything other than what you are—a professional who is a paralegal. For those who are not familiar with the role of the paralegal, you may have to clarify what the paralegal can and cannot do in your jurisdiction.

**Avoiding UPL: Giving Advice**

Every UPL statute or rule prohibits anyone other than a lawyer properly admitted to practice in the state or jurisdiction from preparing or expressing legal opinions. Clearly, then, a paralegal cannot give a legal opinion or give legal advice. It sounds easy, but the reality is that paralegals must be on guard constantly to avoid giving legal advice or rendering a legal opinion. Clients and those seeking “a little free advice” may not want to respect the limitations on the paralegal’s role in the legal system.

Certain conduct required or requested by an attorney or client should, at the very least, cause the paralegal to pause. A client who asks you to prepare a power of attorney “without bothering the lawyer,” or to “go with me to the support conference” should raise a caution flag in the paralegal’s mind. Even in a social setting, you may have to repeat the statement, “I am not an attorney”. . . “I/we cannot represent you in court, advise you about your legal rights or the law, or select legal forms for you.”

When is giving advice an unauthorized practice of law? If legal rights may be affected, it probably is legal advice. The question of what advice is legal advice is not easy to answer. Consider the seemingly innocent question, “How should I sign my name?” In most circumstances the answer might be: “Just sign it the way you normally write your name.” But when a person is signing a document in a representative capacity—for example as the officer of a corporation or on behalf of another person under a power of attorney—telling the client to “just sign your name” might be giving legal advice because the client’s legal rights could be affected if he or she does not indicate representative capacity.

**Avoiding UPL: Filling Out Forms**

Filling out forms for clients also can be a source of trouble. In some jurisdictions, paralegals are permitted to assist clients in preparing certain documents. Other courts, however, view this assistance as rendering legal advice.

As a general matter, other courts have held that the sale of self-help legal kits or printed legal forms does not constitute the unauthorized practice of law as long as the seller provides the buyer no advice regarding which forms to use or how the forms should be filled out.

The Florida court addressed this issue in an unlawful practice of law case, holding the UPL consisted of

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\ldots \text{a nonlawyer who has direct contact with individuals in the nature of consultation, explanation, recommendations, advice, and assistance in the provision, selection, and completion of legal forms engages in the unlicensed practice of law; } \ldots \text{[W]hile a nonlawyer may sell certain legal forms and type up instruments completed by clients, a nonlawyer "must not engage in personal legal assistance in conjunction with her business activities, including the correction of errors and omissions. } \ldots \]

The Florida Bar, petitioner, versus We The People Forms and Service Center of Sarasota, Inc., et al., No. SC02—1675

Avoiding UPL: Representing Clients

Knowing when someone may represent a client before a judicial or quasi-judicial board, such as an administrative agency, is a difficult question to answer. The difficulty is in knowing what the individual courts allow or will permit in individual circumstances. Some jurisdictions and administrative agencies do permit those who are not licensed or admitted to practice to appear in court or before administrative law judges or referees on behalf of clients. Typically, these are law students acting under the guidance and supervision of an attorney under limited circumstances, but they may include paralegals. Depending upon the jurisdiction, nature of the action, and level of the court, the paralegal might be permitted to appear with or on behalf of a client—for example, before a Social Security Administration Administrative Law Judge.

Who may represent clients is not a simple question for lawyers, or for paralegals. Representation of parties traditionally has been the role of lawyers. But even lawyers are not always permitted to represent parties. Appropriate admission to practice in the jurisdiction is typically a requirement. A lawyer admitted to practice in one state may not necessarily represent the same client in another state. Lawyers admitted to practice in one jurisdiction, however, may ask the court of another jurisdiction for permission to appear and try a specific case. This is a courtesy generally granted for a single case, and usually when the trial attorney has retained local counsel who will appear as well to advise on local rules and procedures. But the issue of out-of-state counsel is not without other issues. The complexity of the issue is raised in a portion of a report on the Unauthorized Practice of Law prepared by the Nevada Assistant Bar Counsel.

The Bar has received complaints of out-of-state counsel participating in the pre-litigation mediation procedures. Writing notification letters, engaging in discovery, and appearing at pre-litigation mediations in a representative capacity is generally the practice of law. In Nevada there is no mechanism to obtain authority from the Supreme Court to appear in pre-litigation cases. Therefore, engaging in legal activities involving Nevada disputes and Nevada parties requires a licensed Nevada attorney. . . .

(Unauthorized Practice of Law, David A. Clark, Assistant Bar Counsel, September 20, 2001)

If the representation of clients is not clear for members of the bar, it certainly is not clear for members of the paralegal profession. Generally, only duly admitted lawyers in the jurisdiction may represent parties. But this rule has been modified to allow law students in some states to represent parties in certain situations, generally under appropriate supervision.

In some states a nonlawyer employee may represent a business in some proceeding before administrative agencies or before the minor judiciary, such as small claims courts. There is no uniformity of rules when nonlawyers may represent parties or before which agencies or courts. Any appearance before a court must be approached carefully. Even the presentation of a request for continuance of a case may be considered by some courts to be the practice of law.
Appearance on behalf of clients before federal and state administrative agencies is no less lacking in uniformity than appearances before courts. But it frequently is easier to determine the ability to appear as a paralegal representing a client. Some federal agencies specifically permit nonlawyers to appear. Most notable is the Social Security Administration, which allows representation by nonlawyers with few differences from representation by lawyers. The U.S. Patent Office also specifically permits nonlawyer practice. Some states, by specific legislation or administrative rule, also permit representation by nonlawyers.

**Avoiding UPL: Guidelines**

The National Association of Legal Assistants, Inc. Model Standards and Guidelines for the Utilization of Legal Assistants provides guidelines on conduct that may prevent UPL.

**Guideline 1**

Legal Assistants Should:

1. Disclose their status as legal assistants at the outset of any professional relationship with a client, other attorneys, a court or administrative agency or personnel thereof, or members of the general public.

**Guideline 2**

Legal Assistants Should Not:

1. Establish attorney-client relationships; set legal fees; give legal opinions or advice; or represent a client before a court, unless authorized to do so by said court; nor
2. Engage in, encourage, or contribute to any act that could constitute the unauthorized practice of law.

**Guideline 3**

Legal Assistants May Perform Services for an Attorney in the Representation of a Client, Provided:

1. The services performed by the legal assistant do not require the exercise of independent professional legal judgment;
2. The attorney maintains a direct relationship with the client and maintains control of all client matters;
3. The attorney supervises the legal assistant;
4. The attorney remains professionally responsible for all work on behalf of the client, including any actions taken or not taken by the legal assistant in connection therewith; and
5. The services performed supplement, merge with, and become the attorney's work product.

**Ethical Obligations**

Ethical behavior is expected and required of every member of the legal team, attorney, paralegal, litigation support, information technologist, and outside consultant. What is sometimes not clear in the minds of nonlawyer members of the legal team is what ethical obligations they have and how the ethics rules are to be followed and enforced.
Duty to Supervise

The attorney is ultimately responsible for the ethical conduct of everyone on the legal team. The supervising attorney is the one in charge of a case and those working on the case.

The duty of supervision is required of partners and lawyers with managerial authority in the firm to ensure other lawyers’ conduct conforms to the ethical code. Rule 5.1. Direct supervising attorneys with authority over nonlawyers have an ethical obligation to ensure those persons’ conduct is compatible with the obligations of the lawyer. Rule 5.3(b). What happens in the handling and processing of a case by the legal team is ultimately the responsibility of the supervising attorney. Any ethical breaches or lapses are ultimately the responsibility of the attorney under the ethical guidelines and under common law principles of agency law. (The principal is responsible for the acts of the agent when the agent is acting within the scope of their employment.) The attorney is the one to whom the client looks for professional advice and the outcome of the case. The attorney will suffer any sanctions that result from a failure to follow and enforce the ethical rules by members of the legal team. As noted in the opinion of the magistrate judge in the Qualcomm v. Broadcom case:

. . . Producing 1.2 million pages of marginally relevant documents while hiding 46,000 critically important ones does not constitute good faith and does not satisfy either the client’s or attorney’s discovery obligations. Similarly, agreeing to produce certain categories of documents and then not producing all of the documents that fit within such a category is unacceptable. Qualcomm’s conduct warrants sanctions.

C. Sanctions

The Court’s review of Qualcomm’s declarations, the attorneys’ declarations, and Judge Brewster’s orders leads this Court to the inevitable conclusion that Qualcomm intentionally withheld tens of thousands of decisive documents from its opponent in an effort to win this case and gain a strategic business advantage over Broadcom. Qualcomm could not have achieved this goal without some type of assistance or deliberate ignorance from its retained attorneys. Accordingly, the Court concludes it must sanction both Qualcomm and some of its retained attorneys . . .

QUALCOMM INCORPORATED, v. BROADCOM CORPORATION, and RELATED COUNTER-CLAIMS. Case No. 05cv1958-B (BLM)

Ethical obligations of lawyers are enforced by the court in the jurisdiction where the attorney is practicing or where the case is being tried. The supervising attorney of every legal team must follow the ethics rules and ensure the members of the legal team follow the same rules as the supervising attorney. The obligation to ensure ethical conduct is that of the supervising attorney under the ethical obligation to supervise all who work on the case for the attorney, under Rules 5.1 and 5.3.

