Legal Ethics Concerns for Paralegals

By Gilda T. Russell[1]

I. Ethics Rules Applicable to Paralegals.

Paralegals, like lawyers, must comply with legal ethics rules. Paralegal associations have established their own ethics codes. The National Association of Legal Assistants, Inc. ("NALA") has promulgated the NALA Code of Ethics and Professional Responsibility ("NALA Code"), and the National Federation of Paralegal Associations ("NFPA") has established the NFPA Model Code of Ethics and Professional Responsibility and Guides for Enforcement ("NFPA Model Code"). The American Association for Paralegal Education has set forth "Core Competencies" ("AAFPE Core Competencies") which contains certain ethics requirements.

In addition, paralegals are required to comply with the ethics rules applicable to lawyers. In this regard, Canon 10 of the NALA Code states: "A paralegal's conduct is guided by bar associations' codes of professional responsibility and rules of professional conduct." As such, in addition to paralegal codes, paralegals are bound by their states' counterpart rules to the American Bar Association Model Rules of Professional Conduct ("ABA Model Rules") governing lawyers. While this article references the ABA Model Rules throughout, paralegals should consult the corresponding ethics rules in their own states to determine applicable requirements.

Discussed below are some important legal ethics rules with which paralegals should be familiar as a guide to their professional conduct. These are requirements of Competence, Diligence, and Professional Integrity, requirements of Client Confidentiality, rules concerning Conflicts of Interest, responsibilities of supervisory lawyers' regarding nonlawyer assistants, and prohibitions concerning the Unauthorized Practice of Law.

II. Requirements of Competence, Diligence, and Professional Integrity.

Under ABA Model Rule 1.1, "Competence," the representation of a client must be competent which means having sufficient knowledge and skill as well as preparing thoroughly for a client's representation. Similarly under the NALA Code, Canon 6, a paralegal is to strive to maintain a high degree of competency, obtained through education and training. And under the NFPA Model Code, Rule 1.1, a paralegal is required to maintain and achieve a high level of competence. *See also*

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NFPA Model Code, Ethical Consideration ("EC") 1.1(a), which provides that a paralegal should obtain competency through education, training, and work experience.

As a practical guide, in order to be competent, a paralegal should know and understand procedures relevant to the area of practice in which the paralegal is working, know how to obtain necessary factual information, develop and maintain legal research and analytical abilities, and make his or her lack of knowledge known to supervising attorneys when necessary,

ABA Model Rule 1.3, "Diligence," requires diligence and promptness in the representation of a client. Similarly, NFPA Model Code, EC 1.1(c) provides that a paralegal shall be prompt and efficient. A practical approach for paralegals in this area is to prioritize one's work, always respond to others' inquiries, keep track of scheduling and deadlines, and regularly communicate with supervising lawyers.

Paralegals, as well as lawyers, have ethics obligations to maintain professional integrity and honesty. Under ABA Model Rule 4.1 (a) and (b), "Truthfulness in Statements to Others," a lawyer shall not knowingly "make a false statement of material fact or law to a third person," and shall not "fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal act or fraudulent act by a client, unless disclosure is prohibited by [ABA Model] Rule 1.6 [regarding Client Confidentiality]." ABA Model Rule 3.3, "Candor Toward The Tribunal," requires in part that a lawyer shall not knowingly "make a false statement of fact or law to a tribunal or fail to correct a false statement of fact or law previously made by the lawyer to the tribunal." ABA Model Rule 3.3 (a) (1). (*See* ABA Model Rule 3.3 and its Commentary for full requirements in this area including remedial measures to be taken when false evidence has been offered to a court.)

Paralegal codes also have requirements concerning honesty and integrity. Under NALA Code, Canon 6, a "paralegal must strive to maintain integrity." (Note that under NALA Code, Canon 5, a paralegal also must disclose that he she is a paralegal "at the beginning of any professional relationship with a client, attorney, a court or administrative agency or personnel thereof, or a member of the general public.") And, under NFPA Model Code, EC 1.2, a paralegal must have a high degree of personal and professional integrity.

On a practical level, these rules require paralegals to be honest with clients, colleagues, and the public as well as with the courts when they are involved in litigation. And, maintaining professional integrity and moral judgment is essential to an effective career in the law. In the area of professional integrity, it is also important to note that, when paralegals participate in social media, they should not only follow employers' social media policies, but also make sure that their commentary conforms to common standards of integrity and professionalism.

