

# **A BASIC GUIDE FOR PARALEGALS AND OTHER PROFESSIONAL COLLEAGUES: ETHICS, CONFIDENTIALITY, AND PRIVILEGE**

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## A. INTRODUCTION

Lawyers' reliance upon and interaction with their non-lawyer colleagues implicate a number of important issues.

- These issues involve ethics (unauthorized practice of law, multijurisdictional practice and confidentiality), the attorney-client privilege, the work product doctrine, conflicts of interest, fee-sharing, litigation tactics, marketing and other issues.

Paralegals confront these issues more frequently than other non-lawyer colleagues.

- This is because paralegals' activities can come closer to the unauthorized practice of law line, and because they more frequently deal with the public (and thus risk mistakenly "holding themselves out" as lawyers).
- Paralegals also play a substantive role in legal issues, privileged communications, and work product material.

However, everyone who works with lawyers at least occasionally confronts some of these issues.

This outline focuses primarily on paralegals,<sup>1</sup> but the principles it discusses apply with equal force to every non-lawyer colleague who works with lawyers in a law firm, law department, governmental agency, or any other setting.

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<sup>1</sup> The American Bar Association has offered a definition of the term "paralegal," and a comment about the proper terminology. ABA Model Guidelines for Paralegals, Preamble n.1 ("In 1997, the ABA amended the definition of legal assistant by adopting the following language: 'A legal assistant or paralegal is a person qualified by education, training or work experience who is employed or retained by a lawyer, law office, corporation, governmental agency or other entity who performs specifically delegated substantive legal work for which a lawyer is responsible.' To comport with current usage in the profession, these guidelines use the term 'paralegal' rather than 'legal assistant,' however, lawyers should be aware that the terms legal assistant and paralegals are often used interchangeably.").

## B. ETHICS

### 1. Source of Lawyers' Ethics Guidance

#### a. General Rules

Lawyers practice under a license issued by their state government.

Most states organize, supervise and discipline lawyers with a mixture of involvement by the judicial, legislative and executive branches.

- Each state's supreme court generally plays the most active role in this process.
- State statutes often define the practice of law or provide other oversight.
- The executive branch sometimes handles discipline (especially in enforcing UPL rules).

States also take differing approaches to organizing their lawyers in bars.

- Some states have an "integrated bar," which all lawyers must join to practice law.
- Lawyers also organize themselves in voluntary bar associations.

Each state has adopted its own ethics rules governing lawyers.

- Most states follow a variation of the ABA Model Rules.
- California is currently the only state that does not follow the ABA Model Rules format.

Both the ABA Model Rules and state rules are continually changing, so it would be a mistake to assume that rules represent a static set of timeless principles.

- States also constantly revise their ethics rules. New York adopted an entirely new set of ethics rules on April 1, 2009, and Illinois dramatically revised its rules on January 1, 2010. California finally moved to the ABA Rules format (with substantive changes too) on November 1, 2018.

Another common misperception assumes that state ethics rules all follow essentially the same approach.<sup>2</sup>

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<sup>2</sup> A 2012 article highlighted the often dramatic differences between the ethics rules followed by neighboring and largely similar states.

Different Rules. In some instances, the respective RPCs are simply different. Oregon, for example, gives lawyers the discretion to reveal confidential information when necessary to prevent reasonably certain death or substantial bodily harm. Washington, by contrast, makes the duty to disclose mandatory in this circumstance. (footnote omitted).

Different Wording within the Same Rule. In other instances, the variations are more subtle but equally important. Both Oregon and Washington use versions of the "no contact" rule that are based largely on ABA Model Rule 4.2. Oregon's version, however, defines the prohibition as extending broadly to the entire "subject" involved, while Washington's version hews to the narrower focus on the particular "matter" found in the ABA Model Rule. (footnote omitted).

Different Meanings for the Same Words. In still other instances, the respective RPCs use the same words but they have different meanings. Oregon, for example, defines "information relating to the representation of a client" in its confidentiality rule using the former and comparatively narrower terminology for "confidences" and "secrets." Washington, by contrast, defines the term more broadly using comments patterned on the ABA Model Rule commentary. (footnote omitted).

Different Commentary on the Same Rule. Oregon does not have official comments to its RPCs but does have a very comprehensive set of state bar ethics opinions. Washington does have official comments (and ethics opinions). In some instances, commentary on the same rule creates differences (or at least potential differences) in application. Oregon, for example, has an ethics opinion that specifically approves the use of "advance" conflict waivers (as long as the risks are adequately explained). When the Washington Supreme Court adopted its current version of RPC 1.7, however, it deleted proposed Comment 22 on advance waivers that mirrored the corresponding ABA Model Rule comment and substituted "Reserved" in its place. (footnote omitted).

Different Interpretations of the Same Rule. In still other instances, court interpretations of the same rule differ. The Oregon Court of Appeals, for example, found (albeit under a relatively similar predecessor version to RPC 1.8(a)) that the modification of a fee agreement to add security for past due fees is not a business transaction with a client. The Washington Supreme Court, by contrast, concluded (again under a comparatively similar predecessor version to RPC 1.8(a)) that a modification of that kind of a business transaction with a client. (footnote omitted).

Different Impacts from External Court Rules. Apart from differences within the professional rules and the accompanying commentary, differences arise from the application of external court rules. Oregon, for example, has no expert discovery in state civil proceedings and, therefore, an ethics opinion concludes that a lawyer can directly contact an opposing expert (because no court rule prohibits it). Washington, by contrast, has expert discovery patterned on the corresponding federal procedural rules and, therefore, a Supreme Court decision finds that opposing experts may not be contacted directly (because contact is limited to depositions). (footnote omitted).

Different Impacts from External Law. Differences also arise from the application of both common law and statutory law. On the former, Oregon, for example, concludes that an insurance defense counsel has two clients for conflict purposes while Washington finds that an insurance defense counsel has only one client. On the latter, Oregon, for



- There are enormous differences among the states' ethics rules, especially in the area of confidentiality. For instance, some states require lawyers to disclose client confidences that other states prohibit lawyers from disclosing.
- State bars also issue legal ethics opinions that provide additional guidance.

### **b. American Bar Association**

The American Bar Association is a purely voluntary bar association.

The ABA's ethics rules carry persuasive force, although they are not mandatory in any state.

- In 1983, the ABA replaced its Model Code of Professional Responsibility with its Model Rules of Professional Conduct.
- The ABA changed many of its basic rules in 2002, adopted a small number of changes in 2012, and periodically tinkers with the Model Rules.
- The ABA also issues legal ethics opinions.

## **2. Source of Paralegals' Ethics Guidance**

### **a. Paralegal Licensing**

No state currently requires paralegals to be licensed.

- Wisconsin rejected a mandatory regulation plan on April 7, 2008, and New Jersey similarly rejected a license requirement in 1999.

In 2004, California enacted a law that defines the term "paralegal," describes the activities that paralegals can and cannot engage in, and sets educational qualifications for paralegals. Cal. [Bus. & Prof.] Code §§ 6450 et seq. (2004).

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example, concludes that there is no ethics violation for recording a telephone call (as long as one participant consents) because such recording is permitted by Oregon statutory law while the same conduct is proscribed by Washington statutory law. (footnote omitted).

Different Consequences. There are differences in potential consequences, too. Oregon, for example, concludes that its Unfair Trade Practices Act generally does not apply to the business aspects of law practice. Washington, by contrast, finds that its Consumer Protection Act applies to the business aspects of law practice. (footnote omitted).

Mark J. Fucile, "Model" Doesn't Mean "Uniform": The Continuing Importance of State Variation, 21 Prof. Law. 20, 20-21 (2012) [ABA].

In 2005, Florida adopted amendments to its supreme court rules, establishing a Florida Registered Paralegal Program.

- Under this voluntary program, Florida paralegals may refer to themselves as "Florida Registered Paralegals" if they voluntarily register with the state bar, satisfy "certain minimum educational, certification, or work experience criteria" and "agree to abide by an established code of ethics."
- To become an eligible Florida Registered Paralegal, paralegals must successfully complete the Paralegal Advanced Competency Exam offered by the National Federation of Paralegal Associations, complete the Certified Legal Assistant/Certified Paralegal examination offered by the National Association of Legal Assistants, or provide proof from a supervising lawyer that the paralegal had met the other work experience requirements for 5 out of the last 8 years.
- To maintain status as a Florida Registered Paralegal, paralegals must complete a minimum of 30 hours of CLE every 3 years, 5 hours of which must be in ethics or professionalism. Paralegals may attend courses approved by the Florida Bar, the National Association of Legal Assistants or the National Federation of Paralegal Associations.
- The Florida program also includes an elaborate process for punishing or suspending paralegals who fail to meet the requirements.

In 2011, the Florida legislature failed to pass proposed legislation that would have developed a licensing and continuing education process for paralegals.<sup>3</sup>

Other states have taken the same approach.

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<sup>3</sup> Julie Kay, [Florida Bills Push for Licensing, Definition of Paralegals](#), Daily Business Review, Mar. 25, 2011 ("Companion bills in the Florida Legislature would pave the way to make Florida the first state in the country to require licenses for paralegals. The bills require the Florida Supreme Court to develop a licensing and continuing education scheme and make it a felony for unlicensed people to identify themselves as paralegals. The bills, sponsored by state Senator Garrett Richter, R-Naples, and state Representative Richard Steinberg, D-Miami Beach, were filed March 9 and have been assigned to the judiciary committees. They were written by the Florida Alliance of Paralegal Associations, a consortium of paralegal organizations that first started talking to The Florida Bar about enacting some kind of mandatory licensing in 1996. The group wants to prevent legal secretaries and others from using the title of paralegal to market themselves and to formally define what a paralegal is. 'We're a group of professionals that want to protect the integrity of the profession and feel legislation is the way to do that,' said Mark Workman, a Miami-based Gunster paralegal who is past president of the Florida Alliance of Paralegal Associations and the South Florida Paralegal Association. 'There are people out there that say to the public that they have those professional designations they don't have, and they dupe the public. We feel if we have the legislation in place, we'll have a means to avoid that and assist in defining who can and can't be a paralegal.'").

- For instance, Texas, Ohio, and North Carolina have adopted voluntary certification programs.

Unlike mandatory licensing plans, this approach requires those wishing to call themselves "registered" (or "certified") paralegals to comply with certain minimum standards.

- This approach does not prohibit others from engaging in what amounts to paralegal activities, as long as they do not call themselves "registered" or "certified" paralegals.

## **b. Calls for Paralegal Licensing**

Given some states' steps toward licensing of non-lawyers to provide limited defined tasks after focused training and testing (discussed below), it should come as no surprise that some have renewed calls for paralegal licensing.

- Judy Stouffer, The Time Has Come for All Paralegals to Be Licensed, *The Legal Intelligencer*, May 15, 2014 ("You're either for or against paralegal regulation, kind of like the left or the right. I've never encountered any gray matter or 'in between' here, and stance can vary from paralegal to paralegal and attorney to attorney."); "While attending the National Federation of Paralegal Associations' (NFPA) (the first national professional association for paralegals founded 40 years ago) annual joint conference on regulation, certification and leadership in Boston recently, I learned of an intriguing new concept within the paralegal profession: Limited License Legal Technician, or 'Triple-L-T' (LLLT) since that's quite a mouthful. Now, a bit of history is in order. You may recall that an esteemed jurist from the New York Court of Appeals, Chief Judge Jonathan Lippman, raised a bit of a stir with his 2012 Law Day speech, announcing a minimum 50-hour pro bono service requirement for New York bar applicants seeking a license, the first state to do so. Lippman's 2014 State of the Judiciary speech admirably took that concept one step further 'to expand the role of non-lawyers in assisting unrepresented litigants . . . that . . . has taken hold elsewhere in the common-law world . . . to great positive effect.'"; "As for bar association recognition of the paralegal profession, state bar associations in Colorado, Connecticut, Illinois, Indiana, Kansas, Maryland, Massachusetts, Minnesota, Montana, Nevada, New Jersey, New Mexico, Oklahoma, Oregon, South Carolina, South Dakota, Utah and Vermont offer membership and/or section-only membership to paralegals. The Florida, North Carolina, Ohio and Texas (via special board) bars also offer voluntary paralegal certifications. In addition, the American Bar Association welcomes paralegal membership and, locally, the Philadelphia Bar Association not only welcomes paralegal membership, but has partnered with the local paralegal association since 2013 to offer a discount when joining both associations simultaneously."; "So, LLLT discussions are already under way in California, New York, Oregon, Vermont and Washington state, with the

Washington State Supreme Court leading the way by having already adopted a LLLT rule in 2012 and establishing a LLLT board to administer the program. Licensing may begin as early as next spring."; "NFPA paralegals have been and are leading movements across the country to have self-credentialed paralegals excused from LLLT requirements already completed, such as skipping certain classroom prerequisites and those fulfilled by NFPA's self-certification programs."; "Defining and licensing all paralegals, not just LLLTs, would resolve the murky waters. In Pennsylvania, even massage therapists are licensed. It isn't that far of a stretch to license paralegals. Someone has clearly missed all the fees and jobs outside paralegal regulation could generate, or maybe that's just another thing attorneys and firms fear."; "While there are some paralegals who use the profession as a stepping stone to law school, some of us are truly happy being 'just paralegals'; shocking, I'm sure. Mandatory licensing will not only assist with equal access to justice, but will also ensure the integrity of the profession by protecting against disbarred attorneys working as 'paralegals' and non-lawyers who are clearly engaging in the unauthorized practice of law. Clients who pay by the hour see both attorney and paralegal time on their bill and presume that paralegals are already held to a higher standard. In a perfect world, paralegal students too would have minimum pro bono requirements and all paralegals would be licensed.").

- Limited-Licensing For Paralegals, The Estrin Report, Mar. 13, 2013 ("Licensing paralegals has been talked about for years. And years. And years. It's been pushed back as long as I can remember. One objection is that paralegals do not practice law and therefore do not need licensing. They are supervised by attorneys and it is the attorney's license on the line. Another issue was there were no standard requirements to enter the field (i.e., anyone who wanted to could call themselves a paralegal) therefore, licensing would have no real meaning. In California, some years ago, a stab at licensing called for governance not by the State Bar but under the Consumer Protection Board that also licensed dog groomers, manicurists, and similar professions. The idea wasn't well received by the paralegal community. In a new twist, the Washington Supreme Court adopted the Limited License Legal Technician (LLLT) Rule, effective September 1, 2012. Legal technicians are not paralegals. They are document handlers who provide typing and form-filling services directly to the public for family matters, wills, adoptions, bankruptcy. This rule authorizes non-attorneys who meet certain educational requirements to advise clients on specific areas of law, which have yet to be determined. With the rule, the Supreme Court established the LLLT Board to administer the program. In late December 2012, the Supreme Court appointed the first LLLT Board, which includes several non-attorneys and a legal educator. The Board must establish an area of the law in which to license LLLTs and seek approval from the Supreme Court for that area of the law within one year. This includes regulations for professional conduct, exam procedures, continuing education requirements, and disciplinary procedures.").

### c. Applicability of Lawyers' Ethics Rules to Paralegals

Although paralegals are not governed by lawyers' ethics rules, they must become familiar with and follow those ethics rules.

- This compliance requirement stems from the supervising lawyer's ethical responsibilities.

The Florida Registered Paralegal Program mentions this issue.

- Rule Regulating the Florida Bar 20-7.1(c) ("A Florida Registered Paralegal should understand the attorney's Rules of Professional Conduct and this code in order to avoid any action that would involve the attorney in a violation of the rules or give the appearance of professional impropriety. It is the obligation of the Florida Registered Paralegal to avoid conduct that would cause the lawyer to be unethical or even appear to be unethical, and loyalty to the lawyer is incumbent upon the Florida Registered Paralegal.").

ABA Model Rule 5.3(a) requires that a law firm's partners in firm management "shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the [non-lawyer's] conduct is compatible with the professional obligations of the lawyer" (emphasis added).

ABA Model Rule 5.3(b) similarly requires that a lawyer "having direct supervisory authority over [a non-lawyer] make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer" (emphasis added).

The ABA's paralegal model guidelines parallel these duties.

- Am. Bar Ass'n Standing Comm. on Paralegals, ABA Model Guidelines for the Utilization of Paralegal Services (2012), Guideline 1 ("ABA Model Guidelines for Paralegals") ("A lawyer is responsible for all of the professional actions of a paralegal performing services at the lawyer's direction and should take reasonable measures to ensure that the paralegal's conduct is consistent with the lawyer's obligations under the rules of professional conduct of the jurisdiction in which the lawyer practices.").
- ABA Model Guidelines for Paralegals, cmt. to Guideline 1 ("[A] lawyer must give appropriate instruction to paralegals supervised by the lawyer about the rules governing the lawyer's professional conduct, and require paralegals to act in accordance with those rules. . . . Additionally, the lawyer must directly supervise paralegals employed by the lawyer to ensure that, in every circumstance, the paralegal is acting in a manner consistent with the lawyer's ethical and professional obligations.").

#### **d. American Bar Association**

The ABA has issued suggested ethics guidelines for paralegals.

- Am. Bar Ass'n Standing Committee on Paralegals, ABA Model Guidelines for the Utilization of Paralegal Services (2012 revised in 2018) ("ABA Model Guidelines for Paralegals").

#### **e. Voluntary Paralegal Organizations**

In addition to statewide organizations, paralegals may also look to ethics guidelines issued by several national voluntary associations.

- National Association of Legal Assistants, Model Standards and Guidelines for Utilization of Paralegals (updated 12/2018) ("NALA Model Standards").
- National Federation of Paralegal Associations, Model Code of Ethics and Prof'l Responsibility and Guidelines for Enforcement (1997) ("NFPA Model Code").
- American Alliance of Paralegals, Inc., Code of Ethics ("AAPI Code").

## C. UNAUTHORIZED PRACTICE OF LAW: GENERAL RULES AND NEW TRENDS

Perhaps the most important ethics/legal issue confronting paralegals and lawyers working with them involves the unauthorized practice of law ("UPL").

### 1. UPL -- Defining the "Practice of Law"

Defining the "practice of law" can be remarkably difficult.

States define the "practice of law," but in a surprising variety of ways.

States' and courts' approach to this issue represent a broad spectrum.

Some courts permit such activity without much comment.

- In re Perrone, 899 A.2d 1108 (Pa. 2006) (allowing reinstatement of a disbarred lawyer who had performed paralegal work from home).
- Haye v. Ashcroft, Civ. A. No. 3:01 CV 414 (CFD), 2004 U.S. Dist. LEXIS 17288 (D. Conn. Aug. 27, 2004) (finding that a lawyer had not violated Rule 5.5 by hiring a disbarred lawyer as a paralegal, because the lawyer had properly supervised the disbarred lawyer).
- Am. Bar Ass'n Standing Comm. on Client Protection, 2015 Survey of Unlicensed Practice of Law Committees, at 1 (September 2015) ("The majority of responding jurisdictions have definitions for both the 'practice of law' and the 'unauthorized practice of law.' 'Practice of law' definitions are established by court rule in fifteen jurisdictions, by statute in sixteen, through case law in twenty-one, and through advisory opinions in three jurisdictions. Many jurisdictions have definitions in more than one resource, such as Pennsylvania, which has practice definitions in case law and advisory opinion. 'Unauthorized practice of law' definitions usually are found either in statutes (fourteen jurisdictions), through a court rule (thirteen jurisdictions) or some combination of statute, rule, case law and advisory opinion.").

The Restatement acknowledges the great difficulty in defining the "practice of law" in the real world.

- Restatement (Third) of Law Governing Lawyers § 4 reporter's note cmt. c (2000) ("Courts have occasionally attempted to define unauthorized practice by general formulations, none of which seems adequately to describe the line between permissible and impermissible non-lawyer services, such as a definition based on application of difficult areas of the law to specific situations. . . . Many courts refuse to propound comprehensive definitions, preferring to deal with situations on their individual facts.").

Courts have also acknowledged this difficulty.

- In re Dissolving Comm'n on Unauthorized Practice of Law, 242 P.3d 1282, 1283 (Mont. 2010) (dissolving the bar's Commission on the unauthorized practice of law, and explaining that the Attorney General will now handle any UPL matters; "[W]e conclude that the array of persons and institutions that provide legal or legally-related services to members of the public are, literally, too numerous to list. To name but a very few, by way of example, these include bankers, realtors, vehicle sales and finance persons, mortgage companies, stock brokers, financial planners, insurance agents, health care providers, and accountants. Within the broad definition of § 37-61-201, MCA, it may be that some of these professions and businesses 'practice law' in one fashion or another in, for example, filling out legal forms, giving advice about 'what this or that means' in a form of contract, in estate and retirement planning, in obtaining informed consent, in buying and selling property, and in giving tax advice. Federal and state administrative agencies regulate many of these professions and businesses via rules and regulations; federal and state consumer protection laws and other statutory schemes may be implicated in the activities of these professions and fields; and individuals and non-human entities may be liable in actions in law and in equity for their conduct. Furthermore, what constitutes the practice of law, not to mention what practice is authorized and what is unauthorized is, by no means, clearly defined. Finally, we are also mindful of the movement towards nationalization and globalization of the practice of law, and with the action taken by federal authorities against state attempts to localize, monopolize, regulate, or restrict the interstate and international provision of legal services." (emphasis added)).
- State ex rel. Ind. State Bar Ass'n v. United Fin. Sys. Corp., 926 N.E.2d 8, 14 (Ind. 2010) ("Although it is the province of this Court to determine what acts constitute the practice of law, we have not attempted to provide a comprehensive definition because of the infinite variety of fact situations. . . . Nor do we attempt to do so today." (emphasis added)).
- Sudzus v. Dep't of Emp't Sec., 914 N.E.2d 208, 215 (Ill. App. Ct. 2009) (holding that a non-lawyer's role for his employer in an unemployment compensation hearing did not amount to the unauthorized practice of law; "Running through both contentions is an awareness that it is often difficult, if not impossible, to lay down a formula or definition of what constitutes the practice of law. . . . Hence, definition of the term 'practice of law' defies mechanistic formulation."), appeal denied, 920 N.E.2d 1082 (Ill. 2009) (unpublished opinion).
- Pennsylvania LEO 90-02 (3/2/90) (explaining that "[w]hat activity constitutes the 'practice of law' in Pennsylvania is, as in most states, undefined").

In 2002, an ABA Task Force articulated a possible definition.



- ABA Ctr. for Prof'l Responsibility, Task Force on Model Definition of the Practice of Law (Draft, Sept. 18, 2002) ("The 'practice of law' is the application of legal principles and judgment with regard to the circumstances or objectives of a person that require the knowledge and skill of a person trained in the law. . . . A person is presumed to be practicing law when engaging in any of the following conduct on behalf of another: (1) Giving advice or counsel to persons as to their legal rights or responsibilities or to those of others; (2) Selecting, drafting, or completing legal documents or agreements that affect the legal rights of a person; (3) Representing a person before an adjudicative body, including, but not limited to, preparing or filing documents or conducting discovery; or (4) Negotiating legal rights or responsibilities on behalf of a person.").

Remarkably, the ABA could not agree on the definition of what its members do, and abandoned its task on March 28, 2003.

The ABA Model Rules now contain a fairly sheepish comment.

- ABA Model Rule 5.5 cmt. [2] ("The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons.").

Although bars and courts differ in their definition of the "practice of law," many decisions articulate the core activities that meet the definition.

- Ohio UPL Advisory Op. 11-01 (10/7/11) ("The court has defined the unauthorized practice of law as 'the rendering of legal services for another by any person not admitted [or otherwise registered or certified] to practice [law] in Ohio.' Gov. Bar R. VII(2)(A). Although 'rendering of legal services' is not defined by statute or rule in Ohio, it has been addressed in a body of Supreme Court decisions dating back to the 1930's. In the seminal Dworken case, the court held, 'the practice of law is not limited to the conduct of cases in court. It embraces the preparation of pleadings and other papers incident to actions and special proceedings and the management of such actions and proceedings on behalf of clients before judges and courts, and in addition conveyancing, the preparation of legal instruments of all kinds, and in general all advice to clients and all action taken for them in matters connected with the law.' Land Title Abstract & Trust Co. v. Dworken (1934), 129 Ohio St. 23, 28, 1 O.O. 313, 193 N.E. 650, 652, quoting People v. Alfani (1919), 125 N.E. 671.").
- In re Wolf, 21 So. 3d 15, 17 (Fla. 2009) ("We think that in determining whether the giving of advice and counsel and the performance of services in legal matters for compensation constitute the practice of law it is safe to follow the rule that if the giving of such advice and performance of such services affect important rights of a person under the law, and if the reasonable protection of the rights and property

of those advised and served requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advice and the performance of such services by one for another as a course of conduct constitute the practice of law." (citation omitted)).

- In re Wiles, 210 P.3d 613, 617, 618 (Kan. 2009) (disbarring a lawyer for engaging in the unauthorized practice of law after his license was suspended; "The focus of the hearing panel's conclusions regarding McKinney's complaint was Wiles' use of professional letterhead that portrayed him as an 'Attorney At Law' who was 'Licensed in Missouri and Kansas' after his Missouri law license had been suspended. . . . [i]n finding that Wiles violated KRPC 5.5(a) by engaging in the unauthorized practice of law."; also concluding that the lawyer had actually engaged in the unauthorized practice of law; explaining that "[a] general definition of the 'practice of law' has been quoted with approval as follows: 'As the term is generally understood, the 'practice' of law is the doing or performing of services in a court of justice, in any matter depending therein, throughout its various stages, and in conformity to the adopted rules of procedure. But in a larger sense it includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured, although such matter may or may not be depending in a court.' State ex rel. Boynton v. Perkins, 138 Kan. 899, 907-08, 28 P.2d 765 (1934) (quoting Eley v. Miller, 7 Ind. App. 529, 34 N.E. 836 [1893])." (emphasis added)).
- In re Garas, 881 N.Y.S.2d 744, 746, 745, 746, 747 (N.Y. App. Div. 2009) (explaining that "the provision of closing services such as the preparation of deeds constitutes the practice of law" (emphasis added); "Respondent formed Resale Closing Services, LLC (RCS), for the purpose of bidding on a contract with the United States Department of Housing and Urban Development (HUD) for the provision of closing agent services on the sale of previously foreclosed properties. The HUD contract required the designation as 'key personnel' of an admitted attorney. RCS consisted of two members: respondent and a non-lawyer. The non-lawyer member owned a majority share of the corporation, and the two members shared in profits and losses according to their membership interests. The non-lawyer was paid an annual salary as general manager of RCS, and respondent received an annual fee for his services as general counsel. HUD accepted the bid of RCS, and the non-lawyer member established an office in Buffalo. The services provided by non-lawyer employees of RCS included the preparation of deeds. Although respondent reviewed the prepared deeds and title searches, he had no involvement in the day-to-day operations of RCS, and he exercised no supervisory authority over the non-lawyer member, who administered the services provided under the HUD contract. In addition, respondent and the non-lawyer member opened a noninterest-bearing trust account as joint signatories, through which the proceeds of each sale were disbursed. Non-lawyer employees of RCS attended closings for which RCS

provided services."; "While the applicable statutes make it clear that the provision of closing services such as the preparation of deeds constitutes the practice of law, an exception has been recognized for a single transaction that occurred incident to otherwise authorized business and did not involve the rendering of legal advice" (emphasis added); "[w]e find that the services provided by RCS and GLF pursuant to the HUD contracts constituted the practice of law"; "We thus find that respondent has committed professional misconduct by forming a corporation with a non-lawyer for the provision of those services, failing to exercise oversight of its activities or employees and failing to safeguard sale proceeds in an adequate manner.").

- Illinois LEO 94-5 (7/1994) ("The threshold issue presented is whether the representation of a party to an arbitration proceeding is the practice of law. In general, the courts have held that a person practices law when the person applies the law to the facts of a particular case. Rotunda, Professional Responsibility 123 (3d ed. 1992). The Illinois position is consistent with the general rule. The Supreme Court has held that the practice of law involves more than the representation of parties in litigation and includes the giving of advice or the rendering of any services requiring the use of legal skill or knowledge. People v. Schafer, 404 Ill. 45, 87 N.E.2d 773, 776 (1949). In a case directly relevant to the present inquiry, the Supreme Court held that the representation of parties in contested workers' compensation matters before an arbitrator of the Illinois Industrial Commission constituted the practice of law. People v. Goodman, 366 Ill. 346, 8 N.E. 2d 941, [sic] (1937). The respondent in Goodman had argued that he was not practicing law because he was representing parties before an administrative agency rather than a court. The Supreme Court responded that the 'character of the act done, and not the place where it is committed' is the decisive factor. 8 N.E.2d at 947. In view of these authorities, the Committee concludes that the representation of a party in a contested arbitration proceeding would be considered the practice of law." (emphasis added)).
- Illinois LEO 93-15 (3/1994) ("The practice of law has been defined generally as giving of advice or rendering any sort of service by any person, firm or corporation when the giving of advice or rendering of such service requires the use of any degree of legal knowledge or skill. It has been defined as appearing in court or before tribunals representing one of the parties, counseling, advising such parties and preparing evidence, documents and pleadings to be presented. It has been defined as preparing documents the legal effect of which must be carefully determined according to law. It has been defined as referral to attorneys for service; advising or filling out of forms; negotiations with third parties and, in short, engaging in any activities which require the skill, knowledge, training and responsibility of an attorney." (emphases added)).

## 2. States' Enforcement of UPL Rules

Although states have had great difficulty in defining the "practice of law," they enforce unauthorized practice of law provisions.

A 2000 law review article explained the historic context of such efforts.

- John S. Dzienkowski & Robert J. Peroni, Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century, 69 Fordham L. Rev. 83, 90-91 (Oct. 2000) ("Until the 1930s, the state bars rarely invoked unauthorized-practice-of-law claims against non-lawyers. The economic pressure of the post-Depression society led state bars to form unauthorized-practice-of-law committees and to enforce the unauthorized-practice laws against non-lawyers.") (footnotes omitted).

A 2015 ABA survey described states' UPL enforcement efforts as of that time.

- Am. Bar Ass'n Standing Comm. on Client Protection, 2015 Survey of Unlicensed Practice of Law Committees, at 1-2 (September 2015) ("Enforcement authority against UPL is established by court rule in nineteen jurisdictions, by statute in twenty-eight. Most responding jurisdictions report enforcement authority by both statute and court rule. In most jurisdictions there are two or more authorities authorized to enforce UPL regulations, including states attorneys general, state bar committees/counsel, state supreme court committees/commissions, and local and county attorneys. UPL enforcement in the majority of the responding jurisdictions is funded through bar association dues or lawyer assessments or the state supreme court. Most jurisdictions either do not have a specific annual expenditure for UPL enforcement or were unaware of the exact amount. The Florida Bar continues to lead the country in funding UPL enforcement, spending approximately \$1.8 million annually. Other jurisdictions providing a significant budget for enforcement are Ohio, Colorado, Nebraska, and Texas.").

Not surprisingly, states' approaches to this issue continue to evolve.

- For instance, in April 2010 the Montana Supreme Court disbanded its commission on unauthorized practice, and handed over that duty to the Montana State Attorney General's Consumer Protection Office. In re Dissolving Comm'n on Unauthorized Practice of Law, 242 P.3d 1282 (Mont. 2010).

Those states which continue to enforce unauthorized practice of law restrictions can rely on a variety of remedies for non-lawyer's improper actions.

The 2015 ABA survey reported on numerous remedies relied upon by the jurisdictions that responded to the ABA.

- Am. Bar Ass'n Standing Comm. on Client Protection, 2015 Survey of Unlicensed Practice of Law Committees, at 2 (September 2015) ("The penalties/sanctions for UPL violations that are available to enforcement authorities include (by number of responding jurisdictions): civil injunctions (35), criminal fines (23), prison sentence (21), civil contempt (20), restitution (15), and civil fines (15). Other remedies may be available. Most jurisdictions have several available remedies.").

Non-lawyers who violate unauthorized practice of law statutes can face surprisingly severe punishment.

- Andrew Keshner, Lawyer's Son is Sentenced for Posing as Attorney, N.Y. L.J., July 23, 2013 ("A prominent criminal defense attorney's son who posed as a lawyer was sentenced Monday in Manhattan Supreme Court. Terence Kindlon Jr., 43, was given a 1 1/2-to-three-year term after pleading guilty in May to two Class E felonies: offering a false instrument for filing in the first degree and third-degree attempted grand larceny. Kindlon's father is Terence L. Kindlon of Kindlon Shanks & Associates in Albany. Kindlon Jr. passed the bar exam last year but was not admitted.").

Several states have increased the level of punishment for such violations.

- Thomas B. Scheffey, Turning Unauthorized Practice Into A Felony, Conn. L. Tribune, May 31, 2013 ("A bill signed by the governor will make unauthorized practice of law a felony. It becomes effective October 1, and carries a criminal penalty of up to five years in prison. Previously, unauthorized practice was a misdemeanor with a \$250 fine."; the new law distinguishes between unauthorized practice by non-lawyers and by lawyers from other states; "Any person who violates any provision of this section shall be guilty of a class D felony, except that in any prosecution under this section, if the defendant proves by a preponderance of the evidence that the defendant committed the proscribed act or acts while admitted to practice law before the highest court of original jurisdiction in any state, the District of Columbia, the Commonwealth of Puerto Rico or a territory of the United States or in a district court of the United States and while a member in good standing of such bar, such defendant shall be guilty of a class C misdemeanor.").
- Joel Stashenko, Unlicensed Practice of Law Boosted To Felony, N.Y. L. J., Dec. 13, 2012 ("The unlicensed practice of law will become a felony in New York under a bill Governor Andrew Cuomo signed into law yesterday. The measure, A5700/S1998, was developed in part with language proposed by the New York State Bar Association earlier this year. The bill will take effect November 1, 2013."; "Currently, the unlicensed practice of law is a misdemeanor. The bill will make it a Class E felony if offenders fraudulently hold themselves out as lawyers and their activities result in the monetary loss of \$1,000 or more to victims. The current sentence of up to one year in jail will increase to up to four years in prison

under the new statute."; "'Unscrupulous individuals pretending to be lawyers often prey on immigrants and the poor,' state bar President Seymour James Jr. said in a statement. 'The consequences of their bad advice can be life altering for their victims, resulting in jail time, loss of child custody, deportation and financial hardship.'"; "Advocates of the bill said it will bring penalties for practicing law without a license in line with sanctions for the fraudulent practices of other professions in New York where a license is also required, including physicians, dentists, veterinarians, pharmacists, nurses, certified public accountants and architects. Assemblyman Edward Braunstein, D-Bayside, and Senator Charles Fuschillo Jr., R-Merrick, sponsored the bill.").

### 3. Traditional Statutory-Regulatory Exceptions

Although the law generally prohibits anyone but licensed lawyers for practicing law, numerous statutory and regulatory exceptions permit non-lawyers to engage in what undoubtedly is the practice of law.

The 2015 American Bar Association Standing Committee on Client Protection described various state regulations permitting certain non-lawyers to engage in the practice of law in particular situations.

- Am. Bar Ass'n Standing Comm. on Client Protection, 2015 Survey of Unlicensed Practice of Law Committees, at 2 (September 2015) ("Twenty-one jurisdictions authorize nonlawyers to perform some legal services in limited areas, generally under the supervision of a lawyer. Washington adopted the Limited Legal License Technician Rule in 2012 which allows properly licensed nonlawyer legal professionals to provide limited representation in family law matters. Of those responding to the 2015 questionnaire, six jurisdictions are contemplating the limits on nonlawyer service providers. Other allowable nonlawyer activities include: real estate agents/brokers may draft documents for property transactions or attend real estate closings; nonlawyers may attend (and in some states participate in) administrative proceedings; and participate in alternative dispute resolution proceedings. Many of these jurisdictions do not classify these activities as the practice of law.").

The Restatement also describes some of the exceptions.

- Restatement (Third) of Law Governing Lawyers § 4 cmt. c (2000) ("Certain activities, such as the representation of another person in litigation, are generally proscribed. Even in that area, many jurisdictions recognize exceptions for such matters as small-claims and land-lord-tenant tribunals and certain proceedings in administrative agencies. Moreover, many jurisdictions have authorized law students and others not admitted in the state to represent indigent persons or others as part of clinical legal-education programs.").

A 2011 Ohio legal ethics opinion provided other examples.

- Ohio UPL Advisory Op. 11-01 (10/7/11) ("In the federal arena, there are also several examples of permitted nonattorney assistance and representation. See 8 C.F.R. 292.1 (immigration representatives); Section 110, Title 11, U.S. Code (bankruptcy-petition preparers); 37 C.F.R. 1.31 and 11.5-11.9 (patent practitioners); and Section 406, Title 42, U.S. Code (Social Security hearing representatives). When federal law authorizes nonattorney practice, the Supremacy Clause requires state regulation of the unauthorized practice of law to 'yield' to federal provisions. Clause 2, Article VI, United States Constitution; Sperry v. State ex rel. Florida Bar (1963), 373 U.S. 379, 83 S. Ct. 1322, 10 L. Ed. 2d 428 (Florida could not enjoin conduct of nonattorney authorized to practice before the United States Patent Office).").

A 2000 law review article put some of these regulatory exceptions in historical context.

- John S. Dzienkowski & Robert J. Peroni, Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century, 69 Fordham L. Rev. 83, 95 (Oct. 2000) ("Some of these examples are explained by historic industry practices, and others are explained by the market power of the other professions involved in the service. For example, non-lawyers at banks are permitted to draft routine mortgages and non-lawyers are permitted to execute these legal documents with bank clients without running afoul of the unauthorized-practice-of-law prohibitions. Bank employees are also permitted to execute the joint tenancy with right of survivorship agreements on standard bank accounts. The theory underlying these practices is that the transactions are relatively common and straightforward for the client to understand, and society is unwilling to force consumers to incur legal fees for making these types of uncomplicated legal decisions. Many of these documents are also non-negotiable, form agreements and could not be modified by the client even if represented by an independent lawyer. The real estate industry in most states has been given the power to execute contracts on residential property in which the agent holds a commission." (footnotes omitted).

Some of these statutory/regulatory exceptions allow paralegals to engage in what would otherwise be the practice of law -- without violating any unauthorized practice of law statutes.

#### **4. Trend Toward Licensing or Otherwise Regulating Other Professionals**

Ironically, while states have rejected moves toward licensing paralegals, some states have recognized entirely new professions.

- These new varieties of professionals can play a limited role in legal proceedings and elsewhere without acting under a lawyer's supervision.

Washington state took such a step in 2012.