These rules are as much a part of the administration of justice as the rules of civil or criminal procedure and the rules of evidence. The bigger issue is who has the responsibility to instruct the nonlawyer members of the legal or trial team and who is responsible for ensuring their compliance. While it is ultimately the responsibility of the lawyer to supervise the nonlawyers support staff, such as secretaries, investigators, litigation support staff, and technical consultants, in many cases this obligation falls to the paralegal or litigation manager on the legal team. Each person working for or supervised by the attorney is in fact the agent of the attorney. Under fundamentals of agency law, the agent and the principal—the attorney—have a fiduciary relationship to each other. The agent must obey the reasonable instructions of the principal and the principal is presumed to know everything the agent learns in the ordinary course of working for the attorney on the case. The attorney is ultimately responsible for the ethical conduct of the agent.

Supervising attorney The member of the legal team to whom all others on the team report and who has the ultimate responsibility for the actions of the legal team.

Agent A party who acts on behalf of another.

Principal A party who employs another person to act on his or her behalf.

Fiduciary relationship A relationship under which one party has a duty to act for the interest and benefit of another while acting within the scope of the relationship.
By definition, the paralegal works under the supervision of an attorney. As such, the paralegal is the agent of the attorney and therefore owes a duty to the supervising attorney similar to that of the traditional agent–servant relationship found in agency law—that of a fiduciary obligation. Among the fiduciary obligations of an agent are the duty to exercise reasonable care, skill, and diligence.

The agent also owes a duty of loyalty to the principal. This includes the obligation to act for the employer's benefit rather than for his or her own benefit or the benefit of another whose interest may be adverse to that of the employer.

**Ethical Guidelines and Rules**

Lawyers generally need to follow only one set of ethics guidelines. Although it may be a set enacted by the state legislature, it usually is one adopted by the supreme court of the state in which they practice.

The most widely adopted is the Model Rules of Professional Conduct, prepared by the American Bar Association and originally released in 1983. The prior release, the Model Code of Professional Conduct (Model Code), is still in use in some jurisdictions. Procedurally, each state reviews the Model Rules or Model Code and adopts the entire recommended set of Model Rules or the Model Code, or portions as it thinks appropriate for its jurisdiction.

Unlike the ABA for lawyers, no single source of ethical rules is set out for the legal assistant. Absent a single unified body of ethical rules, legal assistants must follow state statutes and conduct themselves in conformity with the rules of professional conduct applicable to attorneys and with the ethics opinions of their professional associations. The two major legal assistant organizations providing an ethical code for their members are the National Federation of Paralegal Associations (NFPA) and the National Association of Legal Assistants (NALA).

Although legal assistants are not governed directly by the American Bar Association ethical rules, there is an intertwined relationship between the lawyer, the client, and the paralegal. What the paralegal does or does not do can have a real impact on the lawyer's duty and obligation to the client. Under the Model Rules, the lawyer ultimately is responsible for the actions of the legal assistant.

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

In 1991, the American Bar Association’s policymaking body, the House of Delegates, initially adopted a set of guidelines intended to govern the conduct of lawyers when utilizing paralegals or legal assistants. These guidelines were updated in 2002 to reflect the legal and policy developments that had taken place since 1991.

Attorneys are bound by the ethical code adopted by the state in which they practice. The ethical guidelines for the paralegal are a combination of the ethical rules imposed on the supervising attorney and the paralegal professional association rules imposed on paralegals. As a general rule, whatever the ethical rules forbid the attorney from doing, they also forbid the paralegal from doing. Paralegals, therefore, can look to their state’s adopted set of rules, or code, of professional responsibility for guidance in deciding what is appropriate or inappropriate from an ethical perspective.

By extension of the rule of agency, the paralegal, as a subagent of the supervising attorney, becomes an agent of the client. The attorney is an agent of the client, and the paralegal is a subagent. As an agent of the client, the same duties that are owed to the law firm as the employer are also owed to the client.

One of the questions that arise in firms engaged in corporate practice and in securities practice is whether the paralegal can purchase stock (securities) in a client corporation. Some firms have written policies prohibiting members of the firm, including
paralegals, from purchasing the securities (stock) of client corporations. At the forefront is the propriety of using the information leading to the purchase or the transaction in client securities. Among the issues is whether the purchase was made based upon material inside information, information not generally available to the public, the knowledge of which would cause a person to buy or sell a corporate security. Use of material inside information of publicly traded stocks is generally a violation of federal securities laws prohibiting insider transactions.

For the attorney, guidance is available from Model Rule 1.7 and the comments to the Model Rule and under the previous Model Code DR 5–101A, which provides that an attorney must refuse employment when personal interests, including financial interests, might sway professional judgment. To the extent that this rule applies to the attorney, good judgment would dictate that it applies to the paralegal as well.

Uniformity of Paralegal Ethics

The paralegal profession has no unified code of ethics. State regulations and ethics opinions are not uniform. National organizations such as the National Association of Legal Assistants and the National Federation of Paralegal Associations each provide a uniform code of ethical conduct for members.

Ethics Codes of Paralegal Associations

The two leading national paralegal membership organizations are the National Federation of Paralegal Associations and the National Association of Legal Assistants. Each of these groups has formulated a set of ethical guidelines for its respective membership, as well as for others looking for ethical guidance in regulating the paralegal profession.
National Federation of Paralegal Associations

The National Federation of Paralegal Associations, Inc. is a professional organization composed of paralegal associations and individual paralegals throughout the United States and Canada. Members of NFPA have varying backgrounds, experiences, education, and job responsibilities that reflect the diversity of the paralegal profession. NFPA promotes the growth, development, and recognition of the paralegal profession as an integral partner in the delivery of legal services.

In April 1997, NFPA adopted the Model Disciplinary Rules (Model Rules) to make possible the enforcement of the Canons and Ethical Considerations contained in the NFPA Model Code. At present, unlike a violation by an attorney of the state-adopted rules that can result in loss of the right to practice (disbarment), no such sanction exists for the paralegal breach of association rules except loss of membership.

National Association of Legal Assistants

The National Association of Legal Assistants, formed in 1975, is a leading professional association for legal assistants. NALA provides continuing professional education, development, and certification. It may best be known in the profession for its Certified Legal Assistant (CLA) examination. The ABA Standing Committee on Paralegals has recognized the CLA designation as a designation marking a high level of professional achievement.

A proper coverage of the ethical rules and guidelines is the subject for a course by itself. This overview highlights some key ethical issues that the paralegal must be aware of as a member of a legal team. As a part of the legal team, the paralegal is required to follow the same rules as the supervising attorney. In a majority of jurisdictions these ethical rules are based on the ABA Model Rules of Professional Conduct. Among the ethical obligations of the attorney, and the legal team acting as agent of the attorney, which will be discussed below, are those of:

- Competency, Model Rules of Professional Conduct Rule 1.1,
- Confidentiality, Model Rules of Professional Conduct Rule 1.6(A),
- Conflicts Of Interest, Model Rules of Professional Conduct Rule 1.7,
- Candor, Model Rules of Professional Conduct Rule 3.3,
- Fairness To Opposing Party And Counsel, Model Rules of Professional Conduct Rule 3.4, and
- Duty to Supervise, Model Rules of Professional Conduct Rules 5.1 and 5.3.

Related to the ethical obligation of confidentiality are the related rules of evidence that limit the obligation of the members of the legal team from having to testify under the attorney–client privilege and protect the work product of the legal team prepared for trial from disclosure (Federal Rules of Evidence 501). Paralegals and other nonlawyers also must be concerned with the ethical issues as discussed in the Advice from the Field by Betty Wells.

Competence

ABA Model Rule of Professional Conduct 1.1 requires that lawyers provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. Few ethics opinions have been written on the subject of competent representation required under Rule 1.1 as it relates to nonspecific legal issues of workload and legal knowledge. However, the minimum standards clearly require an understanding of the rules of court. These rules continue to grow in number and complexity including the adoption of rules regarding electronic discovery. New rules require a new level of knowledge to competently represent clients. Further, lawyers
Advice from the Field

ETHICS THROUGH THE EYES OF A NON-LAWYER

Betty Wells, PP, PLS, TSC

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The American Bar Association and NALS . . . the association for legal professionals uses this definition for a legal assistant or paralegal: “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 and who performs specifically delegated substantive legal work for which a lawyer is responsible.”

In simple language, a legal assistant is a non-lawyer who provides substantive legal services and is supervised by a lawyer. Legal services performed by non-lawyers differ from firm to firm but may include anything from answering the phone to complex research. Just as the description of legal tasks the non-lawyer may be asked to perform varies from firm to firm, so do non-lawyer classifications. In one firm, a legal secretary may simply answer the attorney’s phone and revise documents, while in another firm a legal secretary may prepare complex wills and research case law. You may be “classed” as a legal secretary in your firm while you are actually asked to perform “legal assistant or paralegal” work while working under the supervision of an attorney.

Non-lawyers should be aware of how their conduct could affect not only themselves, but also the lawyer and firm for whom they work. Although legal assistants or paralegals are not directly subject to any rules of professional conduct promulgated by courts, legislatures, or government agencies, those non-lawyer personnel could lose [sic] their job for not following the rules of ethical conduct. In addition, the supervising lawyer could be reprimanded, suspended, or even disbarred, depending on the severity of the unethical conduct of the non-lawyer. Legal assistants or paralegals who are members of national and/or local paralegal associations are required to follow the ethical codes of those associations.