III. Requirements of Client Confidentiality.

Paralegals should be aware that the principle of "client confidentiality" is a centerpiece of the legal profession and is found in two bodies of law: the ethics rules and the law of evidence. The requirements of client confidentiality apply in all areas of legal work whether paralegals are involved in civil, criminal, government agency, corporate, or other types of legal matters.

a. Ethics Protections of Client Confidentiality. With regard to ethics protections of client confidentiality, under ABA Model Rule 1.6(a), "Confidentiality of Information," information relating to the representation of a client *cannot be revealed* unless the client gives informed consent, or the disclosure is impliedly authorized to carry out the representation, or the disclosure is permitted by ABA Model Rule 1.6(b).

Under ABA Model Rule 1.6(b), paralegals should be aware that information relating to the representation *may* be revealed in certain limited circumstances. Among these circumstances are if the disclosure is reasonably necessary to prevent "reasonably certain death or substantial bodily harm," to prevent a client "from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services," and "to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which client used lawyer's services." ABA Model Rule 1.6 (b)(1) – (3).

Further under ABA Model Rule 1.6 (b), information relating to the representation *may* be revealed to secure advice regarding compliance with the ethics rules, in order to establish a claim or defense in a controversy with the client, to establish a defense to a criminal charge or civil claim based on conduct in which client was involved, or to respond to allegations in a proceeding concerning the representation. In addition, disclosure can take place to comply with law or a court order, or to identify and resolve conflicts of interest arising from change of employment or from changes in composition or ownership of a firm, but only if the revealed information would not harm the attorney-client privilege or prejudice the client. ABA Model Rule 1.6(b)(4) – (7).

Of course, disclosures of client confidential information without client consent should not occur unless authorized by supervising attorneys. And, under Comment 16 to ABA Model Rule 1.6, an adverse disclosure regarding a client should be no greater than that reasonably necessary to accomplish the purpose.

The paralegal codes also provide protections of client confidentiality. For example, under NALA Code, Canon 7, a paralegal must protect client confidences, and under NFPA Model Code, EC 1.5(a) – 1.5(f), a paralegal is to be aware of the law

regarding confidential information, may reveal confidential information only on full disclosure and client consent, or if required by court order, or "when necessary to prevent a client from committing an act that could result in death or serious bodily harm."

It should be emphasized that there is no uniformity among states' rules of professional conduct as to when client confidential information can or must be disclosed. Thus, paralegals must keep in mind that disclosure provisions are very jurisdiction specific and also may vary significantly from the ABA Model Rules.

Paralegals should additionally note that, under the NFPA Model Code, they must keep a supervising lawyer informed of confidential information that they have, and they cannot engage in indiscreet communications about a client. NFPA Model Code, EC 1.5(a) – 1.5(f).

b. Evidentiary Protections of Client Confidentiality -- Attorney-Client Privilege. As to the "evidentiary" protections of client confidentiality, the substantive law of evidence applies rather than legal ethics principles. Paralegals should have a basic understanding that the attorney-client privilege protects from disclosure *communications* between a client and lawyer if made for purpose of obtaining or rendering legal services.

The attorney-client privilege applies to paralegals as well as to lawyers, does not apply to communications regarding the commission of future crime, cannot be waived by a paralegal (or a lawyer) as the authority to waive belongs to the client, and applies to courtroom and related proceedings (e.g., discovery). The NALA Code, Canon 7, specifically provides that a paralegal cannot violate the law concerning privileged communications. (Note that the identity of a client is not protected by the attorney-client evidentiary privilege -- unless the identity of the client is included in a client communication – but, rather, is protected by client confidentiality under the ethics provisions.)

Inasmuch as the attorney-client privilege applies only to communications, the ethics protections of client confidentiality *are much broader* than those of the evidentiary privilege. This is because the ethics protections of client confidentiality apply to *any* information relating to the representation and not only to communications.

c. Inadvertent Disclosure of Confidential Information. Under ABA Model Rule 1.6(c), reasonable efforts are to be undertaken to prevent inadvertent disclosure of information relating to the representation. In addition, ABA Model Rule 4.4(b), "Respect for Rights of Third Persons," provides that a lawyer who receives a document the lawyer knows or should know was inadvertently sent must promptly notify the sender. Such obligations apply to paralegals as well.

However, paralegals should be aware that the ethics obligations concerning receipt of inadvertently disclosed material also vary depending on the jurisdiction. For example, under ABA ethics opinions, ABA Model Rule 4.4 (b) has been interpreted as requiring only prompt notification of the sender and not as prohibiting examining the material or requiring compliance with the instructions of the sending lawyer. *See* ABA Formal Opinion 05-437 (2005). (*See also* ABA Formal Opinion 06-440 (2006), reaffirming ABA Formal Opinion 05-437). However, some state ethics requirements in this area are much more stringent. In this regard, *see* D.C. Bar Ethics Opinion 256 (1995) (Receiving lawyer must return inadvertently sent documents to sender and cannot read or use material.)