- Order No. 25700-A-1005, at 4-5, 5-6, 8, In re Adoption of New APR 28 -- Ltd. Practice Rule for Ltd. License Legal Technicians, (Wash. June 14, 2012), [http://sbmblog.typepad.com/files/wsc\\_limitedlicense.pdf](http://sbmblog.typepad.com/files/wsc_limitedlicense.pdf) (approving a new court rule allowing trained licensed legal technicians to provide certain limited and defined assistance to civil litigants, without being licensed lawyers; "Recognizing the difficulties that a ballooning population of unrepresented litigants has created, court managers, legal aid programs and others have embraced a range of strategies to provide greater levels of assistance to these unrepresented litigants. Innovations include the establishment of courthouse facilitators in most counties, establishment of courthouse-based self-help resource centers in some counties, establishment of neighborhood legal clinics and other volunteer-based advice and consultation programs, and the creation of a statewide legal aid self-help website."; "From the perspective of pro se litigants, the gap places many of these litigants at a substantial legal disadvantage and, for increasing numbers, forces them to seek help from unregulated, untrained, unsupervised 'practitioners.' We have a duty to ensure that the public can access affordable legal and law related services, and that they are not left to fall prey to the perils of the unregulated market place."; "Stand-alone limited license legal technicians are just what they are described to be -- persons who have been trained and authorized to provide technical help (selecting and completing forms, informing clients of applicable procedures and timelines, reviewing and explaining pleadings, identifying additional documents that may be needed, etc.) to clients with fairly simple legal law matters. Under the rule we adopt today, limited license legal technicians would not be able to represent clients in court or contact and negotiate with opposing parties on a client's behalf. For these reasons, the limited licensing of legal technicians is unlikely to have any appreciable impact on attorney practice."; "The Practice of Law Board and other proponents argue that the limited licensing of legal technicians will provide a substantially more affordable product than that which is available from attorneys, and that this will make legal help more accessible to the public. Opponents argue that it will be economically impossible for limited license legal technicians to deliver services at less cost than attorneys and thus, there is no market advantage to be achieved by creating this form of limited practitioner."; attaching new Rule APR, as adopted, which defines the requirements of being such a licensed legal technician and explains that: "the LLLT may undertake the following: 1) Obtain relevant facts, and explain the relevancy of such information to the client; 2) Inform the client of applicable procedures, including deadlines, documents which must be filed, and the anticipated course of the legal proceeding; 3) Inform the client of applicable procedures for proper service of process and filing of legal documents; 4) Provide the client with self-help materials prepared by a Washington lawyer or approved by the Board, which contain information about relevant legal requirements, case law basis for the client's claim, and venue and jurisdiction requirements; 5) Review documents or exhibits that the client has received from the opposing side, and explain them to the client; 6) Select and complete forms that have been approved by the State of Washington, either through a governmental agency or by the



Administrative Office of the Courts or the content of which is specified by statute; federal forms; forms prepared by a Washington lawyer; or forms approved by the Board; and advise the client of the significance of the selected forms to the client's case; 7) Perform legal research and draft legal letters and pleadings documents beyond what is permitted in the previous paragraph, if the work is reviewed and approved by a Washington lawyer; 8) Advise a client as to the other documents that may be necessary to the client's case (such as exhibits, witness declarations, or party declarations), and explain how such additional documents or pleadings may affect the client's case; 9) Assist the client in obtaining necessary documents, such as birth, death, or marriage certificates." [Att. to Order at 4-5]; Rule, as adopted, also explains that a licensed legal technician may not undertake certain activities, including the following: "5) Represent a client in court proceedings, formal administrative adjudicative proceedings, or other formal dispute resolution process, unless permitted by GR 24; 6) Negotiate the client's legal rights or responsibilities, or communicate with another person the client's position or convey to the client the position of another party; unless permitted by GR 24(b);] 7) Provide services to a client in connection with a legal matter in another state, unless permitted by the laws of that state to perform such services for the client [;] 8) Represent or otherwise provide legal or law related services to a client, except as permitted by law, this rule or associated rules and regulations." [Att. to Order at 7]).

Other states have moved in the same direction.

- Joel Stashenko, Nassau Bar Criticizes Enlisting Non-lawyers to Represent Poor, N.Y. L.J., Sept. 30, 2013 ("Relying on non-attorneys to provide civil legal services to low-income New Yorkers -- an idea being explored by Chief Judge Jonathan Lippman -- is 'fraught with peril,' a Nassau County Bar Association committee has warned."; "The committee said it is too early to say that non-attorneys must be enlisted to fill the 'access to justice gap' because existing legal services providers and attorneys working pro bono cannot make up the shortfall.").
- Mark Dubois, Op-Ed., Authorized Practice Of Law, Conn. L. Tribune, July 24, 2013 ("There is a fascinating dichotomy in thinking developing with regard to just who can offer legal services to the public. A few weeks ago, Governor Dannel Malloy signed a bill which raised the penalty for the unauthorized practice of law by non-lawyers to a felony."; "While lawyers had been pushing for several years to increase the penalty, they never made it across the finish line until the Chief State's Attorney joined the fray. He pointed out some really egregious cases where suspended lawyers or persons who were simply scammers had taken serious money for worthless legal services. He argued that even though there had clearly been conduct deserving criminal prosecution, under the then existing regime the penalty was so minimal that he could not justify devoting his limited prosecutorial resources to the effort. He was joined at the legislature by representatives of the Connecticut Bar Association who argued that real harm

was being done to the public, there were few responding to the problem and increasing the jeopardy would have a deterrent effect."; "At the same time, some have been suggesting that Connecticut should consider allowing non-lawyers to provide legal services directly to the public. A recent Law Tribune editorial (Is Time Right For Non-Lawyer Legal Techs? May 31) pointed to a program being developed in Washington state which would license paralegals to provide legal services directly to the public. The Washington program includes minimum training and educational standards, a test and continuing legal education."; "A growing chorus is suggesting that in a world where many, if not most, of the litigants at some court sessions are not represented, some lawyering at a reasonable price would go a long way towards unclogging court dockets and guaranteeing that folks shut out of the legal aid system can have access to justice. For instance, in Massachusetts housing courts, I understand that paralegals have been engaging in limited representation and advocacy with the approval of the administrative judges. They apparently don't have rules that allow this, but have adopted a 'don't ask, don't tell' approach. Many tenants in Connecticut's housing courts are unrepresented, and the Massachusetts model might provide some needed help, but it is hard to envision starting a program which basically turns a blind eye to what is going on."; "Nevertheless, this all can be done. For instance, in immigration courts, there is a very well designed program that allows advocacy by accredited representatives from non-profits, persons of repute, lay representatives and others. The bankruptcy courts allow non-lawyers to prepare petitions; the Department of Labor allows agents to advocate for employers; and the Internal Revenue Service allows 'registered representatives' to advocate for taxpayers."; "So how do we reconcile these seemingly contradictory efforts -- encouraging non-lawyer representation while at the same time raising the criminal penalties for doing so without authorization? Remember, the unauthorized practice of law regime does not mean that only lawyers can practice law. It simply means that the practice of law by non-lawyers must be 'authorized.' And the entire enterprise is not turf protection for lawyers but consumer protection for the public.").

- Christine Simmons, [City Bar Eyes Non-lawyer 'Aides,' 'Technicians' to Help the Poor](#), N.Y. L.J., June 26, 2013 ("In England and Wales, non-lawyer courtroom aides called 'McKenzie Friends' can appear beside litigants in some courts to give moral support, take notes and provide other 'quiet' advice. In Washington state, non-lawyer 'legal technicians' can inform clients of document procedures and deadlines, perform legal research and review some documents. Now, a New York City Bar committee, recognizing the large unmet need for legal services for the poor, is proposing similar concepts. Specifically, the city bar's Committee on Professional Responsibility is recommending a role for non-lawyer courtroom aides in judicial and administrative hearings. The recommendations, released last week, come as state court officials are studying the feasibility of allowing nonattorneys to provide legal services to poor New Yorkers in simple civil matters. A separate committee named by Chief Judge Jonathan Lippman will focus on the

creation of pilot programs across the state that would use non-lawyers to help poor clients in housing, elder law and consumer credit matters. . . . The committee also noted some non-lawyer assistance is already provided to litigants in several forums. In landlord-tenant cases, for instance, Housing Court help desks, court sponsored courses, student volunteers and guardians ad litem are available. The city bar committee looked to other jurisdictions for ideas. In some United Kingdom courts, a 'McKenzie friend' can offer discreet assistance in court to a litigant and sometimes is allowed to present evidence and argument as a lay advocate, the report said. In some cases, they can charge a fee. Anyone can serve as a 'McKenzie friend', including a family member, neighbor or trained volunteer. . . . Aides who are paid should be subject to formal regulation related to qualifications, disclosures, fee arrangement and standards of conduct, the report said. The city bar committee also recommended New York adopt some form of Washington state's 'legal technician' model for non-lawyer assistance outside judicial and administrative hearings. The Washington Supreme Court recently adopted a rule establishing a regime where legal technicians will be licensed to provide services in specific practice areas. According to the report, legal technicians are allowed to obtain relevant information and explain it to their clients, inform clients about procedures and anticipated course of proceedings, provide certain approved materials, and select and complete some forms, among other tasks. The Washington rule holds legal technicians to the standard of care of a lawyer. The rule also imposes requirements such as completion of an American Bar Association-approved paralegal training program. The city bar report endorsed Washington state's set of mandatory disclosures in a written contract between the technician and the client.").

- Joel Stashenko, Non-lawyers May Be Given Role in Closing 'Justice Gap,' N.Y. L.J., May 29, 2013 ("Chief Judge Jonathan Lippman yesterday announced the makeup of a committee to study the feasibility of allowing non-attorneys to provide legal services to poor New Yorkers in 'simpler' civil matters."; "Roger Maldonado, a partner at Balber Pickard Maldonado & Van Der Tuin in Manhattan, and Fern Schair, chairwoman of the Feerick Center for Social Justice at Fordham University School of Law, will co-chair the Committee on Non-lawyers and the Justice Gap. Lippman said the committee will make preliminary recommendations for pilot programs by November."; "The 20 members of the committee in addition to the two co-chairs include private attorneys, civil legal services providers, bar association representatives, advocates for the poor and one judge, Jenny Rivera of the Court of Appeals."; "Despite the pro bono contributions made by attorneys and the courts' funding of civil legal services, Lippman said the state 'simply cannot keep pace' with the growing need for legal services among low-income New Yorkers."; "Some civil legal services providers say they turn away as many as seven in eight people who seek services because of insufficient resources."; "The new committee will examine to what extent 'non-lawyer advocates' who are expert in certain areas 'can help the most vulnerable and the most disadvantaged,' Lippman said in an interview."; "Are there certain niches in which

non-lawyers can provide legal assistance without running afoul of the statutes against the unauthorized practice of law?' Lippman said. 'I think we would be missing the boat to fail to explore this area.'"; "Maldonado said the committee at first will focus on the creation of pilot programs both inside and outside New York City that would use non-lawyers to help poor clients in housing, elder law and consumer credit matters.").

- News Release, Cal. State Bar, State Bar Group To Hold Public Meeting On Limited-Practice Licensing (Apr. 4, 2013) ("The State Bar will hold its first public meeting next week to discuss limited-practice licensing, an idea that could ultimately create a new class of technicians able to give basic legal advice on routine matters."; "The meeting of the Limited License Working Group will be held from 10 a.m. to 1:30 p.m. on Thursday, April 11, on the fourth floor of the State Bar's office at 180 Howard Street in San Francisco. The group is slated to review similar programs in other jurisdictions, including Washington state and Canada, comparable licensing practices of other professions and any previous initiatives by the State Bar in this area. The meeting will include an opportunity for public comment."; "The Limited License Working Group is chaired by Board of Trustees member Craig Holden and includes board President Patrick M. Kelly and board members Karen Goodman, Loren Kieve, Heather Rosing and David A. Torres. Glenda Corcoran is a non-voting member of the group."; "The idea of limited-practice licensing surfaced at a State Bar retreat in San Diego in January where the Board of Trustees looked at ways of improving public protection, access to justice and the State Bar's regulatory functions. Proponents of limited-practice licensing see it as a way to improve delivery of legal services to the public, who often turn to non-lawyers for assistance when they can't afford the services of licensed attorneys. Such a program, supporters argue, would make legal services more affordable, while ensuring consistency and quality."; "California currently allows non-lawyers to perform some tasks that don't constitute the practice of law, such as helping people fill out legal forms. Paralegals working under attorney supervision, unlawful detainer assistants, legal document assistants and immigration consultants registered by county clerks or the California Secretary of State can also assist consumers with some legal needs, short of practicing law."; "Each year, the State Bar receives hundreds of complaints about businesses and individuals practicing law without a license, but it is limited in the action it can take because it does not regulate non-attorneys. The unauthorized practice of law is a crime punishable by a misdemeanor conviction.").
- Philadelphia LEO 2012-1 (8/2012) (allowing non-lawyers "Community Advocates" to solicit members of the public who need the assistance of legal aid organizations and public interest groups, because such advocates would not be motivated by "pecuniary gain," which is an element of Pennsylvania ethics rules' limitation on solicitation; "[T]he non-profit would like to create a 'Community Advocates' program. The program would recruit volunteers from the community to act as Advocates in the program. They would not provide legal services (including

rendering advice) in any form, but would be made aware of the most prevalent legal issues dealt with in the community and trained in how to refer members of their community to a lawyer who might assist them, either at the inquirer's organization, or at other local public interest organizations using the Philadelphia Bar Association's public interest directory if there is a more specialized need. There would be ongoing training and supervision of the Advocates provided by the inquirer's staff, and the Advocates would be asked for advice by the non-profit on how to improve current programs and services. The hope is that trained Advocates would be able to improve the likelihood that members of the community will seek out legal aid and receive the assistance they need, either from the inquirer's organization or others in the city. Advocates would work on a voluntary basis without compensation. The reason for their using in-person solicitation would be to increase access to legal services, and not for the organization's pecuniary gain, as clients are not charged for the organization's services."; "The Committee believes that the Advocates will be exercising legal judgment in evaluating the community members' legal problems and making referrals. They will be trained in some way to purportedly enable them to recognize the legal issues that community members may face and based on that analysis make a determination as to whether to refer them to a lawyer and if so, to whom. That is at least to some degree a legal judgment."; "Such conduct is not improper, so long as a licensed lawyer supervises the Advocates and accepts responsibility for their actions. In order to ensure that appropriate supervision is taking place, the Advocates must complete a written intake form, and this written form must be reviewed in a timely manner by a supervising attorney who will be responsible for any mistakes made in the intake and referral process. This prompt review by an attorney of the Community Advocates' work is required by Rule 5.3. The disclosure to the recipients of the services should also clearly communicate that the Advocate is not a lawyer and that the Advocate's intake notes and recommendations will be reviewed by an attorney at the inquirer's program.").

The Washington state rule and other states' proposed rules normally do not use the term "paralegal" in discussing these new types of professions.

- The decision to avoid that term might be motivated by the desire to avoid any confusion, given the history of informally rather than formally regulating paralegals' duties and responsibilities.
- However, these new types of professionals clearly parallel the role that paralegals have traditionally played.

## D. UNAUTHORIZED PRACTICE OF LAW: PARALEGALS

### 1. Lawyers' Reliance on Paralegals' and Others' Assistance

The ABA Model Rules acknowledge that lawyers may rely on paralegals when they practice law.

- ABA Model Rule 5.5 cmt. [2] ("The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work." (emphasis added)).

The Restatement also acknowledges that lawyers can rely on other professionals to help them practice law.

- Restatement (Third) of Law Governing Lawyers § 4 cmt. g (2000) ("For obvious reasons of convenience and better service to clients, lawyers and law firms are empowered to retain non-lawyer personnel to assist firm lawyers in providing legal services to clients. In the course of that work, a non-lawyer may conduct activities that, if conducted by that person alone in representing a client, would constitute unauthorized practice. Those activities are permissible and do not constitute unauthorized practice, so long as the responsible lawyer or law firm provides appropriate supervision . . . and so long as the non-lawyer is not permitted to own an interest in the law firm, split fees, or exercise management powers with respect to a law-practice aspect of the firm." (emphases added)).

The ABA has discussed lawyers' possible obligation to advise clients of their reliance on paralegals.

- ABA Model Guidelines for Paralegals, cmt. to Guideline 4 ("Although in most initial engagements by a client it may be prudent for the attorney to discharge this responsibility with a writing, the guidelines requires only that the lawyer recognize the responsibility and ensure that it is discharged. Clearly, when a client has been adequately informed of the lawyer's utilization of paralegal services, it is unnecessary to make additional formalistic disclosures as the client retains the lawyer for other services.").

### 2. General Rules

Paralegals may not engage in the practice of law -- an axiom that is easier to state than to apply.

The ABA has emphasized paralegals' independent duty to avoid UPL.

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

Paralegals' duty to avoid unauthorized practice of law violations focuses on several issues.

- How paralegals "hold themselves out."
- Prohibited activities.
- Permitted activities.

#### a. "Holding Out" Issues

Because paralegals work so closely with lawyers, they must be careful to avoid "holding themselves out" as lawyers -- either intentionally or unintentionally.

- ABA Model Guidelines for Paralegals, Guideline 4 ("A lawyer is responsible for taking reasonable measures to ensure that clients, courts, and other lawyers are aware that a paralegal, whose services are utilized by the lawyer in performing legal services, is not licensed to practice law.").
- ABA Model Guidelines for Paralegals, cmt. to Guideline 4 ("Since a paralegal is not a licensed attorney, it is important that those with whom the paralegal communicates are aware of that fact. The NFPA Guidelines EC 1.7(a)-(c) require paralegals to disclose their status. Likewise, NALA Ethics Canon 5 requires a

paralegal to disclose his or her status at the outset of any professional relationship. While requiring the paralegal to make such disclosure is one way in which the lawyer's responsibility to third parties may be discharged, the Standing Committee is of the view that it is desirable to emphasize the lawyer's responsibility for the disclosure under Model Rule 5.3(b) and (c). Lawyers may discharge that responsibility by direct communication with the client and third parties, or by requiring the paralegal to make the disclosure, by a written memorandum, or by some other means. Several state guidelines impose on the lawyer responsibility for instructing a paralegal whose services are utilized by the lawyer to disclose the paralegal's status in any dealings with a third party.").

- ABA Model Guidelines for Paralegals, cmt. to Guideline 4 ("The most common titles are 'paralegal' and 'legal assistant' although other titles may fulfill the dual purposes noted above. The titles 'paralegal' and 'legal assistant' are sometimes coupled with a descriptor of the paralegal's status, e.g., 'senior paralegal' or 'paralegal coordinator,' or of the area of practice in which the paralegal works, e.g., 'litigation paralegal' or 'probate paralegal.' Titles that are commonly used to identify lawyers, such as 'associate' or 'counsel,' are misleading and inappropriate.").
- ABA Model Guidelines for Paralegals, cmt. to Guideline 4 ("Most state guidelines specifically endorse paralegals signing correspondence so long as their status as a paralegal is clearly indicated by an appropriate title. See ABA Informal Opinion 1367 (1976).").
- NALA Model Standards, Guideline 1; NFPA Model Code, EC-1.7(b), (c); AAPL Code ¶ 4.

The Florida Registered Paralegal Program requires that "[a] Florida Registered Paralegal shall disclose his or her status as a Florida Registered Paralegal at the outset of any professional relationship with a client, lawyers, a court or administrative agency or personnel thereof, and members of the general public." Rule Regulating the Florida Bar 20-7.1(a).

Most authorities allow paralegals to use business cards, letterheads, etc., as long as these accurately described their role.

- ABA Model Guidelines for Paralegals, cmt. to Guideline 5 ("Most states with guidelines on the use of paralegal services permit the listing of paralegals on firm letterhead. A few states do not permit attorneys to list paralegals on their letterhead.").
- ABA Model Guidelines for Paralegals, cmt. to Guideline 5 ("All state guidelines and ethics opinions that address the issue approve of business cards for paralegals, so long as the paralegal's status is clearly indicated.").



- ABA Model Guidelines for Paralegals, cmt. to Guideline 5 ("Many states have rules or opinions that explicitly permit lawyers to list names of paralegals on their letterhead stationery.").
- New Jersey LEO 720 & UPL Op. 46 (3/23/11) ("The Committees find that the Rules of Professional Conduct do not prohibit paralegals from signing routine, non-substantive correspondence to clients, adverse attorneys, and courts, provided supervising attorneys are aware of the exact nature of the correspondence. As noted above, the correspondence must reflect the identity and non-attorney status of the paralegal and include the name of the responsible attorney in the matter.").
- Virginia LEO 767 (1/29/86) (a law firm may include paralegals and other staff on the firm letterhead as long as they are properly identified).

#### **b. Prohibited Activities**

States' analyses of this issue tends to focus on certain key prohibited activities, and specific types of interaction with a lawyer's clients that involve the greatest risk of engaging in the unauthorized practice of law.

- ABA Model Guidelines for Paralegals, Guideline 3; NALA Model Standards, Guideline 2; NFPA Model Code, EC-1.2(a), (b).

Paralegals should not engage in the following activities:

- **Providing legal advice**

ABA Model Guidelines for Paralegals, Guideline 3 ("A lawyer may not delegate to a paralegal: (a) responsibility for establishing an attorney-client relationship[;] (b) responsibility for establishing the amount of a fee to be charged for a legal service[; or] (c) responsibility for a legal opinion rendered to a client.").

ABA Model Guidelines for Paralegals, cmt. to Guideline 3 ("Clients are entitled to their lawyers' professional judgment and opinion. Paralegals may, however, be authorized to communicate a lawyer's legal advice to a client so long as they do not interpret or expand on that advice. Typically, state guidelines phrase this prohibition in terms of paralegals being forbidden from 'giving legal advice' or 'counseling clients about legal matters.'").

NALA Model Standards, Guideline 2 ("Paralegals should not . . . give legal opinions or advice; or represent a client before a court, unless authorized to do so by said court; nor engage in, encourage, or contribute to any act which could constitute the unauthorized practice (sic) law.").

Rule Regulating the Florida Bar 20-7.1(d)(1) & (5) ("A Florida Registered Paralegal should not . . . give legal opinions or advice, or . . . act in matters involving professional legal judgment.").

Doe v. Condon, 532 S.E.2d 879, 880, 882, 882-83 (S.C. 2000) (holding that a paralegal would commit the unauthorized practice of law by presenting seminars and answering questions about the law; "[A] non-lawyer employee conducting unsupervised legal presentations for the public and answering legal questions for the public or for clients of the attorney/employer engages in the unauthorized practice of law."; adopting a referee's findings on this issue; "Petitioner intends to conduct unsupervised 'wills and trusts' seminars for the public, 'emphasizing' living trusts during the course of his presentation. Petitioner also plans to answer estate planning questions from the audience. I find Petitioner's proposed conduct constitutes the unauthorized practice of law. I find, as other courts have, that the very structure of such 'educational' legal seminars suggests that the presenter will actually be giving legal advice on legal matters. . . . At the very least, Petitioner will implicitly advise participants that they require estate planning services. Whether a will or trust is appropriate in any given situation is a function of legal judgment. To be sure, advising a potential client on his or her need for a living trust (or other particular estate planning instrument or device) fits squarely within the practice of law. These matters cry out for the exercise of professional judgment by a licensed attorney. Thus, in conducting these informational seminars, Petitioner would engage in the unauthorized practice of law as a non-attorney offering legal advice. Petitioner plans to answer 'general' questions during his presentation. I have reviewed the Estate Planning Summary submitted by Petitioner and his attorney-employer. This summary sets forth the subject matter to be covered by the paralegal. Petitioner would present information on, among other things, revocable trusts, irrevocable living trusts, credit shelter trusts, qualified terminable interest property trusts, charitable remainder trusts, qualified personal residence trusts, grantor retained annuity trusts, grantor retained unitrusts and charitable lead trusts. It is difficult to imagine such specific estate planning devices eliciting 'general' questions or a scenario in which the exercise of legal judgment would not be involved. It is, after all, a legal seminar, apparently for the purpose of soliciting business. To suggest that some 'plan' would anticipate all possible questions with predetermined nonlegal responses is specious." (footnote omitted); "I fully recognize the prevailing popularity of 'financial planners' and others 'jumping on the estate planning bandwagon.' (Estate Planning Summary submitted by Petitioner's attorney-employer, p.1). This trend in no way affects the decision before the Court. This paralegal would not be presenting the estate planning seminar as a financial planner. This seminar would be conspicuously sponsored by the paralegal's attorney-employer. The attorney's law firm is prominently displayed in the brochure submitted, e.g., name, address, telephone number and 'Firm Profile.' In promoting the law firm and representing to the public the 'legal'

nature of the seminar, neither the paralegal nor his attorney-employer can escape the prohibition against the unauthorized practice of law.").

- **Establishing a lawyer-client relationship**

ABA Model Guidelines for Paralegals, Guideline 3 ("A lawyer may not delegate to a paralegal: (a) responsibility for establishing an attorney-client relationship[;] (b) responsibility for establishing the amount of a fee to be charged for a legal service[; or] (c) responsibility for a legal opinion rendered to a client.").

NALA Model Standards, Guideline 2 ("Paralegals should not . . . [e]stablish attorney-client relationships . . . nor engage in, encourage, or contribute to any act which could constitute the unauthorized practice (sic) law.").

Rule Regulating the Florida Bar 20-7.1(d)(1) ("A Florida Registered Paralegal should not . . . establish attorney-client relationships" or "accept cases.").

Doe v. Condon, 532 S.E.2d 879, 883 (S.C. 2000) (adopting a referee's findings about a paralegal's initial client interview; "Petitioner intends to gather client information and answer general estate planning questions during his proposed 'initial client interviews.' While Petitioner may properly compile client information, Petitioner may not answer estate planning questions. . . . Petitioner's answering legal questions would constitute the unauthorized practice of law for the reasons stated above. While the law firm in which Petitioner is employed plans to direct clients to an attorney for 'follow-up' consultations, a paralegal may not give legal advice in any event. Moreover, permissible preparatory tasks must be performed while under the attorney's supervision. The proposed after the fact attorney review comes too late.").

- **Making fee arrangements**

ABA Model Guidelines for Paralegals, Guideline 3 ("A lawyer may not delegate to a paralegal: (a) responsibility for establishing an attorney-client relationship[;] (b) responsibility for establishing the amount of a fee to be charged for a legal service[; or] (c) responsibility for a legal opinion rendered to a client.").

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

NALA Model Standards, Guideline 2 ("Paralegals should not . . . set legal fees.").

Rule Regulating the Florida Bar 20-7.1(d)(1) ("A Florida Registered Paralegal should not . . . set legal fees.").

- **Maintaining a direct client relationship**

ABA Model Guidelines for Paralegals, cmt. to Guideline 3 ("Model Rule 1.4 and most state codes require lawyers to communicate directly with their clients and to provide their clients information reasonably necessary to make informed decisions and to effectively participate in the representation. While delegation of legal tasks to non-lawyers may benefit clients by enabling their lawyers to render legal services more economically and efficiently, Model Rule 1.4 and [Ethical Consideration] 3-6 under the Model Code emphasize that delegation is proper only if the lawyer 'maintains a direct relationship with his client, supervises the delegated work and has complete professional responsibility for the work product.'").

- **Preparing pleadings or other legal documents without a lawyer's supervision**

Virginia LEO 1869 (5/28/13) (explaining that a family court self-help center facilitator (a lawyer or a paralegal trained in family law who volunteers to assist unrepresented customers) does not establish an attorney-client relationship with such customers, if the Customer Agreement "has the pro se litigant understand and acknowledge that the limited assistance provided by the Facilitator does not create a lawyer-client relationship, that no legal advice is given, that information will not be kept confidential and that the Facilitator may provide assistance to adverse litigants." (footnote omitted); noting that a lawyer merely providing legal information and not legal services does not fall under Rule 6.5's provision governing "short-term limited legal services" because "[m]erely providing sample pleadings or forms to a pro se litigant is not the practice of law; however, the completion of a form pleading or legal document for the pro se litigant would be."; explaining that Rule 6.5 does not address conflicts arising after a lawyer provides such a limited representation, so the lawyer may be precluded from other representations adverse to the client the lawyer had assisted; warning that paralegals may not engage in the "unsupervised preparation of pleadings or other legal documents," so lawyers may not train paralegals to provide such unsupervised services; advising that various resources can help lawyers distinguish between providing "legal information" and "legal advice.").

- **Appearing before a tribunal**

ABA Model Guidelines for Paralegals, cmt. to Guideline 2 ("As a general matter, most state guidelines specify that paralegals may not appear before courts,

administrative tribunals, or other adjudicatory bodies unless the procedural rules of the adjudicatory body authorize such appearances.").

Rule Regulating the Florida Bar 20-7.1(d)(1) ("A Florida Registered Paralegal should not . . . represent a client before a court or other tribunal, unless authorized to do so by the court or tribunal.").

- As explained below, some laws, rules, or regulations allow paralegals to assist as "jailhouse" legal advisors, provide advice to their corporate employers, etc.
- In re Burns, 249 So. 3d 811, 812 (La. 2018) (per curiam) (suspending for one year a lawyer who allowed a paralegal to appear in court; "In July 2013, respondent began representing the defendants in a civil case captioned Ultimate Entertainment LLC v. Marcel Morton and Down South Entertainment LLC, pending before Judge Michael Mentz in the 24th Judicial District Court for the Parish of Jefferson. Judge Mentz scheduled a pre-trial conference for September 4, 2013. Respondent was unable to attend the pre-trial conference and sent his paralegal, Randy Tucker, to the conference instead. Mr. Tucker never advised court personnel or opposing counsel that he was not an attorney. Instead, Mr. Tucker participated in the conference and later engaged in settlement discussions with opposing counsel in the presence of Judge Mentz' law clerk.").

Beyond these basic principles, states sometimes disagree about what activities paralegals may perform.

- ABA Model Guidelines for Paralegals, cmt. to Guideline 2 ("Thus, some tasks that have been specifically prohibited in some states are expressly delegable in others. Compare, Guideline 2, Connecticut Guidelines (permitting paralegal to attend real estate closings even though no supervising lawyer is present provided that the paralegal does not render opinion or judgment about execution of documents, changes in adjustments or price or other matters involving documents or funds) and The Florida Bar, Opinion 89-5 (November 1989) (permitting paralegal to handle real estate closing at which no supervising lawyer is present provided, among other things, that the paralegal will not give legal advice or make impromptu decisions that should be made by a lawyer) with Supreme Court of Georgia, Formal Advisory Opinion No. 86-5 (May 1989) ([www.gabar.org/barrules/handbookdetail.cfm?what=rule&id=505](http://www.gabar.org/barrules/handbookdetail.cfm?what=rule&id=505)) (closing of real estate transactions constitutes the practice of law and it is ethically improper for a lawyer to permit a paralegal to close the transaction). It is thus incumbent on the lawyer to determine whether a particular task is properly delegable in the jurisdiction at issue." (emphases added)).

### c. Permitted Activities

Defining the type of permitted activities in which paralegals may engage presents the same line-drawing difficulties.

- NALA Model Standards, Guideline 3.

National organizations have generally defined permitted activities.

- ABA Model Guidelines for Paralegals, Guideline 2 ("Provided the lawyer maintains responsibility for the work product, a lawyer may delegate to a paralegal any task normally performed by the lawyer except those tasks proscribed to a non-lawyer by statute, court rule, administrative rule or regulation, controlling authority, the applicable rule of professional conduct of the jurisdiction in which the lawyer practices, or these guidelines.").
- NALA Model Standards, Guideline 5 ("Except as otherwise provided by statute, court rule or decision, administrative rule or regulation, or the attorney's rules of professional responsibility, and within the preceding parameters and proscriptions, a paralegal may perform any function delegated by an attorney, including, but not limited to the following: Conduct client interviews and maintain general contact with the client after the establishment of the attorney-client relationship, so long as the client is aware of the status and function of the paralegal, and the client contact is under the supervision of the attorney[;] Locate and interview witnesses, so long as the witnesses are aware of the status and function of the paralegal[;] Conduct investigations and statistical and documentary research for review by the attorney[;] Conduct legal research for review by the attorney[;] Draft legal documents for review by the attorney[;] Draft correspondence and pleadings for review by and signature of the attorney[;] Summarize depositions, interrogatories and testimony for review by the attorney[;] Attend executions of wills, real estate closings, depositions, court or administrative hearings and trials with the attorney[;] Author and sign letters providing the paralegal's status is clearly indicated and the correspondence does not contain independent legal opinions or legal advice.").

State bars take the same approach.

- New Jersey LEO 720 & UPL Op. 46 (3/23/11) ("The Committees find that the Rules of Professional Conduct do not prohibit paralegals from signing routine, non-substantive correspondence to clients, adverse attorneys, and courts, provided supervising attorneys are aware of the exact nature of the correspondence. As noted above, the correspondence must reflect the identity and non-attorney status of the paralegal and include the name of the responsible attorney in the matter." (emphasis added)).
- North Carolina LEO 2006-13 (10/20/06) ("[I]f exigent circumstances require the signing of a pleading in the lawyer's absence, a lawyer may delegate this task to a paralegal or other non-lawyer staff only if 1) the signing of a lawyer's signature by an agent of the lawyer does not violate any law, court order, local rule, or rule of civil procedure, 2) the responsible lawyer has provided the appropriate level of

supervision under the circumstances, and 3) the signature clearly discloses that another has signed on the lawyer's behalf." (emphasis added); "A paralegal or paraprofessional may never sign and file court documents in her own name. To do so violates the statutes prohibiting the unauthorized practice of law.").

- Avista Mgmt., Inc. v. Wausau Underwriters Ins. Co., Case No. 6:05-cv-1430-Orl-31JGG (Consol.), 2006 U.S. Dist. LEXIS 38526, at \*1-2 (M.D. Fla. June 6, 2006) (ordering resolution of plaintiff's motion to designate the location of a deposition in the following way: "If counsel cannot agree on a neutral site, they shall meet on the front steps of the Sam M. Gibbons U.S. Courthouse, 801 North Florida Ave., Tampa, Florida 33602. Each lawyer shall be entitled to be accompanied by one paralegal who shall act as an attendant and witness. At that time and location, counsel shall engage in one (1) game of 'rock, paper, scissors.' The winner of this engagement shall be entitled to select the location for the 30(b)(6) deposition to be held somewhere in Hillsborough County during the period July 11-12, 2006." (emphasis added)).
- North Carolina LEO 2002-9 (1/24/03) (superseding several older legal ethics opinions, and taking a fact-intensive approach to whether a lawyer must be present at a real estate closing, or whether the lawyer can allow a paralegal to conduct the closing; "When and how to communicate with clients in connection with the execution of the closing documents and the disbursement of the proceeds are decisions that should be within the sound legal discretion of the individual lawyer. Therefore, the requirement of the physical presence of the lawyer at the execution of the documents, as promulgated in Formal Ethics Opinions 99-13, 2001-4, and 2001-8, is hereby withdrawn. A non-lawyer supervised by the lawyer may oversee the execution of the closing documents and the disbursement of the proceeds even though the lawyer is not physically present. Moreover, the execution of the documents and the disbursement of the proceeds may be accomplished by mail, by e-mail, by other electronic means, or by some other procedure that would not require the lawyer and the parties to be physically present at one place and time. Whatever procedure is chosen for the execution of the documents, the lawyer must provide competent representation and adequate supervision of any non-lawyer providing assistance. Rule 1.1, Rule 5.3, and Rule 5.5." (footnote omitted) (emphasis added); "In considering this matter, the State Bar received strong evidence that it is in the best interest of the consumer (the borrower) for the lawyer to be physically present at the execution of the documents. This ethics opinion should not be interpreted as implying that the State Bar disagrees with that evidence." (footnote omitted)).
- North Carolina LEO 2000-10 (7/27/01) ("[W]hen a lawyer has a conflicting commitment to appear in another court or when another legitimate conflict prohibits a lawyer's appearance in court for a client, the lawyer may send a non-lawyer employee to the court to inform the court of the situation. This is not assisting in the unauthorized practice of law. In response to information about a

lawyer's availability, the court may, on its own motion, determine that a continuance or other action is appropriate." (footnote omitted) (emphasis added); "A lawyer should rely on a non-lawyer to notify the court of a scheduling conflict only when necessary. Moreover, Rule 5.3 requires a lawyer who supervises a non-lawyer assistant to make reasonable efforts to ensure that the non-lawyer's conduct is compatible with the professional obligations of the lawyer. If a non-lawyer is present in court to provide information about the lawyer's scheduling conflict, the duty of supervision includes insuring that the assistant complies with court rules on decorum and attire.").

- Virginia UPL Op. 191 (10/28/96; revised and reissued 4/15/98; approved by Supreme Court 9/29/98) (describing the permitted activities as follows: "[A] non-lawyer employee working under the direct supervision of a Virginia attorney may participate in gathering information from a client during an initial interview . . ., provided that this involves nothing more than the gathering of factual data and the non-lawyer renders no legal advice." (emphasis added)).
- Virginia UPL Op. 147 (4/19/91) (indicating that a "paralegal company" may gather necessary real estate documents, complete non-legal documents and arrange for the necessary signatures and relaying of documents required for real estate closings).
- Virginia UPL Op. 129 (2/22/89) (indicating that paralegals employed by a non-profit organization may provide "services to and under the supervision of attorneys on behalf of the organization").

Some law firms have found imaginative ways to use paralegals' talents.

- Conn. law firm uses former restaurant drive-thru, Associated Press (Oct. 21, 2010) ("Legal service at one Connecticut firm can now be as easy to get as a hamburger and fries."; "The Kocian Law Group has opened a drive-through office in a building that once housed a former Kenny Rogers Roasters."; "Attorney Nick Kocian tells WVIT-TV that clients can use the drive-through at the law firm's Manchester, Conn., site to drop off and pick up documents."; "A paralegal works at the window, handing out documents and answering questions." (emphasis added); "Consultations and meetings with lawyers will still be scheduled for the office.").

#### **d. Sanctions**

Paralegals who engage in the unauthorized practice of law are theoretically subject to criminal charges in most states.

- The stakes are high -- the unauthorized practice of law is a crime in every state (for example, a Class 1 misdemeanor in Virginia, Va. Code § 54.1-3904).



Courts may also investigate, enjoin, and impose monetary sanctions on, paralegals who engage in improper UPL activities.

- Montana Supreme Court Comm'n on Unauthorized Practice of Law v. O'Neil, 147 P.3d 200 (Mont. 2006) (concluding that a paralegal violated Montana's UPL statutes by drafting pleadings, providing legal advice and appearing in court with his customers), cert. denied, 549 U.S. 1282 (2007).
- State ex rel. Ind. State Bar Ass'n v. Diaz, 838 N.E.2d 433 (Ind. 2005) (enjoining a notary from assisting immigration clients, but allowing her to offer translations and other routine services).
- Dayton Bar Ass'n v. Addison, 837 N.E.2d 367 (Ohio 2005) (enjoining a paralegal from preparing wills or other documents, and fining him \$10,000; noting that he had never been a lawyer and was engaged in the unauthorized practice of law).
- Sussman v. Grado, 746 N.Y.S.2d 548, 553 & 550, 552 (N.Y. Dist. Ct. 2002) (holding that an "independent paralegal" who is the president and sole shareholder of a "Consulting Group" had engaged in the unauthorized practice of law by preparing an order involving two bank accounts; finding that the legal assistant "crossed the line between filling out forms [which would have been acceptable] and engaging in the practice of law by rendering legal services" because she "tried to create a legal document without the required knowledge, skill or training"; awarding plaintiff \$135.00 in damages, but referring the matter to the New York State Attorney General's Office for possible action against the paralegal).

## E. UNAUTHORIZED PRACTICE OF LAW: LAWYERS

Lawyers may also be found liable for other professionals' unauthorized practice of law.

- The lawyers' misconduct can take the form of directing such UPL violations or failing to supervise other professionals who engage in UPL.

### 2. Lawyers -- Prohibition on Assisting the Unauthorized Practice of Law

The ABA Model Rules also explicitly indicate that:

- ABA Model Rule 5.5(a) ("A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so." (emphasis added)).
- Id. (cmt. [1] (Explaining that the prohibition applies to a lawyer's unauthorized practice of law "through the lawyer's direct action or by the lawyer assisting another person." (emphasis added))).

The Restatement takes the same approach.

- Restatement (Third) of Law Governing Lawyers § 4 (2000) ("A person not admitted to practice as a lawyer . . . may not engage in the unauthorized practice of law, and a lawyer may not assist a person to do so.").
- Restatement (Third) of Law Governing Lawyers § 4 cmt. f (2000) ("The lawyer codes have traditionally prohibited lawyers from assisting non-lawyers in activities that constitute the unauthorized practice of law. That prohibition is stated in the Section. The limitation supplements requirements that lawyers provide adequate supervision to non-lawyer employees and agents . . . . By the same token, it has prevented lawyers from sponsoring non-law-firm enterprises in which legal services are provided mainly or entirely by non-lawyers and in which the lawyer gains the profits.").