Possibly the biggest ethical situation a non-lawyer faces is the unauthorized practice of law (“UPL”). If you are “tenured,” you may find you know more about a particular area of the law than some newly “sworn” lawyers. Because of your knowledge, you may get dangerously close to crossing or may have already crossed the UPL line. Tasks a non-lawyer may perform are limited by statutory or court authority, and the lawyer’s determination of the non-lawyer’s competency. As the legal profession has evolved so has the role of non-lawyers. Today a non-lawyer is well-educated and well-trained with a variety of backgrounds and experience. The practice of law includes accepting cases, setting fees, giving legal advice, preparing or signing legal documents, and appearing before a court or other judicial body in a representative capacity. The unauthorized practice of law occurs when a non-lawyer engages in activities which affect the legal rights and obligations of clients. The biggest risk for a non-lawyer is giving legal advice instead of general legal information especially when the request comes from a family member or friend. Family members are typically the hardest to convince that you cannot give them legal advice, and they can be relentless in their pursuit of advice. Be aware: Your willingness to dispense legal advice to the family member or friend could potentially result in your unemployment.

How can the non-lawyer avoid UPL? The best way is to always identify oneself as a legal secretary, legal assistant or paralegal who has posed the specific question to a supervising lawyer and as one who is relaying information gleaned from that lawyer. Make certain all legal documents and correspondence that could be considered legal opinion are reviewed, approved and signed by your supervising lawyer or another lawyer in the firm that is familiar with the matter. If you do not know what the UPL provisions are in your state, call your state bar and ask them for the guidelines non-lawyers must follow. Find out today before you are forced to explain what you have done, not only to your employer but to the bar association in your state.

Confidentiality is another area non-lawyers are faced with each and every day. It is important to a lawyer’s practice that his clients are able to freely consult with their lawyer’s support personnel and for the clients to know the information they are relaying through you will be held in the strictest of confidence. Did the firm where you are employed ask you to sign a confidentiality statement when you were hired? If they did, did they explain to you what confidential information was in play? If they didn’t, ask them for the form and ask them to explain client confidentiality.

If the firm doesn’t have a confidentiality form for non-lawyers, ask them to create one—their malpractice insurance carrier will love you for it. In simple (continued)
terms, protecting a client’s confidence means you do not talk about clients or cases in your firm with anyone, anywhere, especially in public places—the ethics rules require the lawyer to exercise reasonable care to prevent his employees or associates from violating the obligation regarding client confidences or secrets. In other words, the non-lawyer must follow the same rules as the lawyer when it comes to protecting client confidentiality.

Have you ever interviewed for a position at a law firm only to find yourself conflicted out of employment? More and more often, law firms are asking support personnel to provide a list of clients they have worked with. On occasion a non-lawyer has not been hired due to a conflict of interest that cannot be resolved. Have you been hired by a firm, or found yourself doing temp work in a firm and realized you have knowledge from your past job that could change the outcome of the matter on which you are working? Did you immediately go to the supervising lawyer or HR department and tell them of the possibility of a conflict? You should never make the decision that the information you have is inconsequential or take it for granted simply because you are “just a temp. Remember, it is important for you to inform your employer of the potential conflict to avoid potential problems as the matter progresses, not only for you but for the lawyer and their firm as well.

What about receiving legal fees? Can you “troll” for clients and be compensated when your firm is hired? Remember, you are not allowed to set fees, you must not practice law or give the appearance of practicing law, so therefore, you must not accept fees. The reasoning behind this is to protect the lawyer’s professional independence of judgment. The obligations of the lawyer to the client do not change simply because you “brought” the client to the firm.

Your unethical behavior may cause you to lose your job and it may cost your employer his or her career. Stay current with ethical requirements in your profession by attending continuing legal education seminars offered by local and state bar associations, as well as through your local, state, and national association. You and your employer will be glad you did.

**Conflict of Interest**

The representation of one client being directly adverse to the interest of another client.

**Conflict of Interest**

A conflict of interest exists if the representation of one client will be adverse to the interest of another client. Conflict of interest may best be explained by the adage that no one can serve two masters. If the master is entitled to complete loyalty, any conflict in loyalties presents a conflict of interest in which neither master can be certain of the loyalty of his or her servant. It’s easy to see the conflict that would arise in a lawyer’s going to court representing both the plaintiff and the defendant.

Less obvious are situations in which the attorney represents two parties with a common interest, such as a husband and wife purchasing a new home. In most cases, the interests would be the same and no conflict would exist. When these clients are seeking counseling for marital problems, however, the conflict becomes more obvious as one of them seeks a greater share of the common property or other rights and the lawyer is called upon to give legal advice as to the right to the parties. Finally, lawyers clearly cannot represent both husband and wife in court in the marital dissolution trial.

The American Bar Association Model Rules of Professional Conduct provide a guideline in Rule 1.7, Conflict of Interest: General Rule, which provides in part that a lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and each client consents after
consultation. The essence of the rule is that of loyalty to the client. The 1981 version of the American Bar Association Model Code of Professional Responsibility provides in Canon 5:

A lawyer should exercise independent professional judgment on behalf of a client.

The ethical considerations comment to Canon 5 states:

EC-1 The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

Clearly, a lawyer should not accept the employment if the lawyer’s personal interests or desires will, or if there is a reasonable probability that they will, adversely affect the advice to be given or services to be rendered to the prospective client. The
information that may be considered to create a conflict of interest is not limited solely to that of the attorney representing a client. It also includes the information held by another member of the legal team, including the legal assistant.

The National Federation of Paralegal Associations Model Code of Ethics provides in Canon 8:

A paralegal shall avoid conflicts of interest and shall disclose any possible conflict to the employer or client, as well as to their prospective employers or clients.

The ultimate obligation to determine the conflict of interest of the paralegal or legal assistant rests with the supervising attorney. Standard procedure in law firms is to check for conflicts of interest within the law firm before accepting a new client or undertaking a new matter for an existing client. Just as other attorneys are asked to review lists of new clients and new matters, so must paralegals check to be certain they do not have a conflict of interest.

Conflicts of interest may arise for paralegals when they change from one employer to another. If the previous employer represented a client or handled certain matters for a client during the period in which the paralegal was employed, a conflict of interest may exist. A more difficult concern for the paralegal is the conflict of interest that can arise from a law firm's representation of family members and personal friends. Paralegals frequently refer family and friends to the attorney or the law firm where they work. The mere relationship or friendship itself might not create conflict, but in some cases could give rise to a claim of undue influence wherein the paralegal may stand to benefit from the action of the law firm. Examples are the drafting of wills and trusts in which the paralegal may be named as a beneficiary or instances in which the paralegal may be named as the executor of the estate or as a trustee receiving compensation.

**Ethical Wall**

Law firms use the term “ethical wall”—also called a Chinese wall (after the Great Wall of China)—to describe an environment in which an attorney or a paralegal is isolated from a particular case or client to avoid a conflict of interest or to protect a client’s confidences and secrets. By creating this boundary or wall, any potential communications, whether written or oral, are prevented between members of the legal team handling a particular matter or client and the person with whom there may be a conflict of interest.

In an age of consolidation of law firms in many areas, the number of individual employers has diminished while the number of clients has increased. As a result, professionals today may find themselves in firms that were on the opposite side of cases in the past. Creating an ethical wall permits the professional to accept employment with the other firm. It also permits greater mobility by professionals, as they can go to a new firm in which there may have been a conflict.

**Freelance or Independent Paralegal**

Freelance or independent paralegals who work for more than one firm or attorney face the potential problem of conflict of interest. Special caution has to be taken to avoid accepting employment in cases where conflicts may exist. Freelance and independent paralegals are keenly aware of this and generally take precautions to prevent conflicts. The law firms and attorneys for whom they work usually are aware of the potential and also take special precautions to isolate potential conflict situations. Full-time paralegals who seek outside income should pay special attention to potential conflicts that may arise.

Not all of these conflicts are obvious. Consider the case of a paralegal working for a plaintiff’s negligence firm handling cases against a major retail store. That
CHAPTER 2 Ethics and Professional Responsibility

HISTORY: SUP. CT. ORDER NO. 04–07, 2007 WI 4, 293 WIS. 2D XV.

ABA COMMENT: LEGAL KNOWLEDGE AND SKILL

1. In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer’s general experience, the lawyer’s training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

2. A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

3. In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client’s interest. A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

5. Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Maintaining Competence

6. To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject. See also Rule 6.2.

SOURCE: http://www.legis.state.wi.us/rsb/scr/5200.pdf

paralegal’s acceptance of employment at the retail store the firm is suing presents a conflict of interest. Knowledge of the strategy of the case would be of interest to the retail store employer. But divulging the information would breach the confidence of the law firm and the confidence of the law firm’s client. Failing to disclose information to the retail store that directly affects its business breaches the duty of loyalty to that employer.

