Legal Ethics for Legal Assistants

By Lyle Griffin Woodruff

Attorneys everywhere, from trials lawyers in small firms to the folks representing corporate giants, have discovered the advantages of employing paralegals to assist in managing their workloads. Trained legal assistants provide a valuable and cost efficient service to firms and clients alike, and make their attorneys' lives much less stressful. With the additional delegation of responsibility to legal assistants, however, it is important to be cognizant of the ethical rules that apply to the practice of law and to consider to what extent activities of non-lawyers constitute the unauthorized practice of law. There are a variety of ethical and model rules that touch on these issues, and minimal case law interpreting those provisions.

For a complete understanding of the ethical rules applicable to paralegals, you may want to review the National Federation of Paralegal Associations, Inc.'s Model Code of Ethics and Professional Responsibility and Guidelines for Enforcement. Some of the Code is quoted or paraphrased here. However, for the complete text, see the Federation's website: www.paralegals.org/development/modelcode.html.

Qualifications of a Legal Assistant

A variety of professionals work under the title of "paralegal" or "legal assistant." The ethical rules under which they and their employers must operate remain the same regardless of the name designation; but certain qualifications are necessary to be officially recognized as a

paraprofessional in this field. The National Association of Legal Assistants adopted the following definition in 1984:

> Legal assistants, also known as paralegals, are a distinguishable group of persons who assist attorneys in the delivery of legal services. Through formal education, training, and experience, legal assistants have knowledge and expertise regarding the legal system and substantive and procedural law which qualify them to do work of a legal nature under the supervision of an attorney.

This definition emphasizes the knowledge and expertise necessary in both substantive and procedural law, which is generally obtained through education and work experience. Significantly, it also recognizes that the paralegal is a professional working under the supervision of an attorney, as opposed to a non-lawyer who delivers services directly to the public without any intervention or review of work product by an attorney. Employers should be careful not to label those who do not meet the criteria set forth in this definition, such as secretaries and other administrative staff, as legal assistants.

While paralegal training may be obtained in a variety of ways, a legal assistant should meet certain minimum qualifications. The following standards may be used to determine an individual's qualifications as a legal assistant:

l. Successful completion of the Certified Legal Assistant ("CLA") certifying examination of the National Association of Legal Assistants, Inc.;

2. Graduation from an ABA approved program of study for legal assistants;

3. Graduation from a course of study for legal assistants which is institutionally accredited but not ABA approved, and which requires not less than the equivalent of 60 semester hours of classroom study;

4. Graduation from a course of study for legal assistants, other than those set forth in (2) and (3) above, plus not less than six months of in-house training as a legal assistant;

5. A baccalaureate degree in any field, plus not less than six months in-house training as a legal assistant;

6. A minimum of three years of law-related experience under the supervision of an attorney, including at least six months of in-house training as a legal assistant; or

7. Two years of in-house training as a legal assistant.

The CLA examination, which was established by National Association of Legal Assistants ("NALA") in 1976, is a voluntary nationwide certification program for paralegals. The CLA designation is a statement to the legal profession and the public that the legal assistant has met the high levels of knowledge and professionalism required by NALA's certification program. Continuing education requirements, which all certified legal assistants must meet, further assure that certain standards are maintained. It should be noted that the CLA certification is above and beyond the type of certificate obtained from an accredited paralegal program. While the CLA designation has been recognized as a means of establishing the qualifications of a legal assistant in supreme court rules, state court and bar association standards, the reality in today's market is that few paralegals actually seek certification or are required to do so.

Whatever the method of study employed, these minimum qualifications recognize legal related work backgrounds and formal education backgrounds, both of which provide the legal assistant with a broad base in exposure to and knowledge of the legal profession. This background is necessary to assure the public and the legal profession that the employee identified as a legal assistant is qualified.

The professional qualifications for paralegals also make it appropriate for their employers to bill for their services. Whereas the services of a legal secretary are considered part of overhead costs and are not recoverable in fee awards, the courts have held that fees for paralegal services are recoverable as long as they do not include clerical functions, such as organizing files, copying documents, checking dockets, updating files, checking court dates and delivering papers. *See Missouri v. Jenkins*, 491 U.S.274, 109 S.Ct. 2463, 2471, n.10 (1989) (holding tasks performed by

legal assistants must be substantive in nature which, absent the legal assistant, the attorney would perform).