This jurisdictional disparity also applies to the permissibility or disallowance of the "mining" of metadata in electronically transmitted documents. *See* ABA Formal Opinion 06-442 (2006) (ABA Model Rules do not prohibit lawyer from reviewing and using embedded information in electronic documents). *Compare* D.C Bar Ethics Opinion 341 (2007) (Lawyer cannot review metadata inadvertently sent); Florida Bar Ethics Opinion 06-2 (2006) (Lawyer should not try to obtain information from metadata that lawyer knows is not intended for lawyer and should notify sender of inadvertent receipt of information from metadata); New York State Bar Association Committee Ethics Opinion 749 (2001) (Lawyer may not use computer software technology to "surreptitiously 'get behind'" visible documents and trace e-mail.)

V. Rules Concerning Conflicts of Interest.

Under both lawyers' ethics rules and the paralegal codes, paralegals must avoid conflicts of interest. (*See* NFPA Model Code, EC 1.6). Consequently, paralegals have to have an understanding of conflicts and how they arise in practice in the taking on of new clients and matters, adding additional parties to matters, and the hiring of lawyers and staff. Further, under NFPA Model Code, EC 1.6, a paralegal must disclose any conflicts to the paralegal's employer or client. Discussed below are the various types of conflicts of interest with which paralegals should be familiar.

a. Concurrent Representation Conflicts. A Concurrent Representation Conflict of Interest is the standard type of conflict of interest. Under ABA Model Rule 1.7(a), "Conflict of Interest: Current Clients," "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be limited by the lawyer's responsibilities to another client, a former client or a third person, or by a personal interest of the lawyer."

Under ABA Model Rule 1.7(b) (1), a concurrent representation conflict of interest can be resolved if "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives consent confirmed in writing."

A concurrent representation conflict of interest, like a subsequent representation conflict of interest discussed below, is identified through a conflicts check. Hence, a paralegal should be aware of an employer's conflicts of interest database, how and by whom conflicts checks are run and conflicts reports are interpreted, and the processes for disclosing and resolving conflicts of interest, including form "conflict waiver" letters as well as appropriate formats for email conflict of interest waivers.

b. Subsequent Representation Conflicts. A Subsequent Representation Conflict of Interest arises in the representation of a client adverse to a former client. Under ABA Model Rule 1.9(a), "Duties to Former Clients," a lawyer shall not represent a client adverse to a former client in the same or a substantially related matter unless the former client gives informed written consent.

In this context, the important issues to resolve are is the adverse party a "former" and not a current client, and is the current matter "substantially related " to the prior representation of the client. (If it is determined that the client is not a former client, but, rather, is still a current client, then it does not matter if the adverse representation is unrelated to the client's representation. As noted above, an adverse representations to a current client even in an unrelated matter is prohibited unless the requirements of ABA Model Rule 1.7(b) (1) are met.)

Under ABA Model Rule 1.9(b), "a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client (1) whose interests are materially adverse to that person; and (2) about whom the lawyer had acquired information protected by Rule 1.6 and 1.9(c) that is material to the matter, unless the former client gives informed consent, confirmed in writing."

Under amended ABA Model Rule 1.10(a) (1)-(2), "Imputation of Conflicts of Interest," -- which Rule, as most recently amended, has not as of yet been adopted by a majority of the states -- when a lawyer moves from one firm to another and is disqualified from a matter under ABA Model Rule 1.9 (b), the firm can screen the lawyer from the matter so as not to disqualify the entire firm. (*See* screening requirements under ABA Model Rule 1.10(a)(2)(i) – (iii).) In states that do not allow screening of a personally disqualified lawyer to avoid disqualification of the entire firm, consent must be obtained from the disqualified lawyer's former client.

In this area, paralegals should be aware of their own obligations when they change employment. In most jurisdictions, a paralegal who, when previously employed elsewhere, worked on a matter adverse to interests of a client of the

paralegal's new firm can be screened from the matter in order to avoid imputed disqualification of the new firm. Thus, it is extremely important that paralegals fully disclose to prospective employers the matters on which they have previously worked. Such is essential in order for paralegals' new employers to make accurate conflicts assessments and to be able to effectively screen paralegals when necessary. Ethics screens or walls should provide in writing that information related to the screened matter will not be shared with the paralegal, the paralegal will not have access by computer or otherwise to documents relevant to the screened matter, and that there will be no discussion with the paralegal concerning the screened matter.

c. Joint Representation Conflicts. A Joint Representations Conflict of Interest arises in the representation of two or more clients in a matter. ABA Model Rule 1.7, discussed above under "Concurrent Representation Conflicts," also applies to joint representations. Specifically, ABA Model Rule 1.7(a)(2) provides in part that a concurrent conflict of interest occurs when, among other things, "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client." Such risk can arise in a joint representation.