The Duty of Confidentiality, Attorney–Client Privilege, and Work–Product Doctrine

The three concepts—duty of confidentiality, attorney–client privilege, and work–product doctrine—have something in common: they are all connected to the legal profession’s obligation to protect the secrets of the client so that the client can provide all the information necessary for the legal team to conduct an effective representation of the client.
Attorney–client privilege

A rule that says a client can tell his or her lawyer anything about the case without fear that the attorney will be called as a witness against the client.

Web Exploration

Review the most current version of Rule 1.6 on Confidentiality in your jurisdiction with the American Bar Association Model Rules of Professional Conduct at the American Bar Association website at www.abanet.org/cpr/mrccp/rule16.html.

Attorney–client privilege is founded on the belief that clients should be able to tell their attorneys everything about their case so the attorney can give proper legal advice to the client. For the attorney, the ABA Model Rules provide in Rule 1.6, Confidentiality of Information, that a lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized. What is confidential information is also defined in the ABA model rules: “all information, regardless of the source, gained in the representation of the client.” Even information that may be published in the newspaper is confidential for the lawyer and paralegal working for the client and may not be discussed with others. The article may or may not be accurate and any discussion with others could result in discussion of items not in the newspaper story, therefore the lawyer or paralegal cannot confirm or deny anything.

As stated by the federal court in the case of Claus Von Bulow, the attorney–client privilege extends to those working on the case for the attorney representing the client.

The law is clear in this circuit the person claiming the attorney–client privilege has the burden of establishing all the essential elements thereof. The question is a simple one: Was Reynolds [a friend of Claus Von Bulow claiming that information given to her by the defendant was privileged] an agent of an attorney and has she presented sufficient evidence of this relationship? In other words, were communications made to her, in confidence, in her capacity as an agent of an attorney for the purpose of obtaining legal advice from that attorney? We think not.

The attorney–client privilege is founded on the assumption that encouraging clients to make the fullest disclosure to their attorneys enables the latter to act more effectively. We have recognized that an attorney’s effectiveness depends upon his ability to rely on the assistance of various aides, be they secretaries, file clerks, telephone operators, messengers, clerks not yet admitted to the bar, and aides of other sorts. The privilege must include all the persons who act as the attorney’s agents. Von Bulow v. Von Bulow, 811 F. 2d 136 (2d Cir. 1987)
In every case there are two sides, each represented by an attorney. The attorney for each party to a case has a competing interest, either to obtain information or to protect information from the other. Attorneys want to protect the information received from their clients, or developed in the process of preparing for litigation. The conflict over protecting or releasing information has intensified in recent years as private counsel and government counsel challenge the attorney’s obligation to maintain in confidence information obtained directly and through use of agents such as paralegal, and public relations consultants in criminal and civil matters before commencement of litigation. Increased regulatory obligations have created additional obligations on businesses to conduct internal investigations, which has resulted in a new area of federal and state privilege—“the audit privilege.”

Increased use of electronic communications tools, such as email and text messaging, has created the era of the instant message, and with it the instant inadvertent disclosure of potentially privileged material with the press of a key. Lawyers and paralegals must know what action the courts will require of the attorney or paralegal to preserve confidential and privileged information that is inadvertently disclosed and, when possible, prevent a loss of the confidentiality privilege that could result in a potential loss of the case and a possible malpractice claim against the law firm. Email has become a universal form of communication, not only for personal communication but also for business and between attorneys and client. Consider the frequent situation where an email is sent to the wrong party by accident. It may be necessary to avoid using electronic communications in jurisdictions that take a hard line that all disclosure, inadvertent or intentional, is a breach of confidentiality or privilege.

Confidentiality

The duty of confidentiality is just that for the legal team, a duty. It is a duty imposed on the attorney and each member of the legal team working under the supervision of the attorney to enable clients to obtain legal advice by allowing the client to freely and openly give the members of the legal team all the relevant facts without fear of disclosure of these facts except in limited situations, such as to prevent commission of a crime or to defend against a client’s suit.

Attorneys, and the members of the legal team, have a duty to treat client information obtained in the course of representation of a client in confidence under ABA Rule 1.6. Members of the legal team cannot tell anyone the client’s information. The duty does not end when the case ends but continues forever and precludes discussing the information with friends, spouses, strangers, or anyone else who might inquire about the case.

The duty of confidentiality also extends to paralegals under ethical guidelines of the major national paralegal organizations such as NALA. Although these ethical rules are not mandatory on the paralegal, in most states the paralegal’s position as an agent creates an obligation to the attorney and to the client.

In the modern practice of law, the attorney must rely on others, such as paralegals, legal secretaries, investigators, law clerks, and the like, to assist in vigorous representation of the client. These “agents” also must be covered by the attorney–client privilege. To do otherwise would require the attorney to guard every document,

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1 American Bar Association Model Rules of Professional Conduct 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).
2 NALA Code of Ethics and Professional Responsibility Canon 7. A legal assistant must protect the confidences of a 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.
exhibit, and pretrial memorandum from the eyes of everyone on the legal team and perform every task personally from interviews of clients and witnesses, to the typing of reports and memorandum of law, to the conduct of fact and legal research to the preparation of trial exhibits and documents. This is clearly not desirable or cost effective for the client or the administration of justice.

Attorney–Client Privilege

The attorney–client privilege differs from the duty of confidentiality because it applies only to information obtained from the client—for example, the client’s confession of commission of the crime. This privilege is found in the state or federal evidence code. It is a rule of evidence that applies in cases where the Rules of Evidence apply: a court of law, a deposition, or other places where a witness is under oath, such as interrogatories, responses to requests for documents, or grand jury hearings. The attorney–client privilege is a part of both state and federal law. The law of each jurisdiction must be consulted to determine the extent of the privilege. In the federal courts the rule determining which privilege rules are followed is governed under the Federal Rules of Evidence Rule 501.

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law. (Jan. 2, 1975, P.L. 93–595, §1, 88 Stat. 1933)

For example, Pennsylvania is typical of many states in treating the privilege as part of the state common law tradition that has been incorporated in state law (Commonwealth v. Noll, 662 A.2d 1123, 1126 (Pa.Super. 1995), appeal denied, 543 Pa. 726, 673 A.2d 333 (1996)).

The “privilege” belongs to the client, not to the attorney. The client may waive the privilege and allow the attorney or paralegal to reveal the information; however, the

Rule 501 General Rule Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law. (Jan. 2, 1975, P.L. 93–595, §1, 88 Stat. 1933).
attorneys or paralegals may not of themselves waive the privilege when asked what the client has told them. In a court proceeding, an appropriate answer to the question of what the client said would be: “I declined to answer because of the attorney–client privilege.” If the client had revealed or released the same information to someone else, the privilege is lost. Thus, the client must really keep the information secret for the privilege to apply.

The concept of privilege also extends to persons while acting within certain roles as discussed by the U.S. Supreme Court:

The privileges between priest and penitent, attorney and client, and physician and patient limit protection to private communication. These privileges are rooted in the imperative need for confidence and trust. The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return. The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client’s reasons for seeking representation if the professional mission is to be carried out. Similarly, the physician must know all that a patient can articulate in order to identify and to treat disease; barriers to full disclosure would impair diagnosis and treatment.


Additional relationships include:

1. Spouse

Claim of Privilege

Privilege is not automatically invoked. The person claiming the privilege—usually the client—has the burden to establish the existence of the privilege.

To sustain a claim of privilege, the party invoking it must demonstrate that the information at issue was a communication between client and counsel or his employee, that it was intended to be and was in fact kept confidential, and that it was made in order to assist in obtaining or providing legal advice or services to the client.

Extension of Attorney–Client Privilege to Others

It is now accepted that the efficient administration of justice requires lawyers to engage others, such as legal assistants, accountants, and other experts. This would not be possible if the privilege did not extend to these agents of the attorney including, most recently, public relations firms.

The U.S. District Court for the Southern District of New York summarized the law, stating:

. . . the privilege in appropriate circumstances extends to otherwise privileged communications that involve persons assisting the lawyer in the rendition of legal services. This principle has been applied universally to cover office personnel, such as secretaries and law clerks, who assist lawyers in performing their tasks. But it has been
applied more broadly as well. For example, in *United States v. Kovel*, the Second Circuit held that a client’s communication with an accountant employed by his attorney were privileged where made for the purpose of enabling the attorney to understand the client situation in order to provide legal advice.

(IN RE Grand Jury Subpoenas dated March 24, 2003 directed to (A) Grand Jury Witness Firm and (B) Grand Jury Witness, M11-188 (USDC, S.D.N.Y.) (June 2, 2003)).

**Common Interest Privilege**

Another variation of privilege is the **common interest privilege**. “The purpose of the common interest privilege is to permit a client to share confidential information with the attorney for another who shares a common legal interest, such as the attorney for a co-defendant who has separate counsel.

The key consideration is that the nature of the interest be identical, not similar [emphasis added], and be legal, not solely commercial.”\(^v\)

**Work–Product Doctrine**

The **work–product doctrine** is different from both the attorney–client privilege and the duty of confidentiality. The attorney–client privilege and the duty of confidentiality relate to the information provided by the clients regardless of whether they involve potential litigation. The U.S. Supreme Court recognized the work–product doctrine and its importance saying:

Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests.

This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this case as the “work product of the lawyer.” Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten.

An attorney’s thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

. . . where relevant and non-privileged facts remain hidden in an attorney’s file and where production of those facts is essential to the preparation of one’s case, discovery may be properly had.