Authorized Activities

When considering whether a particular task is appropriately handled by a paralegal, cases addressing the issue of a disbarred attorney serving in the capacity of a legal assistant may be instructive. Additionally, there are guidelines relating to standards of performance and professional responsibility that are intended to aid legal assistants and attorneys. Of course, the ultimate responsibility to educate assistants with respect to the duties they are assigned and to supervise the manner in which such duties are accomplished rests with an attorney who employs legal assistants.

In general, a legal assistant is allowed to perform any task which is properly delegated and supervised by an attorney, as long as the attorney is ultimately responsible to the client and assumes complete professional responsibility for the work product.

National and state restrictions for the unauthorized practice of law obviously apply to the tasks assigned to legal assistants. In this regard, the ABA Model Rules of Professional Conduct, Rule 5.3 provides:

> With respect to a non-lawyer employed or retained by or associated with a lawyer:
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> (a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
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> (b) a lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
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> (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the rules of professional conduct if engaged in by a lawyer if:
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> (1) the lawyer orders or, with the knowledge of the specific conduct ratifies the conduct involved; or

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

In any discussion of the proper role of a legal assistant, attention must be directed to what constitutes the practice of law. However, the proper delegation to legal assistants is complicated and confused by the lack of an adequate definition of the practice of law. For example, the Georgia State Disciplinary Board, in considering to what extent paraprofessionals are permitted to deal with other lawyers, clients and the public, found that of utmost importance is the avoidance of the unauthorized practice of law. However, the definition of the practice of law in Georgia is very broad and includes furnishing "legal services," which, taken to its extreme would obviously encompass essentially all duties of a paralegal. O.C.G.A. § 15-19-51.

Clearly, where a non-lawyer is involved in the practice of law, that individual's status must be readily apparent. Thus, paralegals should disclose their status as legal assistants at the outset of any professional relationship with a client, other attorneys, and a court or administrative agency. Like attorneys, paralegals are to preserve the confidences and secrets of all clients. The NALA recommends that legal assistants understand the attorney's Rules of Professional Responsibility in order to avoid any action that would involve the attorney in a violation of the Rules, or give the appearance of professional impropriety. A similar position has been enunciated by the State Disciplinary Board of the Georgia Bar.

Perhaps to avoid the possibility of misleading clients or others concerning a paralegal's capacity, Georgia does not allow a legal assistant's name to be included on the firm letterhead. Because the paralegals in our office are an integral part of our team, and the firm felt they should be recognized as such, we have asked the State Bar to remove this impediment. Although we have been advised that there is no real justification for the rule, as far as I know, it remains intact. A

paralegal may, however, maintain business cards with his or her name along with the firm, provided the card contains the word "paralegal" to clearly convey that the assistant is not a lawyer. *See* Advisory Opinion No. 21. Additionally, correspondence from the paralegal issued on firm letterhead must indicate the paralegal status of the individual signing the letter.

The ultimate responsibility for compliance with approved standards of professional conduct rests with the supervising attorney. He or she must educate the assistant with respect to the duties which may be assigned and then to supervise the manner in which the legal assistant carries out such duties. However, this does not relieve the legal assistant from an independent obligation to refrain from illegal conduct. Notwithstanding the fact that the Rules are not binding upon non-lawyers, the very nature of a legal assistant's employment imposes an obligation not to engage in conduct that would involve the supervising attorney in conduct in violation of the Rules.

Essentially, legal assistants may perform services for an attorney in the representation of a client, provided the services performed by the legal assistant do not require the exercise of independent professional legal judgment; and the attorney maintains a direct relationship with the client and maintains control of all client matters. Because the paralegal's work is said to "merge" with that of the attorney, the work product of a legal assistant is subject to civil rules governing discovery of materials prepared in anticipation of litigation, whether the legal assistant is viewed as an extension of the attorney or as another representative of the party itself. Fed. R. Civ. P. 26 (b)(2); O.C.G.A. § 9-11-26(b)(2).

With all of these restrictions, what then can you do in your role as paralegal? With the caveat of proper control and supervision, the Georgia Bar recognizes the following activities as proper within the purview of a legal assistant:

1. "The interview of clients, witnesses and other persons with information pertinent to any cause being handled by the attorney."

In a trial practice and other practice areas where individual clients are represented, once an attorney-client relationship is established, the paralegal is frequently the individual in the firm who will maintain client and witness contact on a regular basis.