#### b. Sanctions

Lawyers can face sanctions for UPL violations by their non-lawyer colleagues.

- ABA Model Rule 5.3(c)(2) (A lawyer responsible for a non-lawyer's conduct may be punished for his or her actions that would be a violation of the rules if the lawyer orders or knowingly ratifies the conduct, or if the lawyer is a partner or direct supervisor of the non-lawyer and "fails to take reasonable remedial action" when the lawyer "knows of the conduct at the time when its consequences can be avoided.").

The ABA has explained the risk lawyers run in connection with paralegal's unauthorized practice of law.

- ABA Model Guidelines for Paralegals, cmt. to Guideline 2 ("Serious consequences can result from a lawyer's failure to properly delegate tasks to or to supervise a paralegal properly. For example, the Supreme Court of Virginia upheld a malpractice verdict against a lawyer based in part on negligent actions of a paralegal in performing tasks that evidently were properly delegable. Musselman v. Willoughby Corp., 230 Va. 337, 337 S.E. 2d 724 (1985). See also C. Wolfram, *Modern Legal Ethics* 236, 896 (1986). Disbarment and suspension from the practice of law have resulted from a lawyer's failure to properly supervise the work performed by paralegals. See Matter of Disciplinary Action Against Nassif, 547 N.W.2d 541 (N.D. 1996) (disbarment for failure to supervise which resulted in the unauthorized practice of law by office paralegals); Attorney Grievance Comm'n of Maryland v. Hallmon, 681 A.2d 510 (Md. 1996) (90-day suspension for, among other things, abdicating responsibility for a case to paralegal without supervising or reviewing the paralegal's work). Lawyers have also been subject to monetary and other sanctions in federal and state courts for failing to properly utilize and supervise paralegals. See In re Hessinger & Associates, 192 B.R. 211 (N.D. Cal. 1996) (bankruptcy court directed to reevaluate its \$100,000 sanction but district court finds that law firm violated Rule 3-110(A) of the California Rules of Professional Conduct by permitting bankruptcy paralegals to undertake initial interviews, fill out forms and complete schedules without attorney supervision).").
- ABA Model Guidelines for Paralegals, cmt. to Guideline 2 ("While appropriate delegation of tasks is encouraged and a broad array of tasks is properly delegable to paralegals, improper delegation of tasks will often run afoul of a lawyer's obligations under applicable rules of professional conduct. A common consequence of the improper delegation of tasks is that the lawyer will have assisted the paralegal in the unauthorized 'practice of law' in violation of Rule 5.5 of the Model Rules, Model Code DR 3-101, and the professional rules of most states.").

Some courts' punishment rests on lawyers' specific direction to paralegals engaged in the unauthorized practice law.

- Attorney Grievance Comm'n v. Chapman, 60 A.3d 25, 43, 45, 46 (Md. 2013) (suspending for ninety days a lawyer who had entered into an arrangement with a non-lawyer loan modification consultant, which essentially allowed the consultant to avoid restrictions on such consultants who were not lawyers; "The Commission essentially argues that Mr. Chapman abdicated his professional responsibility by ceding all responsibility for the loan modification work to Mr. Weiskerger and his associates. In response, Mr. Chapman argues that he established a system to oversee the loan modification work through regular email communication and

weekly review meetings."; "While I found Mr. Chapman's testimony credible that he and Mr. Weiskerger were in regular communication, and that they met weekly for a half hour or so to discuss matters, there was no evidence that he had any familiarity with either the Bogarosh or the Butler matters until after the complaints were filed. Rather, the testimony demonstrated that Mr. Weiskerger was responsible for generating much, if not all[,] of the loan modification business. He conducted the initial client meetings, he set the strategy, and his associates processed the necessary papers, called the banks, and communicated with the clients. Mr. Chapman had essentially no contact with these clients. Other than isolated instances, he met with none of the loan modification clients and all of the substantive loan modification work was managed and directed by his consultant." (emphasis added); "Certainly a firm can engage consultants to assist in representation without violating an ethical obligation. Similarly, lawyers and firms can, and often do[,] delegate responsibility for much of the file or case processing to paralegals or other paraprofessionals. In the latter instance, the lawyer clearly has an ethical obligation to oversee and manage the work delegated to junior lawyers and non-lawyers within an office. The distinction in this case, and the flaw in the arrangement, is that virtually all core case responsibility was ceded by the consultant." (emphasis added); "The Consulting Arrangement enabled JW Capital to avoid the clear statutory requirements for license, contract disclosures, and fees, in exchange for a fee paid to Mr. Chapman, with no expectation that he would directly undertake to direct the work to be done. However earnestly Mr. Chapman believed that arrangement comported with the statutory or his ethical requirements, it operated to misrepresent and mislead clients into believing they engaged the services of a law firm, rather than an unlicensed foreclosure consultant. For that reason, the Court finds clear and convincing evidence of a violation of MRPC 8.4."; "The business association between Mr. Weiskerger and Mr. Chapman was designed to allow Mr. Weiskerger to continue to provide loan modification services without a license, and to demand fees in advance. Mr. Chapman's involvement served to cloak those services with the aura of a law firm, thereby allowing Mr. Weiskerger to continue in a manner that would not otherwise be permitted. While there's nothing inherently wrong with a lawyer engaging a consultant, or with passing through a payment of a fee for the reasonable value of those consulting services, the operation in this instance is not that model. It is more akin to payment of a fee by a business for use of the cache of the law firm. The law firm is not much more than a prop to attract business that does not require special legal acumen or skill. Of particular concern in this case, the affiliation with the law firm enabled those non-legal loan modification services to be done by non-lawyers not affiliated with the firm in a manner that would not otherwise be permitted.").

- In re Bradley, 495 B.R. 747, 784-85, 785 (Bankr. S.D. Tex. 2013) (imposing sanctions on a lawyer, his law firm and his paralegal for improper conduct in connection with bankruptcy matters; "The Defective Pleadings were, at least initially, filled out entirely by Aduwa's legal assistant, Gutierrez. . . . Gutierrez is

not a licensed attorney and should have not been preparing legal documents -- particularly those to be signed under oath by the Debtors -- without direct oversight from Aduwa. Aduwa needed to review her drafts of the Defective Pleadings prior to those documents being filed." (emphasis added); "Gutierrez -- at Aduwa's direction -- was improperly engaged in the practice of law by (a) giving legal advice to the Debtors about the necessity of converting their case to Chapter 7 to prevent the Chapter 13 case from being dismissed . . . and (b) unilaterally preparing and filing the Notice of Conversion, Initial Conversion Schedules, Initial Conversion SOFA, Amended Conversion Schedules, and Amended Conversion SOFA with this Court."; "This Court recognizes the fundamental role that legal assistants play in assisting bankruptcy attorneys, particularly by collecting financial information from debtors, but there is an inherent difference between a legal assistant and a bankruptcy attorney. Bankruptcy attorneys aid their clients by using their expertise in bankruptcy law to give legal advice. On the other hand, legal assistants may not counsel, warn, or ensure a debtor's compliance with bankruptcy law. . . . [A] legal assistant cannot be utilized as a stand-in for an absent attorney, and may not prepare and file documents which are un-reviewed by an attorney; rather, legal assistants are charged with mere transposition of a debtor's information onto the Schedules and Statement of Financial Affairs for review by the attorney." (emphasis added; emphasis in original noted by italics)).

- In re Hrones, 933 N.E.2d 622, 625, 628, 630 (Mass. 2010) (suspending for one year and one day a lawyer for helping a non-lawyer engage in the unauthorized practice of law; explaining that the lawyer (Hrones) allowed Porter ("a law school graduate who had not passed the bar examination") to essentially operate an independent business out of Hrones' office; "They agreed that the firm would enter into contingent fee arrangements with Porter's clients, and all fees and retainers would be paid to the firm. The respondent would then give Porter two-thirds of any fee collected and retain one-third. The respondent listed Porter on the firm's letterhead as a paralegal, and he permitted Porter to use a firm business card that identified him as a paralegal."; "The respondent's firm generally did not handle employment or other discrimination cases, and the respondent himself had little or no experience in discrimination cases. The respondent intended that Porter would operate a virtually independent discrimination law practice, without substantial supervision by the respondent or any other attorney at the firm. No one in the office was assigned to, or did, supervise Porter's work." (emphasis added); explaining that in 1936 the court defined the practice of law as follows: "directing and managing the enforcement of legal claims and the establishment of the legal rights of others, where it is necessary to form and to act upon opinions as to what those rights are and as to the legal methods which must be adopted to enforce them, the practice of giving or furnishing legal advice as to such rights and methods and the practice, as an occupation, of drafting documents by which such rights are created, modified, surrendered or secured." (quoting from In re Shoe Mfrs. Protective Ass'n, 3 N.E.2d 746, 748 (1936)); explaining that Hrones had allowed Porter to essentially create the attorney-client

relationship with a prospective client, which fell within the definition of the practice of law; "The respondent's efforts to curb Porter's conduct, by holding Porter out as a paralegal, instructing Porter on fee agreements, requiring Porter to turn over all fee payments to the firm, and minimally reprimanding Porter when he was informed of Porter's missteps, are not sufficient to avoid a charge of assistance in the unauthorized practice of law."); see also Leigh Jones, Attorney Suspended for Assisting in Unauthorized Practice of Law, National Law Journal, Sept. 14, 2010 ("Hrones is a partner at Hrones & Garrity. In a much-publicized case, he represented Christian Karl Gerhartsreiter, who went by the name Clark Rockefeller, convicted in 2009 of abducting his 7-year-old daughter from a street in Boston and assaulting a social worker. The firm's Web site says that Hrones is a graduate of Harvard University and the University of Michigan Law School and earned a Fulbright Fellowship in 1969.").

- In re Miller, 238 P.3d 227, 236, 237 (Kan. 2010) (disbarring a lawyer who arranged for an independent contractor to essentially handle his legal practice during his earlier two-year suspension; "A suspended attorney is unable to undertake any further representation of a client after the effective date of the suspension order. . . . Obviously, then, the suspended attorney cannot hire an independent contractor to do the legal work which the suspended attorney is precluded from doing." (emphasis added); "Given the uncontroverted finding that Cowger was an independent contractor of the professional corporation, he would not be Miller's 'attorney-employer.' To the contrary, Miller was an employee of the professional corporation. Ordinarily, an independent contractor of a corporation would have no authority to supervise and direct the actions of the corporation's employees. Here, Cowger confirmed that his responsibilities were limited to his contractual obligation and that he had no corporate responsibilities. That left Miller working for the corporation without attorney supervision. A suspended attorney cannot function independently as a law clerk or paralegal; he or she must work for and be supervised by a licensed attorney who is ultimately responsible for the paralegal work.").
- In re Guirard, 11 So. 3d 1017, 1018, 1022, 1027 (La. 2009) (disbarring lawyers for allowing their non-lawyer staff to practice law; explaining that the non-lawyers acted as "case managers" and received compensation based on the cases that they handled; "The committee commented that this is not a situation in which the case managers are paid a percentage of net profits at the end of the year on the general business of the law firm; rather, 'each non-lawyer receives a piece of the action if the case is [settled] by them. This is fee splitting and always has been.' Moreover, the committee found the arrangement creates a clear conflict of interest between the law firm (particularly the case managers) and the clients. The non-lawyer case manager is being paid on a successful settlement of a claim; if the file is turned over to litigation, the case manager receives nothing, or, at most, a discretionary percentage. Under these circumstances, the committee found the case manager has an 'overwhelming motive to settle a claim at any price' before

losing control over the file."; "By allowing non-lawyers to practice law, respondents ran the risk of having cases settled improperly and proceedings later being declared nullities. By implementing the compensation plan at issue, the potential for conflict between the client's interests and the case managers' interests was also great. Further, by improperly paying their case managers and investigators bonuses for 'signing up' clients, the reputation of the legal profession and the legal system has undoubtedly been marred. The board found the applicable baseline sanction is disbarment." (footnote omitted) (emphasis added)).

- In re Garrett, 12 So. 3d 332, 333, 335-36, 344, 344-45 (La. 2009) (disbarring a lawyer for allowing his paralegal to play too substantial a role in cases that the lawyer's firm handled; "Respondent is a solo practitioner handling primarily plaintiff's personal injury cases. In July 1999, respondent hired Marcia Jordan to work in his office as a legal assistant. At the time he employed Ms. Jordan, respondent knew she had graduated from law school in 1996 and passed the Louisiana bar examination, but had not been admitted to the practice of law."; "Ms. Jordan testified that she always works under respondent's supervision, but she has the primary day-to-day responsibility for handling the 'J' files. She orders the accident report, maintains contact with the clients, responds to inquiries from third parties for additional information concerning the case, and does legal research. She drafts correspondence, pleadings, and discovery for respondent to review and sign. Ms. Jordan also participates in the taking of recorded statements of the client by an insurance adjuster." (emphasis added); "We find the record, taken as a whole, supports the conclusion that respondent facilitated Ms. Jordan's unauthorized practice of law by allowing her to negotiate personal injury settlements on behalf of his clients and in representing clients during recorded statements taken by insurance companies. . . . [A] review of Ms. Jordan's earlier testimony suggests that she clearly testified that she was authorized by respondent to handle settlement negotiations independently so long as she stayed within a pre-determined 'high and low' range, and that she frequently participated in the taking of recorded client statements." (emphasis added); "Rule 5.5 of the Rules of Professional Conduct . . . specifically defines the 'practice of law' to include 'appearing as a representative of the client at a deposition or other discovery matter' and 'negotiating or transacting any matter for or on behalf of a client with third parties.' Accordingly, respondent has facilitated the unauthorized practice of law by his assistant, Ms. Jordan, in violation of Rule 5.5(a)."; "Respondent has also committed misconduct by sharing his legal fees with Ms. Jordan. Ms. Jordan and respondent describe her compensation arrangement as 'complex' and 'convoluted,' but we find it simple: under their agreement, respondent and Ms. Jordan share a predetermined percentage of his legal fees as compensation for her work on the 'J files.' Such an arrangement clearly violates the letter and spirit of Rule 5.4(a) of the Rules of Professional Conduct, which provides that a lawyer 'shall not share legal fees with a non-lawyer' except under limited circumstances not relevant to this case." (emphasis added)).

- In re Colman, 885 N.E.2d 1238 (Ind. 2008) (suspending for three years an Indiana lawyer who, among other things, arranged for one of his friends to prepare a will for one of the lawyer's clients who wanted to make the lawyer a beneficiary of his estate; noting that the friend who prepared the will never spoke directly with the client and did not charge the client for his services; also noting that the friend sent a paralegal to the hospital to go over the will with the hospitalized client before the client signed the will).
- Fla. Bar v. Abrams, 919 So. 2d 425, 429, 430 (Fla. 2006) (suspending a lawyer for one year for allowing a paralegal to act on his behalf in dealing with an immigration matter, including handling all interaction with the clients, and preparing and filing pleadings on the clients' behalf; "In the present case, the record shows that even though Akbas worked as a paralegal at U.S. Entry, she actually was the person in control of the corporation's day-to-day operations. She met with the clients, conducted the client interviews, and made the decisions as to the appropriate course of action for the clients." (emphasis added); explaining that "Abrams did not merely fail to supervise Akbas in the transmission of legal advice, but rather he provided no legal advice whatsoever. Instead, Akbas conducted client intake and formulated and dispensed legal advice.").
- Fla. Bar v. Barrett, 897 So. 2d 1269, 1271 (Fla. 2005) (disbarring a lawyer for engaging in the following practice: "Barrett was the senior partner and managing partner in the Tallahassee law firm of Barrett, Hoffman, and Hall, P.A. In approximately January 1993, Barrett hired Chad Everett Cooper, an ordained minister, as a 'paralegal.' Although Cooper had previously worked for a law firm in Quincy, Florida, Cooper's primary duty at Barrett's law firm was to bring in new clients. As Cooper testified, Barrett told him to 'do whatever you need to do to bring in some business' and 'go out and . . . get some clients.' Cooper was paid a salary averaging \$ 20,000 and, in addition to his salary, yearly 'bonuses' which generally exceeded his yearly salary. In fact, Cooper testified that Barrett offered him \$ 100,000 if he brought in a large case. To help Cooper bring in more personal injury clients to the law firm, Barrett devised a plan so that Cooper could access the emergency areas of a hospital and thus be able to solicit patients and their families. In order to gain such access, Barrett paid for Cooper to attend a hospital chaplain's course offered by Tallahassee Memorial Hospital." (emphases added); explaining that the lawyer paid the paralegal a bonus of \$200 for each client that the paralegal brought into the firm).
- In re Lester, 578 S.E.2d 7 (S.C. 2003) (publicly reprimanding a lawyer for allowing a paralegal to handle real estate closings without a lawyer present).
- People v. Milner, 35 P.3d 670 (Colo. 2001) (disbarring a lawyer whose paralegal provided advice to one of the lawyer's clients on domestic relations matters, and advised the client not to seek temporary custody of the client's children or speak with a government agency).



- In re Carlos, 227 B.R. 535 (Bankr. C.D. Cal. 1998) (finding that a law firm had assisted in the unauthorized practice of law by allowing a paralegal to negotiate a bankruptcy agreement with a debtor; acknowledging that the lawyer reviewed the agreement, but emphasizing that the lawyer had not been involved in any of the negotiations).

Other orders sanctioning lawyers point to the lawyers' failure to supervise other professionals, who then engage in unauthorized practice of law (presumably either with the lawyer knowing of their misconduct or negligently failing to know of it).

- State ex rel. Okla. Bar Ass'n v. Martin, 240 P.3d 690, 696, 698 (Okla. 2010) (issuing a public reprimand against a lawyer for inadequate supervision of a non-lawyer sharing his offices; "In May of 2006 respondent agreed to help Wingo [non-lawyer] by putting him on the law firm's payroll. According to their verbal arrangement, Wingo would call his business the Jeff Martin Research Center (JM Research Center or Center). Wingo was to operate it as a self-sustaining enterprise by earning service fees that were to be used to defray his business costs, including salaries and expenses. Wingo was to run the business as an employee and be responsible for all losses incurred by him. Respondent [lawyer] would be compensated by a percentage of the income generated. There was no agreement to share profits and losses as partners."; "Respondent admits that even though the Center was set up under his name, he neither did a background check on Wingo nor took any steps to find out what services, if any, Wingo was actually providing. Neither did respondent have any direct daily contact with Wingo's operations."; "Respondent's utter failure to supervise any of Wingo's work activities not only enabled Wingo to misrepresent respondent's individual involvement in the case but also to engage in the unauthorized practice of law by performing legal services in the form of legal research, the alleged preparation of a motion for post-conviction relief and of a petition for writ of certiorari to the United States Supreme Court without proper supervision by a licensed lawyer. Respondent's dereliction violated ORPC Rule 5.5(b), which provides that 'a lawyer shall not . . . assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.'" (emphasis added)).
- In re Bennett, 32 So. 3d 793, 795 n.1, 797 (La. 2010) (suspending a lawyer for one year and one day (but deferring the suspension) for having negligently supervised a paralegal; "In the summer of 2006, respondent learned that Ms. Adducci's [paralegal] previous employer had accused her of embezzling \$100,000. After receiving his information, respondent informed Ms. Adducci that she was no longer allowed to handle money at his office. However, she continued to request checks from the Carbo firm."; "Respondent was negligent in employing Ms. Adducci, continuing her employment after notice of allegations of embezzlement, and allowing her to continue to access his trust account. Respondent was also negligent in failing to properly and reasonably supervise, control, reconcile, and maintain his trust account and in allowing the trust account

to be used without proper and reasonable oversight or procedures in place to protect funds belonging to clients and third parties.").

- In re Phillips, 244 P.2d 549, 551, 551-52, 552 (Ariz. 2010) (suspending for six months a lawyer who had not properly supervised non-lawyer subordinates; "The Hearing Officer found that Phillips violated ER 5.1(a) as alleged in Counts 3 and 4, which related to the caseloads of P&A's [Phillips & Assocs.] bankruptcy attorneys, each of whom carried as many as 500 cases at a time. A former P&A attorney testified that, upon joining the firm, she was immediately responsible for 540 cases. Counts 3 and 4 involved circumstances in which clients' needs were not met because of the high volume of cases assigned to bankruptcy attorneys. In both counts, the Hearing Officer also found that, because of the number of attorneys handling a given case, inadequate attention was paid to the problems presented in the case and the client was confused and not adequately informed."; "The P&A attorney handled forty files per day and at times would have six to seven 341 meetings within thirty minutes."; "Another category of violations related to P&A's intake and retention procedures. Prospective clients who visit the firm's offices do not immediately meet with an attorney. Instead, they are provided a blank fee agreement and a general questionnaire. After completing the questionnaire, the prospective client meets with a P&A legal administrator, a non-lawyer tasked with retaining clients. Legal administrators are paid a base salary and monthly bonuses, based in part on the number of cases that the legal administrator retains. After obtaining general information from the client, the legal administrator meets with a lawyer who sets the fee. After the fee agreement is prepared, the client speaks with a lawyer to make sure the client understands the fee agreement, who the lawyer will be, and the scope of P&A's representation. The Hearing Officer found that this process, known as 'closing,' was often not completed by an attorney knowledgeable in the relevant practice area." (emphasis added); "The Hearing Officer also found violations of ER 5.3 arising from P&A's providing legal administrators with bonuses based, in part, on the number of clients retained. Count 8 involved a legal administrator who used 'high pressure tactics' to attempt to dissuade a client from terminating P&A's representation.").
- In re Foster, 45 So. 3d 1026 (La. 2010) (in a per curiam opinion, sanctioning a lawyer for not adequately supervising a non-lawyer who had included misleading information on the law firm's website).
- Miss. v. Thompson, 5 So. 3d 330 (Miss. 2008) (holding that a lawyer had violated Mississippi Rule 5.3 by failing to adequately supervise the ex-inmate that she hired as a paralegal; explaining that the ex-inmate had apparently provided legal advice and prepared pleadings; citing other states sanctioning lawyers for failing to adequately supervise non-lawyer employees who had engaged in the unauthorized practice of law).

- Graham v. Dallas Indep. Sch. District, Civ. A. No. 3:04-CV-2461-B, 2006 U.S. Dist. LEXIS 13639, at \*2 & n.2, \*3, \*5, \*6 (N.D. Tex. Jan. 10, 2006) (assessing a motion to sanction a lawyer ("Layer") for essentially permitting a legal research firm run by a non-lawyer ("McIntyre") to prepare and file pleadings on behalf of the plaintiff in a lawsuit against the Dallas School District; noting that Layer (1) had filed "an incomprehensible and untimely" response brief to one defendant's motion to dismiss, which had relied on Texas procedure rules even though the case was pending in federal court; (2) had responded to defendants' motion to dismiss the plaintiff's complaint (in part because it was unclear whether the plaintiff was suing the defendant in "his official or individual capacity") by arguing that his client's complaint "clearly stated that Defendants were being sued jointly and severally"; (3) had moved for contempt against several of the defendants for failing to serve a copy of a pleading, but withdrew the motion several days later because his office had actually received the defendants' pleading and had "wrongfully filed [it] in another client's file" (internal quotations omitted); (4) had filed a "nonsensical brief" asking to strike one of the defendant's motions because it incorporated the brief in the motion rather than filing a separate brief -- although no local rule required a separate brief; (5) was not prepared for a hearing, and appeared "unable to grasp basic legal concepts in Defendants' motions or even those contained in his own briefing"; (6) had moved to withdraw as counsel, but the plaintiff opposed the motion because (among other things) Layer had allowed non-lawyer McIntyre to prepare and file all the legal papers -- and further noting that the plaintiff "asserted that McIntyre had sought sexual favors in return for legal representation, and she claimed to have an audiotape recording of McIntyre propositioning her for sex"; (7) had stunningly insisted at a later hearing that he had not signed or proofed any of the filings in the case -- including the complaint -- "despite being [the plaintiff's] sole counsel of record"; (8) "when asked whether he had anything to do with preparing the responses to Defendants' motions to dismiss," had told the court "'I don't believe I did' and that 'I certainly didn't do any research'" (emphases added); ordering Layer to pay defendants' attorney's fee and sending a copy of its sanction order to the Texas Bar).
- In re Mopsik, 902 So. 2d 991 (La. 2005) (suspending for sixty days a lawyer who had not adequately supervised a paralegal, and allowing her to essentially act as a lawyer).
- In re Froelich, 838 A.2d 1117 (Del. 2003) (publicly reprimanding a lawyer for allowing an independent paralegal service to handle real estate settlements and the lawyer's escrow account without adequate supervision).
- In re Cuccia, 752 So. 2d 796 (La. 1999) (disbarring a personal injury lawyer for not adequately supervising paralegals; also noting that the paralegal engaged in settlement negotiations with insurance companies and entered into binding settlements).

- In re Robinson, 495 S.E.2d 28 (Ga. 1998) (holding that Robinson had not adequately supervised paralegals, who had the sole interaction with the lawyer's clients and also arranged for the attorney-client relationship).
- Fla. Bar v. Am. Senior Citizens Alliance, Inc., 689 So. 2d 255 (Fla. 1997) (finding that a lawyer had not adequately supervised paralegals, who contacted customers and sold them estate planning documents; noting that the paralegals obtained information from the clients and prepared trust and estate documents using standardized forms; acknowledging that the lawyer later reviewed the documents, but nevertheless finding inadequate supervision and the unauthorized practice of law).
- Disciplinary Bd. v. Nassif (In re Nassif), 547 N.W.2d 541, 543 (N.D. 1996) (disbarring a lawyer for (among other things) not adequately supervising paralegals; "The record demonstrates an unacceptable lack of supervision by Nassif of his office staff. Nassif allowed untrained 'paralegals,' whom he deemed to be independent contractors and not his employees, to, in effect, practice law under his license. These paralegals were allowed to recruit and advise clients, negotiate fee agreements with clients, and perform legal work for clients, with little or no supervision by Nassif. One of these paralegals was held out to a client as a licensed attorney practicing with Nassif. Nassif routinely split fees with the non-lawyer paralegals, and candidly admitted cashing a retainer check from a client and giving half of the cash to his paralegal. Nassif testified he considered this a 'common sense formula' for compensation for work done." (emphasis added)).
- In re Hessinger & Assocs., 192 B.R. 211, 222, 223 (N.D. Cal. 1996) (holding that a bankruptcy lawyer had violated California ethics rules by failing to supervise several paralegals; providing as one example the following testimony: "Patricia Hoagland, another Hessinger paralegal, testified that she performed functions without proper legal supervision, that the firm was organized similar to a production line, with little or no review by attorneys, and that paralegal/credit specialists were required to produce at least two bankruptcy petitions each day to keep their job." . . . Again, appellant has made no effort to specifically contradict this testimony." (emphasis added); rejecting the lawyer's defense that other lawyers used paralegals in the same fashion; "As a final point on this issue, the court notes that a persistent theme in appellant's position on the role of paralegals in its practice is the argument that 'everybody does it;' [sic] that is, all large consumer bankruptcy firms rely on paralegals to perform a large amount of the work required for filing a bankruptcy petition, and in all such firms the paralegals do so with only minimal attorney supervision. This may well be true; it may also be true that, given sufficient training, paralegals are fully capable of competently handling most aspects of a consumer bankruptcy case. The court, however, is not in a position to decline to enforce the Rules of Professional Conduct merely because application of those rules results in attorneys being required to perform work which could be performed less expensively and more efficiently by non-

lawyers. Nor is the court in a position to condone an unethical practice merely because most consumer bankruptcy firms are engaging in it."; remanding for appropriate sanctions).

- People v. Fry, 875 P.2d 222 (Colo. 1994) (finding that a lawyer had engaged in improper supervision of a paralegal, who had met with and given legal advice to a bankruptcy client whom the lawyer had never met).
- Fla. Bar v. Lawless, 640 So. 2d 1098 (Fla. 1994) (suspending a lawyer for ninety days for failing to supervise an independent contractor paralegal).

Some courts and bars are more forgiving.

- In re Cabibi, 922 So. 2d 490, 496, 496 n.11 (La. 2006) (dismissing charges against a lawyer who had allowed his daughter (a paralegal) to prepare a document under which the lawyer received a bequest; noting that the lawyer's daughter had not discussed the document with her father, and also noting that the person making the bequest was a long-time family friend; "[N]o harm was caused as a result of the misconduct, which was unintentional and attributable to the fact that respondent did not think of Mrs. Hirsch as a client, but only as a longtime family friend"; "Mrs. Hirsch [the client making the bequest to the lawyer] had executed four previous olographic [sic] wills leaving her property - in some cases her entire estate - to the Cabibi family.").
- North Carolina LEO 2008-6 (7/18/08) (answering in the affirmative the following question: "May a lawyer hire a non-lawyer independent contractor to organize and speak at educational seminars at which the non-lawyer will present general information about wills, trust, and estates?"; explaining that "[t]he non-lawyer may not answer questions that require the exercise of independent legal judgment or the giving of specific legal advice. The hiring lawyer assumes the risk that the non-lawyer will cross the line between answering general informational questions and giving legal advice.").

Lawyers may also be found liable for malpractice if they fail to adequately supervise paralegals.

- Musselman v. Willoughby Corp., 337 S.E.2d 724 (Va. 1985) (finding that a lawyer had committed malpractice by allowing a non-lawyer to handle a real estate transaction).

### **3. Suspended or Disbarred Lawyers Acting as Paralegals**

Although nothing in the ABA Model Rules prohibits a suspended or disbarred lawyer from acting as a paralegal, some states' ethics rules contain specific and unforgiving restrictions that apply to such a situation.

The American Bar Association Standing Committee on Client Protection's 2015 survey of unlicensed practice of law committees reported on the results of its survey.

- Am. Bar Ass'n Standing Comm. on Client Protection, 2015 Survey of Unlicensed Practice of Law Committees, at 2 (September 2015) ("The survey also asked questions regarding the law-related activities of disbarred lawyers. Twenty-two responding jurisdictions permit disbarred lawyers to engage in law-related activities while disbarred. Usually the disbarred lawyer's conduct is regulated by court rules or case law that defines the supervision necessary for the disbarred lawyer working for a lawyer.").

The Restatement assesses in part a disbarred lawyer's motivation for continuing in a law-related job.

- Restatement (Third) of Law Governing Lawyers § 3 cmt. d (2000) ("Either by rule, decisional law, or specific order, a jurisdiction may . . . prohibit a disbarred or suspended lawyer from functioning as a paralegal in a law firm . . . , even beyond the prohibition against practicing as a lawyer or holding oneself out as such. The concern is not only that a disbarred lawyer functioning as a paralegal will harm the interests of clients by performing services incompetently, but also that a lawyer who has committed a violation sufficiently serious to warrant substantial discipline and who as a result has been deprived of a law license and the income that it represents is in a position and may be motivated to use such a role as a subterfuge to continue law practice." (emphasis added)).

Lawyers otherwise permitted to hire a disbarred lawyer as a paralegal may themselves face punishment if they allow the disbarred lawyer to practice law, or otherwise fail to supervise him or her.

- Ky. Bar Ass'n v. Unnamed Attorney, 191 S.W.3d 640 (Ky. 2006) (privately reprimanding a lawyer who had hired a suspended lawyer as an independent contractor and allowed the suspended lawyer to attend client meetings and answer clients' questions).
- In re Comish, 889 So. 2d 236 (La. 2004) (suspending a lawyer for one year and one day, because the lawyer permitted a disbarred lawyer (acting as a paralegal) to engage in such activities as signing his name as a notary, depositing trust money into his own account, meeting with clients, communicating with adjusters, handling fees, negotiating settlements, etc. -- all without adequate supervision).

Not surprisingly, suspended or disbarred lawyers obviously cannot supervise paralegals.

- In re Miller, 238 P.3d 227, 236, 237 (Kan. 2010) (disbarring a lawyer who arranged for an independent contractor to essentially handle his legal practice during his earlier two-year suspension; "A suspended attorney is unable to

undertake any further representation of a client after the effective date of the suspension order. . . . Obviously, then, the suspended attorney cannot hire an independent contractor to do the legal work which the suspended attorney is precluded from doing."; "Given the uncontroverted finding that Cowger was an independent contractor of the professional corporation, he would not be Miller's 'attorney-employer.' To the contrary, Miller was an employee of the professional corporation. Ordinarily, an independent contractor of a corporation would have no authority to supervise and direct the actions of the corporation's employees. Here, Cowger confirmed that his responsibilities were limited to his contractual obligation and that he had no corporate responsibilities. That left Miller working for the corporation without attorney supervision. A suspended attorney cannot function independently as a law clerk or paralegal; he or she must work for and be supervised by a licensed attorney who is ultimately responsible for the paralegal work.").

States' and courts' approach to this issue represent a broad spectrum.

One court permitted disbarred lawyers to work in a law firm, as long as they do not work in specified law-related activities.

- In re Moncier, 569 F. Supp. 2d 725, 736-37 (E.D. Tenn. 2008) (setting forth with specificity district court's rules prohibiting certain activities by a suspended lawyer; "This memorandum provides a description of the general limitation on the activities of an attorney suspended from the practice of law before the federal court of the Eastern District of Tennessee. However, it is not intended to be, nor could any such description ever be, comprehensive of the entire scope of activity in which a suspended attorney is prohibited from engaging. In evaluating whether a specific action is permissible, the core restriction is that a suspended attorney must refrain from exercising any of the powers, prerogatives, or privileges of a member of the bar of the Eastern District of Tennessee. This core restriction includes both a prohibition on practice before, or contact with, all federal courts in this district, and also a prohibition on any activities regarding any matter or potential matter, or case or potential case in federal court in the Eastern District of Tennessee. A suspended attorney is therefore prohibited from contact with counsel, parties, witnesses, potential witnesses, or other individuals regarding any matter or potential matter, or case or potential case in federal court in the Eastern District of Tennessee." (emphases added)).

Some states have adopted incredibly intricate rules permitting disbarred or suspended lawyers to engage in some law-related activities, but with various notification and registration requirements.

- Ohio LEO 2008-7 (12/5/08) ("A lawyer or law firm may employ an attorney who is disqualified (disbarred or resigned with discipline pending) or suspended from the practice of law, but only in compliance with the conditions set forth in Gov.Bar

R.V(8)(G) and (H). This governing bar rule imposes conditions upon both the employing lawyer or law firm and the employed disqualified or suspended lawyer. An employing lawyer or law firm must register the employment, contractual, or consulting relationship with the Office of Disciplinary Counsel on a form provided by that office and provide an affidavit that the employing or supervisory attorney has read and understands the limitations of the order of disbarment, suspension, or resignation with discipline pending. An employing lawyer or law firm must receive written confirmation from the Office of Disciplinary Counsel before commencing the employment relationship. An employing lawyer or law firm is required to provide written notice to every client on whose matters the disqualified or suspended attorney will perform work or provide services. A disqualified attorney is not permitted to enter an employment, contractual, or consulting relationship with a lawyer or law firm with which the disqualified attorney was associated at the time of the misconduct which resulted in the attorney's disbarment or resignation with discipline pending. A suspended attorney may enter an employment, contractual, or consulting relationship with a law firm with which the suspended attorney was associated at the time of the misconduct resulting in the suspension. A disqualified or suspended attorney must have no direct client contact other than an observer at a meeting, hearing, or interaction between an attorney or client and must not receive, disburse, or otherwise handle client trust funds or property. A disqualified or suspended attorney does not violate the condition of no direct client contact by serving as a receptionist at a law firm provided that any communication with a client is limited to scheduling an appointment, taking a message, or transferring a question or call to the appropriate legal or non-legal staff, or other similar conduct. If a hiring lawyer or law firm limits the duties of a disqualified or suspended attorney to activities such as receptionist, mail room services, copying services, filing pleadings in court, or other similar conduct, the requirement of notification to clients would not be invoked since these activities do not directly involve performing work or providing services on a client matter. If a hiring lawyer or law firm expands the duties of a disqualified or suspended attorney to performing legal research and writing on client matters, the requirement of notification to the clients is invoked since the activity involves performing work or providing services on a client matter. . . . A disqualified or suspended attorney must not engage in the practice of law in Ohio and must comply with the court's order of disbarment, resignation with discipline pending, or suspension. A judge or a lawyer who is concerned that a disqualified or suspended attorney is engaging in the practice of law should direct those concerns to the Office of Disciplinary Counsel." (emphases added) (emphasis in original indicated by italics)).

At the other end of the spectrum, some states prohibit disbarred or suspended lawyers from acting as paralegals.

- In re Castillo, 46 N.Y.S.3d 713, 714 (N.Y. App. Div. 2017) (holding that a suspended lawyer could not work as a paralegal or a clerk; "When an attorney is



suspended from the practice of law, it is the duty of this Court to command said attorney 'to desist and refrain from the practice of law in any form, either as principal or as agent, clerk or employee of another' (Judiciary Law § 90 [2]) and to forbid him or her from, among other things, giving to another 'an opinion as to the law or its application, or of any advice in relation thereto' (Judiciary Law § 90 [2] [b]). Notwithstanding, respondent requests permission from this Court to engage in 25 specific duties and functions, all of which are traditionally performed by attorneys and necessarily involve the exercise of independent legal judgment on behalf of a particular client in a particular legal matter -- i.e., the very type of activities that, when engaged in by suspended or disbarred attorneys, have previously been found to constitute the unauthorized practice of law . . .").

Some states have adopted very strict ethics rules prohibiting a law firm or lawyer from hiring in any capacity a disbarred lawyer if the lawyer was associated with the law firm at any time during or after the lawyer engaged in the wrongdoing that resulted in his or her disbarment.

- Virginia Rule 5.5(a) ("A lawyer, law firm or professional corporation shall not employ in any capacity a lawyer whose license has been suspended or revoked for professional misconduct, during such period of suspension or revocation, if the disciplined lawyer was associated with such lawyer, law firm or professional corporation at any time on or after the date of the facts which resulted in suspension or revocation.").
- Peter Vieth, Lawyer covered for suspended colleague, Virginia State Bar charges, Va. Laws. Wkly., May 20, 2014 ("An Ashland lawyer is in trouble with the Virginia State Bar [VSB] for allegedly helping to keep a law office going after its owner was suspended by the VSB."; "A disciplinary subcommittee charges that attorney William V. Riggerbach acted as cover in 2012 while Robert Smallenberg continued to practice law without a valid license. The arrangement left multiple clients with poor legal work and lost fees, the bar says."; "Riggerbach started work as an employee at Smallenberg's Metropolitan Law Center LLP in Ashland shortly after Smallenberg was suspended for three years in May 2012, according to the VSB charges."; "Even though Riggerbach was the only lawyer at the office with a valid license at the time, he told the bar he thought Smallenberg was still licensed, the bar said. Riggerbach claimed he believed Smallenberg's suspension had been stayed by the state Supreme Court."; "In fact, the Virginia State Bar charged, the court had denied the stay and Smallenberg was suspended. Nevertheless, Smallenberg continued to practice law and manage operations at the office, including management of the bank accounts, the bar said."; "By October, Riggerbach learned that Smallenberg was officially suspended and that the VSB was investigating the operations of the law office, the bar said."; "Based on advice from the VSB's Ethics Hotline, Riggerbach formed a new corporation with himself as sole owner and opened new bank accounts for that corporation."; "But changing the structure of the firm failed to

change its practice, the bar said. The new corporation essentially continued the operation of Smallenberg's old practice, the VSB said. Although Smallenberg was designated as a paralegal, he continued to manage the office and its bank accounts, the VSB charged.").