*Hickman v. Taylor*, 329 U.S. 495 (1947) at page 511

The work–product doctrine provides a limited protection for material prepared by the attorney or those working for the attorney in anticipation of litigation or for trial, such as research on theories of law or defenses that may be raised in the trial or trial strategy for the order of presentations or methods of impeaching the credibility of witnesses for the other side.


\(^v\) Also see the interesting article on the issue of providing privileged information to insurers. Guarding privileged documents poses challenge to “utmost good faith” doctrine, *National Underwriter; Eranger*, April 28, 2003; *Sally Agel; Felton Newell.*
The work–product doctrine is narrower than the attorney–client privilege in that it protects only materials prepared “in anticipation of litigation,” Fed. R. Civ. P. 26(b) (3), whereas the attorney–client privilege protects confidential legal communications between an attorney and client regardless of whether they involve possible litigation.\footnote{Electronic Data Systems Corporation v. Steingraber Case 4:02 CV 225 USDC, E.D. Texas (2003).}

The work–product doctrine is codified in the Federal Rules of Civil Procedure Rule 26 (B) (3),\footnote{FRCP 26 (b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows: (1) In General. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i),(ii), and (iii).} and in Rule 16 (B) (2) of the Federal Rules of Criminal Procedure.\footnote{Fed. R. Crim. P. 16.}

**FRCP 26 (b) Discovery Scope and Limits**

Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i),(ii), and (iii).

**Exceptions and Limitations to the Work–Product Doctrine**

The work–product doctrine has some exceptions. It does not cover documents prepared in the normal operation of the client's business, such as sales reports, data analysis, or summaries of business operations.

The work–product doctrine does not extend to documents in an attorney's possession that were prepared by a third-party in the ordinary course of business and that would have been created in essentially similar form irrespective of any litigation anticipated by counsel.\footnote{In Re Grand Jury Subpoenas, 318 F. 3d 379 (2nd Cir 2002) at page 385.}

In other words, the client cannot obtain protection for internal business documents by giving them to the attorney and thereby protect them from discovery by the other side because they are in the possession of the attorney.

**Exception to the Third-Party Document Exception**

The courts have made an exception to the exception in which a lawyer is trying to find out the other party's strategy by asking about documents already in his/her possession that would not be protected under the third-party exception. To protect the lawyer's trial strategy, the court may impose a privilege where it would not otherwise exist. We, too, have observed that

Where a request is made for documents already in the possession of requesting party, with precise goal of warning what the opposing attorney's thinking or strategy may be, even **third-party documents** may be protected. \footnote{Id page 385.}
Governmental Attorney Exception

The attorney-client privilege does not extend to government attorneys. Individuals and corporations are both subject to criminal liability for their transgressions. Individuals will not talk and corporations will have no incentive to conduct or cooperate in internal investigations if they know that any information disclosed may be turned over to the authorities. . . . A state agency, however, cannot be held criminally liable. . . . A government attorney should have no privilege to shield relevant information from the public citizens to whom she owes ultimate allegiance, as represented by the grand jury. 

Inadvertent Disclosure of Confidential Information

Inadvertent disclosure of confidential or privileged information does happen. It may be the slip of the finger in sending an email, an accidental pushing of the wrong number on the speed dial of a fax machine or the sending of a misaddressed envelope. The admissibility of the inadvertently disclosed documents may hinge on the steps the firm takes before and after the disclosure. Having a proper screening policy in place and monitoring this policy may prevent a claim of negligence.

The treatment will depend on the individual jurisdiction. The courts follow no single policy.

Judicial Views

There are three judicial views on handling the inadvertent disclosure under the attorney-client privilege: (1) Automatic waiver; (2) no waiver; (3) and balancing test.

Automatic Waiver
These cases hold that once the confidentiality is breached, the privilege is therefore waived.

No Waiver
There can only be a waiver when a client makes a knowing voluntary waiver of the privilege. Therefore, the attorney’s inadvertent disclosure does not constitute a waiver.

Balancing Test
The courts using the balancing test looked to the nature of the methods taken to protect the information, efforts made to correct the error, the extent of the disclosure and fairness. Remedies under this test range from unlimited use of the disclosed materials, to court-ordered return of documents, to disqualification of attorneys who have reviewed inadvertently disclosed privileged documents.

ABA Ethics Opinion

The American Bar Association has issued a formal opinion modifying the long-standing opinion 92-368, which advocated for confidentiality of privileged materials to protect the client, and imposing a burden upon receiving attorneys not to review privileged material and return it following instructions given to them by the disclosing attorney, issuing a clarifying formal opinion 05-437, which states:

A lawyer who receives a document from opposing parties or their lawyers and knows or reasonably should know that the document was inadvertently sent should promptly notify the sender in order to permit the sender to take protective measures. To the extent that Formal Opinion 92-368 opined otherwise, it is hereby withdrawn.

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\(^{xv}\) In Re a Witness, 288 F.3d 289 (7th Cir.2002) at pages 293–294.

\(^{xvi}\) VLT Inc. Lucent Technologies, no 00–11049-PBS (D. Mass. 01/21/03).

\(^{xvii}\) Inadvertent Disclosure: Approaches and Remedies, The Practical Lawyer; Philadelphia, April 2001, by Kevin M. McCarthy.
Internal Investigations and Evidentiary Privileges

Businesses, and particularly corporations with publicly traded stocks, are under state and federal requirement to take a proactive approach to determine wrongdoing and identify violations of statutes and regulations. These investigations and “audits” create a body of documents all, some, or none of which may be subject to evidentiary privilege.

Candor and Fairness in Litigation

Litigation is the practice of advocacy, advocating a legal position to the court or trying to persuade a trier of facts to accept the facts as presented. It is the duty of the advocate to avoid any conduct that undermines the integrity of the process. The duty to the client to persuasively present the case is a qualified duty, qualified by the ethical obligation (candor) to not mislead the court or opposing counsel with false statements of law or of facts which the lawyer knows to be false. Without mutual respect, honesty, and fairness the system cannot function properly. It may be a simple ethical duty to competently research and present the current case and statutory law, even when the most current version is not favorable to the position taken. In the technology age, this duty requires making a complete search for ALL the law, statutory enactments and case law, and not just the part that is favorable to the client’s position. In an age of vast numbers of electronic cases, it is easy to lose a few or not run the search as professionally as possible. Not making the proper inquiry of the client’s staff to find all of the law may lead to sanctions and potentially worse, disbarment.

Fairness to Opposing Party and Counsel

Fairness in the practice of law has been an issue probably as long as there has been an adversarial justice system. A number of states have established professionalism commissions and committees. Attorneys are advocates for their clients and occasionally forget that the purpose of the legal system is justice for all. The ethical rule of fairness to opposing counsel and parties is an attempt to set the guidelines to ensure justice is done even if one’s client loses the case. Each side is expected to use its best skills and knowledge and present fairly their position in the form of evidence for the trier of fact to determine where the truth lies. Destroying, falsifying, or tampering with evidence destroys the fabric of the system. If people lose confidence in the system because of these unfair tactics society loses confidence in the system and it breaks down. Just consider the criminal cases where the prosecutor does not turn over, as required, exculpatory evidence that might show the defendant innocent.

The obligation of the supervising attorney to the court and to the other side may extend not only to the legal term but also in insuring that the client and the client’s staff fully comply with the rules of court. Sanctions for failure to properly supervise can come from two sources: the court hearing the underlying action (as in the Qualcomm

**ETHICAL PERSPECTIVE**

**One Last Word About Integrity**

Model Rule 8.1 states that legal professionals should be persons of integrity. The more integrity each of us brings to the profession, the better the legal system will be. Regardless of a person’s expertise or extraordinary gift for the law, the person still will be held to high standards of moral ethical conduct, as has been the case historically. (See also ECB-7)

case above) and the attorney disciplinary agency. The court typicallypunishes this sort
of misbehavior with monetary sanctions, the purpose of which is to recompense the
other side for the time and effort they have expended or will expend because of the dis-
covery abuse. The attorney disciplinary agency’s punishment can include, in extreme
cases, disbarment or suspension from practice before the court for a period of time, or
in less extreme cases public or private censure. In addition, under some circumstances
“unfair” litigation tactics may result in a suit for malpractice by the client against the
attorney and the law firm.

**Web Exploration**

A list of commissions and committees may be seen at www.
ABANE.org/cpr/professionals/
profcommissions.htm.