2. "Legal research and drafting of pleadings, briefs of law and other legal documents for the attorney's review, approval and use."

Paralegals are invaluable in the drafting of discovery documents, particularly client responses. However, although research is an officially authorized activity, it is my opinion that legal research should be handled by attorneys, or at least lawyers in training. In certain practice areas, such as real estate and wills and estates, paralegals and other support staff actually do the majority of the substantive work in preparing documents. Knowing what is permissible in any given scenario is somewhat of a judgment call. Again, if the attorney is ultimately responsible for reviewing the work and signing off on matters, the possibility for substantial paralegal involvement in the practice of law is extensive.

3. "Drafting and signing of routine correspondence with the clients of the attorney when such correspondence does not require the application of legal knowledge or the rendering of legal advice to the client."

This is part of the flow of communication between firm and client that most often rests with the legal assistant in charge of a file.

4. "Investigation of facts relating to the cause of a client of the attorney, including examination of land records and reporting of his findings to the attorney."

The paralegal's role involves a great deal of investigation, be it into the medical history of a client, the facts surrounding an event, or the individuals involved. In addition to reviewing title documents, in complex litigation matters, legal assistants often perform document reviews before an attorney will examine some portion of the materials produced.

5. "Scheduling of the attorney's activities in the law office and scheduling his appearance before courts, tribunals and administrative agencies."

Scheduling is a task that does not necessarily involve particular skill or training. Nevertheless, it is something that is often best left to a paralegal in the context of her role as case manager. The legal assistant generally has the best handle on the file, including the proposed schedule for the completion of discovery and preparation for trial. The best approach is to have regular conferences between attorneys and paralegals to assure that all deadlines are met and a game plan is carried out. Ultimately, the buck stops with the attorney of record and any adverse consequences will be dealt out at that level. However, in reality, the paralegal is often the one who is called upon to keep up with schedules and make note of deadlines; and when one is missed, we know where the blame will be focused.

6. "Billing of clients and general management of the law firm's office and non-legal staff."

This provision refers to necessary tasks within a law firm that will be conducted by a non-lawyer; but not necessarily a trained legal assistant. Generally, firms will employ personnel trained in accounting to handle billing, and may even have a designated office administrator for the overall management of the firm and its personnel.

7. "Routine contacts with opposing counsel on topics not effecting the merits of the cause of action at issue between the attorneys or requiring the use or application of legal knowledge."

Allowing legal assistants to have contact with opposing counsel simply makes sense. If lawyers alone were authorized to communicate concerning routine matters, no cases would ever move along. In our office, we frequently work with familiar opposing counsel who oftentimes prefer to deal with legal assistants, with whom they have developed a valuable rapport.

8. "Rendering of specialized advice to the clients of the attorney on scientific and technical topics, provided that such advice does not require the application of legal judgment or knowledge to the facts or opinions to be discussed with the client."

This final category requires some explanation. It is unclear what "scientific and technical topics" a paralegal would have specialized knowledge in. It is likely that this would be an unusual situation based on unique skills and training of the individual.

The NALA Model Standards contain a similar list of functions that a legal assistant may perform. These are contained in Guideline 5.

There are some restrictions that apply to a legal assistant, or any non-lawyer's status that are absolute. For example, a lawyer may not form a partnership with a non-lawyer if the partnership's activities involve the practice of law. DR 3-103. Nor may an attorney split legal fees with a legal assistant, or pay a legal assistant for the referral of legal business. (a non-lawyer may be included in a retirement plan even though the plan is based on a profit sharing arrangement). DR 3-102. An attorney may compensate a legal assistant based only on the quantity and quality of the legal assistant's work and value of that work to a law practice.

Maintaining Client Confidentiality

Every member of the legal team has a duty and obligation to maintain their client's confidentiality. The attorney-client privilege is owned by the client and must be strictly protected unless specifically waived by the client.

The principle of confidentiality is given effect in two related doctrines: the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. These provisions naturally include all members of the professional team.