A Joint Representation Conflict of Interest can be waived under ABA Model Rule 1.7 (b) if "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation" to the joint clients and each provides informed written consent. However, in securing the joint clients' consent, pursuant to the Comments to ABA Model Rule 1.7, they should be advised that the attorney-client privilege will not apply to the joint representation and that, as a result, if litigation develops between the formerly jointly represented clients, communications among them will not be protected from disclosure, and that the lawyer or firm cannot continue the joint representation should the interests of the jointly represented clients diverge. *See* ABA Model Rule 1.7, Comments 30 and 29.

VI. Supervisory Lawyers' Responsibilities Regarding Nonlawyer Assistants.

Paralegals should understand the ethics requirements that their supervisors have with regard to ensuring paralegals' compliance with the ethics rules. Under ABA Model Rule 5.3 (a), "Responsibilities Regarding Nonlawyer Assistant," a partner, and a lawyer with comparable managerial authority, "shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that [the nonlawyer's] conduct is compatible with the professional obligations of the lawyer."

In addition, under ABA Model Rule 5.3 (b), a lawyer having direct supervisory authority over a nonlawyer must "make reasonable efforts to ensure that the [nonlawyer's] conduct is compatible with the professional obligations of the lawyer." And, under ABA Model Rule 5.3 (c) (1) and (2), a lawyer is responsible for a nonlawyer's violation of the ethics rules if the lawyer orders or ratifies the

conduct, or is a partner or has comparable managerial authority, or supervisory authority, and knows of the conduct and can avoid or mitigate it, "but fails to take reasonable remedial action."

Thus, firms should undertake reasonable efforts to instruct paralegals as to their ethics obligations. Moreover, adequate supervision of paralegals as to their compliance with ethics rules and stepping in to remediate inappropriate conduct are imperative. However, paralegals should also keep abreast of and comply with the ethics rules, keep supervising lawyers up-to-date on the paralegals' work, work product, and actions, and affirmatively seek out supervising attorneys' opinions and approval on matters including those involving ethics concerns.

VII. Prohibitions Concerning the Unauthorized Practice of Law.

Paralegals should also be aware of the ethics prohibitions concerning the unauthorized practice of law. Under ABA Model Rule 5.5(a), "Unauthorized Practice of Law," a lawyer shall not practice law in violation of the rules regulating the legal profession in the jurisdiction "or assist another in doing so." Under the Comments to Model Rule 5.5, the prohibition applies whether a lawyer engages or assists another engaged in the unauthorized practice of law (Comment 1), a lawyer can employ paralegals as long as the lawyer supervises delegated work and retains responsibility for it (Comment 2), and the lawyer may provide professional advice and instructions to paralegals (Comment 3).

The ABA Guidelines for the Utilization of Paralegal Services also describe the tasks that a lawyer *should not* give to paralegals. Under Guideline 2, a lawyer can delegate to a paralegal any task normally performed by a lawyer *except* tasks proscribed by law or the Guidelines. Under Guideline 3, a lawyer *may not* delegate to a paralegal establishing the attorney-client relationship, establishing the amount of a fee, or the responsibility for a legal opinion. And under Guideline 4, a lawyer is responsible for taking reasonable measures to ensure that clients, courts, and other lawyers are aware that a paralegal is not licensed to practice law.

Under the NALA Code, Canon 3, a paralegal cannot engage in or contribute to the unauthorized practice of law. The NFPA Model Code, EC 1.8 and 1.8 (a) similarly provide that a paralegal cannot engage in the unauthorized practice of law and that a paralegal must comply with law governing the unauthorized practice of law in jurisdiction. The types of activities that generally constitute the practice of law can be categorized as giving legal advice, appearing in court on behalf of a party, or preparing legal documents.

Thus, as a practical matter, paralegals should pass on to supervising attorneys requests for legal advice in order to stay clear of unauthorized practice issues. In addition, supervising lawyers and paralegals should determine whether applicable state and federal law permit paralegals to appear in court in any limited

circumstances. Also, supervising lawyers should review and sign off on all drafts of legal documents prepared by paralegals.

VII. Conclusion.

It is hoped that this discussion has served as a primer for paralegals on a few significant ethics concerns. While there are many other ethics issues that can arise in paralegals' work, the specific areas discussed above – requirements of Competence, Diligence, and Professional Integrity, requirements of Client Confidentiality, rules concerning Conflicts of Interest, responsibilities of supervisory lawyers' regarding nonlawyer assistants, and prohibitions concerning the Unauthorized Practice of Law -- are very important to paralegals' successful and ethical legal careers.