- Peter Vieth, Virginia State Bar to lawyer: Fire your assistant/husband, Va. Laws. Wkly., Jan. 6, 2012 ("The Virginia State Bar (VSB) has ordered a Richmond lawyer to get rid of her assistant -- her husband, an ex-lawyer who was convicted of fraud and disbarred 20 years ago. Yvonne Cochran-Morton was given a public reprimand by a VSB disciplinary subcommittee for sloppy supervision of an employee and ordered to disassociate her law practice from Ivan L. Morton, her husband. If she fails to do so, Cochran-Morton will be hit with a one-year suspension. . . . The discipline panel found Cochran-Morton had violated disciplinary rules concerning non-lawyer assistants. Her public reprimand was coupled with a requirement that she prohibit Morton from having any access to her firm, her clients or the firm's records. Morton is not even allowed to visit his wife's firm, under the VSB's terms. If she did not agree to her husband's banishment, the VSB penalty would be a one-year suspension, according to the discipline panel's decision.").
- Virginia LEO 1852 (12/23/09) (explaining that under Virginia Rule 5.5, a law firm may not employ "in any capacity" a lawyer whose license was revoked or suspended for any misconduct if the lawyer was associated with the law firm while the lawyer engaged in the alleged misconduct, regardless of when the lawyer was convicted of a crime or the date the bar revoked or suspended the lawyer's license; noting that another law firm may employ the disciplined lawyer, but if the disciplined lawyer serves at that law firm "as a consultant, law clerk, or legal assistant" that law firm may not represent: (1) any client previously represented by the disciplined lawyer; or (2) any client represented by the disciplined lawyer's law firm on or after the date of the disciplined lawyer's wrongdoing at the former firm; concluding that the disciplined lawyer's former firm could not retain an "adjusting firm" to provide services to the law firm -- if the disciplined lawyer was the adjusting firm's chief executive officer; however, other law firms or companies can retain a company to provide non-legal services, even if the disciplined lawyer owns or is employed by the company).
- North Carolina LEO 98-7 (4/16/98) ("[A] law firm may employ a disbarred lawyer as a paralegal provided the firm accepts no new clients who were clients of the disbarred lawyer's former firm during the period of misconduct; however, a disbarred lawyer may not work as a paralegal at a firm where he was employed as a lawyer during the period of misconduct."; relying on North Carolina Rule 5.5(d); "When a disbarred lawyer is employed by another law firm, the disbarred lawyer may attract clients from his former practice to the hiring law firm. As a consequence, it may be difficult for the disbarred lawyer to avoid the unauthorized practice of law with respect to these former clients. More problematic, however, is

the possibility that the hiring law firm may be in collusion with the disbarred lawyer to employ the disbarred lawyer in exchange for the disbarred lawyer's delivery of his former clients to the hiring firm. If so, the firm is showing disrespect for the decision of the DHC and is encouraging unauthorized practice by the disbarred lawyer."; "In the present situation, however, it is merely fortuitous that former clients of ABC Law Firm sought the legal services of XYZ Law Firm during the period prior to the employment of Former Attorney A as a paralegal. Therefore, provided all clients of XYZ Law Firm fully understand that the disbarred lawyer is not acting as an attorney but merely as a paralegal, and, provided further, that, after the employment of Former Attorney A, XYZ Law Firm accepts no new clients who were clients of ABC Law Firm during the period of Former Attorney A's misconduct, XYZ Law Firm may employ him as a paralegal. Care should also be taken to follow the recommendations in Comment [2] to Rule 5.5 relative to the supervision of a disbarred lawyer and related matters.").

One state's paralegal regulations take an equally harsh approach.

- Rule Regulating the Florida Bar 20-5.1(a) (rendering ineligible for registration as a paralegal "a person who is currently suspended or disbarred or who has resigned in lieu of discipline from the practice of law in any state or jurisdiction.").

#### **4. Lawyer - Paralegal Partnerships**

Paralegals may not form partnerships with lawyers for the practice of law.

Such an arrangement would violate every state's unauthorized practice of law rule.

- ABA Model Rule 5.4(b) ("A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law.").
- New York LEO 801 (11/17/06) (a New York lawyer may not form a partnership with a lawyer not admitted in New York, if that other lawyer intends to work exclusively in the New York office on New York matters; if the foreign lawyer limited his activities to those permitted by non-lawyers, such as paralegals, then partnering with him would violate the fee-sharing provisions).

## F. MULTIJURISDICTIONAL PRACTICE ISSUES

### 1. Introduction

Multijurisdictional practice ("MJP") involves lawyers practicing law in a state where they are not licensed to practice law.

- Although some types of multijurisdictional practice is permissible under every state's ethics rules, undertaking such activity outside the applicable ethics rules' provisions can amount to the unauthorized practice of law.

In 2002, the ABA adopted ABA Model Rule 5.5, which defines what lawyers may and may not do in states where they are not licensed to practice law.

- Until the ABA began to investigate the issue in 2000, lawyers seemed to have freely practiced law in other states on a temporary basis, usually without anyone complaining.
- Most states have adopted a variation of ABA Model Rule 5.5, although some have maintained a simplistic prohibition on lawyers practicing law where they are not licensed -- without defining what out-of-state lawyers may do in that state on a temporary basis.

### 2. MJP Issues Involving Lawyers

A state's MJP rule determines what lawyers from other states can do in that state.

- Ironically, some lawyers familiarize themselves with their own state's MJP rule, although it does not apply to them -- lawyers must know the MJP rules of other states where they might conduct activities.

In essence, ABA Model Rule 5.5 prohibits lawyers from establishing a "systematic and continuous presence" in a state where they are not licensed.

- To make matters more complicated, lawyers can establish a "systematic and continuous" presence in another state "even if the lawyer is not physically present" there. ABA Model 5.5 cmt. [4]. This obviously refers to a "virtual" presence in the state.

In-house lawyers may establish such a presence where they are not licensed, but can only represent their client/employer and its "organizational affiliates" (defined as "entities that control, are controlled by, or under common control with the employer"). ABA Model Rule 5.5 cmt. [16].

- This provision specifically excludes "personal legal services to the employer's officers or employees." Id.

Lawyers may provide legal services on a "temporary basis" in a state where they are not licensed, under a number of circumstances. Id. at cmt. [5].

- First, lawyers can undertake activities that are in or "reasonably related to" a pending or potential proceeding in any state -- if the lawyer or another lawyer that she is assisting has already appeared or "reasonably expects" to appear in that proceeding. Id. at cmt. [13], [10].
- Second, lawyers can participate in pending or potential alternative dispute resolution proceedings, as long as they relate to the lawyer's practice where she is admitted, and do not require a pro hac vice admission.
- Third, lawyers can undertake activities that otherwise "arise out of or are reasonably related to the lawyer's practice in the jurisdiction in which the lawyer is admitted to practice." Id. at cmt. [12].

The third provision provides a broad "safe harbor."

- For instance, the lawyer's client might have "substantial contacts" with the jurisdiction in which the lawyer is licensed. Id. at cmt. [14].
- The matter (rather than the client) might have a "significant connection" with the lawyer's home state, or the services involve that state's law. Id.

The Restatement of Law (Third) Governing Lawyers takes an even more liberal approach.

- For instance, Restatement § 3 illus. 5 indicates that an out-of-state lawyer traveling to Florida to help a client in drafting a will codicil may prepare estate planning documents for the client's friend -- whom the lawyer met for the first time in Florida.

Under the U.S. Constitution's Supremacy Clause, lawyers can practice purely "federal" law in any state, even if they are not licensed there.

- Examples include patent or military law.
- Lawyers might be tempted to limit their practice to largely "federal" topics such as labor or intellectual property law -- but such practice areas almost invariably include state issues not protected by the Supremacy Clause.
- Although federal courts can determine for themselves who can practice before them, most federal courts require the lawyers before them to either be licensed in the host state, or to be admitted pro hac vice.

### 3. Lawyers Acting as Paralegals in a State Where They Are Not Licensed

Lawyers might be tempted to act as paralegals in that other state where they are not licensed -- in the hopes of avoiding any unauthorized practice of law rules violation.

Some states approve such activity.

- D.C. UPL Op. 16-05 (6/17/05) (holding that "practicing law in the District of Columbia as a contract lawyer is no different than practicing law as a non-contract partner, associate or other employee. Unless the contract lawyer independently qualifies for one of the exceptions to Rule 49, the lawyer must be a member of the D.C. Bar."; explaining that the lawyer rules do not apply to "paralegal work" such as document or privilege review; explaining that determining whether a contract lawyer performing such paralegal work must comply with the D.C. UPL Rules "depends on whether the person is being held out, and billed out, as a lawyer or as a paralegal. Rule 49 does not regulate the hiring of a person as a paralegal or a law clerk, even though the person may be admitted to the practice of law in another jurisdiction. When a person is hired and billed as a lawyer, however, the person is generally engaged in the practice of law, and is certainly being held out as authorized or competent to practice law. Clients would reasonably assume that the person held out as a contract lawyer performs functions that are different in degree, if not in kind, from those performed by paralegals or law clerks, and that the cost of services performed by contract lawyers reflects the legal training and judgment that they bring to the work they perform. When a client is paying for the services of a lawyer, and not a paralegal or a law clerk, the person providing the services and the person's employer must comply with Rule 49."; also explaining that "if a contract lawyer is supervised not as a paralegal or law clerk but as a subordinate attorney would be supervised, the contract lawyer is engaged in the practice of law").
- Virginia UPL Opinion 201 (1/22/01) ("Except as permitted under the cited rule, a foreign attorney, although admitted to and in good standing in the bar of his home jurisdiction, may not advise or prepare legal documents for a Virginia client in Virginia on matters involving Virginia law. The foreign attorney may give advice to and prepare legal instruments for a Virginia lawyer who may then decide whether such work product is acceptable for the client. UPL Op. 107 (1987). Therefore, a non-Virginia licensed attorney may provide legal services concerning Virginia law when directly supervised by a Virginia-licensed attorney if the attorney-client relationship remains between the Virginia attorney and the client." (footnote omitted) (emphasis added)).

As a practical matter, those lawyers might have to explain what they have been doing in the state if they ultimately decide to apply for a license in that state -- because that state's bar will very carefully examine the lawyer's activities to make sure that the lawyer has not violated the state's unauthorized practice of law rules.

#### **4. Foreign Lawyers Acting as Paralegals**

Many states are expanding the opportunity for foreign lawyers to practice law in the United States.

In 2006, the ABA adopted an amended Model Rule for the Licensing and Practice of Foreign Legal Consultants.

As part of its Ethics 2020 Commission recommendations, in 2012 the ABA adopted ABA Model 5.5(d)(1), which expanded the permissibility of foreign lawyers practicing law in the United States.

Foreign lawyers can also normally work as paralegals in the United States, under a U.S. lawyer's supervision.

- Washington LEO 2201 (2009) (finding that a law firm may pay a foreign law consultant to provide translations and paralegal services to the firm's non-English-speaking clients; ultimately concluding that the lawyer may accept referrals from the consultant, and retain the consultant to provide the services; explaining that the law firm and the consultant can split fees under the ethics rules; also analyzing the foreign consultant's conduct as a paralegal; "Where the FLC [foreign law consultant] is hired to act as a paralegal, legal assistant or translator for the client, the FLC is acting as a non-lawyer professional. As such, the inquiring lawyer may compensate the FLC as any third party cost would be paid. This is permissible because there is no difference between such third-party costs and that for other third-party costs, including copy services, and court reporters."; "The client, however, must be ultimately responsible for such costs. The inquiring lawyer must inform the client about the fees to be paid to the FLC and describe the services. The client should initially agree to the third-party cost in the engagement letter, and the inquiring lawyer should include the cost to the client on any subsequent bills. Absent an express agreement by the client (preferably in writing), a mark-up on third-party costs is impermissible.").

#### **5. Outsourcing**

Lawyers may arrange for other lawyers or other professionals from other jurisdictions to assist in the practice of law.

- No state bar prohibits such outsourcing, although lawyers undertaking such a process must comply with all the ethics rules governing confidentiality, conflicts of interest, and fee sharing, among others.

Some states' legal ethics opinions explaining the requirements for such outsourcing specifically never mention other professionals' participation in the outsourced work.

- North Carolina LEO 2007-12 (4/25/08) (analogizing foreign outsourcing and lawyers' reliance on the services of "any non-lawyer assistant"; concluding that a lawyer in that circumstance must advise the client of any foreign outsourcing; indicating that lawyers may arrange for foreign outsourcing, as long as the lawyers: "determine that delegation is appropriate"; make "'reasonable efforts' to ensure that the non-lawyer's conduct is compatible with the professional obligations of the lawyer"; "exercise due diligence in the selection of the foreign assistant" (including taking such steps as investigating the assistant's background, obtaining a resume and work product samples, etc.); "review the foreign assistant's work on an ongoing basis to ensure its quality"; "review thoroughly" the foreign assistant's work; make sure that "[f]oreign assistants may not exercise independent legal judgment in making decisions on behalf of the client"; "ensure that procedures are in place to minimize the risk that confidential information might be disclosed" (including the selection of a mode of communication); obtain the client's "written informed consent to the outsourcing," because absent "a specific understanding between a lawyer and client to the contrary, the reasonable expectation of the client is that the lawyer retained by the client, using the resources within the lawyer's firm, will perform the requested legal services").
- Florida LEO 07-2 (1/18/08) (addressing foreign outsourcing; concluding that a lawyer might be obligated to advise the client of such foreign outsourcing; "A lawyer is not prohibited from engaging the services of an overseas provider to provide paralegal assistance as long as the lawyer adequately addresses ethical obligations relating to assisting the unlicensed practice of law, supervision of non-lawyers, conflicts of interest, confidentiality, and billing. The lawyer should be mindful of any obligations under law regarding disclosure of sensitive information of opposing parties and third parties."; "The committee believes that the law firm should obtain prior client consent to disclose information that the firm reasonably believes is necessary to serve the client's interests. Rule 4-1.6 (c)(1), Rules Regulating The Florida Bar. In determining whether a client should be informed of the participation of the overseas provider an attorney should bear in mind factors such as whether a client would reasonably expect the lawyer or law firm to personally handle the matter and whether the non-lawyers will have more than a limited role in the provision of the services."; "The law firm may charge a client the actual cost of the overseas provider, unless the charge would normally be covered as overhead.").



## G. PARALEGAL AND LAWYER LIABILITY

### 1. Introduction

Paralegals and lawyers who supervise them can be punished for improper conduct other than unauthorized practice of law violations.

- UPL violations are discussed above.

### 2. Paralegal Liability

Paralegals acting independently sometimes face liability for wrongful conduct other than UPL violations.

Paralegals' wrongdoing can include essentially any type of criminal or civil misconduct.

- Helen Christophi, California Ex-Paralegal Accused Of Pocketing Settlement Funds, Law360, Feb. 4, 2012 ("Former paralegal Ana Lissa Reyes was arraigned Thursday on mail fraud and tax evasion charges alleging she stole settlement funds from her firm's clients and underreported her income on tax forms to hide her extra earnings, government officials said Friday."; "A criminal complaint filed in California federal court last year alleges Reyes, who worked as a secretary, office manager and paralegal for an unnamed San Francisco Bay Area law firm specializing in personal injury, family law and criminal defense, settled client claims between 2006 and 2011 without the knowledge of the firm or its clients, and then deposited the settlement funds into her personal bank account. Reyes also allegedly stole the retainer fee payments clients made to the firm."; "The former paralegal even set up a phony company to correspond with clients by postal mail in order to keep the firm in the dark about her activities and deceive clients into believing the firm was working on their cases, according to the complaint.").
- Glenna Herald, Houston Attorney Sues East End Paralegal For Defamation, Houston Chronicle, Sept. 8, 2012 ("A Houston attorney is suing after, he says, an East End paralegal posted damaging comments about him on Facebook."; "Attorney Bob Bennett filed a defamation lawsuit on August 30 in Harris County District Court against Xiomara Collins, of East End, citing business disparagement and tortious interference."; "Bennett says on August 12, Collins, a paralegal who used to work for the Texas State Bar Disciplinary Counsel, damaged his good name when she responded negatively on the Houston Family Law Facebook page to another attorney's request for a lawyer referral."; "The suit alleges Collins posted, 'bob bennett he is bad news' and 'I would recommend Satan before Bob Bennett' and then stated that he, Bennett, 'is a frequent flyer with the SBOT,' or the State Bar of Texas.").

- Helen Christophi, California Ex-Paralegal Accused Of Pocketing Settlement Funds, Law360, Feb. 4, 2012 ("Former paralegal Ana Lissa Reyes was arraigned Thursday on mail fraud and tax evasion charges alleging she stole settlement funds from her firm's clients and underreported her income on tax forms to hide her extra earnings, government officials said Friday."; "A criminal complaint filed in California federal court last year alleges Reyes, who worked as a secretary, office manager and paralegal for an unnamed San Francisco Bay Area law firm specializing in personal injury, family law and criminal defense, settled client claims between 2006 and 2011 without the knowledge of the firm or its clients, and then deposited the settlement funds into her personal bank account. Reyes also allegedly stole the retainer fee payments clients made to the firm."; "The former paralegal even set up a phony company to correspond with clients by postal mail in order to keep the firm in the dark about her activities and deceive clients into believing the firm was working on their cases, according to the complaint.").
- Ziarko v. Crawford Law Offices, PLLC, Civ. No. 10-153-ART, 2010 U.S. Dist. LEXIS 128683, at \*5-6 (E.D. Ky. Dec. 6, 2010) ("The defendants next argue that Ziarko failed to state a claim against Vicini, who is a paralegal, not a lawyer. It may be true that Ziarko is precluded from suing Vicini for legal malpractice, but Ziarko has asserted claims against Vicini for garden-variety negligence and fraud. But wait, say the defendants. Before there can be negligence there must be a duty. And Vicini did not owe a duty to Ziarko because, according to the defendants, paralegals do not owe duties to the clients of the lawyers who employ them. The defendants do not cite to any Kentucky case establishing this 'paralegal exception' to the general 'duty of reasonable care which is owed by each of us to everyone else.' . . . Instead, the defendants ask the Court to fashion a paralegal exception out of whole cloth, relying on public policy. That is not this Court's role. And even if it were, the defendants have not identified what, exactly, is so sacrosanct about a paralegal's position that warrants a reprieve from the usual rule that everyone owes a duty of reasonable care to everyone else. Because the defendants have not established immunity of any sort for Vicini, Ziarko has stated a claim against her for both negligence and fraud. The defendants' motion for summary judgment must be denied on this ground as well.").
- Zack Needles, Paralegal Allegedly Used Stolen Funds Pay Restitution, Legal Intelligencer, May 19, 2009 ("The Montgomery County district attorney's office announced Monday that a former paralegal of Norristown, PA.-based firm High Swartz was arrested for allegedly stealing more than \$100,000 from the firm and using the money to pay restitution in a case where she has been found guilty of stealing \$285,000 from a New York law firm.").
- Paralegal Who Beheaded Gang Member Acted in Self-Defense, Say Defense Attorneys, Associated Press, Oct. 31, 2008 ("Attorneys for a Fresno, California,

paralegal accused of dismembering the body of a gang member don't have an explanation for the act, but they called the murder 'textbook' self-defense. Brian Waldron, 50, works for the man now defending him, David Mugridge. On Wednesday the attorney called a news conference to say that the dead man, still unidentified, had forced his way into Waldron's home. After a confrontation, Waldron allegedly hit the man with a metal pipe, placed him in the bathtub, cut off his head and limbs and bagged them in plastic, acts his attorney referred to as 'not something normal.' He then buried the body parts in the Sierra. Mugridge said his paralegal 'did not have a chance' to call 911.").

Most cases involving paralegal misconduct focus on lawyers' alleged liability under respondeat superior or other legal theories.

### 3. Lawyers' Liability

Lawyers themselves may face liability for their paralegals' misconduct.

#### a. Primary Liability

Lawyers can face primary liability in several scenarios.

First, lawyers can be primarily liable for directing paralegals to engage in prohibited misconduct.

- ABA Model Rule 8.4(a) ("It is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.").
- Lisa Ryan, Ill. Atty Benched 90 Days For Handing Work To Non-Lawyers, Law360, Apr. 21, 2015) ("The Illinois Attorney Registration and Disciplinary Commission on Monday hit lawyer Matthew Wildermuth with a 90-day suspension for delegating loan modification legal work to non-lawyers and failing to fully explain how he'd achieve legal objectives to his clients."; "Wildermuth, the managing partner of the Law Offices of Matthew R. Wildermuth, was hit in 2012 with a six-count complaint accusing the attorney of engaging in misconduct while representing clients in loan modification matters, ranging from failing to explain matters to his clients and charging an unreasonable fee to deceiving clients into believing he could achieve results he knew were not possible."; "The commission's hearing board found in its opinion that Wildermuth failed to recognize the 'wrongfulness of his conduct,' and that the attorney improperly allowed non-lawyers to handle clients who were retaining his legal services, thereby placing those clients' legal rights at risk. The board noted that his 'inattention was even more troubling' because his clients 'were in desperate financial straits.'"; "Considering the pattern of misconduct in this case, we do not believe a censure would be sufficient to preserve the integrity of the profession and protect the administration of justice from reproach. Rather, we conclude that

a suspension is warranted and that the duration should be 90 days,' the opinion said."; "Wildermuth has been a licensed attorney in Illinois since 1989 and operates his law firm in Chicago and Woodbridge, Illinois, according to the opinion, where he currently has 45 non-lawyers and four lawyers on staff."; "The attorney began handling loan modifications in February 2009, and at the time there was no template for how to construct the processes he put into place, the opinion said. He and his employees defended foreclosure cases and handled loan modifications, with his non-lawyer employees receiving a salary and commission for each loan modification they obtained for clients."; "Wildermuth and his staff handled an average of 1500 to 1600 loan modifications at any given time between 2009 and 2011, in addition to 400 to 500 foreclosure matters, with hourly rates of \$225 to \$250 per hour and flat fees for loan modifications, according to the opinion.").

- In re Colman, 885 N.E.2d 1238 (Ind. 2008) (suspending for three years an Indiana lawyer who, among other things, arranged for one of his friends to prepare a will for one of the lawyer's clients who wanted to make the lawyer a beneficiary of his estate; noting that the friend who prepared the will never spoke directly with the client and did not charge the client for his services; also noting that the friend sent a paralegal to the hospital to go over the will with the hospitalized client before the client signed the will).

Some of the cases discussed above in connection with UPL violations involve lawyers' direction of paralegal misconduct rather than failure to supervise or train.

Specific litigation-related misconduct is discussed below.

- For obvious reasons, lawyers often direct their paralegals to engage in deceptive discovery tactics, ex parte communications, etc., that the lawyers apparently feel uncomfortable undertaking themselves.

A 2014 Florida incident involved an interesting scenario.

- Carolina Bolado, Fla. Bar To Charge Tampa Attys Over Opponent's DUI Arrest, Law360, May 12, 2014 ("The Florida Bar said Friday that it had found probable cause to pursue ethics charges against three attorneys at Tampa firm Adams & Diaco for allegedly setting up an opposing counsel for a drunk driving arrest during the course of an unrelated trial."; "After an investigation, a Florida Bar grievance committee for the Thirteenth Judicial Circuit found that there was probable cause to begin drafting ethics complaints against Robert D. Adams, Stephen Diaco and Adam Filthaut over their roles in the DUI arrest of Shumaker Loop & Kendrick LLP attorney Charles Philip Campbell Jr. in January 2013."; "Campbell was at the time representing local talk radio host Todd Schnitt in a defamation suit against another radio talk show host, Bubba the Love Sponge Clem, who was represented by Adams & Diaco." (emphasis added); "The parties were midtrial on January 23, 2013, when Campbell left the courthouse to go to a

bar a few blocks away from his downtown Tampa condominium for dinner and a drink with a colleague, according to the grievance committee's investigative report. An Adams & Diaco paralegal, Melissa Personius, was at the same bar with a friend and recognized Campbell, according to the Bar's report." (emphasis added); "Personius and her friend left for another bar but returned later and sat next to Campbell and drank with him, according to the report, which said she bought him drinks, flirted and told him that she worked as a paralegal at a different firm." (emphasis added); "The report referenced a number of calls and texts made between Personius and attorneys at Adams & Diaco, as well as several calls between Filthaut and his friend at the police department." (emphasis added); "At about 9:30 p.m., Campbell said he would walk home and offered to pay for a cab for Personius, who was too drunk to drive home, according to the report. The report says that Campbell confirmed with the valet at the garage that she could leave her car there overnight, but she insisted that she needed access to her car and said that she needed to move her car a few blocks away." (emphasis added); "Campbell put his briefcase -- which contained trial information and documents -- in the car and got into the driver's seat to move the car and was pulled over a few blocks from the bar, according to the report. The briefcase, which was left in the car after the arrest, later ended up in the hands of Adams & Diaco attorneys, although all testified that they did not open it, according to the report." (emphasis added); "Prosecutors later dropped the DUI charges against Campbell and instead began investigating the actions of the Adams & Diaco attorneys.").

Second, lawyers may face primary liability for failing to take reasonable steps to assure that paralegals and other professionals working with lawyers act in a way "compatible" with the lawyers' own ethics rules.

The ABA Model Rules take slightly different approaches to law firm managers and direct supervisors.

Those with managerial authority in a law firm (or law department) must take reasonable institutional measures to assure such compliance.

- ABA Model Rule 5.3(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.").

Lawyers directly supervising other professionals have a more direct responsibility.

- ABA Model Rule 5.3(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.").
- ABA Model Rule 5.3 cmt. [2] ("Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent

contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising non-lawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.").

This supervision duty includes adequate training of other professionals.

- ABA Model Guidelines for Paralegals, cmt. to Guideline 2 ("A lawyer should start the supervision process by ensuring that the paralegal has sufficient education, background and experience to handle the task being assigned. The lawyer should provide adequate instruction when assigning projects and should also monitor the progress of the project. Finally, it is the lawyer's obligation to review the completed project to ensure that the work product is appropriate for the assigned task.").
- ABA Model Guidelines for Paralegals, Guideline 10 ("A lawyer who employs a paralegal should facilitate the paralegal's participation in appropriate continuing education and pro bono public activities.").

Many of the cases discussed above in connection with UPL violations involve lawyers' failure to supervise.

### **b. Secondary Liability**

The ABA Model Rules describe lawyers possible secondary liability for their other professionals' ethics violations.

- ABA Model Rule 5.3(c) ("[A] lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if: (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.").

As a practical matter, lawyers may face the same punishment under their primary liability for failure to supervise, or under their secondary liability under a respondeat superior theory.

- Fla. Bar v. Gilbert, 246 So. 3d 197, 198 (Fla. 2018) (per curiam) (disbarring a lawyer who hired, fired, rehired and inadequately supervised a felon who stole \$4.8 million from the firm's trust account; "We have for review a referee's report

recommending that Respondent, Randall Lawrence Gilbert, be found guilty of professional misconduct and suspended from the practice of law for a period of two years. We have jurisdiction. . . . The egregious facts, as found by the referee, demonstrate Gilbert's failure to exercise any supervision over Steven Sacks, Gilbert's employee with a known history of wire fraud and embezzlement of more than \$7 million. Even after Gilbert was warned by Sacks' probation officer of the risk of financial irresponsibility and his opinion that Sacks should not be working at a law firm given his criminal past, Gilbert did nothing. In fact, shortly after hiring Sacks, when Gilbert became aware that Sacks had embezzled over \$20,000 from the law firm's operating account, Gilbert fired and then rehired Sacks, eventually delegating to Sacks all matters regarding the administration of Gilbert's firm's trust account. The details are set forth more fully below, but by the end of 2014 Sacks had embezzled nearly \$5 million from the firm's trust account.”; “Whether Gilbert was aware of or personally involved in the theft is not the critical inquiry. Indeed, this case gives new meaning to the phrase 'turning a blind eye.' Gilbert, as an attorney and fiduciary, was directly responsible for his firm's trust account and for the supervision of employees. As an attorney, he owed a duty to the public and to his clients to safeguard their money. Instead, he flouted the system by lying to a federal probation officer and allowing a nonattorney to hold himself out as a law school graduate and a certified public accountant (CPA). Sacks was neither and never had been. For the reasons that follow, we approve the referee's factual findings and recommendation as to guilt but reject the referee's recommended disciplinary sanction and, instead, impose the sanction of disbarment.”; “In February 2005, Sacks was referred to Gilbert by a friend/client for a job at Gilbert's law office. Gilbert interviewed Sacks and learned that Sacks was then living in a halfway house, having been recently released from federal prison after being convicted of wire fraud. Sacks claimed in this interview to be a CPA and a disbarred New York attorney. With knowledge of Sacks' criminal history, Gilbert hired Sacks. However, Gilbert did not investigate Sacks' criminal history in any manner, obtain any further information about Sacks' crimes, contact the New York Board of Accountancy to confirm whether Sacks was a CPA, or contact the New York Bar in regard to the circumstances of Sacks' disbarment.”; “Had Gilbert investigated Sacks further, he would have discovered that Sacks was never an attorney in New York. Additionally, if Gilbert had contacted the New York Board of Accountancy, he would have learned that Sacks was not a CPA.”; “Five months after Gilbert hired Sacks, Sacks stole and forged Gilbert's signature on one of the firm's operating account checks, writing the check for \$20,950 to pay for Sacks' girlfriend's cosmetic surgery. Upon Gilbert's discovery of the theft, Sacks returned the check. Gilbert terminated Sacks' employment, but did not report the incident to Officer Feldman. When he learned Sacks had been terminated, Officer Feldman repeatedly reached out to both Sacks and Gilbert in an attempt to determine why Sacks was no longer employed at the firm. Gilbert refused to tell Officer Feldman why he terminated Sacks. Officer Feldman was surprised by Gilbert's refusal to cooperate, especially since Gilbert was a member of The Florida Bar.”; “On October 11, 2005, Sacks called Officer Feldman and

explained that he and Gilbert had reconciled and that Sacks had returned to working for Gilbert.”).

- Andrew Strickler, Ga. Lawyer Who Hired Disbarred Atty As Paralegal Suspended, Law360, May 16, 2017 (“A Georgia lawyer recently ordered to take ethics and professionalism training after pressing a bogus case against [U-Haul International Inc.](#) was suspended Monday by the state Supreme Court for hiring a disbarred lawyer as a paralegal and abandoning a client.”; “The unanimous six-month suspension decision for Michael Robert Johnson Sr. found the Atlanta-area attorney took a \$2,500 deposit from a client with a civil records matter last year but handed the case over to the paralegal, a disbarred lawyer Johnson employed.”; “In issuing the suspension, the court declined to accept a bar recommendation that the sanction be limited to a reprimand, saying Johnson's disciplinary record and the willful nature of his misconduct warranted tougher punishment.”; “Johnson ‘failed to personally do any work at all on the matter and instead allowed the disbarred attorney to have contact with the client in person, by telephone, and through written correspondence,’ according to the decision. And after the client realized that Johnson and the paralegal had abandoned his case without doing any work and tried to fire the lawyer, Johnson also failed to refund the unearned fee.”; “Johnson (and his paralegal) ultimately abandoned the legal matter to the client’s detriment,’ the court said.”).
- In re Ruebling, Case No. 15-71627, 2016 Bankr. LEXIS 4011, at \*17 (Bankr. C.D. Ill. Nov. 21, 2016) (sanctioning lawyers who allowed paralegals to act independently and without adequate supervision; “It is obvious that Attorney Linder has made a wholesale turnover of his bankruptcy practice to an inadequately trained and wholly unsupervised clerical staff member. He allows his paralegal to complete documents and file them without review and he makes no real effort to ensure compliance with the Local Rules and Standing Order. Attorney Linder cannot ethically or professionally practice law by handing off work to his paralegal, asking only limited questions of her regarding completion of the work, and then claiming that he had no knowledge of what was going on. He has a duty to know what is going on in his office and his self-imposed ignorance is no defense. To the contrary, it is an aggravating factor. And the fact that counsel for the UST found another violation of §1746 in a sample of only five of Attorney Linder's other cases suggests that what occurred here is not an isolated incident. Attorney Linder must be sanctioned.”).
- Jeannie O'Sullivan, NJ Atty Suspended Over Secretary's Theft Of Trust Accounts, Law360, Nov. 18, 2016) (“The New Jersey Supreme Court has imposed a three-month suspension on an attorney whose longtime secretary stole more than \$100,000 from his client trust accounts, leading to ethics charges that he failed the safeguard the money, according to a decision and order released Friday.”; “The high court's suspension of John L. Weichsel, who has an office in Hackensack, follows the recommendation of the state's Disciplinary Review



Board, which voted 6-3 in favor of that discipline. The minority had voted to censure Weichsel."; "Roxanne Elliot, Weichsel's secretary since 1985, wrote out checks to herself from his trust accounts totaling \$103,080 between December 2010 and June 2011, according to the board's decision."; "Elliot continued to steal from the accounts even after Weichsel confronted her about the wrongdoing sometime in 2011, but kept Elliot on as an employee and even loaned her more than \$8,000 to help bail her out financially, the decision said."; "As Elliott's employer and direct supervisor, he failed to make any effort to ensure that she could not invade client funds in the trust account, a violation of [attorney rules of professional conduct],' the decision said."; "Weichsel admitted that he missed the thefts initially because he didn't reconcile the accounts, according to the decision. He contacted the police in June 2011 after Elliot's bank called him to confirm his authorization of a check"; "All of the misappropriated funds were replaced through a combination of bank credits, recovery of stolen money from Elliott's PNC bank account, Weichsel's personal funds and proceeds from his employee dishonesty insurance policy, the decision said."; "In addition to failing to safeguard funds, the Office of Attorney Ethics alleged Weichsel ran afoul of recordkeeping requirements and failed to supervise a nonlawyer employee and knowingly making a false statement to an investigator. During a February 2014 interview with the OAE, Weichsel denied that he'd agreed to loan Elliott \$8,837, even though the two had discussed the loan in an email exchange."; "The board cited several cases in which attorneys who admitted to similar misconduct were given lesser penalties than suspensions, but noted that in Weichsel's case, 'a reprimand does not adequately address' the misdeeds because the attorney didn't take corrective action.").

- In re Shtindler, Dkt. No. DRB 16-029, slip op. at 21-22, 22 (N.J. Sept. 29, 2016) (suspending for one year a lawyer who was earlier disciplined in New York for not supervising a paralegal who stole from the law firm's trust account; "This is not a situation where the attorney was duped by a staff member. Respondent gave Vayman the authority to write checks, which Vayman then used to steal the funds. Although the record recites a heart-wrenching description of respondent's medical tribulations, her ethics problems arose before her medical problems were discovered. We are sympathetic to respondent's condition, but we did not find that her health issues serve to reduce the required quantum of discipline. Like the attorneys in Stransky and Ejioqu, respondent, too, should receive a one-year suspension."; "We, therefore, grant the OAE's motion for reciprocal discipline and impose a one-year suspension, retroactive to May 17, 2013, the effective date of respondent's New York suspension. Although Members Gallipoli and Zmirich also voted to impose a one-year retroactive suspension, they determined that the suspension should be retroactive to September 30, 2013, the date on which respondent became administratively ineligible to practice law in New Jersey.").
- In re Donohue, No. 69228, 2016 Nev. LEXIS 650, at \*2-3 (Nev. July 22, 2016) (suspending a lawyer for failing to properly supervise a paralegal, who handled

several matters on her own and also stole money from the law firm; "In May 2012, Welthy Silva retained Donohue to handle her divorce, but according to Silva, Clark [paralegal] handled the majority of the work done on her divorce. Additionally, Silva paid Clark \$4,000 in cash to be applied to her retainer, but that money disappeared and when Silva questioned Donohue why her bill did not reflect the \$4,000 credit, he once again did not immediately limit Clark's access to his client's personal information or property. The panel found that Donohue had violated RPC 1.4 (communication) for failing to respond to Silva, RPC 1.15 (safekeeping property) for allowing Clark to be in a position where she could take Silva's money and not credit that money to Silva's account, RPC 5.3 (responsibilities regarding nonlawyer assistants) for failing to make reasonable efforts to ensure that Clark was not stealing from his clients, and RPC 5.5 (unauthorized practice of law) for allowing Clark to do work on Silva's divorce without properly supervising her.").

- David Gialanella, *Paralegal's Crimes Yield a Censure for Her Boss*, N.J. L.J., Aug. 4, 2014 ("A New Jersey lawyer who failed to vigilantly supervise an employee running an illegal side business has landed in ethics trouble himself."; "The state Supreme Court on July 28 censured East Orange, New Jersey-based solo Stephen Brown for failing to detect his paralegal's participation in a mortgage fraud scheme."; "Specifically, because of respondent's failure to reconcile his attorney trust account during the relevant period and to properly supervise a non-lawyer, he did not discover forged checks and other improprieties committed by his longtime paralegal/bookkeeper,' the Disciplinary Review Board (DRB) previously wrote in the case."; "The employee, Linda Cohen, conducted real estate closings without Brown's knowledge in connection with the scheme, for which she ultimately pleaded guilty, the DRB said."; "The scheme sapped lending institutions of about \$2 million, according to a charging document."; "In her plea a year ago, Cohen, 56, of Orange, New Jersey, admitted to acting as the settlement agent in numerous bogus transactions along with co-conspirators and straw buyers-receiving the lenders' funds, preparing false closing documents and transferring the loan proceeds to her employer's trust account, a fraudulent mortgage company and shell bank accounts she created, the charging documents said."; "Cohen received a fee for each loan she obtained, according to the charging documents."; "Brown's failure to supervise her, or to closely manage his trust account, caused his account to fall short when funds were needed to pay GMAC and tax obligations to the Township of Irvington in connection with client matters, the DRB said."; "In other real estate matters, Brown failed to sign checks, signed blank checks and signed closing statements that he couldn't verify as accurate, the DRB said."; "For failing to supervise a non-lawyer employee, Brown was charged with violating Rules of Professional Conduct 5.3(a) and (b). Those strictures require lawyers to make 'reasonable efforts to ensure that the [non-lawyer]'s conduct is compatible with the professional obligations of the lawyer.").
- Mahoning Cnty. Bar Ass'n v. Lavelle, 836 N.E.2d 1214 (Ohio 2005) (suspending for eighteen months a lawyer whose employee had falsified documents).

- Office of Disciplinary Council v. Ball, 618 N.E.2d 159 (Ohio 1993) (suspending a lawyer for six months for failing to supervise a paralegal who misappropriated trust account funds).

## H. CONFIDENTIALITY

### 1. Ethics Rules

Lawyers' duty of confidentiality is one of the profession's "core values."

- ABA Model Rule 1.6(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 [other ethics rules].").

This duty generally covers any information learned during the attorney-client relationship (not just communications to or from a client).

- ABA Model Rule 1.6 cmt. [3] ("The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.")

Many lawyers do not appreciate the great strength and breadth of their ethics confidentiality duty.

- The 1969 ABA Model Code of Professional Responsibility protected information lawyers learned from any source while representing a client, but only prohibited lawyers' disclosure of privileged communications or information the client asked the lawyer to keep secret or the disclosure of which would harm the client.
- Like the ABA Model Code, the 1983 ABA Model Rules protect information lawyers gain from any source while representing a client -- even information generally known or in the public record.
- But in contrast to the ABA Model Code, the ABA Model Rules prohibit lawyers from disclosing protected client information (absent the client's consent) even if the disclosure would not harm the client in any way.

Lawyers must assure confidentiality in all of their dealings.

- ABA LEO 398 (10/27/95) (reminding lawyers that they must obtain confidentiality commitments from an outside consultant servicing the lawyer's computers.).

Lawyers obviously can face sanctions for violating this duty.

Lawyers have even been sanctioned for the way they dispose of client files.