The purpose of the attorney-client privilege is to encourage complete candor by the client. Since paralegals are often extensively involved in the gathering of information, they may be privy to even more "confidences" than the lawyer. Certainly, the paralegal should ensure the client that the privilege extends to him or her as well as the attorney, and should ensure that such confidences are kept. NSPA Rule 1.5 specifically states that: "a paralegal shall preserve all confidential information provided by the client or acquired from other sources before, during, and after the course of the professional relationship." As a general rule, the right to confidentiality will extend between the client and the firm, and it is generally accepted for confidences to be revealed among members of the firm, unless the client has instructed that certain information not be disseminated beyond a particular confidant.

As a keeper of confidences, it is important to know what is considered a "confidential" communication and what is not. Confidential information may be obtained in formal communications as well as information conversations with a client. It may be helpful to consider the following inquiries when determining to what extent information is privileged. First, is the information something that would be discoverable? Did you obtain the information directly from the client; or was it obtained from a third party? Was the information obtained in the context of developing a legal strategy? Is it information gleaned during settlement negotiations? Finally, and perhaps most importantly, is the information subject to a protective order?

When communicating with others involved in the client's situation or the litigation, including opposing counsel, experts and other witnesses, as well as insurance representatives, it is important to consider what information must be protected from disclosure. For example, it may be appropriate for you to communicate what an insurance representative for your client; however, if you have information that might affect the client's ability to get coverage, this must not be shared.

Because there is no way to identify a concrete list of protected versus non-protected information, it is best to live by the rule: When in doubt, don't disclose it. Of course, it goes without saying that private information about clients obtained in the course of working on the client's file should never be shared with friends or others outside of the office.

Conflicts of Interest

Loyalty is an essential element in a lawyer's relationship to a client. Part of that loyalty requires that no attorney may accept representation of a client that will conflict with the interests of another client. Avoiding conflicts of interest must be a chief goal of all members of the firm, including paralegals. NSPA Rule 1.6 speaks to the paralegal's duty in this regard. "A Paralegal shall avoid conflicts of interest and shall disclose any possible conflict to the employer or client, as well as to the prospective employers or clients." This includes the avoidance of conflicts that may arise from previous assignments, family relationships and from personal or business interests. It is recommended that in order to determine whether conflicts exist and thus to avoid them, a paralegal should keep a record of the clients, matters and parties involved in previous representation. Where a conflict has been identified, a paralegal should not be involved in any work on that matter. However, it is possible for the firm to represent a client where a conflict exists within the firm as long as and "ethical wall" is maintained - meaning any individuals with a conflict have no involvement in or are privy to information pertaining to the file.

Ex Parte Communication

An ex parte communication is one that occurs for or on the behalf of one side, or one party, only. Ex parte contact with an individual who is represented by counsel in the matter or with the Judge is generally prohibited. The reasons for this are to avoid any unfair advantage, or appearance of unfairness, to one side over the other. Rules and regulations addressing ex parte

contact apply directly to lawyers and judges; however, paralegals need to be aware of what is and is not appropriate so as to avoid violations as well - especially given their role as investigator and interviewer.

The State Bar Rules and Regulations, Rule 4-102(d) as well as the Georgia Code of Professional Responsibility, DR 7-104(A)(1), prohibit contact with another party known to be represented by counsel. The rules specifically contemplate the potential for contact by persons acting on behalf of the lawyer and proscribe unauthorized contact by non-lawyers as well. "During the course of his representation of a client a lawyer shall not communicate **or cause another to communicate** on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has prior consent of the lawyer representing such other part or is authorized by law to do so."

Ex parte contact with the court is prohibited from the perspective of the judiciary. Georgia Superior Court Rule 4.1 states: "Judges shall neither initiate nor consider ex parte communications by interested parties or their attorneys concerning a pending or impending proceeding." There are, however, administrative issues that may arise that require contact with the court where the other party is not directly involved. While paralegals are not likely going to be in a position where substantive concerns are addressed with the court, legal assistants are often called upon to deal with scheduling issues and the like, which are not likely going to be the subject of prohibited communication. Canon 3(b)(7) of the Code of Judicial conduct explicitly provides that "ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized" if the communication is reasonable believed to provide no unfair advantage and all parties are promptly notified.

Conclusion

Paralegals are an essential component of the legal team. In order to hold oneself out as an official "legal assistant," certain qualifications must be met with respect to training and experience. With that training, a good paralegal is likely to be sufficiently competent and experienced to perform many tasks necessary in the practice of law. Although competent, however, paralegals and attorneys alike must be careful to ensure that the assistant's activities, as well as that of the lawyers, fit within the ethical confines.