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**Concept Review and Reinforcement**

### Legal Terminology

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**SUMMARY OF KEY CONCEPTS**

**Regulation of the Practice of Law**

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<th>Purpose of Regulation</th>
<th>The practice of law is regulated by state government and court rule in an attempt to protect the public from incompetent and unscrupulous practitioners.</th>
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<td>The Paralegal and Licensing</td>
<td>There are, with a few exceptions, no state licensing requirements for one to work as a paralegal—unlike the procedures that lawyers must follow to practice law.</td>
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<td>Penalties for the Unauthorized Practice of Law</td>
<td>States such as Pennsylvania have specifically addressed the issue of unauthorized practice of law by paralegals and legal assistants. The Pennsylvania statute on the unauthorized practice of law makes it a misdemeanor for “any person, including, but not limited to, a paralegal or legal assistant who within this Commonwealth, shall practice law.”</td>
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**Avoiding UPL: Holding Oneself Out**

<table>
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<tr>
<th>Avoiding UPL: Holding Oneself Out</th>
<th>Parties with whom the paralegal has contact must know the limited role the paralegal plays on the legal team.</th>
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<td>Avoiding UPL: Giving Advice</td>
<td>A paralegal cannot give a legal opinion or give legal advice. If legal rights may be affected, it is probably legal advice.</td>
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<td>Avoiding UPL: Filling Out Forms</td>
<td>UPL may consist of a nonlawyer who explains, recommends, advises, and assists in the selection, completion, and corrections of errors and omissions of legal forms.</td>
</tr>
</tbody>
</table>
Avoiding UPL: Representing Clients

1. Some jurisdictions and administrative agencies do permit those who are not licensed or admitted to practice to appear in court or before administrative law judges or referees on behalf of clients.
2. No uniformity of rules exists outlining when nonlawyers may represent parties or the specific agencies or courts before which nonlawyers can appear. Any appearance before a court must be approved carefully.
3. The presentation of a request for continuance of a case may be considered by some courts to be the practice of law.

Avoiding UPL: Guidelines

Guideline 1
Legal assistants should:
1. disclose their status as legal assistants at the outset of any professional relationship with a client, other attorneys, a court or administrative agency or personnel thereof, or members of the general public.

Guideline 2
Legal assistants should not:
1. establish attorney–client relationships; set legal fees, give legal opinions or advice, or represent a client before a court, unless authorized to do so by said court; nor
2. engage in, encourage, or contribute to any act that could constitute the unauthorized practice of law.

Guideline 3
Legal assistants may perform services for an attorney in the representation of a client, provided that
1. the services performed by the legal assistant do not require the exercise of independent professional legal judgment;
2. the attorney maintains a direct relationship with the client and maintains control of all client matters;
3. the attorney supervises the legal assistant;
4. the attorney remains professionally responsible for all work on behalf of the client, including any actions taken or not taken by the legal assistant in connection therewith.

Ethical Obligations

Expected Behavior
Ethical behavior is expected and required of every member of the legal team, attorney, paralegal, litigation support, information technologist, and outside consultant.

Duty to Supervise
The obligation to ensure ethical conduct is that of the supervising attorney under the ethical obligation to supervise all who work on the case for the attorney.
Ethical behavior is expected and required of every member of the legal team, attorney, paralegal, litigation support, information technologist, and outside consultant.
Ethical obligations of lawyers are enforced by the court in the jurisdiction where the attorney is practicing or where the case is being tried.

Ethical Guidelines and Rules

Every profession develops a set of guidelines for those in the profession to follow. These may be codes of conduct or ethical guidelines. These codes typically set forth the minimum in ethical behavior—the very least each professional should do.
ABA Model Guidelines for the Utilization of Paralegal Services

A set of guidelines intended to govern the conduct of lawyers when utilizing paralegals or legal assistants.

Uniformity of Paralegal Ethics

No single source of ethical rules is set out for the paralegal. At present, unlike a violation by an attorney of the state-adopted rules that can result in loss of the right to practice (disbarment), no such sanction exists for the paralegal breach of association rules except loss of membership.

Ethics Codes of Paralegal Associations

1. National Federation of Paralegal Associations, Inc.
2. National Association of Legal Assistants

Competence

Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

Conflict of Interest

1. A conflict of interest exists if the representation of one client will be adverse to the interest of another client.
2. Conflicts of interest may arise for paralegals when they change from one employer to another if the previous employer represented a client or handled certain matters for a client during the period in which the paralegal was employed.

Ethical Wall

This is an environment in which an attorney or a paralegal is isolated from a particular case or client to avoid a conflict of interest or to protect a client’s confidences and secrets.

Freelance or Independent Paralegal

Freelance or independent paralegals who work for more than one firm or attorney face the potential problem of conflict of interest.

The Duty of Confidentiality, Attorney–Client Privilege, and the Work–Product Doctrine

Attorney–Client Privilege

1. This privilege is found in the state or federal evidence code and is a rule of evidence that applies in cases where the Rules of Evidence apply: a court of law, a deposition, or other places where a witness is under oath: such as interrogatories, responses to requests for documents or grand jury hearings.
2. The “privilege” belongs to the client not to the attorney.
3. The person claiming the privilege, usually the client, has the burden to establish the existence of the privilege.

Confidentiality

This is a duty imposed on the attorney and each member of the legal team working under the supervision of the attorney to enable clients to obtain legal advice by allowing the client to freely and openly give the members of the legal team all the relevant facts without fear of disclosure of these facts except in limited situations, such as to prevent commission of a crime or to defend against a client’s suit.

Claim of Privilege

The person claiming the privilege, usually the client, has the burden to establish the existence of the privilege.

Extension of Attorney–Client Privilege to Others

The efficient administration of justice requires the privilege to extend to agents of the attorney.

Work–Product Doctrine

1. The work–product doctrine provides a limited protection for material prepared by the attorney or those working for the attorney in anticipation of litigation or for trial.
2. The work–product doctrine is different from both the attorney–client privilege and the duty of confidentiality. The attorney–client privilege and the duty of confidentiality relate to the information provided by the clients regardless of whether they involve potential litigation.
### Exceptions and Limitations to the Work–Product Doctrine

| Exception to the Third-Party Document Exception | Courts have made an exception when a lawyer is trying to find out the other party’s strategy by asking about documents already in his/her possession. |
| Governmental Attorney Exception | Government attorneys should have no privilege to shield relevant information from the public citizens to whom they owe ultimate allegiance, as represented by the grand jury. |
| Inadvertent Disclosure of Confidential Information | The treatment will depend on the individual jurisdiction. The courts follow no single policy. |
| Judicial Views | The three judicial views on handling the inadvertent disclosure under the attorney–client privilege are 1. automatic waiver 2. no waiver 3. balancing test |
| Internal Investigations and Evidentiary Privilege | Internal investigations and audits mandated by state and federal regulation create a body of documents, some or none of which may be subject to evidentiary privilege. |

### Candor and Fairness in Litigation

- **Candor and Fairness in Litigation**
- It is the duty of the advocate to avoid any conduct that undermines the integrity of the process. The duty to the client to persuasively present the case is a qualified duty, qualified by the ethical obligation (candor) to not mislead the court or opposing counsel with false statements of law or of facts which the lawyer knows to be false.

### Fairness to Opposing Party and Counsel
- The ethical rule of fairness to opposing counsel and parties is an attempt to set the guidelines to ensure justice is done even if one's client loses the case.

### Working the Web

1. Download the latest ethics opinions and guidelines from the NALA website at www.NALA.org.
4. Use a web browser or search engine to find the URL (web address) for your state or local bar association website that provides guidance or opinions on legal ethics. Three popular search engines are www.google.com, www.yahoo.com, or www.ask.com and www.bing.com.
5. Use the NFPA website to find the names of agencies that allow nonlawyer practice. www.paralegals.org/Development/Roles/allow.html

### Critical Thinking & Writing Questions

1. What is the general theory for regulating the practice of law? How is this applied?
2. Why is “just giving advice” potentially the unauthorized practice of law?
3. How would regulation of the paralegal profession assure the public of quality legal services?
4. When may nonlawyers represent clients?
5. How can the paralegal avoid UPL?
6. How do unauthorized-practice-of-law statutes protect the public?
7. Why should the paralegal be familiar with the ABA Model Rules of Professional Conduct?
8. How do the ABA Model Guidelines for the Utilization of Legal Assistant Services define the role of the paralegal in the law office?

9. Does a paralegal's violation of the ethics rules of the national paralegal associations have the same impact as violating the ethical rules of attorneys on the right to practice?

10. Would a paralegal dating a client have a conflict of interest caused by compromising influences and loyalties?

11. What is the reason for creating privileged communications?

12. Under what circumstances might a paralegal have a conflict of interest in taking a new job in a law firm?

13. How does an ethical wall protect the client?

14. What is a “Chinese wall”?

15. What are the potential dangers in paralegal’s moonlighting?

16. What is a conflict of interest under the Model Rules of Professional Conduct?

17. Does a client have an attorney–client privilege regarding information given to a paralegal during the preparation of a case?

18. What duty does a paralegal owe to the supervising attorney?

19. How is a paralegal an agent of the client?

20. In possible conflict of interest, with whom does the ultimate decision rest?

21. Under what circumstance must a lawyer or a paralegal refuse employment?

22. What is required to invoke the attorney–client privilege?

23. What is covered under the work–product doctrine?

24. Should a paralegal be considered an “other representative” under the Federal Rules of Civil Procedure, Rule 26? Why or why not?

25. What is the duty of the trier of fact?

26. What is exculpatory evidence?

Building Paralegal Skills

VIDEO CASE STUDIES

Disclosure of Status

A client is meeting with his new attorney and the attorney’s paralegal. He expresses some concerns about confidentiality of information given to the paralegal.

After viewing the video case study at www.pearsonhighered.com/goldman answer the following:

1. Does the paralegal have a duty to reveal their status as a paralegal? Does the supervising attorney have the duty?

2. Is the paralegal bound by the same rules of confidentiality as the lawyer?

3. Is the paralegal covered under the attorney client privilege?

Confidentiality Issue: Family Exception?