- Disciplinary Counsel v. Shaver, 904 N.E.2d 883, 884 (Ohio 2009) (issuing a public reprimand against a lawyer (and Mayor of Pickerington, Ohio) for discarding client files in a dumpster, and leaving approximately 20 boxes of other client files next to the dumpster; noting that the tenant who had moved into the office that was vacated by the lawyer "had misgivings about the propriety of respondent's disposal method," "examined the contents of several of the boxes left by the dumpster," and moved the boxes back into a garage that the lawyer continued to lease; also explaining that "[n]either of the property owners nor the new tenant contacted respondent again about his failure to remove all the contents of the garage. An anonymous tipster, however, contacted a television station about the incident, and the tip led to television news and newspaper stories."; publicly remanding the lawyer for violations of Rules 1.6(a) and 1.9(c)(2) -- which prohibit lawyers from revealing client confidences).
- Paralegals should keep these principles in mind, because they often play a central role in such logistical steps.

Lawyers must assure that paralegals under their supervision comply with this ethics duty of confidentiality.

- ABA Model Rule 5.3 ("With respect to a non-lawyer employed or retained by or associated with a lawyer: (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable effort to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer; (b) a lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.").
- ABA Model Guidelines for Paralegals, Guideline 6 ("A lawyer is responsible for taking reasonable measures to ensure that all client confidences are preserved by a paralegal.").

Most paralegals' ethics guidelines contain a parallel duty of confidentiality.

- ABA Model Guidelines for Paralegals, Guideline 6; NALA Model Standards, Guideline 1; NALA Ethics Code, Canon 7; NFPA Model Code, EC-1.5(a)-(e); AAPI Code ¶ 2.

- The Florida Registered Paralegal Program requires that all registered paralegals "shall preserve the confidences and secrets of all clients." Rule Regulating the Florida Bar 20.7.1(b). The same rule indicates that registered paralegals "must protect the confidences of a client" and indicates that "it shall be unethical for a Florida Registered Paralegal to violate any statute or rule now in effect or hereafter to be enacted controlling privileged communications." Id.

## 2. Other Sources of Confidentiality Duties

In addition to the ethics rules, lawyers and paralegals might be subject to confidentiality duties from other sources.

- Explicit or implicit retainer agreements with clients.
- Common-law fiduciary duty -- this is the highest duty known in the law.<sup>4</sup>
- Tort principles.
- Employment agreements between lawyers (or paralegals) and their law firms, law departments, the government, etc.
- Court orders -- the confidentiality duty in court orders often outlasts the litigation.
- Confidentiality agreements entered into by parties in litigation, companies involved in business transactions, etc.
- Miscellaneous laws (such as the securities laws).

## 3. Dangers of Disclosure

Unfortunately, the opportunity for disclosing confidential information exists at all times and in many places.

Lawyers and paralegals must avoid inadvertently revealing confidential information at work.

- Inadvertent disclosure can come from sending a fax to the wrong number, accidentally including privileged documents in a production, etc.

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<sup>4</sup> GECC v. Richter, No. FSTCV126013848S, 2012 Conn. Super. LEXIS 1719, at \*2-3 (Conn. Super. Ct. July 5, 2012) (holding that a paralegal providing temporary services to GE through a temp agency had acted improperly by taking privileged communications with him; "The defendant has breached a fiduciary duty in that through his legal training, he was aware of ethical consequences of his actions. These documents contained attorney/client privilege. They were highly sensitive and confidential. He was obligated to exercise the utmost good faith, loyalty and honesty towards GEC.").

- Confidential information can sometimes be revealed through sloppy document handling (leaving confidential information in conference rooms, etc.) or careless talk in elevators, rest rooms, etc.
- To avoid the risk of others deliberately or inadvertently revealing confidential information, lawyers and paralegals should share information within their law firms or law departments only with those who have a "need to know."

Outside work, the risks are even higher because there is no justification for ever sharing confidential information.

- Lawyers and paralegals should avoid sharing work-related information with anyone (even their spouses).

#### **4. Penalties for Disclosure**

Revealing confidential information at work can cause termination.

Paralegals who violate their supervising lawyer's duty of confidentiality can subject the supervisors to ethics charges (up to disbarment), malpractice actions, etc.

Lawyers and paralegals might even be subjected to criminal penalties for revealing confidential information.

## I. ATTORNEY-CLIENT PRIVILEGE: BASIC RULES AND PARALEGALS' INVOLVEMENT

### 1. Basic Rules

The attorney-client privilege rests on three key elements.

- The **intimacy** of the attorney-client relationship;
- The **confidentiality** of that relationship;
- **Communications** within that intimate relationship.

The attorney-client privilege absolutely protects from disclosure:

- (2) communications from a client;
- (3) to the client's lawyer (or to the lawyer's agent);
- (4) relating to the lawyer's rendering of legal advice;
- (5) made with the expectation of confidentiality;
- (6) and not in furtherance of a future crime or tort;
- (7) provided that the privilege has not been waived.

A client (or a lawyer) asserting the privilege must establish each of these elements.

The attorney-client privilege can apply in a number of ways to paralegals.

- First, the privilege can protect communications directly to and from paralegals (but only under certain circumstances -- as described below).
- Second, the privilege can protect communications between clients and lawyers. Paralegals play a critical role in properly creating the privilege covering these communications, and also avoiding waiver of the privilege protecting these communications.

### 2. Communications Directly to and from Paralegals

In most situations, the privilege will cover direct communications between a client and a paralegal assisting a lawyer in providing legal advice to a client.

- Paralegals will generally be considered the lawyer's agent in communicating in this way.



- Restatement (Third) of Law Governing Lawyers § 70 cmt. g (2000) ("A lawyer may disclose privileged communications to other office lawyers and with appropriate non-lawyer staff -- secretaries, file clerks, computer operators, investigators, office managers, paralegal assistants, telecommunications personnel, and similar law-office assistants.").

Numerous courts have recognized that the attorney-client privilege can cover direct communications with paralegals in these circumstances.

- Van Every v. Ambrozyak, No. 797 MDA 2017, 2018 Pa. Super. Unpub. LEXIS 1256, at \*9-10 (Pa. Super. Ct. Apr. 20, 2018) ("Based on our in camera review of the seven withheld documents, we conclude that the communications contained therein are protected by the attorney-client privilege, and therefore subject to non-disclosure. FFE is a client of the Pion law firm. Each of the email communications was exchanged between FFE employees and Pion attorneys, paralegals and administrative staff. The email communications relate to facts which the attorneys were informed of by FFE, without the presence of strangers, for the purpose of securing assistance in a pending legal matter, and not for the purpose of committing a crime or tort. Finally, the privilege was timely invoked, and not waived.").
- Premier Dealer Servs., Inc. v. Duhon, Civ. A. Nos. 12-1498 & -2790 SECTION: "H" (4), 2013 U.S. Dist. LEXIS 160204, at \*23-24 (E.D. La. Nov. 8, 2013) ("Premier Dealer contends that Mader [non-party] was its agent because he was contracted to sell its automotive repair warranty, therefore his communications with Wolery [plaintiff's in-house counsel] are protected by the attorney-client privilege. Privilege agents include non-employees, such as paralegals and investigators. The presence of these types of third party agents does not waive the privilege if their presence was to facilitate effective communication between lawyer and client or further the representation in some other way. Privileged agents are sometimes grouped into two categories: (1) Communicating agents; and (2) Representing agents. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 70 cmts. f, g (2000) 24 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice & Procedure, § 5483 Supp. (2009) (discussing communicating and source agents).").
- In re MI Windows & Doors, Inc. Prod. Liab. Litig., MDL No. 2333, Case No. 2:12-mn-00001, 2013 U.S. Dist. LEXIS 63392, at \*12-13 (D.S.C. May 1, 2013) (holding that a paralegal's list of earlier cases involving the company was work product, and that the lawyer's list of important earlier cases deserved opinion work product protection; "This is an email from Chris Risberg to Bill Bezubic sending attached information that is not itself privileged. While the underlying information is not privileged, the fact of the transmission is itself a communication about an identifiable subject matter. And that communication was a confidential one between a lawyer (specifically a paralegal who is within the attorney-client unit)

and the client (specifically the point person for the company on legal matters) on a legal matter. Accordingly, the email is protected under the attorney-client privilege.").

- In re Republic of Ecuador, Case No. 4:11mc73-RH/WCS, 2012 U.S. Dist. LEXIS 157497, at \*7, \*8, \*9 (N.D. Fla. Nov. 2, 2012) ("For purposes of this rule [Fed. R. Civ. P 26(b)(4)(C)], an attorney may communicate through others in the office -- another attorney, a paralegal, or another staff member -- as may an expert. Communications between Chevron's attorneys or staff members and Dr. Hinchee or his staff members are protected -- even if other experts or their staff members participated in or incidentally received copies of the communications -- unless the communications come within the three exceptions set out in the rule. But a qualification is in order: sending a copy of an unprotected communication to an attorney -- that is, incidentally copying an attorney on a communication between others -- does not change the communication to a protected one."; "That brings us to materials not described in the 2010 amendments. The amendments do not speak to an expert's own notes that are not sent to an attorney and are not part of a draft report. And the amendments do not speak to an expert's communications only with other testifying experts, not also with attorneys. The better view is that under the rules as they now stand, these materials are not protected."; "Two unassailable points support this conclusion. First, before the 2010 amendments, the attorney-client privilege and work-product doctrine did not protect a testifying expert's own notes or communications with another testifying expert. This apparently was the widespread view."; "Second, the 2010 amendments clearly specify the materials they protect -- draft reports and communications between the expert and the party's attorney -- and do not mention the expert's own notes or communications with other testifying experts. The care with which rules amendments are crafted and reviewed makes it virtually impossible that this was an oversight.").
- Agence Fr. Presse v. Morel, No. 10 Civ. 2730 (WHP) (MHD), 2011 U.S. Dist. LEXIS 126025, at \*3 (S.D.N.Y. Oct. 28, 2011) ("A large number of documents reflect communications between business employees of Getty and either counsel directly or a paralegal who has operated as agent for counsel.").
- Kain v. Bank of N.Y. Mellon (In re Kain), Ch. 13 C/A No. 08-08404-HB, Adv. No. 10-80047-HB, 2011 Bankr. LEXIS 3679, at \*5-6 (D.S.C. Sept. 30, 2011) ("The Fourth Circuit's test for asserting the attorney-client privilege makes it clear that the privilege applies to communication between a client and a person that is 'a member of the bar of a court, or is his subordinate and (b) in connection with this communication is acting as a lawyer . . .'. . . (emphasis added). Therefore, this legal argument is without merit. Further, a review of the documents contained in the privilege log reveals that all communications with the attorney's paralegals and/or staff members were in connection with the attorney's role as Defendants' legal counsel.").

- In re Chase Bank USA, N.A. "Check Loan" Contract Litig., MDL No. 2032, Case No. 3:09-md-2032 MMC (JSC), 2011 U.S. Dist. LEXIS 82706, at \*17 (N.D. Cal July 28, 2011) ("The Court finds that Log No. 7908 contains direct communication 'between a paralegal and a business contact gathering and discussing information requested by counsel' and is therefore privileged.").
- Sid Mike 99, L.L.C. v. SunTrust Bank, No. 2:07-CV-02453-STA-dkv, 2009 U.S. Dist. LEXIS 93364, at \*12-13 (W.D. Tenn. Oct. 6, 2009) ("Roberts is a paralegal for Craft. . . . Craft's affidavit states that under her supervision, Roberts helped provide the Business Team with legal advice concerning the dispute with Sid Mike. . . . There is no proof to the contrary. Therefore, the documents in which Roberts is identified as either author or addressee are protected under attorney-client privilege." (footnote omitted)).
- Southeastern Pa. Transp. Auth. v. CaremarkPCS Health, L.P., 254 F.R.D. 253, 257 (E.D. Pa. 2008) ("Communications with the subordinate of an attorney, such as a paralegal, are also protected by the attorney-client privilege so long as the subordinate is 'acting as the agent of a duly qualified attorney under circumstances that would otherwise be sufficient to invoke the privilege.'" (citation omitted)).
- Olkolski v. PT Inatai Golden Furniture Indus., Case No. 4:06-cv-4083 WDS, 2008 U.S. Dist. LEXIS 75230, at \*5 (S.D. Ill. Sept. 29, 2008) ("Confidential communications made to representatives of the attorney such as paralegals, secretaries, file clerks, or investigators employed by the attorney are also covered by the privilege.").
- Payless Shoesource Worldwide, Inc. v. Target Corp., Civ. A. No. 05-4023-JAR, 2008 U.S. Dist. LEXIS 28878 (D. Kan. Apr. 8, 2008) (holding that a paralegal is treated like a lawyer for privilege and work product purposes).
- Wagoner v. Pfizer, Inc., Case No. 07-1229-JTM, 2008 U.S. Dist. LEXIS 24262, at \*11-12 (D. Kan. Mar. 26, 2008) (finding that the privilege protected communications to and from a non-lawyer assisting a lawyer in conducting an investigation; noting that her "role was not unlike that of a paralegal, assisting in the gathering and organizing of information for an attorney").
- Barton v. Zimmer Inc., Cause No. 1:06-CV-208, 2008 U.S. Dist. LEXIS 1296, at \*25 (N.D. Ind. Jan. 7, 2008) (holding that the privilege protected communications to and from an outside lawyer's paralegal and secretary "with respect to the seeking of legal advice").
- Jenkins v. Bartlett, 487 F.3d 482, 491 (7th Cir.) (applying the privilege to communications to and from a lawyer's agent; finding that the protection "applies both to agents of the attorney, such as paralegals, investigators, secretaries and

members of the office staff responsible for transmitting messages between the attorney and client, and to outside experts engaged 'to assist the attorney in providing legal services to the client,' such as accountants, interpreters or polygraph examiners."), cert. denied, 128 S. Ct. 654 (2007).

- Equity Residential v. Kendall Risk Mgmt., Inc., 246 F.R.D. 557, 566-67 (N.D. Ill. 2007) ("Confidential communications made by a client to representatives of the attorney, such as paralegals or secretaries, are also privileged."; "Several of the documents listed in Connecticut Specialty's log contain communications from a paralegal relaying legal advice to a Connecticut Specialty employee. In addition, several documents include communications from an employee to a paralegal seeking legal advice, or discussing the legal advice sought. As a representative of the attorney, the attorney-client privilege extends to a paralegal acting as a subordinate to the attorney. . . . Thus, these documents are also privileged, and the motion to compel this category of documents is denied.").
- Steele v. Lincoln Fin. Group, No. 05 C 7163, 2007 U.S. Dist. LEXIS 25587, at \*8 (N.D. Ill. Apr. 3, 2007) (protecting as privileged e-mails to and from a paralegal in a corporate law department).
- Executive Risk Indem., Inc. v. Cigna Corp., 81 Pa. D. & C.4th 410, 423-24 (Pa. C.P. Phila. 2006) ("The protection of privilege has been provided to confidential communications by a client to investigators, paralegals, secretaries or other employees of the attorney when necessary to secure proper legal advice." (footnotes omitted)).
- Wal-Mart Stores, Inc. v. Dickinson, 29 S.W.3d 796, 804-05 (Ky. 2000) (finding that the attorney-client privilege and work product doctrine applied with equal force to a lawyer's paralegal; "We believe that the privilege should apply with equal force to paralegals, and so hold. A reality of the practice of law today is that attorneys make extensive use of nonattorney personnel, such as paralegals, to assist them in rendering legal services. Obviously, in order for paralegals, investigators, secretaries and the like to effectively assist their attorney employers, they must have access to client confidences. If privileged information provided by a client to an attorney lost its privileged status solely on the ground that the attorney's support staff was privy to it, then the free flow of information between attorney and client would dry up, the cost of legal services would rise, and the quality of those same services would fall. Likewise, and for the same reasons, we hold that attorney work product prepared by a paralegal is protected with equal force by CR 26.02(3) as is any trial preparation material prepared by an attorney in anticipation of litigation." (citation omitted)).
- Witham Mem'l Hosp. v. Honan, 706 N.E.2d 1087, 1091 (Ind. Ct. App. 1999).
- In re Stoutamire, 201 B.R. 592, 595 (Bankr. S.D. Ga. 1996).

- von Bulow v. von Bulow, 811 F.2d 136 (2d Cir.), cert. denied, 481 U.S. 1015 (1987).
- Flynn v. Church of Scientology Int'l, 116 F.R.D. 1, 4 (D. Mass. 1986).
- United States v. (Under Seal), 748 F.2d 871, 874 (4th Cir. 1984).

If a paralegal is assisting a lawyer in providing legal advice, documents created by the paralegal can deserve privilege protection.

- Dempsey v. Bucknell Univ., 296 F.R.D. 323, 331 (M.D. Pa. 2013) (analyzing issues in connection with a student's criminal prosecution for an alleged sexual assault, which apparently was dropped; concluding that the student's parents were within the privilege as the student's lawyer's agent and as joint clients, but that the student adviser was outside the privilege and the work product protection; "Document No. 6 is a fax dated September 30, 2010, sent from Attorney Becker (via his paralegal) to Attorney Simon and John Dempsey, transmitting a copy of Attorney Becker's handwritten witness interview notes dated September 8, 2010.").
- Wellinger Family Trust 1998 v. Hartford Life and Accident Ins. Co., Civ. A. No. 11-cv-02568-CMA-BNB, 2013 U.S. Dist. LEXIS 79019, at \*1 (D. Colo. June 5, 2013) (in an insurance case, holding that documents prepared by a paralegal deserved privilege but not work product protection; "The Motion to Compel concerns a two page document described in the privilege log as having been prepared by a paralegal in Hartford's legal department and as including '[h]andwritten notes re: portability, conversion, continuation, suicide exclusion, and situs of the Policy (Colorado versus Texas), and citation to C.R.S. § 10-7-109.'" (internal citation omitted)).
- Se. Pa. Transp. Auth. v. CaremarkPCS Health, L.P., 254 F.R.D. 253, 259-60 (E.D. Pa. 2008) (finding that the attorney-client privilege protected draft contract language prepared by a paralegal at a lawyer's direction, and circulated to company executives for their review and comment; "Ms. Hankins [Caremark's Senior Legal Counsel] asserts that she directed Ms. Kershaw [paralegal who acted as Ms. Hankins' subordinate] to 'convey legal advice by way of setting forth revised proposed contract language for consideration by the Caremark [] employees directly involved in the SEPTA contract negotiations, and to seek feedback from both business people and legal personnel regarding the proposed legal contract language.' . . . The fact that Ms. Kershaw authored the e-mail does not destroy the privilege because she was acting as the agent of Ms. Hankins under circumstances where the attorney-client privilege applies.").
- Wagoner v. Pfizer, Inc., No. 07-1229-JTM, 2008 U.S. Dist. LEXIS 24262, \*9, \*10-11, \*11-12 (D. Kan. Mar. 26, 2008) (addressing privilege and work product issues

in an age discrimination case against Pfizer; specifically addressing notes and summaries prepared by a non-lawyer; explaining that "responses by employees to counsel's questions for the purpose of providing legal advice to the corporation are protected by the attorney-client privilege"; "With respect to the notes and summaries prepared by Sarah Alper [non-lawyer], the court is satisfied that the documents are protected by the attorney-client privilege. Pfizer assigned Lisa Shroyer, an attorney in Pfizer's Corporate Compliance Group, to investigate expense account violations by plaintiff Krull and the nature of his relationship with a doctor. Sara Alper, a member of Pfizer's internal audit group, was assigned to assist Shroyer in her investigation. In the course of the investigation Shroyer interviewed Krull, John Allard (Krull's former supervisor), and Marco Cunningham (Krull's co-worker). At the beginning of each interview, Shroyer informed the interviewees of her status as an attorney for Pfizer and that all communications during the interview were protected by the attorney-client privilege. Alper attended the interviews and took notes. At the conclusion of the interviews, Alper prepared summaries for Shroyer which counsel used to provide legal advice to Pfizer. . . . Because the responses by Krull, Allard, and Cunningham are protected by the attorney-client privilege, Alper's notes of the privileged conversations are also protected by the attorney-client privilege."; "Alper's role was not unlike that of a paralegal, assisting in the gathering and organizing of information for an attorney. In addition to taking notes during the above mentioned interviews, Alper contacted other Pfizer employees at Shroyer's direction for information and made notes of their comments 'for the file.' Because Alper was gathering information under counsel's direction, her notes of the phone calls are protected by the attorney-client privilege. Alper also made 'handwritten notes' on a Costco receipt and 'detail reports' of Krull's expenses. The handwritten notes are protected by the attorney-client privilege.").

- Rico v. Mitsubishi Motors Corp., 171 P.3d 1092, 1096, 1097, 1099, 1099-1100, 1100-01 (Cal. 2007) (upholding the disqualification of a plaintiff's lawyer who somehow came into possession of and then used notes created by defendant's lawyer to impeach defendant's expert; noting that defendant's lawyer claimed that plaintiff's lawyer took the notes from his briefcase while alone in a conference room, while the plaintiff's lawyer claimed that he received them from the court reporter -- although she had no recollection of that and generally would not have provided the notes to one of the lawyers; agreeing with the trial court that the notes were "absolutely privileged by the work product rule" because they amounted to "an attorney's written notes about a witness's statements"; "When a witness's statement and the attorney's impressions are inextricably intertwined, the work product doctrine provides that absolute protection is afforded to all of the attorney's notes."; explaining that "[t]he document is not a transcript of the August 28, 2002 strategy session, nor is it a verbatim record of the experts' own statements. It contains Rowley's summaries of points from the strategy session, made at Yukevich's direction. Yukevich also edited the document in order to add his own thoughts and comments, further inextricably intertwining his personal

impressions with the summary."; not dealing with the attorney-client privilege protection; rejecting the argument that the notes amounted to an expert's report; "Although the notes were written in dialogue format and contain information attributed to Mitsubishi's experts, the document does not qualify as an expert's report, writing, declaration, or testimony. The notes reflect the paralegal's summary along with counsel's thoughts and impressions about the case. The document was absolutely protected work product because it contained the ideas of Yukevich and his legal team about the case."; adopting a rule prohibiting a lawyer from examining materials "where it is reasonably apparent that the materials were provided or made available through inadvertence"; acknowledging that the defense lawyer's notes were not "clearly flagged as confidential," but concluding that the absence of such a label was not dispositive; noting that the plaintiff's lawyer "admitted that after a minute or two of review he realized the notes related to the case and that Yukevich did not intend to reveal them"; ultimately adopting an objective rather than a subjective standard on this issue; also rejecting plaintiff's lawyer's argument that he could use the work product protected notes because they showed that the defense expert had lied; agreeing with the lower court and holding that "'once the court determines that the writing is absolutely privileged, the inquiry ends. Courts do not make exceptions based on the content of the writing.' Thus, 'regardless of its potential impeachment value, Yukevich's personal notes should never have been subject to opposing counsel's scrutiny and use.'"; also rejecting plaintiff's argument that the crime fraud exception applied, because the statutory crime fraud exception applies only in a law enforcement action and otherwise does not trump the work product doctrine).

- EEOC v. Woodmen of the World Life Ins. Soc'y, No. 8:03CV165, 2007 U.S. Dist. LEXIS 21574 (D. Neb. Mar. 23, 2007) (finding that the attorney-client privilege protected a document in which a client representative responded to a question from a legal assistant for the defendant).
- E.E.O.C. v. Int'l Profit Assocs., Inc., 206 F.R.D. 215 (N.D. Ill. 2002) (interview notes taken by legal staff working at the direction of EEOC attorneys are protected by the attorney-client privilege).

Similarly, the presence of paralegals does not forfeit privilege protection.

- United States v. Bennett, Case No. CR609-067, 2010 U.S. Dist. LEXIS 113955, \*6 n.4, \*11, \*18-19 (S.D. Ga. Oct. 5, 2010) (finding that the presence of a paralegal (the criminal defendant's former spouse) did not destroy the privilege; "Bennett's motivation is critical in determining whether the conversation was privileged, since the attorney-client privilege shields from disclosure any confidential communication between a client and his attorney made for the purpose of seeking or providing legal assistance to the client."; "Although the matter is not free from doubt, the Court finds that Bennett has carried his burden of establishing that he went to the law offices of Cheney and Cheney [Linda's

lawyer] for the purposes of obtaining the legal advice of counsel. He contacted his ex-wife, a paralegal, because he felt she could assist him in arranging a prompt meeting with Van Cheney. Obviously, Bennett may have had another purpose as well, as the paralegal he spoke to was not only his ex-wife but also the co-seller of the property who would naturally be interested in any fraud investigation surrounding that sale."; "In general, the presence of a third party destroys the confidentiality of the communication between attorney and client. . . . That is not the case, however, when the third party is acting as an agent of the client or attorney. 1 MCCORMICK ON EVIDENCE § 91. Ms. Richards [defendant's former spouse] testified to such an understanding of her role on that occasion, and it would not be unusual for a paralegal, after conducting such a screening task, to be present during the attorney's conference with a potential client in order to render any assistance that might be required. (Indeed, Ms. Richards rendered just such assistance when she looked for and obtained the file related to the loan closing.) Of course, Ms. Richards was in the unusual posture of serving both as a paralegal and as a person who had been married to Bennett when they sold their residence to Wilcox. This fact, standing alone, is not enough to defeat the privilege. It is undisputed that Ms. Richards was not complicit in her ex-husband's criminal conduct and had no knowledge of the chicanery surrounding the issuance of a dummy cashier's check and the fraudulent down payment by Wilcox. Ms. Richards interviewed her ex-husband in the same manner that she might have screened any other potential client seeking access to Mr. Cheney. She viewed herself primarily as a paralegal on that occasion, not as a mere friend or confidant to her ex husband, and she continued in her role as paralegal after she ushered Bennett in to see Mr. Cheney. If Mr. Bennett had been a stranger rather than her ex-husband, there likely would be no controversy here. But the fact that Bennett chose to seek legal assistance from an attorney who also employed his wife, and that he used her to gain access to that attorney, does not destroy the privilege.").

Not surprisingly, paralegals deserve privilege protection as a lawyer's agent only if they are assisting a lawyer in providing legal advice, and otherwise meet the privilege's exacting standards.

- Veolia Water Sols. & Techs. Support v. Siemens Indus., Inc., 63 F. Supp. 3d 558, 569 (E.D.N.C. 2014) (analyzing privilege issues in a patent case; "[T]he fact that a paralegal is copied on the communication . . ., without some specific reference or direction to the paralegal, is not sufficient in itself to establish privilege, given the absence of other indicia of attorney-client privileged communication.").
- In re MI Windows & Doors, Inc. Prod. Liab. Litig., MDL No. 2333, Case No. 2:12-mn-00001, 2013 U.S. Dist. LEXIS 63392, at \*4, \*8-9, a\*9 (D.S.C. May 1, 2013) (holding that a paralegal's list of earlier cases involving the company was work product, and that the lawyer's list of important earlier cases deserved opinion work product protection; "These are handwritten notes prepared by Mike Ohlin which



summarize issues and arguments that the Defendant was having with a supplier, St. Gobain. The Defendant invokes the work-product immunity. As required by the CMO entered in this matter, the Defendant has specifically identified the litigation for which these notes were prepared. The Defendant avers that Ohlin's notes reflect advice of counsel. That assertion is difficult to evaluate in light of the sketchy nature of the notes. But what is clear is that at the time the notes were prepared, litigation was certainly anticipated and these notations relate to and are prepared in response to the threat of that litigation. So even if no lawyer was involved, these notes would be protected work product. The work product immunity protects material prepared by non-lawyers in anticipation of litigation."; "This is a case list prepared by Chris Risberg, a paralegal working for outside counsel. It basically sets out the name of the case, the state in which the case is brought, the building type, and the product or claim at issue in each case. The Defendant claims privilege but that claim fails, because there is no communication between attorney and client reflected in this list. It is, rather, just a factual description of the extant cases. The attorney-client privilege does not protect underlying facts."; "The Defendant claims work product, and while there does not seem to be much though [sic] process going on in the preparation of the list, it is apparent that the list is prepared for litigation purposes and it would be of some assistance to MIWD's lawyer. As such, it is granted the qualified immunity of fact work product.").

- Spartalian v. Citibank N.A., Case No. 2:12-cv-00742-MMD-PAL, 2013 U.S. Dist. LEXIS 28966, at \*20 (D. Nev. Mar 1, 2013) (holding that the attorney-client privilege did not protect communications with a paralegal, because the paralegal was not acting under a lawyer's supervision; "[M]any of Plaintiff's objections to producing the documents are based on the purported attorney-client or work product privilege. These objections are not well taken. The Plaintiff does not have an attorney-client or work product privilege for communications with a friend who lives in Malta who is a paralegal not working under the direct supervision of a lawyer. Plaintiff testified at his deposition that he did not have an attorney. The party asserting the attorney-client privilege must establish the attorney-client relationship and the privileged nature of the communication." (emphasis added)).
- Smith v. J.P. Morgan Chase Bank, No. 3:11-cv-00314-LRH (VPC), 2013 U.S. Dist. LEXIS 3473, at \*5, \*8, \*9 (D. Nev. Jan. 8, 2013) (holding that the attorney-client privilege did not protect communications to and from a lawyer who is not licensed in any state; "In April 2007, Mr. McCann resigned from the practice of law in the State of California. Mr. McCann was admitted to the practice of law in the State of Nevada on October 7, 2010. As a result, Mr. McCann was not licensed to practice law in any state from April 2007 until October 7, 2010, a period of approximately two and one-half years." (footnote omitted); "While plaintiff and her late husband sought legal advice from Mr. McCann at that time concerning their Colorado Inn and the mortgage on their ranch, Mr. McCann was not admitted to practice law in any state, and plaintiff admits she knew this . . . . Fundamental to

a claim of attorney-client privilege is that the person dispensing the legal advice must be licensed to practice law. Mr. McCann was not, and plaintiff knew that; therefore, any discussions Mr. McCann had with plaintiff during their meeting in Florida are not protected by the privilege."; "The third time period overlaps somewhat with the second and concerns the balance of the summer of 2010. Mr. McCann attests that in mid-June 2010, Mr. Raggio asked him to communicate with plaintiff as Mr. Raggio's paralegal or agent, and that Mr. McCann did so . . . . A representative of a lawyer is defined as 'a person employed by the lawyer to assist in the rendition of professional legal services.' N.R.S. 49.085 (emphasis supplied). Mr. McCann has provided no evidence that he was an employee of Mr. Raggio or his law firm, Jones Vargas; therefore, Mr. McCann's claim he served as a representative of Mr. Raggio or Jones Vargas fails.").

- Lockhart v. Examone World Wide, Inc., No. 2:11-cv-37-JMS-WGH, 2012 U.S. Dist. LEXIS 8501, at \*5-6 (S.D. Ind. Jan. 25, 2012) (holding that communications to and from a paralegal did not deserve privilege protection, because the paralegal was not engaged in a legal function; "Just as the attorneys who were hired to do consultants' work in Burden-Meeks [Burden-Meeks v. Welch, 319 F.3d 897 (7th Cir. 2003)] were not protected by the attorney-client privilege, a company such as Western and Southern cannot simply dispatch a paralegal to perform personnel matters and expect that the paralegal's interviews will be protected by the attorney-client privilege. The communications between Saenz [paralegal] and the Vincennes office employees are, therefore, not protected by the attorney-client privilege. Furthermore, any notes or memoranda documenting Saenz's interviews are not protected by the attorney-client privilege." (footnote omitted)).
- In re Royce Homes, LP, 449 B.R. 709, 743 (Bankr. S.D. Tex. 2011) (finding that a paralegal was not within the privilege because her assistance was not "necessary" to print off e-mails; "How was she necessary to the transmission of Speer's e-mails? Boothe merely testified to her general role as Speer's paralegal, a position she held while employed by the Debtor; whereas, she reviewed and collated Speer's e-mails after she had resigned working for the Debtor. . . . This sparse testimony in no way established an absence of waiver. Speer could have easily appeared in court and testified as to Boothe's specific involvement with these e-mails at the time of their creation. He chose not to do so, and thus failed to meet his burden of proof.").
- Agence Fr. Presse v. Morel, No. 10 Civ. 2730 (WHP) (MHD), 2011 U.S. Dist. LEXIS 126025, at \*12 (S.D.N.Y. Oct. 28, 2011) ("As for the fact that copies of these documents were circulated to an attorney or paralegal, that too does not offer the protection of the privilege to the document. Communications between non-lawyer employees that are not on their face privileged do not acquire a privileged status by virtue of the author sending a copy to a lawyer or his representative.")

- Naham v. Haljean, Case No. 08 C 519, 2010 U.S. Dist. LEXIS 81675, at \*6, \*6-7 (N.D. Ill. July 30, 2010) (holding that the attorney-client privilege did not protect communications to and from a paralegal and a plaintiff who was representing himself pro se; "If Plaintiff is arguing that a privilege exists insofar as his paralegal acted as his attorney, this argument is without merit. A paralegal is not an attorney, and communications with a paralegal are not entitled to any more protection than communications with any other non-attorney."; "If Plaintiff is arguing that a privilege exists because Plaintiff is acting as his own attorney, and conversations between attorneys and paralegals are privileged, this argument is also without merit. It is true that a privilege often applies in the context of an attorney's communication with a paralegal or other agents, but that is because that agent is present 'to assist the attorney in rendering legal services.' Jenkins, 487 F.3d at 491 [Jenkins v. Bartlett, 487 F.3d 482 (7th Cir. 2007)]. In other words, if an attorney-client relationship exists, the privileged nature of those communications will not necessarily be destroyed by the insertion of a third party, such as a paralegal. But the basis of that privilege is still centered around the existence of an attorney-client relationship into which the paralegal is joined. Plaintiff is representing himself, and in that way is somewhat like both an attorney and a client. However, Plaintiff is one person, and cannot by himself establish the existence of an attorney-client relationship. Since no attorney-client privilege exists, there is no privilege to extend to the paralegal.").
- Willard v. Hobbs, No. 2:08CV00024 WRW/HDY, 2009 U.S. Dist. LEXIS 6134 (E.D. Ark. Jan. 26, 2009) (finding that the attorney-client privilege did not protect communications between a prisoner and a "paralegal" who was also the prisoner's spiritual advisor).
- Volrie v. State, No. 13-05-667-CR, 2007 Tex. App. LEXIS 6574 (Tex. App. Aug. 16, 2007) (unpublished opinion) (finding that a criminal defendant's conversations with a friend who acted as a paralegal did not deserve attorney-client privilege protection).
- State v. Ingraham, 966 P.2d 103, 121 (Mont. 1998) ("Windham testified in chambers that, although she worked for Gregory Ingraham as an independent contractor, she performed no paralegal services for Lloyd Ingraham. She also testified that she had done nothing to assist Gregory Ingraham in defending this case, and that to her knowledge, there was no file on this case at the Ingraham Law Firm. Our review of the pertinent testimony indicates that Ingraham's conversations with Windham were purely personal and not in the course of a professional relationship.").

One New Jersey case provides a frightening example of what can happen when lawyers and paralegals are sloppy in their treatment of the attorney-client privilege (especially in a corporate law department setting).

- HPD Labs., Inc. v. Clorox Co., 202 F.R.D. 410 (D.N.J. 2001) (holding that the attorney-client privilege did not protect from disclosure communications between a long-time Clorox in-house paralegal and Clorox employees, because the employees were seeking the paralegal's own advice rather than working with the paralegal to obtain a lawyer's advice; noting that the paralegal did not copy in-house lawyers on her communications, and did not involve in-house lawyers in her meetings with Clorox employees; ordering the production of documents reflecting communications between the paralegal and Clorox employees).
- No court seems to have followed this approach since 2001.
- Still, corporate law departments would be wise to assure that their paralegals involve in-house lawyers to a degree sufficient to avoid this horrible result.

### **3. Communications Between Clients and Lawyers -- Paralegals' Role in Creating the Privilege**

As critical players in clients' communications with lawyers, paralegals play a central role in assuring that privileged communications receive the protection they deserve.

If correspondence, memoranda, etc., meet the criteria listed above, paralegals should assure that the basis for the privilege appears in the documents -- which may be later viewed by a court in camera if the privilege becomes an issue.

Paralegals should carefully use a "privilege" stamp on these and other documents -- under-stamping may weaken the privilege claim and over-stamping might generate charges of abuse.

Paralegals should monitor third parties who are participating in (or might try to participate in) privileged communications -- but whose presence could destroy the privilege ab initio.

Generally, clients' agents are outside the privilege unless their role is to facilitate communications between the client and lawyer (such as translators, etc.).

- Examples of client agents outside the intimate attorney-client relationship include: accountants or investment bankers attending a corporate board meeting; a videographer setting up a camera in the presence of the client and lawyer; a sister who helped her jailed inmate brother call his lawyer and then stayed on the line.

On the other hand, lawyers' agents (hired to assist the lawyer in providing legal advice) generally are inside the attorney-client relationship for privilege purposes.

Lawyers cannot assure this protection merely by hiring the agent or consultant herself.

Paralegals should understand these differences and monitor both kinds of agents' involvement.

If the client will seek the protection of the "common interest" doctrine (sometimes called the "joint defense" doctrine) that maintains the privilege despite the involvement of third parties in litigation or business transactions, paralegals should assure that the doctrine's criteria are met.

- It is usually best to put such "common interest" arrangements in writing.

When dealing with corporations, paralegals should be familiar with the rule articulated by the United States Supreme Court in Upjohn Co. v. United States, 449 U.S. 383 (1981), which most states follow.

- Under Upjohn, communications between a corporation's lawyer and any level of employee deserves privilege protection if the employee knows that the person is a lawyer (or the lawyer's agent); the employee has important information that the lawyer must obtain in order to provide legal advice to the company; and the employee maintains the confidentiality of the communication with the lawyer.

A few states (including Illinois) continue to follow what is called the "control group" test -- under which the attorney-client privilege only protects communications between lawyers and a corporation's upper management.

Attorney-client privilege protection can be expressly or impliedly waived.

- An express waiver occurs upon the intentional or unintentional disclosure of privileged communications to an outsider.
- An implied waiver occurs when the privilege's owner relies on the fact of the communication to gain some advantage, without disclosing any privileged communication.

In some situations, waiving the attorney-client privilege can cause a "subject matter waiver" -- requiring disclosure of additional privileged communications on the same subject matter.

Federal Rule of Evidence 502 and parallel common law developments have dramatically reduced the danger of such subject matter waivers.

- In most courts, a subject matter waiver occurs only if the privilege's owner voluntarily discloses or relies on privileged communications to paint a misleading picture in litigation.

## J. WORK PRODUCT DOCTRINE: BASIC PRINCIPLES AND PARALEGALS' INVOLVEMENT

### 1. Basic Rules

The work product doctrine offers limited protection to trial preparation material prepared by a client or by the client's agent (lawyers, paralegals, accountants, etc.) during litigation or in reasonable anticipation of litigation. Fed. R. Civ. P. 26(b)(3).

### 2. Differences Between the Attorney-Client Privilege and Work Product Doctrine

Many lawyers (and even courts) tend to equate or merge the work product doctrine and the attorney-client privilege. However, they are fundamentally different concepts.

- Unlike the attorney-client privilege, the work product doctrine: is relatively new; is based on court rules rather than the common law; covers documents prepared by the client or the clients agents (not limited to lawyers) rather than just protecting communications between a client and a lawyer; arises only at certain times (in connection with or in anticipation of litigation); can be overcome if the party seeking the information cannot obtain the "substantial equivalent" without "undue hardship"; and is not automatically waived by sharing it with third parties (waiver occurs only if the sharing makes it more likely that the materials will "fall into enemy hands").

It is also important to remember that a communication or document can be protected by both the attorney-client privilege and the work product doctrine.

- Communications between lawyers and clients not motivated by anticipated litigation can be privileged, but can never be work product.
- Communications outside the intimate attorney-client privilege can be work product, but can never be privileged.
- Communications between lawyers and clients motivated by anticipated litigation can deserve both protections.

It is usually worth considering both possible protections in every circumstance.

- The attorney-client privilege has the advantage of providing absolute protection (unlike the work product doctrine, which often provides only a qualified protection that can be overcome if the adversary needs the document and cannot obtain the substantial equivalent without undue hardship).
- However, the attorney-client privilege provides only a fragile protection, and therefore might be lost by disclosure to a third person (even a friendly third person) -- the work product doctrine normally survives such disclosure.

### 3. Role of Paralegals in Creating the Protection

Paralegals play a key role in assuring work product doctrine protection.

Unlike the narrower attorney-client privilege (which protects only those communications to and from the client's agent necessary for the transmission of the information, or the lawyer's agent assisting a lawyer in providing legal advice), the work product doctrine protects communications to and from any client or lawyer "representative."

Establishing that the paralegal is acting as a client's or a lawyer's "representative" is essentially automatic.

- Hausman v. Holland Am. Line-U.S.A., Case No. 2:13-cv-00937-BJR, 2015 U.S. Dist. LEXIS 165179, at \*4-5 (W.D. Wash. Dec. 9, 2015) (holding that a paralegal's witness interview notes deserved opinion work product protection; "Discovery of 'opinion work-product is therefore permissible only where a party has made 'a far stronger showing of necessity and unavailability for other means' than would otherwise be sufficient for discovery of 'fact' work product." (citation omitted)).
- United States EEOC v. Pioneer Hotel, Inc., Case No. 2:11-cv-01588-LRH-GWF, 2014 U.S. Dist. LEXIS 142735, at \*11 (D. Nev. Oct. 6, 2014) ("[T]he attorney's or paralegal's interview notes are considered opinion work product which are entitled to almost absolute immunity from discovery.").
- In re Prograf Antitrust Litig., No. 1:11-md-02242-RWZ, 2013 U.S. Dist. LEXIS 63594, at \*11 (D. Mass. May 3, 2013) (adopting a set of rules to govern privilege and work product determinations; ultimately concluding that disclosure to a public relations agency waived the attorney-client privilege but not the work product doctrine and that agency-created documents did not deserve work product protection; "The results of paralegal Marilyn Whitney's monitoring of the generic tacrolimus market, conducted at the request of Wertjes [defendant's in-house lawyer] and outside counsel, is work product and remains protected even if shared with Goodman and Rich Wartel of Two Labs Marketing, a 'friendly party.'").
- Fields v. City of Chi., Case No. 10 C 1168, 2012 U.S. Dist. LEXIS 181642, at \*9 (N.D. Ill. Dec. 26, 2012) ("The City contends that the information Fields seeks is protected by the work product doctrine because its attorney Noland [City Attorney] gathered the information, presumably together with paralegal Majka [City Paralegal]. The Court doubts whether a party can shield relevant evidence (in this case, where and by whom undisclosed information significant to the underlying criminal case was kept) by having its attorney collect that evidence. But assuming for present purposes that Noland's efforts and the information he gathered are covered by the work product doctrine, that privilege is not absolute.").
- Jordan v. United States DOJ, Civ. A. No. 07-cv-02303-REB-KLM, 2009 U.S. Dist. LEXIS 81081, at \*62-63 (D. Colo. Aug. 14, 2009) (analyzing FOIA issues; "Plaintiff

challenges Defendant BOP's [Bureau of Prisons] redaction of documents prepared by paralegals on the grounds that the attorney work-product privilege does not extend to nonattorneys. . . . Here Plaintiff is plainly wrong. As noted above, the work-product privilege includes information prepared by nonattorneys supervised by attorneys or at the request of attorneys. . . . BOP paralegals prepared the memorandums in question at the direction of BOP Regional Counsel and the ADX [Administrative Maximum Penitentiary] attorney. . . . These memorandums also clearly represent the work product of Defendant BOP, a government agency. . . . Therefore, they qualify for protection pursuant to Exemption 5.").

- Kallas v. Carnival Corp., Case No.: 06-20115-CIV-MORENO/TORRES, 2008 U.S. Dist. LEXIS 42299, at \*22-23 (S.D. Fla. May 27, 2008) (assessing work product issues in a class action arising from the spread of Norovirus on a cruise; ultimately ordering the production of fact, but not opinion, work product; not ordering the production of the database created by paralegals who had called cruise line customers; "Documents that need not be produced include notations related to the survey made by interviewers other than the two affiants, and the entire printout of the Plaintiffs' Epi Info database beyond those portions that Plaintiffs intend to rely upon and have been produced. The entire database is not responsive to the document requests in question and, to the extent it is, it retains its work product protection. The underlying relevant data -- the names of the passengers and their symptoms -- has been produced. The database is in part a by-product of the paralegals' work during the survey, but documents they relied upon in preparation or generated during the course of the survey are being produced.").
- Payless Shoesource Worldwide, Inc. v. Target Corp., Civ. A. No. 05-4023-JAR, 2008 U.S. Dist. LEXIS 28878 (D. Kan. Apr. 8, 2008) (holding that a paralegal is treated like a lawyer for privilege and work product purposes).
- Doyle v. First Fed. Credit Union, No. C06-0049, 2007 U.S. Dist. LEXIS 30700, at \*9 (N.D. Iowa Apr. 25, 2007) ("The Court concludes that the notes taken by the legal assistant, if any, constitute attorney work product.").
- Fine v. Facet Aerospace Prods. Co., 133 F.R.D. 439, 445 (S.D.N.Y. 1990) ("[T]he work product of a paralegal is subject to Rule 26(b)(3), whether the paralegal is viewed as an extension of the attorney or as another representative of the party itself."; finding that a paralegal's notes on a document were properly redacted before the document was produced).

The work product doctrine only protects documents created because of the litigation -- and does not extend to documents created in the ordinary course of business or which would have been created even if there had been no litigation pending or anticipated.



- Paralegals play a central role in properly characterizing documents that clients have prepared, and should suggest that clients creating work product indicate on the face of the documents why they are creating the documents.
- Paralegals can also help determine when a litigant first reasonably anticipated litigation -- which is the date the work product protection is triggered.
- If possible, it is best to document this anticipation contemporaneously so a court will later select the right date.
- Although paralegals play a less important role in establishing the motivation for a document's creation (compared to the timing of the document's creation when the client anticipates litigation), paralegals should understand this critical motivational element and educate lawyers about it.

#### **4. Overcoming the Work Product Protection**

As indicated above, the work product doctrine is not a privilege -- it is a limited immunity that can be overcome in certain circumstances.

- For instance, if a paralegal interviews and prepares notes regarding a witness who later dies or disappears, the adversary would almost surely be entitled to see the notes -- the adversary cannot obtain the "substantial equivalent" because the witness is no longer available.
- Paralegals should therefore be very careful with what they write even in documents that are undoubtedly work product -- but whose protection may be stripped away through later events.

"Opinion" work product receives a higher protection than factual work product.

- Some courts give absolute protection to "opinion" work product -- making it the equivalent of the attorney-client privilege -- while others give it only heightened protection.
- Lawyers may direct paralegals to infuse their work product (such as witness interview memoranda) with the paralegal's opinion -- thus increasing the odds of receiving this heightened protection.

#### **5. Role of Paralegals in Avoiding Waiver of the Work Product Protection**

Unlike the attorney-client privilege, the work product doctrine protection does not automatically evaporate for documents shared with third parties.

- Work product can sometimes be shared with third parties (witnesses, etc.) without waiving the protection. For instance, the same decision concluding that Martha

Stewart had waived the attorney-client privilege protection covering an e-mail by sharing it with her daughter Alexis also found that she had not waived the separate work product protection covering the e-mail, because her daughter Alexis was her ally. United States v. Stewart, 287 F. Supp. 2d 461 (S.D.N.Y. 2003).

- Courts often look for a confidentiality agreement in determining if sharing of materials has waived the work product protection, so paralegals should remind lawyers about the possible efficacy of such agreements.

## K. PARALEGALS' INVOLVEMENT IN DISCOVERY

### 1. Introduction

Paralegals play a critical role in responding to discovery requests.

- Their lower hourly rate pleases clients, and their experience and focused role in such tasks usually results in fewer mistakes than when clients and lawyers rely on distracted and advancement-focused associates.

Paralegals should be most concerned with avoiding waiver of clients' privilege and work product protection.

- Numerous courts have focused on a subset of this issue -- paralegals' role in privilege reviews during litigation.

### 2. Inadvertent Waiver: Basic Rules

Paralegals play a central role in avoiding inadvertent waiver of privileged documents during litigation.

Before Federal Rule of Evidence 502, most courts took one of three positions on the waiver effect of litigants' inadvertent production of privileged documents.

- The vast majority of courts took a fact-intensive approach, often called the Lois Sportswear approach. Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co., 104 F.R.D. 103 (S.D.N.Y. 1985).
- Under that approach, courts examined whether litigants had a plan for withholding privileged documents from production; whether they carefully followed the plan; how many documents slipped through; and how quickly the litigants sought their return.

A few courts took different positions.

- Some courts held that any inadvertent disclosure automatically waived privilege protection.
- Some courts held just the opposite -- that lawyers' mistakes did not waive clients' privilege protection.

Federal Rule of Evidence 502 now governs inadvertent express waivers in federal court litigation.

Rule 502 does not apply to other situations in which inadvertent disclosures might occur.

- Examples include disclosures occurring before or after a federal "proceeding"; during a federal proceeding but not "in" a federal proceeding, such as communications to the adversary or to third parties; in adversarial settings that are not "proceedings," such as administrative actions, arbitrations, etc.; to federal employees other than those in an "office or agency"; to state offices, agencies, or other employees; in state proceedings that are the subject of a state court order "concerning waiver," presumably regardless of that order's provisions; during arbitrations.
- However, courts seem to be applying the general Rule 502 standard even where it does not apply by its terms.

Rule 502's central provision mimics the pre-Rule 502 Lois Sportswear factors.

- Courts applying Rule 502 quickly realized this, and usually use the same standards they had relied upon before Rule 502.

The first inquiry under Rule 502 focuses on whether disclosures were "inadvertent."

- Some courts recognize that mistakes inevitably will occur in large document productions -- implicitly endorsing a fairly forgiving view of such mistakes' waiver impact.

Most courts interpret Rule 502's "inadvertent" provision as requiring courts to determine if litigants accidentally disclosed privileged communications.

The next Rule 502 factor focuses on whether litigants took reasonable steps to prevent such accidental disclosures.

- Courts agree that having lawyers supervise initial privilege determinations constitutes a reasonable step.

Courts have analyzed "privilege" labels' effect on the waiver analysis.

- Some courts find that litigants allowing such labeled documents to be disclosed may not have taken reasonable steps to withhold them.

Courts disagree about whether inadvertently produced documents' inclusion on a privilege log helps or hurts litigants.

- Some courts hold that such inclusion shows that the disclosures must have been accidental.
- In contrast, some courts hold that absence of a log weighs in favor of a waiver.

Some courts expect litigants discovering their accidental production to re-review their production to catch any other errors.

Some courts look at other factors in determining whether litigants have acted reasonably.

- Examples include whether a litigant relied completely on a contractor to conduct the privilege review; whether the producing litigant's law firm had relied on another law firm to conduct a privilege review of document subpoenaed from the other law firm's client (who possessed some of the litigant's privileged documents); whether the producing litigant's lawyer reviewed the documents at all; whether the producing litigant reviewed a database before making it available to the adversary; whether a software glitch caused the inadvertent production; whether a clerical error resulted in the inadvertent production.

Litigants seeking to retrieve inadvertently produced documents usually must explain what steps they took to prevent such accidents.

Courts applying Rule 502 also look at the number of inadvertent disclosures.

Courts disagree about whether they should consider the number of disclosed documents or the number of accidents.

- For instance, a single accident might result in production of an entire file of privileged documents.

Some courts examine the percentage of produced documents litigants inadvertently disclosed.

- Some courts focus on the number of documents, while some courts focus on the number of pages.

Under Rule 502, courts also examine the promptness of litigants' remedial measures.

- Most courts begin the calculation when producing litigants discover their accident, not when the accident occurred.

Courts disagree about what producing litigants' actions comply with Rule 502's request to take prompt remedial measures.

- Some courts look at producing litigants' request for the documents' return, while some courts expect producing litigants to seek court orders requiring the documents' return.

Most courts require producing litigants to take some remedial steps within days of discovering their accidental disclosures.

Some courts examine other factors when applying Rule 502.

- Some courts assess disclosures' breadth. The broader the disclosures, the more likely courts' finding of waiver.

Some courts assess prejudice to adversaries.

- The more adversaries have relied on inadvertently disclosed documents, the more likely courts' finding of waiver.

Some courts assess other factors.

- Examples include whether the interests of justice weighed in favor of a waiver; whether the inadvertently produced document was easy to miss because, for example, it contained only a lawyer's first name; whether there was sufficient time for the litigant to review the documents; whether the producing party had to review a large volume of material. Inexplicably, one court took exactly the opposite approach: that a large volume of material meant that the producing party should have been more careful, so the court should be less forgiving in that context; whether there was a short timetable for the privilege review; whether the producing party engaged in what could be called a "document dump," including many irrelevant documents along with responsive documents; whether the producing party inadvertently produced more than one copy of the document at issue.

### 3. Paralegals' Role in Privilege Reviews

Courts have addressed paralegals' role in privilege reviews, especially reviews that did not identify and withhold protected documents that were later inadvertently produced.

- In analyzing the reasonableness of a litigant's steps to avoid such inadvertent disclosure, some courts analyze the impact of a paralegals' involvement in the privilege review.

Most courts find that relying on paralegals constitutes a reasonable step in that setting.

- Clark Cnty. v. Jacobs Facilities, Inc., Case No. 2:10-cv-00194-LRH-PAL, 2012 U.S. Dist. LEXIS 141651, at \*29, \*36 (D. Nev. Oct. 1, 2012) (analyzing the inadvertent disclosure of privileged documents in a litigation in which the litigants had agreed to a claw-back order (which used the term "inadvertent" and required the producing party to "immediately" alert the receiving party of any inadvertent disclosure of privileged communications); "Three different levels of privilege review were conducted, initially by a paralegal, then by an associate attorney, and finally by an officer of the law firm." (emphasis added); ultimately holding that the inadvertent disclosure of privileged documents did not result in a waiver).

- Heriot v. Byrne, 257 F.R.D. 645, 660 n.10 (N.D. Ill. 2009) (analyzing the application of Fed. R. Evid. 502; ultimately concluding that the inadvertent production of privileged documents did not waive the attorney-client privilege; finding that plaintiffs' employment of paralegals and other non-lawyers was reasonable, and sufficient; explaining that the mistake occurred when the vendor mistakenly produced documents, not during the initial privilege review; "This factor may be relevant if, for example, the initial review by non-lawyers resulted in the inadvertent disclosure. Nevertheless, this Court declines to hold that a procedure is unreasonable in every case that a paralegal or non-lawyer reviews documents for privilege." (emphasis added)).
- Coburn Group, LLC v. Whitecap Advisors LLC, 640 F. Supp. 2d 1032, 1035, 1039, 1040 (N.D. Ill. 2009) (providing an extensive analysis of Rule 502, and ultimately concluding that defendant had not waived privilege protection for two documents totaling sixteen pages that were inadvertently produced in a 40,000 page document production; noting that one of defendant's lawyers "assigned two experienced paralegals to review the documents and to separate them into categories for production or assertion of privilege." (emphasis added); finding that the use of paralegals in the review process was appropriate; "Coburn criticizes Whitecap's use of paralegals for the document review. . . . Although the experience and training of the persons who conducted the review is certainly relevant to the reasonableness of the review, this court joins with Heriot [Heriot v. Byrne, 257 F.R.D. 645 (N.D. Ill. 2009)] in declining to hold that the use of paralegals or non-lawyers for document review is unreasonable in every case. . . . In light of the large number of documents to be reviewed, Whitecap's use of experienced paralegals who were given specific direction and supervision by a lawyer who is lead counsel in the case was not unreasonable."; "Coburn also claims that the protocol described by Mr. Hultquist did not teach the paralegals what to look for in determining whether a document was 'prepared in anticipation of litigation.' . . . Coburn argues that it is unreasonable to expect the paralegals to identify the e-mail at issue here as work product because it is not apparent on its face that it is work product and therefore the procedure was unreasonable."; "Unquestionably, reviewing documents for work product can be challenging because sometimes there are subtleties to the determination. As Coburn points out, whether a document is work product can rest on facts not apparent from the face of the document, as in this case. Here, although there are clues on the face of the e-mail, the fact that it was prepared to provide information to Whitecap's attorneys is not apparent from the document itself. But the document review can not [sic] be deemed unreasonable solely because a document slipped through which in close examination and with additional information turns out to be privileged or work product. If that were the standard, Rule 502(b) would have no purpose; the starting point of the Rule 502(b) analysis is that a privileged or protected document was, in fact, turned over.").

- Pucket v. Hot Springs Sch. Dist. No. 23-2, 239 F.R.D. 572, 586 (D.S.D. 2006) ("The court finds that this review of the file by both an attorney and paralegal to remove privileged material is a reasonable precaution.").
- Aramony v. United Way of Am., 969 F. Supp. 226, 237 n.12 (S.D.N.Y. 1997) (finding no waiver based on review of 630,000 pages of documents over an 11-week period by four lawyers and three paralegals who spent a total of 769.5 hours reviewing the documents; finding that "the use of paralegals and a junior associate here was warranted" because of the massive number of documents to review).
- Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A., 160 F.R.D. 437, 445 (S.D.N.Y. 1995) (finding no waiver and no delay in demand by the producing party for inadvertently produced privileged documents to be returned; finding that the party inadvertently producing the privileged documents had taken "reasonable" precautions by using cost-effective legal assistants rather than lawyers for privilege review, and by "physically removing documents" rather than using "easily dislodged" Post-its).

Some courts have found that clients relying on lawyers rather than paralegals for privilege reviews were more likely to pass muster, or have otherwise criticized paralegal's involvement.

- EEOC v. Office Concepts, Inc., No. 1:14-cv-00290-RL-SLC, 2015 U.S. Dist. LEXIS 170587, at \*13, \*14 (N.D. Ind. Dec. 22, 2015) (applying Rule 502, and finding a waiver, based largely on the six week delay in plaintiff's effort to retrieve inadvertently produced documents; "The Court will now turn to the reasonableness of the decision to have Office Concepts itself review the documents for privilege without assistance of counsel. Courts in this Circuit have 'declin[ed] to hold that the use of paralegals or non-lawyers for document review is unreasonable in every case.' . . . However, these courts have noted that document review by non-lawyers is only reasonable where they 'have the legal training necessary to implement and oversee reasonable review procedures' . . . . Office Concepts has not provided any information regarding the training and experience of the individuals conducting the document review, nor has it provided any information about the actual process used by these individuals to determine whether documents were privileged. Office Concepts has therefore failed to meet its burden to provide 'specific facts and details to show the procedures were reasonable.'" (citation omitted)).
- Beyond Sys., Inc. v. Kraft Foods, Inc., 2010 U.S. Dist. LEXIS 39497, at \*3 n.1, \*5, \*6, \*6-7 (D. Md. Apr. 19, 2010) (denying defendant's efforts to retrieve inadvertently produced privileged documents; noting that a court order governing the litigation allowed a party to retrieve such documents if it acted within twenty-days, but noting that the defendant had not sought the return of the



documents until thirty days after learning of the inadvertent disclosures; "While the parties have not raised this issue in their memoranda, it is interesting to observe that despite the clear identification of the Spreadsheet as being a privileged document, there is no indication that Plaintiff made known to Defendant its receipt of such before its intended use of the Spreadsheet during a deposition."; "The Spreadsheet has been 'inadvertently' disclosed twice. While difficult to fathom, such mistakes do happen."; "The language and the import of the Confidentiality Order are clear -- investigate and make a demand for the return of privileged materials within 21 days of discovery. October 30, 2009 was the point of no return. By Defendant's untimely action, it waived any claim to the return of the Spreadsheet under the provisions set forth in the Confidentiality Order."; "Defendant took seriously the need for a privilege review by doing so in both instances, even though said reviews did not detect the presence of the Spreadsheet among the more than 164,000 files. Defendant did not delegate this responsibility to a paralegal or other staff member. In retrospect, it is clear that a more meaningful review was required, but counsel's effort should not suggest its approach was done in a cavalier manner. The failure to have a more effective review process under these circumstances does not equate to a loss of the designation termed 'inadvertent.' . . . The Court does not find the precautions taken by Defendant to be grossly negligent or intentional." (emphasis added)).

- Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251, 265 (D. Md. 2008) (assessing the inadvertent production of electronic documents, in an opinion by well-regarded United States Magistrate Judge Paul Grimm; holding that a party may rely on a well-prepared privilege log until the adversary challenges the privilege protection; "[B]ecause privilege review and preparation of privilege logs is increasingly handled by junior lawyers, or even paralegals, who may be inexperienced and overcautious, there is an almost irresistible tendency to be over-inclusive in asserting privilege/protection." (emphasis added); concluding that the inadvertent production resulted in a waiver).
- Deere & Co. v. MTD Prods., Inc., No. 00 Civ. 5936 (LLM) (JCF), 2003 U.S. Dist. LEXIS 13325, at \*2 (S.D.N.Y. Aug. 1, 2003) (in addressing the waiver implications of an inadvertent production of documents, noting that "[i]t is at least noteworthy that the review was conducted by counsel rather than being delegated to paralegal staff" (emphasis added)).
- In re Sause Bros. Ocean Towing, 144 F.R.D. 111 (D. Or. 1991) (finding a waiver where twelve to fifteen privileged documents were mistakenly included in 140,000 pages produced and where the law firm had relied on a paralegal services firm to review the documents and did not seek return of the inadvertently produced documents for over one year).
- Mfrs. & Traders Trust Co. v. Servotronics, Inc., 522 N.Y.S.2d 999, 1005 (N.Y. App. Div. 1987) (holding that a bank's lawyer had not waived the privilege by

accidentally producing privileged documents; applying what it called "a reasonable precaution test," the court found that the lawyer had delegated the document screening job to a lawyer rather than a legal assistant.)

Unfortunately for paralegals, courts are not reluctant to describe their role in mistakes occurring during document productions.

- (E-2017-206 cite checked) Walker v. Geico Indem. Co., Case No. 6:15-cv-1002-Orl-41KRS, 2017 U.S. Dist. LEXIS 47670 (M.D. Fla. Mar. 30, 2017) (disqualifying a law firm for relying on rather than returning inadvertently produced protected documents; "Here, the attorneys had no knowledge of the production, and they were not given the opportunity to review the documents before they were produced even though the firm's longstanding operating procedures required the legal assistant to bring the documents to an attorney prior to producing them. Contrary to Defendant's assertion, Plaintiff is not attempting to create a 'legal assistant exception' to excuse lawyer misconduct. Unlike in U.S. Fidelity [U.S. Fid. & Guar. Co. v. Liberty Surplus Ins. Corp., 630 F. Supp. 2d 1332 (M.D. Fla. 2007)], there was no lawyer misconduct here.").
- Barnett v. Aultman Hosp., Case No. 5:11 CV 399, 2012 U.S. Dist. LEXIS 53733, at \*3-4, \*7-8, \*8, \*9 (N.D. Ohio Apr. 17, 2012) (finding that an inadvertent production resulted in a waiver; "The party claiming its disclosure was inadvertent bears the burden of proving that the disclosure was truly inadvertent."; "Rule 502 does not define 'inadvertent disclosure.' The Oxford English Dictionary defines 'inadvertent,' as applied to actions, to mean 'characterized by want of attention or taking notice; hence unintentional.' Oxford English Dictionary, available at [www.oed.com/viewdictionaryentry/Entry/93041](http://www.oed.com/viewdictionaryentry/Entry/93041)."; "According to the testimony of defendant's counsel, the documents at issue (Bates number Aultman 509-512 and 515) were reviewed by defendant's attorneys Hearey and Billington. At their instruction, a paralegal at the firm partially redacted one of the pages at issue . . . . However, the partially redacted page contained privileged material even after the redaction. It is unclear to the Court after considering the testimony of defendant's attorneys Hearey and Billington, whether the unredacted content of the documents at issue were not recognized by defendant as privileged before the documents were disclosed, or whether the documents were recognized as privileged and disclosed by mistake. However, either way under Rule 502(b), the disclosure was inadvertent." (emphasis added); "According to the testimony of defendant's counsel, the production in this case involved several hundred documents, which is a relatively small production. Further, there is no evidence in the record to suggest that defendant was required by plaintiff to review and produce these documents under short time constraints. In addition, counsel testified that no privilege log was prepared and the documents were not marked as privileged or confidential in any way. Defendant's counsel also testified that no procedure, protocol or method was followed or implemented by defendant's counsel to prevent disclosure of privileged material."; "The Court finds that the

statement of defendant's counsel that the documents were reviewed for privilege, in the absence of any other precaution to prevent disclosure of privileged material, is insufficient to establish that defendant took reasonable steps to prevent disclosure of privileged material under Federal Rule of Evidence 502(b).").

- Williams v. D.C., 806 F. Supp. 2d 44, 49, 49-50 (D.D.C. 2011) (concluding the inadvertent production of privileged documents resulted in a waiver; "The District has failed to support its arguments with an affidavit or declaration from its prior counsel or the paralegal who is claimed to have reviewed the documents. This failure is both inexplicable and unacceptable and constitutes sufficient grounds to deny the District's motion outright."; "First, and most importantly, the District has utterly failed to explain its 'methodology' for review and production. [Amobi v. D.C. Dep't of Corr., 262 F.R.D. 45, 54 (D.D.C 2009)]. The District explains only that '[p]rior to production, this material was reviewed by an experienced litigation paralegal under the supervision of an attorney.' . . . It should go without saying that this sort of conclusory statement is patently insufficient to establish that a party has discharged its duty of taking 'reasonable steps' to guard against the disclosure of privileged documents. . . . In this case, the District does not indicate when its review occurred, how much time it allocated to the review of documents, the nature of the reviewer's experience, the extent of the alleged supervision of an attorney, whether it conducted multiple rounds of review, how it segregated privileged documents from non-privileged documents, and other basic details of the review process. The general statement that a privilege review was performed, without any supporting details, is completely uninformative.").
- Klig v. Deloitte LLP, C.A. No. 4993-VCL, 2010 Del. Ch. LEXIS 193, at \*9-10 (Del. Ch. Sept. 7, 2010) (severely criticizing a privilege log created by Skadden; refusing to let Skadden prepare a better log, and also refusing to certify the issue for appeal – although staying a waiver ruling so that Skadden's client Deloitte could file an appeal; criticizing Skadden's boilerplate language; noting that the court had earlier said the following at an August hearing: "I think that the privilege [law] out there is clear. A summer associate can find it in approximately an hour. There is no reward for doing a good privilege log. It's painful. It results in these huge documents. No one has any incentive to be responsible [on] a privilege log as opposed to [being] overinclusive. Junior associates or paralegals get tasked with it. They screw up if they don't log a document, not if they come to the partner and say, "Really, this one shouldn't be logged." Because of those incentives, people have ample reason to be, again, overinclusive, not to describe documents meaningfully and hope that the other side won't challenge them. It's particularly a win-upside-no-downside scenario, if the only thing that happens when you then get challenged on it is you actually have to go back and do what you . . . should have done in the first place. So I'm not going to play that game. An improperly asserted claim of privilege is no claim at all. It's waived. So as to those documents on the log, they're being ordered to be produced. So both sides, both logs, you blew it." (emphasis added)).

- Preferred Care Partners Holding Corp. v. Humana, Inc., 258 F.R.D. 684, 697-98 (S.D. Fla. 2009) (finding that an inadvertent production of documents resulted in a waiver for some of the inadvertently produced documents, but not others; addressing the choice of law issue, but applying Florida law without any choice of laws analysis; finding that Humana did not waive the attorney-client privilege protection under Federal Rule of Evidence 502 for some of the inadvertently produced documents; "Humana's disclosure of this document was inadvertent. In reaching this conclusion, the undersigned relies primarily on the sworn affidavit of Humana attorney Andrew S. Berman, who averred that the 50/50 Email was identified by counsel as being privileged, but was omitted from the Privilege Log and produced to PCP due to a clerical error committed either by a paralegal or a copy clerk who 'misinterpreted a flag placed on that document.'").
- Kalra v. HSBC Bank USA, N.A., No. CV-06-5890 (JFB)(ETB), 2008 U.S. Dist. LEXIS 34696 (E.D.N.Y. Apr. 28, 2008) (explaining that a paralegal working for HSBC reviewed the documents for privilege before production; ultimately finding that the accidental production did not cause a waiver).
- U.S. Fid. & Guar. Co. v. Liberty Surplus Ins. Corp., 630 F. Supp. 2d 1332, 1340 (M.D. Fla. 2007) (addressing work product issues in a first party insurance case; also addressing the paralegal's mistake that resulted in the inadvertent production of privileged documents; "On June 29, 2007, Liberty produced 1911 pages of documents, about 3/4 of a standard banker's box. . . . Within the production are 94 pages that Liberty claims are privileged and were inadvertently disclosed."; explaining that "the paralegal misunderstood" the lawyer's instructions, and sent the privileged documents to the copier; finding that the inadvertent production caused a waiver).
- VLT, Inc. v. Lucent Techs., Inc., Civ. A. No. 00-11049-PBS, 2003 U.S. Dist. LEXIS 723, at \*9 (D. Mass. Jan. 21, 2003) (explaining that a paralegal who mistakenly produced privileged documents during a document production was "unbeknownst [to the law firm] going through 'significant emotional difficulties' during the document review process that severely impaired her job performance and resulted in a mental breakdown (possibly caused by alcoholism) within the next few months after the document review. She was eventually fired for absenteeism." (emphasis added)).
- Lifewise Master Funding v. Telebank, 206 F.R.D. 298, 303, 304 (D. Utah 2002) (explaining that a litigant had accidentally produced privileged documents "when copies of documents were made and a paralegal apparently sent the wrong set with other properly disclosed documents"; finding that the "oversight was not gross," and concluding that "fairness dictates return of the documents.").
- Amgen Inc. v. Hoechst Marion Roussel, Inc., 190 F.R.D. 287, 303, 309 (D. Mass. 2000) (explaining how a paralegal at the well-respected Boston firm of Choate,

Hall & Stewart had accidentally produced approximately 200 privileged documents comprising 3,821 pages -- out of 200,000 pages reviewed and 70,000 pages produced; "when Choate's outside copy vendor arrived to collect non-privileged responsive documents to be numbered and copied for production, due to an error by a paralegal working with the copy vendor, the boxes containing the privileged documents were taken from the separate shelf"; describing these as "egregious circumstances" and finding that Choate's adversary did not have to return the documents).

#### 4. Discovery about Discovery

Adversaries sometimes try to challenge litigants' discovery responses in a "sideshow" that can eclipse the main case.

- This tactic might be called "discovery about discovery."

Adversaries sometimes focus on litigants' document discovery.

- Courts disagree about opinion work product protection for the existence or non-existence of documents.

Courts disagree about adversaries' entitlement to discovery about litigants' search for and collection of responsive documents.

- Some courts allow such discovery only if adversaries establish good cause for scrutinizing litigants' actions.

Adversaries sometimes focus on litigants' interrogatory answers.

- Some courts protect the identity of those who assisted in preparing litigants' answers, while some courts take the opposite position.
- Some courts preclude discovery into litigants' case investigations, which can involve interrogatory answers and other discovery responses.
- Some courts order litigants to identify documents they relied on when answering interrogatories.
- Some courts allow discovery of paralegals or lawyers who sign interrogatory attestations.

Courts permitting such discovery sometimes point to litigants' actions.

- Such actions can include litigants' representative's signature on discovery responses, or litigants' testimony about their document search (especially if such testimony seeks to explain inadvertent productions or to avoid sanctions).

Because paralegals are often intimately involved in the discovery process, they sometimes become witnesses about the discovery process -- potentially triggering an implied waiver.

- Wal-Mart Stores, Inc. v. Dickinson, 29 S.W.3d 796, 803-04 (Ky. 2000) (finding that a Wal-Mart legal assistant (Vestal) could be deposed by the lawyer for plaintiff Laurenz, who was injured during a purse-snatching in a Wal-Mart parking lot; noting the difference between responses to document requests and responses to interrogatories; "In signing Wal-Mart's response to Laurenz's request for production of documents, Vestal held herself out as the person who conducted the search and as the only person able to provide the answers to the questions posed in the trial court's order. . . . [W]e hold that a person -- regardless of whether that person is opposing counsel -- signing a response to a request for production, which is made pursuant to CR 34.01, holds him or herself out as having personal knowledge of the answers given and is subject to deposition for the limited purpose of exploring his or her actual knowledge of the answers given including, but not limited to, the methods employed to search for the documents requested and the scope of that search.").

Litigants can impliedly waive the work product doctrine by relying on a paralegal's testimony about the creation of work product.

- Montana Land & Mineral Owners Ass'n v. Devon Energy Corp., No. CV 05-30-H-DWM, 2006 U.S. Dist. LEXIS 48742, at \*12-14 (D. Mont. June 2, 2006) ("Plaintiffs elected to present the paralegals' affidavits and to make 'testimonial use' of the paralegals' spreadsheet. Plaintiffs have asked the Court to rely on the paralegals' summary in their motion for class certification . . . . They have placed the focus on the paralegals' analysis of the subject leases. Accordingly, having elected to use the paralegals' work product as an exhibit offered in support of their motion, Plaintiffs have waived work product privilege regarding the preparation of the paralegals' summary. Accordingly, Plaintiffs have not met their burden of proving the applicability of this doctrine. Therefore, the Court will grant Defendants' motion. . . . The waiver is co-extensive with, and the depositions must be limited to, matters set forth in the affidavits themselves. The thought processes of counsel are not the subject of the affidavits. . . . In other words, the depositions may be used to understand how the paralegals compiled the data into the summaries themselves, not to inquire into counsels' instructions or counsels' strategies.").

Courts generally take a hostile view to an adversary deposing a client's lawyer.

Most courts follow what they call the Shelton standard, named for a 1986 Eighth Circuit decision. Shelton v. Am. Motors Corp., 805 F.2d 1323 (8th Cir. 1986).

- Under the Shelton standard, adversaries seeking to depose litigants' trial lawyers must demonstrate that they seek crucial non-privileged information unavailable elsewhere.

Some courts, including the Second Circuit, follow a more "flexible" standard -- but still strongly discourage such depositions. Official Comm. of Unsecured Creditors of Hechinger Inv. Co. of Del., Inc. v. Friedman, 350 F.3d 65, 72 (2d Cir. 2003).

At least one court has applied the same standard to paralegals' depositions.

- Fields v. City of Chi., Case No. 10 C 1168, 2012 U.S. Dist. LEXIS 181642, at \*11 (N.D. Ill. Dec. 26, 2012) ("Fields' proposed course is to take the depositions of Noland [City Attorney] and Majka [City Paralegal]. The deposition by one party of the other side's attorney in the litigation (or, by extension, the attorney's paralegal) is disfavored and should be permitted only if there is no other reasonable means to obtain relevant and significant information that the attorney possesses. . . . Fields is close to that point but is not quite there, at least not yet.").

## 5. Ethics of Discovery

### a. Ex Parte Communications with Unrepresented Persons

Most states' ethics rules prohibit lawyers from providing any legal advice to unrepresented third parties -- except for the advice to hire a lawyer. ABA Model Rule 4.3.

- Paralegals are bound by the same provision.

The rules usually allow litigants in a civil action to suggest that potential witnesses with whom they have some connection (because the witnesses are current or former employees or agents, or family members) not speak with the adversary -- as long as refusing to speak would not harm the witness. ABA Model Rule 3.4(f).

### b. Ex Parte Contact with Represented Persons

Most states' rules generally prohibit a lawyer (or someone acting directly on behalf of a lawyer) from communicating ex parte with a represented person -- without the other lawyer's consent. ABA Model Rule 4.2.

When the adversary is a corporation, it is sometimes difficult to determine whether lower-level employees are "represented" by the company's lawyer for these purposes.

- As indicated above, communications between a corporate lawyer and lower-level employees may be entitled to the attorney-client privilege protection if they meet the Upjohn standards. However, a different test applies here.

Most states' ethics rules generally prohibit ex parte contacts with a corporate adversary's upper management (called the "control group"), but many rules allow ex parte contacts with lower-level employees.

The ABA Model Rules address this issue in a comment.

- ABA Model Rule 4.2 cmt. [7] ("In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.").

The ABA Model Rule prohibition does not include a category of employees who previously were off limits: employees "whose statement may constitute an admission on the part of the organization."

As a matter of ethics, the ABA indicates that a litigant may have ex parte contacts with a corporate adversary's former employee. ABA LEO 359 (3/22/91).

- Some courts take a more restrictive approach.

Paralegals who are asked to conduct such interviews should be familiar with these differing approaches.

### **c. Deceptive Conduct**

The ABA Model Rules flatly prohibit a lawyer from ordering another lawyer to engage in any deceptive conduct. ABA Model Rule 5.1(a)(b).

- However, ABA Model Rule 5.3 only requires a lawyer to assure that other professionals under the lawyer's supervision engage in conduct that is "compatible" with the ethics rules.

Some courts permit knowingly deceptive conduct by those acting under lawyer's direction -- but only to a point.

- Gidatex, S.r.L. v. Campaniello Imports, Ltd., 82 F. Supp. 2d 119, 122, 124 (S.D.N.Y. 1999) (finding that lawyers could ethically arrange for private investigators to portray themselves as interested consumers and record conversations with store clerks in an effort to see if stores were violating the trademark laws by "palming-off" merchandise; noting that "hiring investigators to pose as consumers is an accepted investigative technique, not a misrepresentation"; "enforcement of the trademark laws to prevent consumer confusion is an important policy objective, and undercover investigators provide



an effective enforcement mechanism for detecting and proving anti-competitive activity which might otherwise escape discovery or proof").

- Apple Corps Ltd. v. Int'l Collectors Soc'y, 15 F. Supp. 2d 456 (D.N.J. 1998) (holding that a lawyer did not act unethically in directing a private investigator and a staff member to make purchases by phone to verify that a third party was violating a consent order; the callers simply represented themselves as consumers and did not intimidate the third party into making the sale).
- These courts would probably have decided differently if the deception covered more than the litigant's identity and the reason for the communication.

A 2007 New York County legal ethics opinion allowed such minimal types of deception in certain situations.

- N. Y. County Law. Ass'n LEO 737 (5/23/07) ("In New York, while it is generally unethical for a non-government lawyer to knowingly utilize and/or supervise an investigator who will employ dissemblance in an investigation, we conclude that it is ethically permissible in a small number of exceptional circumstances where the dissemblance by investigators is limited to identity and purpose and involves otherwise lawful activity undertaken solely for the purpose of gathering evidence. Even in these cases, a lawyer supervising investigators who dissemble would be acting unethically unless (i) either (a) the investigation is of a violation of civil rights or intellectual property rights and the lawyer believes in good faith that such violation is taking place or will take place imminently or (b) the dissemblance is expressly authorized by law; and (ii) the evidence sought is not reasonably and readily available through other lawful means; and (iii) the lawyer's conduct and the investigator's conduct that the lawyer is supervising do not otherwise violate the New York Lawyer's Code of Professional Responsibility (the 'Code') or applicable law; and (iv) the dissemblance does not unlawfully or unethically violate the rights of third parties. These conditions are narrow. Attorneys must be cautious in applying them to different situations. In most cases, the ethical bounds of permissible conduct will be limited to situations involving the virtual necessity of non[-]attorney investigator(s) posing as . . . ordinary consumer(s) engaged in an otherwise lawful transaction in order to obtain basic information not otherwise available. This opinion does not address the separate question of direction of investigations by government lawyers supervising law enforcement personnel where additional considerations, statutory duties and precedents may be relevant. This opinion also does not address whether a lawyer is ever permitted to make dissembling statements directly himself or herself.").