Paralegal Judy meets with her mother in a public coffee shop and tells her mother details of the case she is working on that has her stressed out.

After viewing the video case study at www.pearsonhighered.com/goldman answer the following:

1. Does being stressed out change the rules of confidentiality?

2. Is there a privilege that permits discussing the facts of a case with a family member?

3. Can the facts be discussed if names are left out?

Confidentiality Issue: Public Information

A law firm has a case that has received coverage in the local newspaper. Two of the paralegals from the same law firm are having coffee in a public coffee shop. One of the paralegals who is not assigned to the case reads an article about the client and asks her friend who is working on the case about the accuracy of the article.

After viewing the video case study at www.pearsonhighered.com/goldman answer the following:

1. How does public disclosure of information about a client or a case change the paralegals responsibility to maintain confidentiality?

2. Are there any ethical issues in discussing cases in a public area?

3. Is the paralegal who was not working on the case under any duty of confidentiality?
1. Are paralegals held to the same standard as attorneys when there is no supervising attorney?

2. What is the paralegal’s duty to the client when the paralegal’s employer breaches its duty to the client?

3. Who is responsible for the quality of the legal work performed for a client—the attorney or the paralegal?

4. Assume you have graduated from a paralegal program at a local college. While you are looking for a job where your talents can be properly utilized, a friend asks you to help him fill out a set of bankruptcy forms using a computer program he purchased at the local office supply mega warehouse. The program is designed to pick out the exemptions after the requested information is plugged in. [(In Re Kaitangian, Calif. 218 BR 102 (1998).)] Is this the unauthorized practice of law?

5. Assume you are offered the opportunity to work with a local law firm providing living trust services to the public. Your responsibility would be to make a presentation to community groups and in other public meetings on the advantages of living trusts. After the general session, any interested person would meet with you and you would fill out the forms, collect the fee, and send the completed form and half the fee collected to the law firm for review and transmittal to the client. You would retain half the amount collected as your fee. [(Cincinnati Bar Assn. v. Kathman, 92 Ohio St.3d 92 (2001).)] What ethical issues are involved? Explain.

Paralegal Ethics in Practice

5. Assume you are offered the opportunity to work with a local law firm providing living trust services to the public. Your responsibility would be to make a presentation to community groups and in other public meetings on the advantages of living trusts. After the general session, any interested person would meet with you and you would fill out the forms, collect the fee, and send the completed form and half the fee collected to the law firm for review and transmittal to the client. You would retain half the amount collected as your fee. [(Cincinnati Bar Assn. v. Kathman, 92 Ohio St.3d 92 (2001).)] What ethical issues are involved? Explain.

ETHICS ANALYSIS & DISCUSSION QUESTIONS

1. Are paralegals held to the same standard as attorneys when there is no supervising attorney?

2. What is the paralegal’s duty to the client when the paralegal’s employer breaches its duty to the client?

3. Who is responsible for the quality of the legal work performed for a client—the attorney or the paralegal?

4. Assume you have graduated from a paralegal program at a local college. While you are looking for a job where your talents can be properly utilized, a friend asks you to help him fill out a set of bankruptcy forms using a computer program he purchased at the local office supply mega warehouse. The program is designed to pick out the exemptions after the requested information is plugged in. [(In Re Kaitangian, Calif. 218 BR 102 (1998).)] Is this the unauthorized practice of law?

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DEVELOPING YOUR COLLABORATION SKILLS

1. In a group or individually, identify all the potential ethical issues involved in this scenario.

2. Imagine that a local lawyer who knows both Kathryn and Kelsey was sitting next to them and overheard their conversation. The lawyer sends a letter to the local Ethics Board. Let one group represent the Ethics Board, one group represent Kathryn’s employer, and another Kelsey’s employers.

   a. How should the Ethics Board respond?
   b. How should the lawyers Kelsey works for respond?

3. Write or discuss a summary of the advice the group would give to Kathryn and Kelsey, and the law firms that employ them.

PARALEGAL PORTFOLIO EXERCISE

Prepare a memorandum of law for submission to a potential employer, outlining the existing regulations in your state for paralegals, and the application of any unauthorized practice of law statutes. Include complete citations to any cases, statutes or regulations, and the Internet address of any state or local ethics sites for lawyers and/or paralegals.

LEGAL ANALYSIS & WRITING CASES

**In Re Estate of Devine** 263 Ill. App.3d 799 (1994)

A paralegal working in a small office became friendly with a client of the attorney and assisted the client in personal matters outside of the office, including helping him to shop and handle personal finances. In that role, the paralegal was given power to sign checks for the client. After the client died, the paralegal withdrew $165,958 from the joint account with the deceased client. Is a lawyer responsible for the actions of a paralegal?

The court held both the paralegal and the attorney liable for breach of fiduciary duty, holding that if the attorney, who performed work including writing a will leaving a bequest to the attorney and the paralegal, was a fiduciary, so then
was the paralegal as a matter of law. Further, the court noted that the law in a number of states holds the attorney liable for a paralegal’s acts including the responsibility for unethical conduct by nonlawyer employees of the lawyer. The Illinois court quoted New York and New Jersey cases holding the employing attorney in violation of the Code of Professional Conduct for failing to properly supervise employed paralegals.

**In the Matter of JOHN A. ARETAKIS, an Attorney, Respondent.** 791 N.Y.S.2d 687
**COMMITTEE ON PROFESSIONAL STANDARDS, Petitioner.**

An attorney made certain statements public from a complaint filed against him with the state committee on disciplinary standards in violation of the rules on confidentiality of proceeding on complaints against attorneys.

The court stated . . . “The Court of Appeals has observed that Judiciary Law § 90 and its counterparts reflect a policy of keeping disciplinary proceedings involving licensed professionals confidential until they are finally determined. The policy serves the purpose of safeguarding information that a potential complainant may regard as private or confidential and thereby removes a possible disincentive to the filing of complaints of professional misconduct. The State’s policy also evinces a sensitivity to the possibility of irreparable harm to a professional’s reputation resulting from unfounded accusations—a possibility which is enhanced by the more relaxed nature of the [proceedings] . . . Indeed, . . . Professional reputation ‘once lost, is not easily restored.’”

**Questions**
1. Can the reputation of a professional be tarnished by disclosure of unsubstantiated claims of ethical breaches?
2. Once tarnished can a professional reestablish his or her professional integrity?
3. Is the greater good to allow all complaints to be made public?

**Tegman v. Accident and Medical Investigations**

30 P.3d 8 (Wash. Ct. App. 2001)
**Court of Appeals of Washington, Division One**

Read the following case excerpted from the Court of Appeals opinion. Review and brief the case. In your brief, answer the following questions.

1. How does this court define “the practice of law”?
2. What is the standard or duty of care that this court imposes on a paralegal who does not have a supervising attorney?
3. What action does this court suggest that a paralegal take when it becomes clear that there is no supervising attorney?
4. Why should a paralegal contact the supervising attorney immediately upon being given a case to handle?
5. Based on this case, should a paralegal advise the client that he or she is a paralegal? If so, when? Why?

**Becker, Mary K., A.C.J.**

Between 1989 and 1991, plaintiffs Maria Tegman, Linda Leszynski, and Daina Calixto were each injured in separate and unrelated automobile accidents. After their accidents, each plaintiff retained G. Richard McClellan and Accident & Medical Investigations, Inc. (AMI) for legal counsel and assistance in handling their personal injury claims. . . . Each plaintiff signed a contingency fee agreement with AMI, believing that McClellan was an attorney and AMI a law firm. McClellan has never been an attorney in any jurisdiction. McClellan and AMI employed Camille Jescavage, . . . [a] licensed attorney. . . .
Jescavage . . . learned that McClellan entered into contingency fee agreements with AMI's clients and that McClellan was not an attorney. [Attorneys for AMI] settled a number of cases for AMI, and learned that McClellan processed settlements of AMI cases through his own bank account. . . .

In July 1991, McClellan hired Deloris Mullen as a paralegal. Mullen considered Jescavage to be her supervising attorney, though Jescavage provided little supervision. Jescavage resigned from AMI in the first week of September 1991. McClellan told Mullen that her new supervising attorney would be James Bailey. Mullen did not immediately contact Bailey to confirm that he was her supervising attorney. [He] later told Mullen he was not.

While at AMI, Mullen worked on approximately 50–60 cases, including those of [the] plaintiffs. . . . Mullen was aware of some of McClellan's questionable practices and knew that there were substantial improprieties involved with his operation. Mullen stopped working at AMI on December 6, 1991, when the situation became personally intolerable to her and she obtained direct knowledge that she was without a supervising attorney.

When she left, she did not advise any of the plaintiffs about the problems at AMI. After Mullen left, McClellan settled each plaintiff's case for various amounts without their knowledge or consent, and deposited the funds in his general account by forging their names on the settlement checks.

The “practice of law” clearly does not just mean appearing in court. In a larger sense, it includes “legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured.” Mullen contends that her status as a paralegal precludes a finding that she was engaged in the practice of law. She argues that a paralegal is, by definition, someone who works under the supervision of an attorney, and that it is necessarily the attorney, not the paralegal, who is practicing law and owes a duty to the clients. Her argument assumes that she had a supervising attorney.