Paralegals who are asked to engage in conduct that is arguably deceptive or gives them some pause should research this issue or seek a second opinion within the firm.

In other situations, lawyers direct paralegals to engage in what all or most bars and courts consider inappropriately deceptive conduct.

- Peter Vieth, Prosecutor Accepts Reprimand From Bar, Va. Laws. Wkly., Mar. 20, 2013 ("A prosecutor accused of gathering information from a defense lawyer under false pretenses has agreed to a public reprimand to resolve a Virginia State Bar (VSB) discipline charge."; "Caroline County Commonwealth's Attorney Anthony G. 'Tony' Spencer acknowledged last month he engaged in 'misrepresentation' when he sent his paralegal to ask questions at an adversary's office under the pretense of taking a college survey." (emphasis added); "Spencer was attempting to find out what kind of administrative support was available in the office of Richmond lawyer John G. LaFratta. A courtroom dispute between the two about LaFratta's claimed lack of criminal defense resources led LaFratta to file a bar complaint, according to VSB documents."; "After Spencer's ruse was disclosed, the spat between the two lawyers became so intense a judge threw both of them off the case."; "In a prepared statement, Spencer admitted he made a mistake but said his intentions were good."; "The underlying criminal case involved Clyde Davenport, a former Caroline County sheriff's deputy accused of abusing a young boy. A jury found Davenport guilty and recommended the maximum 30-year prison term, but Circuit Judge Joseph J. Ellis declared a mistrial based on Spencer's statements about the defendant at the 2010 trial."; "Meanwhile, LaFratta filed a bar complaint over other comments made by the prosecutor to the Davenport jury."; "LaFratta had argued he was overmatched as a defense attorney by the resources available to the state. In response, Spencer suggested to the jury that LaFratta worked with a secretary, a paralegal and a partner. That statement by Spencer misrepresented LaFratta's administrative support, LaFratta claimed."; "LaFratta's bar complaint over Spencer's courtroom rhetoric was later dismissed, but it was Spencer's response to that complaint that led to a separate ethics charge."; "Spencer asked his paralegal to check out LaFratta's level of administrative support using the ruse of an academic survey, according to a stipulated statement of facts in the VSB case."; "Spencer's paralegal, Nancy Foster, was taking classes at a community college at the time, according to the VSB certification of charges. At Spencer's request, she went to LaFratta's office, introduced herself as a student of paralegal studies, and said she was taking a survey of 'lawyer administrative support personnel,' according to the stipulated facts."; "Under that pretense, Foster asked the receptionist about the number of attorneys in the office, what type of law they practiced, the number of administrative support personnel and what each support person did for each attorney, according to the stipulation.").
- Mary Pat Gallagher, When "Friending" is Hostile, N.J. L.J., Sept. 8, 2012 ("Two New Jersey defense lawyers have been hit with ethics charges for having used Facebook in an unfriendly fashion."; "John Robertelli and Gabriel Adamo allegedly caused a paralegal to 'friend' the plaintiff in a personal injury case so they could access information on his Facebook page that was not available to the public." (emphasis added); "The 'friend' request, made 'on behalf of and at the direction of the lawyers, 'was a ruse and a subterfuge designed to gain access to non-public portions of [the] Facebook page for improper use' in defending the case, the New

Jersey Office of Attorney Ethics (OAE) charges."; "The OAE says the conduct violated Rules of Professional Conduct (RPC) governing communications with represented parties, along with other strictures. The lawyers are fighting the charges, claiming that while they directed the paralegal to conduct general Internet research, they never told her to make the request to be added as a 'friend,' which allows access to a Facebook page that is otherwise private." (emphasis added); "At first, Cordoba [paralegal] was able to freely grab information from Hernandez's [plaintiff] Facebook page, but after he upgraded his privacy settings so that only friends had access, she sent him the friend request, which he accepted, the complaint says.").

- Peter Vieth, Verdict Slashed, Lawyer Referred for Discipline, Va. Laws. Wkly., Sept. 12, 2011 ("A Charlottesville judge slashed a record wrongful death verdict by two-thirds [the Virginia Supreme Court later reinstated the verdict] and ordered sanctions against the plaintiff and his lawyer in the aftermath of a hotly contested trial." (emphasis added); "Circuit Court Judge Edward L. Hogshire also referred Charlottesville lawyer Matthew B. Murray to the Virginia State Bar on three separate findings of wrongdoing, and referred Murray's client to the local prosecutor for consideration of a perjury charge."; "As the case moved toward trial in 2009, a skirmish erupted over Isaiah Lester's Facebook pages. For unknown reasons, Lester sent a Facebook message to defense lawyer David M. Tafuri. Tafuri checked out Lester's Facebook page and took note of a photo that showed Lester clutching a beer can, wearing a T-shirt proclaiming 'I [heart] hot moms.'"; "Tafuri asked for copies of all aspects of Lester's Facebook site, including all related photographs."; "Hogshire said, 'Instead of providing what was sought, Murray created a scheme to take down or deactivate Lester's Facebook page and to respond by stating that Lester had no Facebook page as of the date the response was signed.'"; "As disputes continued over the Facebook evidence, Hogshire demanded copies of all communications between Lester and his lawyer's office, including some the plaintiff claimed were privileged."; "Despite that order, Murray deliberately failed to disclose an email that directed Lester to delete various pictures from the Facebook site. Murray once referred to the message as the 'stink bomb.' Murray hid that email, Hogshire found, 'out of fear that the Court would grant another continuance of the trial.'"; "Ultimately, all of the Facebook photos emerged and were used to cross-examine Lester at trial."; "After the trial, Murray produced the 'now notorious email' to the judge, but he falsely represented that the earlier omission was caused by the mistake of a paralegal." emphasis added)).

#### **d. Payments to Witnesses**

Paralegals coordinating interviews or depositions of fact witnesses may face requests by those fact witnesses that they be reimbursed for expenses and (in some situations) paid for the time the witnesses spend reviewing documents, preparing for testimony, testifying, etc.

Although there is not much law on this issue, the stakes are high.

- Denying a fact witness's request for such reimbursement could cause the witnesses to refuse the normal cooperation that makes the process easier, such as traveling to another state for a deposition or trial if the witness is outside the court's subpoena power; accepting service for a deposition in another state; meeting beforehand with lawyers for the party seeking the testimony, thereby reducing the element of surprise; agreeing to review documents ahead of time, etc.

At the extreme, a disgruntled witness might even threaten to "shade" testimony.

- On the other hand, making payments to fact witnesses could be seen as "buying" the witness's testimony, which creates cross-examination possibilities for the adversary and (at the extreme) even a risk of "obstruction of justice" charges.

It seems clear that a party seeking a fact witness's testimony may pay reasonable out-of-pocket expenses.

It is much more difficult to determine whether a party can pay a fact witness for time that the witness spends.

- Most states appear to allow a lawyer to reimburse an hourly worker who actually incurs out-of-pocket lost earnings.
- While it is a closer question, most states seem to allow payments to fact witnesses who could argue that they would otherwise have had time to engage in income-earning pursuits (such as a consultant who might otherwise have had a client pay for his or her time). This is not as clear as the hourly worker who must take off from work, because consultants often cannot show that they would have otherwise earned money from clients for the precise time they spent on the case.
- The most difficult issue arises when a witness has not actually lost income, but has nevertheless been inconvenienced and (justifiably) would like to be paid for the inconvenience.

The ABA has indicated that lawyers may compensate fact witnesses under certain conditions.

- ABA LEO 402 (8/02/96) (a lawyer may compensate a non-expert witness for time spent in attending a deposition or trial, meeting with the lawyer to prepare for providing testimony and reviewing documents, as long as the fee is reasonable and the payment is not "being made for the substance or efficacy of the witness's testimony"; determining the reasonableness of the fee is easy when the witness loses hourly wages or a professional fee, but becomes more difficult "where the

witness has not sustained any direct loss of income" (if, for instance, the client is retired or unemployed)).

A Delaware legal ethics opinion also provided guidance, agreeing with the ABA that a party may pay a fact witness for time spent, under certain conditions.

- Delaware LEO 2003-3 (8/14/03) (holding that a lawyer "may pay out-of-pocket travel expenses to witnesses"; explaining that a company may compensate a retired employee of another company for his time (at a rate that the retired employee charges in his full-time independent consulting business), but may not compensate a retired company employee for his time at the rate that the employee was paid when last employed at the company -- because the former employee was presently unemployed; noting that there was no evidence that the witness "will lose an economic opportunity by spending time preparing for his testimony and testifying" at the trial; acknowledging that the witness might be entitled to a "somewhat reduced rate of compensation for the burden of devoting his time to prepare for the Delaware Trial rather than enjoying his retirement," but noting that such an inquiry was not before the bar).
- This concept makes sense -- even a retired former employee who will not lose any "out-of-pocket" lost earnings by spending time reviewing documents, preparing for testimony, etc., is losing the opportunity to enjoy retirement.

## L. CONFLICTS OF INTEREST: BASIC RULES

### 1. Introduction

Lawyers' ethics rules contain very strict prohibitions on the lawyers' conflicts of interest.

- These rules' application to paralegals is discussed below.

### 2. Paralegals' Role in Conflicts Checks

Some firms (or individual lawyers) ask paralegals to help them obtain information for purposes of running "conflicts checks" on new client (or new hirees) or actually analyze the conflicts reports generated by computer or other means.

To the extent they are asked to help with this task, paralegals should familiarize themselves with applicable conflicts of interest rules.

At the very least, paralegals should assure that their firm's conflicts database is up to date and accurate.

- Although most lawyers forget to change the database as the situation changes, they should be reminded to assure that any change in circumstance is reflected in their firm's conflicts database.
- For instance, a friendly co-defendant might become a cross-claim adversary -- the firm's conflicts database should be changed so that a lawyer later wishing to represent or become adverse to the now-adversary will make the proper conflicts decisions.

### 3. Simultaneous Representations on Different Matters

Every state prohibits a lawyer from ever being adverse to any current client on any matter whatever without the client's consent -- even if the matter is totally different from the representation in which the lawyer represents that client. ABA Model Rule 1.7(a); id. cmt. [2].

### 4. Simultaneous Representations on the Same Matter

Lawyers may sometimes represent multiple clients on the same matter, as long as no conflict of interest exists between them or is likely to develop. ABA Model Rule 1.7(b).

- Even so, starting a joint representation like this might create later problems if a conflict does develop -- because it might require the lawyer to withdraw from representing both clients.

- Unless the parties agree otherwise, there can generally be no secrets among jointly represented clients, meaning that paralegals acquiring information from one jointly represented client may have a duty to share it with the other client.

## 5. Former Representations

The conflicts rules applying to adversity to former clients are far different from the conflicts rules governing adversity to current clients. ABA Model Rule 1.9(a).

- Lawyers do not owe a duty of loyalty to former clients as they do to current clients -- lawyers owe only a duty of confidentiality to former clients.
- This means that lawyers may be adverse to former clients unless they formerly represented the client on the same or "substantially related" matter (in which case the law will presume that they have material confidential information) or the lawyer actually acquired material confidential information from the former client.

The rule governing adversity to former clients sometimes inhibits lawyers and paralegals from freely moving to another firm (see below).

## 6. Conflicts with Personal Interests

Lawyers (and paralegals) sometimes find that their personal interests conflict with their clients' interest.

- ABA Model Rule 1.8(a) (doing business with clients involves special ethics rules containing consent and disclosure requirements).

## 7. Imputed Disqualification

The stakes of an individual lawyer's disqualification is raised because of the "imputed disqualification" rule.

- Under ABA Model Rule 1.10, a single lawyer's disqualification usually extends to the entire law firm or law department (absent an ethics rule allowing the disqualified person to be "screened").

This Rule makes it even more important for lawyers to avoid becoming a "Typhoid Mary" to a firm or law department that they join.

## 8. Hiring Lawyers -- General Rules

When lawyers leave one firm and move to another, the clients of the former firm become "former" clients of the lawyer for conflicts purposes.

- Absent consent, the lawyer may not take representations adverse to the former clients if the lawyer has material confidential information about them (either

because the lawyer actually acquired the information or is presumed to have acquired it because the lawyer worked on the "same" or "substantially related" matters for the former client at the old firm).

The ABA and states have debated whether an individually disqualified lawyer's disqualification should be automatically imputed to her new law firm (sometimes called the "Typhoid Mary" effect).

- The trend over the last decade has been to allow such individually disqualified lawyers to be "screened" at their new firm -- thus avoiding the imputation of disqualification.
- The ABA adopted this approach in 2009.

In states following the traditional "Typhoid Mary" approach, the hiring firm must obtain consent to continue in its representation adverse to the lateral lawyer's former client -- thus avoiding the imputation by contract rather than through application of the ethics rules. Most law firms grant such consents, knowing that they might themselves need such a consent when they hire laterals.



## M. CONFLICTS OF INTEREST RULES GOVERNING PARALEGALS' HIRING

### 1. Introduction

Although all the conflicts rules applicable to lawyers are generally applicable to paralegals under the basic principles discussed above, the conflicts rules' application to paralegals primarily focuses on lawyers' hiring of paralegals.

- The key question is whether a newly hired paralegal's individual disqualification is imputed to the entire hiring law firm or law department.

Paralegal ethics guidelines recognize the risks of hiring paralegals, and paralegals' duty to disclose any information necessary to mitigate those risks.

- ABA Model Guidelines for Paralegals, Guideline 7 ("A lawyer should take reasonable measures to prevent conflicts of interest resulting from a paralegal's other employment or interests.").
- NFPA Model Code § 1.6; NFPA Model Code, EC 1.6(a) - (g) ("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.").

As with lateral hire lawyers, courts and bars presumably examine only what material confidential information paralegals take with them when they leave their old firm and move to a new firm.

- In other words, paralegals leaving a law firm and moving to another law firm do not carry with them all of the knowledge in the old firm (for conflicts of interest analysis purposes).

Instead paralegals only carry with them the knowledge that they have in their brains -- acquired either while working for law firm clients or in some other way (during training, "water cooler" conversations with colleagues, etc.).

### 2. Imputation of Paralegals' Individual Disqualification: ABA and Restatement Approach

It seems obvious that a paralegal moving to another law firm or law department cannot "switch sides" -- assisting in a matter adverse to the former client for whom the paralegal worked (on the same matter) at the old firm.

The more subtle issue involves the possible imputation to the entire hiring firm of a paralegal's individual disqualification.

- The ABA Model Rules and about one half of the states' rules permit hiring law firms to avoid imputation when hiring lawyers -- as long they screen the lawyer from the firm's matter adverse to the new hire's former client.

The ABA and the Restatement take a similarly forgiving view of this issue in the non-lawyer context.

The ABA Model Rules explicitly indicate that other professionals' individual disqualification is not imputed to the entire hiring law firm.

- ABA Model Rule 1.10 cmt. [4] ("The [automatic imputed disqualification] rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a non-lawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did as a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the non-lawyers and the firm have a legal duty to protect." (emphases added)).

The Restatement takes the same basic approach.

- Restatement (Third) of Law Governing Lawyers § 123 cmt. f (2000) ("Non-lawyer employees of a law office owe duties of confidentiality by reason of their employment. . . . However, their duty of confidentiality is not imputed to others so as to prohibit representation of other clients at a subsequent employer. Even if the person learned the information in circumstances that would disqualify a lawyer and the person has become a lawyer, the person should not be regarded as a lawyer for purposes of the imputation rules of this Section." (emphasis added)).
- Restatement (Third) of Law Governing Lawyers § 123 cmt. f (2000) ("Some risk is involved in a rule that does not impute confidential information known by non-lawyers to lawyers in the firm. For example, law students might work in several law offices during their law-school careers and thereby learn client information at Firm A that could be used improperly by Firm B. Experienced legal secretaries and paralegal personnel similarly often understand the significance and value of confidential material with which they work. Incentives exist in many such cases for improper disclosure or use of the information in the new employment. On the other hand, non-lawyers ordinarily understand less about the legal significance of information they learn in a law firm than lawyers do, and they are often not in a position to articulate to a new employer the nature of the information gained in the previous employment. If strict imputation were applied, employers could protect themselves against unanticipated disqualification risks only by refusing to hire experienced people. Further, non-lawyers have an independent duty as agents to

protect confidential information, and firms have a duty to take steps designed to assure that the non-lawyers do so. . . . Adequate protection can be given to clients, consistent with the interest in job mobility for non-lawyers, by prohibiting the non-lawyer from using or disclosing the confidential information . . . but not extending the prohibition on representation to lawyers in the new firm or organization. If a non-lawyer employee in fact conveys confidential information learned about a client in one firm to lawyers in another, a prohibition on representation by the second firm would be warranted." (emphases added)).

This analysis does not make much sense.

- Other professionals at law firms clearly have as much (if not more) material confidential information about clients than lawyers possess.
- Perhaps more importantly other professionals (1) might not understand the remarkably stringent rules prohibiting disclosure of such information to anyone outside the law firm where they were working at the time they acquired the information, and (2) do not risk losing their ability to work if they violate such stringent rules (although they might face civil or even criminal sanctions, they do not risk loss of a bar license and their livelihood). Thus, the factors would seem to weigh in favor of a greater application of the "Typhoid Mary" imputation effect when hiring other professionals.

These factors would seem to weigh in favor of a greater application of the imputed disqualification effect when hiring other professionals.

### **3. States' Differing Approaches to the Imputation of Paralegals' Individual Disqualification**

Unfortunately for anyone seeking certainty in the hiring process, states have taken widely varying approaches to law firms' risks when hiring other professionals.

- ABA Model Guidelines for Paralegals, cmt. to Guideline 7 ("Some courts hold that paralegals are subject to the same rules governing imputed disqualification as are lawyers. In jurisdictions that do not recognize screening devices as adequate protection against a lawyer's potential conflict in a new law firm, neither a 'cone of silence' nor any other screening device will be recognized as a proper or effective remedy where a paralegal who has switched firms possesses material and confidential information.").

States disagree about whether a lateral hire paralegal's individual disqualification will be imputed to the entire hiring law firm.

- If so, the hiring law firm risks being disqualified from matters adverse to the paralegal's old law firm's clients for whom the paralegal worked, or about whom the paralegal obtained material information while at the old firm.

- If the hiring law firm faces such an imputed disqualification risk, it must obtain the paralegal's old firm's client's consent to continue handling the adverse matter -- usually conditioned on the hiring firm's screening of the paralegal.

Although most law firms cooperate in arranging for consents from their clients, this approach gives the clients (and the law firm which just lost the paralegal) a "veto power" over the hiring law firm's continued representation of an adversary.

- And because the hiring law firm would not want to jeopardize its ability to represent its clients, it normally will not hire an individually disqualified paralegal without knowing in advance that it will obtain the old law firm's client's consent.
- This process can thus make it very difficult for paralegals to move to the hiring law firm -- because it essentially requires the paralegals to notify their old law firm that they are leaving, and try to arrange for the necessary consents, before knowing that they have a job at the new law firm.

In contrast, some states permit hiring law firms to guarantee avoidance of an imputed disqualification.

- These states essentially follow the ABA Model Rules and Restatement approach that some states apply in the lawyer context -- allowing hiring law firms to avoid such imputed disqualification by imposing what could be called a "self-help" screen.
- This allows the hiring law firm to safely hire paralegals without obtaining the old firm's client's consent to the hiring firm's continued representation adverse to those clients.
- This approach removes the old firm's and its clients' "veto power" over the hiring firm's continued representation of adversaries -- allowing the hiring law firm and paralegals to make whatever employment arrangements they wish without worrying about a disastrous imputed disqualification effect.

Some states take this approach.

- Texas Rule 1.06 cmt [19] ("A law firm is not prohibited from representing a client under paragraph (f) merely because a nonlawyer employee of the firm, such as a paralegal or legal secretary, has a conflict of interest arising from prior employment or some other source. Nor is a firm prohibited from representing a client merely because a lawyer of the firm has a conflict of interest arising from events that occurred before the person became a lawyer, such as work that the person did as a law clerk or intern. But the firm must ordinarily screen the person with the conflict from any personal participation in the matter to prevent the person's communicating to others in the firm confidential information that the person and the firm have a legal duty to protect. See Rule 5.03; see also MODEL

RULES PROF'L CONDUCT r. 1.10 cmt. 4 (AM. BAR. ASS'N 1983);  
RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 123 cmt. f  
(AM. LAW INST. 2000).").

- New York LEO 905 (1/30/12) ("Rules 1.9 and 1.10 do not apply to a lawyer who acquired confidential information while acting solely as a paralegal or legal assistant. A law firm that hires a lawyer who acquired confidential information while acting as a paralegal or legal assistant has an obligation to make reasonable efforts to ensure that the lawyer does not reveal the confidential information. A law firm should instruct the newly hired lawyer not to divulge confidential information. The firm should also perform a conflicts check reasonable under the circumstances. If the lawyer acquired confidential information in a matter while working as a paralegal or legal assistant, the lawyer ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that the firm has a duty to protect.").

Despite this uncertainty, the stakes can be high.

In one interesting case (reported in a newspaper but not in any case law), a large law firm threatened to disqualify another firm that was planning to hire one of its paralegals.

- Nathan Carlile, Holland & Knight Sued for Tortious Interference, Legal Times, Jan. 4, 2008 (reporting that a paralegal who had committed to leave Holland & Knight and join Hughes, Hubbard & Reed had filed a lawsuit against her former firm Holland & Knight after Hughes Hubbard withdrew its employment offer after Holland & Knight had raised the possibility of a conflict caused by her move; explaining that Hughes Hubbard was representing a plaintiff in a lawsuit against a Spanish government involved in an oil spill off the Spanish coast, and that the paralegal had billed approximately 15 hours while at Holland & Knight working for its client (Spain) in that litigation; quoting the paralegal as arguing that she "did not participate in legal strategy, had no direct contact or communications with the client, and had no involvement with the preparation of court filings, case chronologies or deposition outlines"; also quoting Holland & Knight as arguing that the paralegal "worked on a matter in which both firms were engaged as counsel," and that "because of knowledge she gained there was the possibility of a breach in client confidentiality"; also noting that a Holland & Knight partner told a Hughes Hubbard lawyer during a deposition in the case that Holland might try to disqualify Hughes Hubbard if the paralegal began working there).

Most states permit hiring law firms to screen newly-hired paralegals to avoid the imputation of their individual disqualifications.

- Hodge v. Urfa-Sexton, LP, 758 S.E.2d 314, 317, 319, 321-22, 322, 323 (Ga. 2014) (holding that a law firm hiring a non-lawyer can avoid disqualification by screening the non-lawyer, but remanding for determination whether the law firm

followed the proper procedures; "We granted certiorari in this case to determine whether the Court of Appeals correctly held that a conflict of interest involving a non-lawyer can be remedied by implementing proper screening measures in order to avoid disqualification of the entire law firm. For the reasons set forth below, we hold that a non-lawyer's conflict of interest can be remedied by implementing proper screening measures so as to avoid disqualification of an entire law firm. In this particular case, we find that the screening measures implemented by the non-lawyer's new law firm were effective and appropriate to protect against the non-lawyer's disclosure of confidential information. However, we remand this case to the trial court for a hearing to determine whether the new law firm promptly disclosed the conflict." (emphasis added) (footnote omitted); "There is a split of authority among the courts on this issue. The minority approach, which is what Hodge argues we should apply here, is to treat non-lawyers the same way we treat lawyers. Under this approach, when a non-lawyer moves to another firm to work for opposing counsel, the non-lawyer's conflict of interest is imputed to the rest of the firm, thereby disqualifying opposing counsel. . . . URFA-Sexton argues that we should adopt the majority approach and treat non-lawyers differently from lawyers. Under this approach, rather than automatic imputation and disqualification of the new firm, lawyers hiring the non-lawyer can implement screening measures to protect any client confidences that the non-lawyer gained from prior employment. . . . After reviewing both approaches, we join today with 'the majority of professional legal ethics commentators, ethics tribunals, and courts[, which] have concluded that non-lawyer screening is a permissible method to protect confidences held by non-lawyer employees who change employment.'" (emphasis added) (citation omitted); "Accordingly, as a matter of first impression, we set forth the following guidance for disqualification of a law firm based on a non-lawyer's conflict of interest. Once the new firm knows of the non-lawyer's conflict of interest, the new firm must give prompt written notice to any affected adversarial party or their counsel, stating the conflict and the screening measures utilized. . . . The adversarial party may give written consent to the new firm's continued representation of its client with screening measures in place." (emphasis added); "Absent written consent, the adversarial party may move to disqualify the new firm. The adversarial party must show that the non-lawyer actually worked on a same or substantially related matter involving the adversarial party while the non-lawyer was employed at the former firm. If the moving party can show this, it will be presumed that the non-lawyer learned confidential information about the matter. . . . This prevents the non-lawyer from having to disclose the very information that should be protected." (footnote omitted); "Once this showing has been made, a rebuttable presumption arises that the non-lawyer has used or disclosed, or will use or disclose, the confidential information to the new firm. . . . The new firm may rebut this by showing that it has properly taken effective screening measures to protect against the non-lawyer's disclosure of the former client's confidential information. . . . If the new firm can sufficiently rebut the presumption and show that it promptly gave written notice of the non-lawyer's conflict, then disqualification is not required." (emphasis added); "The firm

administrator immediately implemented and confirmed electronic screening measures with Bussey, including taking steps to restrict Bussey's access to any information about the Williams case, implementing security measures to prevent Bussey from accessing any computerized information maintained by Insley & Race regarding the Williams case, and testing the security measures he implemented to ensure their success. Since October 5, Bussey has been unable to access the case management system used by Insley & Race for the Williams matter, including any calendar events, contact information, documents, and billing information for the Williams case. Additionally, the physical file was removed from the general file room and securely placed in the office of an associate.").

- Fedora v. Werber, 84 A.3d 812, 814 (R.I. 2013) (treating a paralegal who moved to another law firm in the same way as a lawyer; declining to disqualify the law firm to which the paralegal moved, because she was screened when she joined the other law firm, but concluding that the new law firm had not adequately provided notice to the former client; "Here, Ms. Jardon began her employment with D&W [DeLuca & Weizenbaum] on September 14, 2009, and D&W did not provide notice of its screening measures to GSM until December 7, 2009, nearly three months later. Furthermore, as the trial justice noted, notice was not independently provided; rather, it was incorporated into plaintiff's objection to defendant's motion to disqualify D&W. Ms. Jardon was employed by D&W for roughly six weeks while Dr. Moulton's case was pending. We are satisfied, therefore, that the trial justice did not abuse her discretion when she determined that D&W's actions failed to constitute prompt notice under Rule 1.10(c)(2).").
- In re Guar. Ins. Servs., Inc., 343 S.W.3d 130, 134 (Tex. 2011) (reversing disqualification of a law firm based on its hiring of a paralegal, and failure to properly screen the paralegal; explaining the Texas approach: "If the lawyer works on a matter, there is an irrebuttable presumption that the lawyer obtained confidential information during the representation. . . . When the lawyer moves to another firm and the second firm represents an opposing party to the lawyer's former client, a second irrebuttable presumption arises -- that the lawyer has shared the client's confidences with members of the second firm. . . . The effect of this second presumption is the mandatory disqualification of the second firm."; "But the rule is different for non-lawyers. A non-lawyer who worked on a matter at a prior firm is also subject to a *conclusive* presumption that confidences were obtained. . . . However, the second presumption [--] that confidences were *shared* with members of the second firm [--] may be rebutted where non-lawyers are concerned." (emphasis added; emphasis in original indicated by italics); explaining that the law firm did not properly screen the paralegal at first, but took remedial steps on finding the issue; explaining that the firm overcame the presumption that the paralegal had shared confidences with the new firm).
- Mississippi LEO 258 (12/1/11) (allowing screening of a paralegal hiree to avoid imputed disqualification; "The Ethics Committee of the Mississippi Bar has been

asked to render an opinion on the following question: A paralegal worked for approximately six years at Firm 1. Corporation A was one of numerous Defendants in a lawsuit in which Firm 1 represented Corporation A as local counsel. The paralegal's involvement in the lawsuit was minimal with the total time spent being approximately fifteen (15) hours and consisting primarily of filing documents with the Court for Corporation A's national counsel. The paralegal never met with representatives of Corporation A. Corporation A settled the lawsuit with the Plaintiff approximately two years ago. Firm 2 and other firms represent the Plaintiff in the lawsuit against the remaining Defendants. The paralegal has now joined Firm 2. Under the Mississippi Rules of Professional Conduct, does the paralegal's employment at Firm 2, wherein she would assist counsel for the Plaintiff in the lawsuit against the remaining Defendants, constitute an ethical violation due to her involvement with Firm 1, who defended Corporation A in the same lawsuit."; "It is the opinion of the Ethics Committee that disqualification of a paralegal is not imputed to the firm so long as the non-lawyer is screened to protect confidential information. The screening process of a non-lawyer should involve the supervisory lawyer cautioning the non-lawyer (1) not to disclose any information relating to the representation of a client of the former employer; and (2) that the employee should not work on any matter in which the employee worked for the prior employer or respecting which the employee has information relating to the representation of the client of the former employer. When the new firm becomes aware of such matters, the employing firm must also take reasonable steps to ensure that the employee takes no action and does no work in relation to matters on which the non-lawyer worked in the prior employment absent written consent from the prior client." (emphasis added); "Sometimes a firm may be disqualified from representing a client when the firm employs a non-lawyer who formerly was employed by another firm. These circumstances are present either (1) where information relating to the representation of an adverse party gained by the non-lawyer while employed in another firm has been revealed to lawyers or other personnel in the new firm; or (2) where screening would be ineffective or the non-lawyer necessarily would be required to work on the other side of the same or a substantially related matter on which the non-lawyer or respecting which the non-lawyer has gained information relating to the representation of the opponent while in the former employment.").

- Hamilton v. Dowson Holding Co., Civ. No. 2008/02 & 2008/10, 2009 U.S. Dist. LEXIS 57715, at \*14-15 (D. V.I. July 2, 2009) ("In this jurisdiction, where a non-lawyer employee has learned the confidences of an adversary, a rebuttable presumption arises that the non-lawyer employee will disclose the confidential information to the new employer. . . . Once the presumption arises, it must be rebutted by competent evidence that the non-lawyer employee has not shared any confidential evidence with the new firm.").
- Virginia LEO 1832 (5/10/07) (explaining that although not bound by lawyers' ethics rules, law firms' secretaries must maintain the confidentiality of information



they learn; warning that a secretary who receives confidential information from a prospective client whom the law firm does not represent (because it wishes to or already does represent the prospective client's adversary) must maintain the confidentiality of that information; explaining that lawyers in that firm can avoid disqualification from representing the adversary if the lawyers screen the secretary from the matters, instruct the secretary "that she cannot reveal to the lawyer any confidential information obtained from Ms. X [the prospective client]," and use another staff person to work on the matter; also noting that the law firm "should send a written communication to Ms. X or her lawyer that these measures have been taken."; ultimately such screens do not prevent imputed disqualification involving an individually disqualified lawyer, but can successfully avoid imputation of a non lawyer's individual disqualification; warning that the firm may have to withdraw from representing the adversary if the screen is breached; recommending that "the firm train non lawyer support staff to minimize confidential information obtained from prospective clients before they can perform the necessary conflicts analysis."

- New York LEO 774 (3/23/04) ("When a law firm hires a secretary, paralegal, or other non-lawyer who has previously worked at another law firm, the law firm must adequately supervise the conduct of the non-lawyer. Supervisory measures may include i) instructing the non-lawyer not to disclose protected information acquired at the former law firm and ii) instructing lawyers not to exploit such information if proffered. In some circumstances, it is advisable that the law firm inquire whether the non-lawyer acquired confidential information from the former law firm about a current representation of the new firm or conduct a more comprehensive conflict check based on the non-lawyer's prior work. The results of such an inquiry will help determine whether the new firm should take further steps, such as seeking the opposing party's consent and/or screening the non-lawyer."; "Occasionally, however, a law firm will conclude that screening the non-lawyer will not adequately protect an opposing party's confidences and secrets. For example, if the non-lawyer had substantial exposure to relevant confidential information at the old firm and will now be working closely with the lawyers who are handling the opposite side of the same matter, or where the structure and practices of the firm make it difficult to isolate a non-lawyer from confidential conversations or documents pertaining to a given matter, a law firm may be obliged to adopt measures more radical than screening" such as "[o]btaining consent from the opposing law firm's client," "[t]erminating the non-lawyer," or "[w]ithdrawing from the matter in question. Concluding that ("[w]hen a New York law firm hires a non-lawyer who has previously worked at another law firm, the hiring firm must, as part of its supervisory responsibilities under DR 1-104(C) and DR 4-101(D), exercise adequate supervision to ensure that the non-lawyer does not reveal any confidences or secrets that the non-lawyer acquired while working at the other law firm. . . . If a law firm learns that a non-lawyer did acquire information protected by DR 4-101(B) that is material to a matter in which the adversary is represented by the non-lawyer's former employer, the law firm should adopt appropriate

measures to guard against improper disclosure of protected information." ).New York LEO 774 (3/23/04) ("When a New York law firm hires a non-lawyer who has previously worked at another law firm, the hiring firm must, as part of its supervisory responsibilities under DR 1-104(C) and DR 4-101(D), exercise adequate supervision to ensure that the non-lawyer does not reveal any confidences or secrets that the non-lawyer acquired while working at the other law firm. . . . If a law firm learns that a non-lawyer did acquire information protected by DR 4-101(B) that is material to a matter in which the adversary is represented by the non-lawyer's former employer, the law firm should adopt appropriate measures to guard against improper disclosure of protected information."; explaining that the appropriate steps the law firm might take include screening of the non-lawyer or "measures more radical than screening" such as: "[o]btaining consent from the opposing law firm's client," "[t]erminating the non-lawyer," or "[w]ithdrawing from the matter in question").

- In re Mitcham, 133 S.W.3d 274, 276 (Tex. 2004) (assessing the imputed disqualification impact of a paralegal (who later obtained a law degree) moving from firm to firm; "[W]e have recognized different standards for attorneys and their assistants. For attorneys, there is an irrebut[t]able presumption they gained confidential information on every case at the firm where they work (whether they work on them or not), . . . and an irrebuttable presumption they share that information with the members of a new firm . . . . For legal assistants, there is an irrebut[t]able presumption they gain confidential information only on cases on which they work, and a rebuttable presumption they share that information with a new employer. . . . The last presumption is rebutted not by denials of disclosure, but by prophylactic measures assuring that legal assistants do not work on matters related to their prior employment."; holding that a law firm's contractual agreement not to bring certain lawsuits because of the paralegal's employment had no time limit and required the new firm's disqualification even after the paralegal/lawyer had left that firm).
- Virginia LEO 1800 (10/8/04) (explaining that a two-member law firm hiring a secretary who until the previous week was the only secretary at another two-member law firm representing a litigation adversary will not be disqualified from the case, as long as the new firm: warns the secretary not to reveal or use any client confidences acquired at the old firm; advises all lawyers and staff not to discuss the matter with the new secretary; screens the new secretary from the litigation matter (including the new firm's files on the matter); recommending that the new firm "develop a written policy statement" regarding such situations, and note the need for confidentiality "on the cover of the file in question." ).
- In re TXU US Holdings Co., 110 S.W.3d 62, 65 (Tex. App. 2002) (explaining that "[a] different rule applies to a firm which hires a non-lawyer who previously worked for opposing counsel. . . . If the former client establishes that the non-lawyer worked on its case, a conclusive presumption exists that the client's confidences

were imparted to the non-lawyer. . . . Unlike the irrebuttable presumption which exists for a disqualified attorney however, a rebuttable presumption exists that a non-lawyer has shared the confidences of a former client with his new employer. . . . The presumption may be rebutted 'only by establishing that "sufficient precautions have been taken to guard against any disclosure of confidences."' (citation omitted); explaining that "non-lawyers are treated differently because of 'a concern that the mobility of a non-lawyer could be unduly restricted'" (citation omitted); applying the irrebuttable presumption because the person who moved from firm to firm had been a non-lawyer at one firm but gained her law degree and moved to another firm as a lawyer; conditionally granting a writ of mandamus and disqualifying the law firm she joined from representing plaintiffs in asbestos actions).

- Pennsylvania LEO 98-75 (12/4/98) ("Lawyers are forbidden to represent a client if that representation will be adverse to another client. Rule 1.7. Rule 1.10 imputes the disqualification of a lawyer in a law firm to the other lawyers when any one of them has a prohibited conflict of interest. The principles of these sections have been extended to non-lawyer assistants. Their conflicts of interest can be charged to their employing lawyer or law firm. But a non-lawyer assistant who arrives with a disqualifying conflict of interest may be employed if the sanitizing procedure of Rule 1.10(b) is followed: She must be screened and the client must be notified.").
- North Carolina RPC 176 (7/21/94) ("The imputed disqualification rules contained in Rule 5.11 of the Rules of Professional Conduct do not apply to non-lawyers. However, Attorney B must take extreme care to ensure that Paralegal is totally screened from participation in the case even if Paralegal's involvement in the case while employed by Attorney A was negligible. See RPC 74. This requirement is consistent with a lawyer's duty, pursuant to Rule 3.3(b), to make reasonable efforts to ensure that the conduct of a non-lawyer over whom the lawyer has direct supervisory authority is compatible with the professional obligations of the lawyer including the obligation to avoid conflicts of interest and to preserve the confidentiality of client information.").

Law firms failing to properly screen individually disqualified paralegals can face firm-wide disqualification or ethics charges.

- In re Johnston, 872 N.W.2d 300, 302, 303 (N.D. 2015) (reprimanding a lawyer for hiring a paralegal from an opposing law firm but not screening him; "In January 2011, the Johnston Law Office hired Chrzanowski as a paralegal. Johnston made no effort to screen Chrzanowski from the West [Johnston's client] matter, despite his prior work on the Hansons' [Farroh's client] behalf as attorney Farroh's paralegal. Rather, Chrzanowski worked directly on West's case against Hanson, serving as a primary contact with West, meeting and exchanging emails with West, discussing litigation strategy, and drafting pleadings that were subsequently

signed by Johnston."; "The hearing panel found Johnston violated N.D.R. Prof. Conduct 5.3(a), (b), and (c) by failing to adequately supervise paralegal Chrzanowski when Johnston failed to screen Chrzanowski from Johnston's litigation on behalf of West involving the same or a substantially related matter in violation of N.D.R. Prof. Conduct 1.7(a) and (c), and 1.9; and when Johnston purportedly held Chrzanowski out as a lawyer and turned West's legal matter over to Chrzanowski in violation of N.D.R. Prof. Conduct 5.5(a) and (d). The hearing panel also found Johnston violated N.D.R. Prof. Conduct 1.5(a) by charging an unreasonable fee in the unsuccessful attempt to recover the client's investment from an insolvent individual. Johnston objected and raises three main issues to this Court in response to the Board's recommendations.").