The trial court's determination that Mullen was negligent was dependent on the court's finding that Mullen knew, or should have known, that she did not have a supervising attorney over a period of several months while she was at AMI. . . . The label “paralegal” is not in itself a shield from liability. A factual evaluation is necessary to distinguish a paralegal who is working under an attorney's supervision from one who is actually practicing law. A finding that a paralegal is practicing law will not be supported merely by evidence of infrequent contact with the supervising attorney.

As long as the paralegal does in fact have a supervising attorney who is responsible for the case, any deficiency in the quality of the supervision or in the quality of the paralegal's work goes to the attorney's negligence, not the paralegal's.

In this case, Mullen testified that she believed James Bailey was her supervising attorney after Jescavage left. The court found Mullen was not justified in that belief. . . . Mullen testified that she had started to distrust McClellan before he informed her that Bailey would be her supervising attorney. Mullen also testified that she did not contact Bailey to confirm that he was supervising her. Bailey testified at a deposition that he did not share Mullen's clients and she did not consult him regarding any of her ongoing cases. He also said that one of the only conversations he remembers having with Mullen with respect to AMI is one where he told her that he was not her supervising attorney after she raised the issue with him. This testimony amply supports the trial court's finding that Mullen was unjustified in her belief that Bailey was her supervising attorney.

[Mullen] continued to send out demand and representation letters after Jescavage left AMI. Letters written by Mullen before Jescavage's departure identify Mullen as a paralegal after her signature, whereas letters she wrote after Jescavage's departure lacked such identification. Even after Mullen discovered, in late November 1991, that Bailey was not her supervising attorney, she wrote letters identifying “this office” as representing the plaintiffs, neglecting to mention that she was a paralegal and that no attorney was responsible for the case. This evidence substantially supports the finding that Mullen engaged in the practice of law.

Accordingly, we conclude the trial court did not err in following Bowers and holding Mullen to the duty of an attorney. The duty of care owed by an attorney is that degree of care, skill, diligence, and knowledge commonly possessed and exercised by a reasonable, careful, and prudent lawyer in the practice of law in Washington. . . .

The court found that the standard of care owed by an attorney, and therefore also by Mullen, required her to notify the plaintiffs of: (1) the serious problems concerning the accessibility of their files to persons who had no right to see them, (2) the fact that client settlements were not processed through an attorney's trust account but, rather, McClellan's own account, (3) the fact that McClellan and AMI, as nonlawyers, had no right to enter into contingent fee agreements with clients and receive contingent fees, (4) the fact that McClellan was, in fact, engaged in the unlawful practice of law, and that, generally, (5) the clients of McClellan and AMI were at substantial risk of financial harm as a result of their association with AMI. Mullen breached her duty to her clients in all of these particulars.
We conclude the finding is supported by substantial evidence. Accordingly, the trial court did not err in concluding that Mullen was negligent.

Although Mullen was a paralegal, she is held to an attorney’s standard of care because she worked on the plaintiffs’ cases during a period of several months when she had no supervising attorney. The fact that she did not render legal advice directly does not excuse her; in fact, her failure to advise the plaintiffs of the improper arrangements at AMI is the very omission that breached her duty. Under these circumstances it is not unjust to hold her accountable as a legal cause of the plaintiffs’ injuries. As all the elements of negligence have been established, we affirm the judgment against Mullen.

Affirmed.

WE CONCUR: AGID, J., COLEMAN, J.

This case also was scheduled to be published in the Washington Appellate Reports, and if cited in the courts of Washington, would require that citation as well. This case has a Lexis number of 2001 Wash. App. LEXIS 1890.

**Rubin v. Enns**

*23 S.W.3d 382 Tex. App.-Amarillo (7th Dist. 2000)*

1. Does the court’s “rebuttable presumption” test work? Would any other test work better?
2. Using the court’s “rebuttable presumption” test, would there be some temptation on the part of the second law firm to obtain confidential information that the paralegal learned at the first law firm?
3. Do the ethics standards of the American Bar Association and paralegal associations adequately address ethical conflicts that paralegals face? Discuss.

**FACTS**

Inda Crawford was employed as a legal assistant by the law firm of Hicks, Thomas & Lilienstern (HTL) for a number of years prior to May 1999. During her employment with the HTL law firm, HTL represented Michael Rubin and other real estate agents in a lawsuit against Westgate Petroleum and other defendants. Crawford worked on this case as a legal assistant for HTL and billed 170 hours of work on the case.

In May 1999, Crawford left her employment at HTL and went to work for the law firm Templeton, Smithee, Hayes, Fields, Young & Heinrich (Templeton). Templeton represented Westgate Petroleum and the other defendants in the previously mentioned lawsuit. Rubin and the other real estate agents in this case filed a writ of mandamus with trial court judge the Honorable Ron Enns to have the Templeton firm disqualified as counsel for Westgate et al. because Crawford had now switched firms.

Rubin argued that because Crawford had previously worked on the case for the HTL firm, the opposing counsel she now worked for should be disqualified from representing the opposing side in the lawsuit. The trial court judge denied the petitioners’ writ of mandamus. The petitioners appealed.

**ISSUE**

Should the writ of mandamus be approved disqualifying a law firm that represents one side of a lawsuit because a legal assistant who worked for the law firm that represented the other side of the lawsuit has now switched firms and works for the law firm sought to be disqualified?

**Boyd, Chief Justice**

In *Phoenix Founders, Inc. v. Marshall*, 887 S.W.2d 831, 835 (Tex. 1994), the court had occasion to discuss at some length circumstances such as the one before us in which a paralegal has changed employment from a law firm on one side of a case to a law firm on the other side of the case. In doing so, it recognized the countervailing interests involved and noted with approval the ABA suggestion that any restrictions on the nonlawyer’s employment should be held to the minimum standard necessary to protect confidentiality of client information. In the course of its discussion, the court held that a paralegal or legal assistant who changes employment and who has worked on a case is subject to a conclusive presumption that confidences and secrets were imparted. While the presumption that a legal assistant obtained confidential information is not rebuttable, the presumption that the information was shared with a new employer is rebuttable.

Such distinction was created to ensure that a nonlawyer’s mobility would not be unduly restricted.
However, the court emphasized that the only way the rebuttable presumption could be overcome would be (1) to instruct the legal assistant not to work on any matter on which the paralegal worked during the prior employment, or regarding which the paralegal had information relating to the former employer’s representation; and (2) “to take other reasonable steps to ensure that the paralegal does not work in connection with the matters on which the paralegal worked during the prior employment, absent client consent.”

The trial court also had before it copies of a May 17, 1999, memo from Joe Hayes, managing partner of the Templeton firm, addressed to all the lawyers and staff of the Templeton firm. In the memo, Hayes designated two cases (one of which underlies this proceeding) as those about which Crawford might possess confidential information. In the memo, the recipients were instructed that Texas Disciplinary Rules 1.05(b)(1) and 5.03(a) prohibited them, as Crawford’s supervising employers, “from revealing any confidential information she might have regarding the cases.” The memo also advised that to satisfy the requirements of the Disciplinary Rules, as well as those set forth by the supreme court in the In Re American Home Products Corporation case, the firm was implementing the following six policies and procedures, effective immediately:

1. Inda shall not perform any work or take any action in connection with the Westgate case or the Seger case [the second, unrelated, case].
2. Inda shall not discuss the Westgate case or the Seger case, or disclose any information she has concerning these cases, with anyone.
3. No lawyer or staff member shall discuss the Westgate case or the Seger case with Inda, or in her presence.
4. All computer information relating to the Westgate case and the Seger case shall be removed from the firm’s computer system. No future information concerning either the Westgate case or the Seger case shall be stored in any electronic medium but, rather, kept solely in hard copy form with the files in the respective case.
5. The files in the Westgate case and the Seger case shall be kept in locked files under my supervision. No one shall have access to those files other than me, and those to whom I have given specific authority to access these files. Inda shall not have access to these files or the area where the files are to be maintained. At the close of each business day, all documents relating to these cases shall be placed in their respective files, which shall be returned to their storage places, which shall then be locked.
6. Inda shall not be given access to any of the files pertaining to the Westgate case or the Seger case, or their contents. None of the documents pertaining to either of these cases shall be disclosed to Inda, discussed with her, or discussed in her presence.

Our review of the record before the trial court convinces us that we cannot say he abused his discretion in arriving at his decision to deny the motion to disqualify the Templeton law firm. Accordingly, relators’ petition seeking mandamus relief must be, and is, denied.

**DECISION AND REMEDY**

The court of appeals affirmed the trial court’s denial of the writ of mandamus, thus permitting Crawford to work for the second law firm, which had imposed sufficient safeguards to assure that confidential information obtained at the first law firm was not disclosed to the second law firm.

The court also may find that the lower court has made an error that can be corrected, by sending the case back to the lower court, and **remand** the case to the lower court, to take additional action or conduct further proceedings. For example, the lower court may be directed to hold further proceedings in which a jury hears testimony related to the issue of damages and makes an award of monetary damages.

An appellate court will reverse a lower court decision if it finds an **error of law** the record. An error of law occurs if the jury was improperly instructed by the trial court judge, prejudicial evidence was admitted at trial when it should have been excluded, prejudicial evidence was obtained through an unconstitutional search and seizure, and the like. An appellate court will not reverse a finding of fact unless such finding is unsupported by the evidence or is contradicted by the evidence.