- USA Recycling, Inc. v. Baldwin Endico Realty Assocs., Inc., Case No. 305816-2013, N.Y.L.J. 1202732053207, at \*2-3, \*12, \*13, \*15, \*15-16 (N.Y. Sup. Ct. July 2, 2015) (disqualifying a lawyer based on his hiring of a paralegal who had previously worked for the adversary; "This motion was brought on by [an] order to show cause by Baldwin on November 3, 2014 seeking a stay of this proceeding, including a stay of the stipulation of settlement, and consolidation of this proceeding with three other proceedings pending in the Supreme Courts of Bronx County and Westchester County. Defendants also seek disqualification of the plaintiff's counsel Rocco F. D'Agostino Esq. upon the grounds that he had access to confidential information from a newly-hired paralegal, one James Monteleon, who had formerly been employed by, or concerned in the affairs of, attorneys representing Baldwin, its principals, and related entities controlled by the late Michael Endico. Defendant contends that Mr. Monteleon's familiarity with the affairs of the late Mr. Endico, and his attorneys, was subject to being improperly utilized in Mr. D'Agostino's prosecution and settlement of this action."; "Where the employer firm takes appropriate measures to isolate the new employee from the case in issue, disqualification will not lie. For example, the retention of a legal secretary/paralegal by plaintiff's counsel, who had worked on 'scores' of cases while employed by the defendant's firm including the case at bar, did not provide grounds for disqualification where plaintiff's counsel demonstrated that it did a satisfactory job of ensuring that its employee was and continued to be isolated from the former employer's case." (emphasis added); "A law firm which hires a secretary, paralegal or other non-lawyer employee who has previously worked at another firm must adequately supervise the non-lawyer not to disclose protected information obtained at the former law firm. This supervision may include instructing the non-lawyer not to disclose protected information or not to exploit such information. It is advisable that the firm conduct an inquiry, or comprehensive conflict check based on the non-lawyer's prior employment." (emphasis added); "There is simply no excuse for the failure of Mr. D'Agostino to make inquiry of his new employee and ascertain whether he should be shielded from participation in this suit, or whether, in the alternative, the consent of his adversary could be obtained to Mr. Monteleon's participation."; "The Court finds that Mr. Monteleon's extensive and unusual involvement in the affairs of the

defendants, and his employment by attorneys representing the defendants, their corporations, and Mr. Endico's Estate necessitates disqualification. Although the distinction between a law school graduate awaiting admission and an attorney admitted to practice is not without significance, under the unusual circumstances of this case, given the extraordinary nature and extent of Mr. Monteleon's involvement, the impact on the defendant's expectation of confidentiality is real and substantial. Due to this appearance of impropriety, the disqualification of Mr. D'Agostino as the counsel for plaintiff USA Recycling Inc. is mandated." (emphases added)).

- Ullman v. Denco, Inc., Case No. 2:14-cv-843 SMV/GBW, 2015 U.S. Dist. LEXIS 179860, at \*17-18, \*19, \*19-21, \*22 (D.N.M. Apr. 22, 2015) (disqualifying a law firm which hired a paralegal who had worked on the other side of the case the law firm was handling; acknowledging that non-lawyers can be screened to avoid imputations of their individual disqualification, but finding that the hiring law firm did not impose timely and effective screens; "Certain relevant factors have been identified by other courts to determine the effectiveness of a screen, including: '(1) the substantiality of the relationship between the former and current matters, (2) the time elapsed between the matters, (3) the size of the firm, (4) the number of individuals presumed to have confidential information, (5) the nature of their involvement in the former matters, (6) the timing and features of any measures taken to reduce the danger of disclosure, and (7) whether the old firm and the new firm represent adverse parties in the same proceedings, rather than in different proceeding because inadvertent disclosure by the non-lawyer employee is more likely in the former situation.' [Liebowitz v. Eighth Judicial Dist. Court, 78 P.3d 515, 521 (Nev. 2003)]."; "The first factor weighs heavily against a finding of effectiveness. The matter on which HMM [Holt Mynatt Martinez] (with Gonzales as their screened employee) seeks to represent Defendants is the same matter on which Gonzales worked while with Plaintiffs' counsel. Similarly, the second factor weighs heavily against effectiveness. No time has elapsed between the matters because they are identical. In fact, less than a week transpired between the end of Gonzales' employment with Plaintiffs' counsel and her first day with HMM. The third factor also weighs against a finding of effectiveness. HMM is a relatively small firm comprised of nine attorneys, three of which are in a 'senior' status. . . . Three of the nonsenior attorneys have entered their appearance in the instant case. Moreover, all attorneys and support staff for HMM work in the same building. . . . HMM's small size is highlighted by the fact that it needed Gonzales to start as soon as possible rather than being able to wait just over three weeks until after the scheduled mediation."; "The fourth factor weighs in favor of an effectiveness finding. Only one person -- Gonzales -- possesses the confidential information and needs to be screened. The fifth factor weighs strongly against an effectiveness finding. It is undisputed that Gonzales was heavily involved in the matter, both quantitatively and qualitatively, when she was employed by Plaintiffs' counsel. She worked extensively on the case, was involved in interviews of Plaintiffs, participated in litigation and settlement strategy

meetings with Furth [plaintiff's lead lawyer], and knows Plaintiffs' 'bottom line' settlement numbers. The sixth factor is evenly balanced. The proposed screening rules are comprehensive. Indeed they mirror and, sometimes exceed, screens approved in other cases. . . . On the other hand, the confidential information possessed by Gonzales is particularly sensitive and susceptible to disclosure given how easily and quickly it could be revealed. Moreover, the Court notes the gap, albeit short, between the implementation of the screening procedures and HMM's contact with Gonzales. The seventh factor weighs heavily against a finding of effectiveness. Plaintiffs' counsel and HMM represent adverse parties in the same proceeding, rather than in different proceedings, making inadvertent disclosure by Gonzales significantly more likely." (footnote omitted); "Considering the factors as a whole, and the balance of interests the factors represent, I conclude that Defendants have failed to meet the burden of proving that the screen will be effective." (emphases added)).

- In re Columbia Valley Healthcare Sys., L.P., 320 S.W.3d 819, 822, 823, 824, 826, 827, 828, 829 (Tex. 2010) (analyzing the ethics implications of a paralegal joining a law firm representing the opposite side of the paralegal's former firm; ultimately disqualifying the law firm; "In this original mandamus proceeding, we must determine whether a law firm should be disqualified from the underlying suit on the basis of a legal assistant's work on the matter after previously having worked on the same matter while employed by opposing counsel. We have previously held that a firm can usually avoid disqualification when hiring an assistant who previously worked on a matter for opposing counsel if the firm (1) instructs the assistant not to work on the matter, and (2) takes other reasonable steps to shield the assistant from working in connection with the matter. In re Am. Home Prods. Corp., 985 S.W.2d 68, 75 (Tex. 1998). We have not, however, set forth the types of 'other reasonable steps' that are required, nor have we addressed whether disqualification is required when an assistant actually works on the matter for the second firm."; "Because the legal assistant's employer did not take effective reasonable steps to shield the assistant from working on the case, and the assistant actually worked on the case at her employer's directive, we hold that disqualification is required and direct the trial court to grant the defendant's motion to disqualify and recuse plaintiffs' counsel."; "Despite the oral instructions from Magallanes, Rodriguez had contact with the Leal file on a few occasions while working at Magallanes & Hinojosa. According to Rodriguez, her contact consisted of the following: (1) filing correspondence related to the Leal case; (2) rescheduling a docket control conference; (3) preparing an order and sending correspondence to counsel concerning a docket control conference; (4) calling Gault's legal assistant regarding the docket control conference; (5) calendaring dates regarding the case on Magallanes' calendar; and (6) making a copy of a birth certificate and social security card in the case at Magallanes' directive on one occasion. When Magallanes learned that Rodriguez had scheduled the docket control conference, he again orally instructed her not to work on the case, and held a meeting where he informed both Rodriguez and Castro that they would

be dismissed if this happened again."; "[U]nlike with attorneys, a non-lawyer is not generally subject to an irrebuttable presumption of having shared confidential information with members of the new firm. . . . Instead, this second presumption can be overcome, but only by a showing that: (1) the assistant was instructed not to perform work on any matter on which she worked during her prior employment, or regarding which the assistant has information related to her former employer's representation, and (2) the firm took 'other reasonable steps to ensure that the [assistant] does not work in connection with matters on which the [assistant] worked during the prior employment, absent client consent.'" (emphasis added); "With these principles in mind, we conclude that a simple informal admonition to a non-lawyer employee not to work on a matter on which the employee previously worked for opposing counsel, even if repeated twice and with threat of termination, does not satisfy the 'other reasonable measures' a firm must take to properly shield an employee from the litigation. Instead, the other reasonable measures must include, at a minimum, formal, institutionalized screening measures that render the possibility of the non-lawyer having contact with the file less likely." (emphasis added); "Despite the screening measures used, if the employee actually works on the case at her employer's directive, as happened here, and the employer reasonably should know about the conflict of interest, then the presumption of shared confidences must become conclusive."; "In summary, when considering a motion to disqualify on the basis of a firm's employment of a nonlegal employee who previously worked on the same or a substantially related matter for opposing counsel, the trial court must consider whether the hiring firm has rebutted the presumption of shared confidences. To rebut this presumption, the hiring firm must demonstrate that (1) the employee was instructed not to work on any matter which she worked on during her prior employment, or regarding which the employee has information related to her former employer's representation, and (2) the firm took other reasonable steps to ensure that the employee does no work in connection with matters on which the employee worked during the prior employment, absent client consent. These other reasonable steps must include, at a minimum, formal, institutional measures to screen the employee from the case." (emphasis added); "We finally note that these requirements apply only to non-lawyer employees who have access to material information relating to the representation of clients, as well as agents who technically may be independent contractors, such as investigators." (emphasis added); "Magallanes asked Rodriguez to make copies for the Leal case on one occasion. Making copies is perhaps a simple, clerical matter, yet the message sent not only to Rodriguez but other employees at the firm was that Magallanes & Hinojosa was not serious about guarding against conflicts of interest.").

At least one bar indicated that paralegals should be treated like lawyers under that state's imputed disqualification rules, while professionals other than paralegals should be treated differently (implicitly allowing their screening to avoid any imputed disqualification).

- Los Angeles County LEO 524 (5/16/11) (explaining the imputed disqualification rules for non-lawyer employees; not including paralegals "as paralegals are subject to the same confidentiality requirements as attorneys under the provisions of Business & Professions Code Section 6453."; "The Committee believes that it is the obligation of the hiring firm, before hiring a non-lawyer employee who has worked on matters at another firm, to conduct a reasonable investigation into whether the proposed employee has been exposed to or acquired confidential information during prior employment relevant to legal matters which may arise in the course of the new employment. The hiring firm should in particular ascertain whether the proposed employee's former firm is or has been opposing counsel to the hiring firm on any current cases, to determine whether the proposed employee has been exposed to confidential information of an adverse party or witness regarding those cases. However, the hiring firm must not attempt to delve into the substance of any information the non-lawyer may have acquired. It is the obligation of the hiring firm to instruct the non-lawyer employee, once hired, as to his or her confidentiality obligations, and, absent first obtaining the consent of the former employer or the affected client of the former employer, to promptly screen the non-lawyer employee from involvement in particular matters if the non-lawyer is in possession of confidential information which is materially related to matters in which the hiring firm represents an adversary party."; "Elements of an adequate screen include written notification to all legal staff to isolate the screened employee from communication regarding the matter, prevention of the screened employee's access to the relevant files, admonishment of the employee not to discuss the prior matter with the new firm, and a search of the firm's records to ensure that all cases on which the new employee's former firm is opposing counsel are identified. . . . The Committee believes that electronic security is also an important element of an effective screen. Electronic files should be password-protected and the password withheld from screen employees. Effective practices may also include documenting the continued existence and impermeability of the screen, for example by periodic electronic or written reminders to all staff or by requiring periodic certification by screened staff that they have not breached the screen.").

Some of these cases and ethics opinions focus on the timing and elements of an effective screen, which of course arises in the lawyer context as well.

- Hodge v. Urfa-Sexton, LP, 758 S.E.2d 314, 317, 319, 321-22, 322, 323 (Ga. 2014) (holding that a law firm hiring a non-lawyer can avoid disqualification by screening the non-lawyer, but remanding for determination whether the law firm followed the proper procedures; "We granted certiorari in this case to determine whether the Court of Appeals correctly held that a conflict of interest involving a non-lawyer can be remedied by implementing proper screening measures in order to avoid disqualification of the entire law firm. For the reasons set forth below, we hold that a non-lawyer's conflict of interest can be remedied by implementing proper screening measures so as to avoid disqualification of an entire law firm. In



this particular case, we find that the screening measures implemented by the non-lawyer's new law firm were effective and appropriate to protect against the non-lawyer's disclosure of confidential information. However, we remand this case to the trial court for a hearing to determine whether the new law firm promptly disclosed the conflict." (footnote omitted); "There is a split of authority among the courts on this issue. The minority approach, which is what Hodge argues we should apply here, is to treat non-lawyers the same way we treat lawyers. Under this approach, when a non-lawyer moves to another firm to work for opposing counsel, the non-lawyer's conflict of interest is imputed to the rest of the firm, thereby disqualifying opposing counsel. . . . URFA-Sexton argues that we should adopt the majority approach and treat non-lawyers differently from lawyers. Under this approach, rather than automatic imputation and disqualification of the new firm, lawyers hiring the non-lawyer can implement screening measures to protect any client confidences that the non-lawyer gained from prior employment. . . . After reviewing both approaches, we join today with 'the majority of professional legal ethics commentators, ethics tribunals, and courts[, which] have concluded that non-lawyer screening is a permissible method to protect confidences held by non-lawyer employees who change employment.'" (citation omitted); "Accordingly, as a matter of first impression, we set forth the following guidance for disqualification of a law firm based on a non-lawyer's conflict of interest. Once the new firm knows of the non-lawyer's conflict of interest, the new firm must give prompt written notice to any affected adversarial party or their counsel, stating the conflict and the screening measures utilized. . . . The adversarial party may give written consent to the new firm's continued representation of its client with screening measures in place." (emphasis added); "Absent written consent, the adversarial party may move to disqualify the new firm. The adversarial party must show that the non-lawyer actually worked on a same or substantially related matter involving the adversarial party while the non-lawyer was employed at the former firm. If the moving party can show this, it will be presumed that the non-lawyer learned confidential information about the matter. . . . This prevents the non-lawyer from having to disclose the very information that should be protected."; "Once this showing has been made, a rebuttable presumption arises that the non-lawyer has used or disclosed, or will use or disclose, the confidential information to the new firm. . . . The new firm may rebut this by showing that it has properly taken effective screening measures to protect against the non-lawyer's disclosure of the former client's confidential information. . . . If the new firm can sufficiently rebut the presumption and show that it promptly gave written notice of the non-lawyer's conflict, then disqualification is not required."; "The firm administrator immediately implemented and confirmed electronic screening measures with Bussey, including taking steps to restrict Bussey's access to any information about the Williams case, implementing security measures to prevent Bussey from accessing any computerized information maintained by Insley & Race regarding the Williams case, and testing the security measures he implemented to ensure their success. Since October 5, Bussey has been unable to access the case management

system used by Insley & Race for the Williams matter, including any calendar events, contact information, documents, and billing information for the Williams case. Additionally, the physical file was removed from the general file room and securely placed in the office of an associate.").

- Fedora v. Werber, 84 A.3d 812, 814 (R.I. 2013) (treating a paralegal who moved to another law firm in the same way as a lawyer; declining to disqualify the law firm to which the paralegal moved, because she was screened when she joined the other law firm, but concluding that the new law firm had not adequately provided notice to the former client; "Here, Ms. Jardon began her employment with D&W [DeLuca & Weizenbaum] on September 14, 2009, and D&W did not provide notice of its screening measures to GSM until December 7, 2009, nearly three months later. Furthermore, as the trial justice noted, notice was not independently provided; rather, it was incorporated into plaintiff's objection to defendant's motion to disqualify D&W. Ms. Jardon was employed by D&W for roughly six weeks while Dr. Moulton's case was pending. We are satisfied, therefore, that the trial justice did not abuse her discretion when she determined that D&W's actions failed to constitute prompt notice under Rule 1.10(c)(2)." (emphasis added)).
- Los Angeles County LEO 524 (5/16/11) (explaining the imputed disqualification rules for non-lawyer employees; not including paralegals "as paralegals are subject to the same confidentiality requirements as attorneys under the provisions of Business & Professions Code Section 6453."; "The Committee believes that it is the obligation of the hiring firm, before hiring a non-lawyer employee who has worked on matters at another firm, to conduct a reasonable investigation into whether the proposed employee has been exposed to or acquired confidential information during prior employment relevant to legal matters which may arise in the course of the new employment. The hiring firm should in particular ascertain whether the proposed employee's former firm is or has been opposing counsel to the hiring firm on any current cases, to determine whether the proposed employee has been exposed to confidential information of an adverse party or witness regarding those cases. However, the hiring firm must not attempt to delve into the substance of any information the non-lawyer may have acquired. It is the obligation of the hiring firm to instruct the non-lawyer employee, once hired, as to his or her confidentiality obligations, and, absent first obtaining the consent of the former employer or the affected client of the former employer, to promptly screen the non-lawyer employee from involvement in particular matters if the non-lawyer is in possession of confidential information which is materially related to matters in which the hiring firm represents an adversary party."; "Elements of an adequate screen include written notification to all legal staff to isolate the screened employee from communication regarding the matter, prevention of the screened employee's access to the relevant files, admonishment of the employee not to discuss the prior matter with the new firm, and a search of the firm's records to ensure that all cases on which the new employee's former firm is opposing

counsel are identified. . . . The Committee believes that electronic security is also an important element of an effective screen. Electronic files should be password-protected and the password withheld from screen employees. Effective practices may also include documenting the continued existence and impermeability of the screen, for example by periodic electronic or written reminders to all staff or by requiring periodic certification by screened staff that they have not breached the screen." (emphasis added)).

## N. LAWYERS SHARING FEES WITH PARALEGALS

### 1. Introduction

Lawyers clearly can pay employee and independent contractor paralegals for their services.

- However, such payments sometimes implicate the equally clear rule that lawyers cannot share their fees with other professionals.

### 2. Fee-sharing: General Rule

Lawyers' ethics rules prohibit lawyers from sharing their fees, except in certain specified circumstances.

- ABA Model Rule 5.4(a) ("A lawyer or law firm shall not share legal fees with a non-lawyer, except [under specified circumstances].").
- ABA Model Guidelines for Paralegals, Guideline 9 ("A lawyer may not split legal fees with a paralegal nor pay a paralegal for the referral of legal business. A lawyer may compensate a paralegal based on the quantity and quality of the paralegal's work and the value of that work to a law practice, but the paralegal's compensation may not be contingent, by advance agreement, upon the outcome of a particular case or class of cases.").

### 3. Employee Paralegals

The difficulty in applying the fee-split prohibition in connection with employee paralegals arises from the reality that all or nearly all of law firm employees' salaries come from the law firm's fees -- because most law firms earn all or most of their profits from providing legal services.

- District of Columbia LEO 322 (2/17/04) ("in a sense, even paying non-lawyer employees a salary could be viewed as a sharing of fees, since fees are the firm's source of revenue").

To make matters more complicated, most ethics rules permit law firms to include their non-lawyer employees in profit-sharing arrangements.

- ABA Model Rule 5.4(a)(3) ("[A] lawyer or law firm may include non-lawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.").

Lawyers can clearly also reward paralegals' good work.

- ABA Model Guidelines for Paralegals, cmt. to Guideline 9 ("There is no general prohibition against a lawyer who enjoys a particularly profitable period recognizing the contribution of the paralegal to that profitability with a discretionary bonus so long as the bonus is based on the overall success of the firm and not the fees generated from any particular case.").

The ABA has explained that lawyers can more generously reward the most productive paralegals.

- ABA Model Guidelines for Paralegals, cmt. to Guideline 9 ("Likewise, a lawyer engaged in a particularly profitable specialty of legal practice is not prohibited from compensating the paralegal who aids materially in that practice more handsomely than the compensation generally awarded to paralegals in that geographic area who work in law practices that are less lucrative.").

However lawyers cannot reward paralegals for bringing specific cases to the firm.

- ABA Model Guidelines for Paralegals, cmt. to Guideline 9 ("In addition to the prohibition on fee splitting, a lawyer also may not provide direct or indirect remuneration to a paralegal for referring legal matters to the lawyer.").

In trying to balance these seemingly inconsistent principles, most bars have struck what at first blush seems like an artificial distinction: permitting law firms to share law firm profits with paralegals as long as the profitability is measured on a firm-wide basis but prohibiting law firms from sharing fees earned on a particular matter.

- District of Columbia LEO 322 (2/17/04) (reviewing legal ethics opinions from other states, and concluding that the opinions nationwide "generally stand for the proposition that paying a percentage of firm net profits to non-lawyer employees is permissible, whereas paying a percentage of a fee in an identifiable case or series of cases is not").

Courts and bars have had great difficulty applying these admittedly confusing principles to paralegals.

As might be expected, some cases have condemned any relationship between a non-lawyer's salary and a particular case.

- In re Phillips, 244 P.3d 549, 551, 551-52, 552 (Ariz. 2010) (suspending for six months a lawyer who had not properly supervised non-lawyer subordinates; "The Hearing Officer found that Phillips violated ER 5.1(a) as alleged in Counts 3 and 4, which related to the caseloads of P&A's [Phillips & Assocs.] bankruptcy attorneys, each of whom carried as many as 500 cases at a time. A former P&A attorney testified that, upon joining the firm, she was immediately responsible for 540 cases. Counts 3 and 4 involved circumstances in which clients' needs were not met because of the high volume of cases assigned to bankruptcy attorneys.

In both counts, the Hearing Officer also found that, because of the number of attorneys handling a given case, inadequate attention was paid to the problems presented in the case and the client was confused and not adequately informed."; "The P&A attorney handled forty files per day and at times would have six to seven 341 meetings within thirty minutes."; "Another category of violations related to P&A's intake and retention procedures. Prospective clients who visit the firm's offices do not immediately meet with an attorney. Instead, they are provided a blank fee agreement and a general questionnaire. After completing the questionnaire, the prospective client meets with a P&A legal administrator, a non-lawyer tasked with retaining clients. Legal administrators are paid a base salary and monthly bonuses, based in part on the number of cases that the legal administrator retains. After obtaining general information from the client, the legal administrator meets with a lawyer who sets the fee. After the fee agreement is prepared, the client speaks with a lawyer to make sure the client understands the fee agreement, who the lawyer will be, and the scope of P&A's representation. The Hearing Officer found that this process, known as 'closing,' was often not completed by an attorney knowledgeable in the relevant practice area."; "The Hearing Officer also found violations of ER 5.3 arising from P&A's providing legal administrators with bonuses based, in part, on the number of clients retained. Count 8 involved a legal administrator who used 'high pressure tactics' to attempt to dissuade a client from terminating P&A's representation." (emphasis added)).

- State Bar of Texas v. Faubion, 821 S.W.2d 203 (Tex. App. 1991) (condemning an arrangement under which a paralegal/investigator was paid a percentage of gross fees calculated based upon [the paralegal's] time involvement in a particular case; explaining that bonuses do not constitute improper fee-splitting if the bonuses are not based on a percentage of the firm's profits or legal fees).

However, a number of older legal ethics opinions took a different approach. These legal ethics opinions approved:

- An arrangement under which paralegals received set bonuses for every bankruptcy schedule drafted (as long as the paralegals would be paid regardless of the firm's collection of its fee from the client). Connecticut LEO 93-1 (1/27/92) (approving a law firm's compensation arrangement under which a part-time paralegal receives a weekly salary and "periodic bonuses" amounting to \$40.00 for "every set of Chapter 7 or Chapter 13 bankruptcy schedules drafted" and "\$5.00 per hour for every billable hour recorded by the paralegal on client work other than Chapter 7 and Chapter 13 debtor clients" (internal quotations omitted)).
- An arrangement under which paralegals received a percentage of the firm's profits generated by the "sports and entertainment law practice area" in which the paralegals worked. Michigan LEO RI-143 (8/25/92) (approving a law firm's compensation arrangement under which paralegals working in the law firm's "sports and entertainment law practice area" would receive compensation based

on "a percentage of the firm's net profits derived from the sports and entertainment law practice area"; concluding that Michigan's rule allowing other professionals to participate in a profit-sharing arrangement was not limited to calculations based on "net profits of the law firm's entire practice" rather than "net profits of a law practice area" (emphasis added); noting that "the result might be different if the compensation plan were based on the fees generated from a particular case or a particular client, rather than net profits of the law practice area of the firm").

At about the same time, several other legal ethics opinions seemed to take a different approach. These condemned:

- An arrangement under which real estate paralegals received bonuses based on the firm's income from the closings on which the paralegals worked (even if the calculations were used for "guidance only," and the bonuses were discretionary). North Carolina LEO 147 (1/15/93) (ruling as unethical a proposed compensation plan under which real estate paralegals would receive bonuses "calculated on the firm's net income from the real estate closings which the legal assistant has worked on," even if the bonuses were discretionary and the calculations were used for "guidance only"; "[i]t is apparent from the inquiry that the paralegal's bonuses would be calculated based upon a percentage of the income the firm derives from legal matters on which the paralegal has worked" -- which violates the fee-split rules).
- A law firm compensation program under which non-lawyer "collectors" would receive a percentage of amounts collected. Kansas LEO 95-09 (10/25/95) ("It is a reasonable process to base an employee's bonus on the success of the firm overall. It is the case by case, collection by collection-based bonus that we opine is impermissible here. The frequency of such bonuses is not a consideration, so long as the bonus or other salary consideration is not based upon a fee-by-fee, case-by-case formula, but rather relies on the net profit of the firm formula.").

More recent court and bar rulings have continued this confusing pattern.

- Office of Lawyer Regulation v. Weigel (In re Weigel), 817 N.W.2d 835, 843-44, 845, 846 (Wis. 2012) (holding that the lawyer did not violate the ethics rules by paying paralegals a percentage of gross recoveries in cases on which they had worked; explaining the context: "In addition to her base pay, the paralegal receives two forms of bonus: (1) thirty cents per thousand dollars (three-tenths of one percent) of the gross recoveries from personal injury cases she worked on; and (2) a quarterly bonus consisting of \$1,500 plus \$250 per thousand (25 percent) of the difference between a weekly average (computed quarterly, over 13 weeks) of gross recoveries from personal injury cases she worked on and her weekly goal of \$127,500 per week."; "As a practical matter, of course, a law firm's profits result almost entirely from legal fees. So, in a sense, even paying non-

lawyer employees a salary could, technically, be viewed as a sharing of fees, because fees are the firm's source of revenue. See, e.g., Ethics Opinion 322 (D.C. Bar, Feb. 16, 2004)."; "The ethical issues arise when the non-lawyer's compensation is tied too directly to specific clients, cases or work performed by the non-lawyer such that the professional independence of the lawyer is compromised."; "A review of ethics decisions from other jurisdictions indicates that 'the line between the prohibited sharing of legal fees with a non-lawyer and a permissible compensation plan based on profit-sharing is not clearly demarcated.' See Ethics Opinion 322 (D.C. Bar, Feb. 16, 2004)."; "Generally, bonuses are deemed permissible where the bonus is not tied to fees generated from a particular case or class of cases from a specific client."; "By contrast, a Florida ethics committee concluded that '[b]onuses to non-lawyer employees cannot be calculated as a percentage of the firm's fees or of the gross recovery in cases on which the non-lawyer worked.' See Florida Ethics Opinion 89-4."; "The OLR contends the bonus arrangement in this case is problematic in several respects. It involves the splitting of revenues and the OLR contends 'that it has nothing to do with profits such that it does not fall within the profit-sharing safe harbor.' The OLR notes the paralegal is entitled to a bonus if she meets certain goals -- whether or not the firm was profitable -- and that the payment to the non-lawyer, although computed on the basis of a client's gross recovery, comes out of the contingent fee earned by the firm. The OLR explains that if the distribution of the client's gross recovery is viewed as a pie chart, and if the firm is entitled to a one-third percentage of the gross recovery, which is typical in contingency cases, the non-lawyer gets an approximate one percent slice of the fee, off the top, before expenses, prior to any computation of 'profit,' that is, total revenues less total expenses on a firm--wide basis." (footnote omitted); "We do not perceive a material ethical distinction between profit-sharing and revenue-sharing for purposes of this bonus calculation. The ethical considerations are the same."; "The potential ethical concern here stems from the fact that the employee's bonus is based upon net profits of a specific law practice area, rather than upon the net profits of the law firm's entire practice."; "Based on the evidence presented we find no indication that the paralegal would be interfering with the lawyer's independent judgment. We emphasize that the law firm has a general duty, and the paralegal's lawyer-supervisor has a specific duty, to ensure that the paralegal's conduct is compatible with the ethical obligations of lawyers. However, we conclude that the rule, as drafted, does not preclude the bonus structure described in this case. Accordingly, we dismiss the third count of the complaint related to the bonus structure used to compensate certain paralegals.").

- Doe v. Condon, 532 S.E.2d 879, 880, 883 (S.C. 2000) ("We further hold that a proposed fee arrangement which compensates non-lawyer employees based upon the number and volume of cases the non-lawyer employee handles for an attorney violates the ethical rules against fee-splitting with non-lawyer employees. Rule 5.4 of the Rules of Professional Conduct, Rule 407, SCACR."; adopting a referee's findings; "Petitioner's law firm intends to compensate him based upon



the volume and types of cases he 'handles.' A paralegal, of course, may not 'handle' any case. This fee arrangement directly violates Rule 5.4 of the Rules of Professional conduct, SCACR 407. . . . This compensation proposal arrangement coupled with Petitioner's desire to market the law firm's services via the educational seminars and meet individually with clients creates a situation ripe for abuse. Indeed, the proposal by Petitioner presents the very evil Rule 5.4 was designed to avoid. Accordingly, I find Petitioner's proposed compensation plan violates both the letter and the spirit of Rule 5.4 prohibiting fee splitting with non-attorneys." (footnote omitted)).

- One bar approved an arrangement under which paralegals received monthly or semiannual payments based on the amount they had billed particular clients. South Carolina Advisory Op. 97-02 (3/97) (approving a law firm's compensation arrangement under which paralegals receive monthly or semi-annual payments "calculated as a percentage of the amount that the paralegal has billed to clients for services rendered"; contrasting this arrangement with an impermissible plan under which "the bonus is based on a percentage of a particular fee earned").
- A state court indicated that profit-sharing plans for other professionals could not be based on the receipt of a particular legal fee. Trotter v. Nelson, 684 N.E.2d 1150, 1155 (Ind. 1997) ("a profit-sharing plan with a non-lawyer may not be tied to the receipt of a particular legal fee," although it may be based on the firm's overall net profits and business performance).

One legal ethics opinion on this topic itself seemed to take both approaches, prohibiting an arrangement under which paralegals received bonuses based on the number of hours they worked on a particular case, but allowing the firm to consider that data as a factor in awarding bonuses.

- Florida LEO 02-1 (1/11/02) (prohibiting a lawyer from paying paralegals and other non-lawyer employees "based on the number of hours the non-lawyer [sic] employee has worked on a case for a particular client" (internal quotations omitted); explaining that a lawyer "may pay the firm's legal assistant a bonus, but that bonus cannot be based in any way upon a percentage of fees generated by the legal assistant or the firm and cannot be based upon generating clients for the firm. Bonuses to non-lawyer [sic] employees cannot be calculated as a percentage of the firm's fees or of the gross recovery in cases on which the non-lawyer [sic] worked."; concluding that "the inquiring attorney may pay the legal assistant a bonus based on the legal assistant's extraordinary efforts on a particular case or over a specific period of time. While the number of hours the legal assistant works on a particular case or over a specific period of time is one of several factors that can be considered in determining a bonus for the legal assistant, it is not the sole factor to be considered. . . . A bonus which is solely calculated on the number of hours incurred by the legal assistant on the matter is tantamount to a finding that every single hour incurred was an 'extraordinary

effort,' and such a finding is very unlikely to be true. Therefore, unless every single hour incurred by the legal assistant was a truly extraordinary effort, it would be impermissible for the inquiring attorney to pay a bonus to his legal assistant calculated in the manner the inquiring attorney has proposed. However, the number of hours incurred by the legal assistant on the particular matter or over a specified time period may be considered by the lawyer as one of the factors in determining the legal assistant's bonus.").

In one case, a court found that a paralegal could enforce a lawyer's promise to pay a percentage of earned attorney's fees even though the agreement violated the fee-sharing rules.

- Patterson v. Law Office of Lauri J. Goldstein, P.A., 980 So. 2d 1234, 1237-38 (Fla. Dist. Ct. App. 2008) (allowing a paralegal to sue a law firm to enforce a lawyer's verbal agreement to pay the paralegal a percentage of fees earned in cases on which the paralegal worked; finding that the agreement violated the ethics rules, but nevertheless allowing the paralegal to enforce it; "In the instant case, Patterson [paralegal], who is not a member of the Florida Bar, is (a) not regulated by the Rules Regulating the Florida Bar and (b) did not have knowledge that Goldstein was breaking the Rules. We therefore find that Patterson was an innocent party and not in pari delicto to this fee-sharing agreement. We conclude that the agreement is enforceable by Patterson, who was not in pari delicto, notwithstanding the fact that it implicates Rule 4-5.4(a)(4). While we recognize generally that the Rules of Professional Conduct of the Rules Regulating the Florida Bar promote the public interest, we find that the public interest is not advanced if an attorney is permitted to promise a bonus arrangement that violates the fee-sharing rule, and then invoke the Rules as a shield from liability under that arrangement. We specifically limit our holding to the factual circumstances of this case involving an employment relationship between an attorney and a paralegal. This opinion is not to be construed to apply to a proscribed referral fee arrangement, which is distinguishable because it raises a separate set of policy considerations.").

#### 4. Independent Contractor Paralegals

One bar has found that independent contractor paralegals should be treated under a different approach.

- This bar reasoned that independent contractor paralegals might be in a position to affect the lawyer's decisions -- thus triggering the "evil" designed to be prevented by the fee-split prohibition. Utah LEO 02-07 (9/13/02) (lawyers may hire a paralegal on an "independent contractor basis" as long as the lawyer controls the work; explaining that a lawyer's employees may be compensated with a percentage of the gross or net income of the lawyer (as long as the compensation is "not tied to specific fees from a particular case"), but that an independent

contractor legal assistant may not receive a percentage of a lawyer's gross or net income, and instead must be "totally independent from the lawyer's relationship with, and compensation from, the client"; explaining that "the apparent difference between the permissible sharing of fees for employee-paralegals and the impermissible sharing of fees with an independent contractor stems from the nature of the lawyer/paralegal relationship, the employee-paralegal, being an employee of the lawyer, is not in a position to exert undue influence on the lawyer. The independent paralegal would be in a less subordinate role.").

## O. OTHER ISSUES

### 1. Introduction

Lawyers' interactions with paralegals and other professionals can implicate a nearly endless series of other issues.

### 2. Billing for Paralegals' Time

Lawyers normally can bill for time spent by paralegals and other professionals in providing services.

- ABA Model Guidelines for Paralegals, Guideline 8 ("A lawyer may include a charge for the work performed by a paralegal in setting a charge and/or billing for legal services.").
- North Carolina LEO 2007-13 (1/25/08) (explaining that lawyer may bill for intra-office communications; "A lawyer may bill for intra-office communications about a client's matter. For example, a lawyer and a paralegal (or two or more lawyers) who meet to discuss a client's case may both bill for the time expended in the meeting provided the meeting advances the representation of the client and the participation of both billing staff members is necessary. Email communications to instruct, update, or confer with other members of the firm is no different and, on occasion, may involve the expenditure of less time by the participants than an in-person meeting (and, therefore, be less expensive for the client). Nevertheless, to insure honest billing predicated on hourly charges, the lawyer must establish a reasonable hourly rate for his services and for the services of his staff; disclose the basis for the amounts to be charged; avoid wasteful, unnecessary, or redundant procedures; and make certain that the total cost to the client is not clearly excessive." (emphasis added)).

Some clients limit such billing in their retainer letters with lawyers.

### 3. Fee Requests

Most courts recognize that paralegals' time should be treated the same as attorneys' time for purposes of fee-shifting statutes or contracts.

- Richlin Sec. Serv. Co. v. Chertoff, 553 U.S. 571 (2008) (holding that a company successfully suing the federal government under the Equal Access to Justice Act can recover paralegal fees at their market rate, not just at the law firm's cost).

In any situation in which a client might seek the recovery of fees (by law or contract), paralegals should be very careful in how they record their time.

- Keeping the time completely and accurately will assure the client's maximum recovery, and avoid charges of "padding" or even fraud.
- Because some courts allow discovery of the billing records of a law firm seeking the recovery of attorneys' fees, paralegals should describe their work in an objective way that will not come back to "haunt" their firms.

#### **4. Client Files**

Paralegals play a central role in creating and maintaining client files. This might involve paralegals in a number of issues involving client files.

- For instance, the ABA Model Rules may require lawyers to turn over a client's files to the client, even if lawyers have not been fully paid. ABA Model Rule 1.16(d).

#### **5. Marketing**

##### **a. General Rules**

Many lawyers do not realize the severe limits many states impose on lawyer advertisements.

- Most states prohibit "self-laudatory" and unverifiable statements such as: "delivers the highest quality work," "experience second to none," etc. A number of states specifically prohibit lawyers from using terms like "expert" or "authority."
- Some states require an elaborate disclaimer whenever a lawyer advertises a "case result."
- Most states now allow advertisements to mention a lawyer's inclusion in lists such as "Best Lawyers in America" and "Super Lawyers" -- but often require information about the years and fields of law. States have struggled with determining the bona fides of less well-known lists.

States impose even more restrictions on targeted mailings (and e-mailings) to potential clients.

- Most states require such "direct mail" to plainly indicate that it contains an advertisement, and most states even dictate the font size, color, and placement of such disclaimers.

States also differ dramatically in restrictions on face-to-face or telephonic solicitation.

- The ABA prohibits such solicitation to anyone other than a family member, friend, or someone with whom the lawyer had a "prior professional relationship."

- Other states go even further. For example, Georgia prohibits solicitation "through direct personal contact" or "through live telephone contact" with any non-lawyer who has not sought the lawyer's advice. Georgia Rules of Prof'l Conduct R. 7.3(d).
- States disagree about whether real-time electronic communications fall within the rule covering direct mail, or the more restrictive solicitation rule.

#### **b. Paralegal Issues**

Paralegals may sometimes find themselves involved in issues related to law firm marketing.

Not surprisingly, paralegals acting under a lawyer's direction cannot engage in marketing activities (such as direct solicitation) that the lawyers themselves may not undertake.

- In re Ravith, 919 N.Y.S.2d 141 (N.Y. Sup. Ct. 2011) (suspending for three months a lawyer who directed her paralegal to solicit clients).
- Anderson v. Ky. Bar Ass'n, 262 S.W.3d 636 (Ky. 2008) (publicly reprimanding a lawyer and conditionally suspending his license for 30 days for improperly establishing a website to recruit plaintiffs involved in an airplane crash without seeking pre-approval of the website advertisement as required by the Kentucky ethics rules; also noting that the lawyer's paralegal had sent e-mails to a potential client without the appropriate disclaimer indicating that the e-mail was an advertisement).

A law firm may not refer to itself as a "group" or a "law group" if the "group" includes paralegals or other professionals.

- Ohio LEO 2006-2 (2/10/06) ("It is proper for a solo practitioner to name his or her law firm 'The X Law Group' when 'X' is the solo practitioner's surname and 'X' employs one or more attorney [sic] as associates. 'Group' and 'Law Group' are not considered misleading or a trade name when used in naming a law firm comprised of more than one attorney. 'Group' or 'Law Group' should not be used in a law firm name to refer to paralegals, other non-attorney personnel, office sharing attorneys, or 'of counsel' attorneys.").

Lawyers may not make any false advertising statements involving paralegals.

- Feldman & Pinto, P.C. v. Seithel, Civ. A. No. 11-5400, 2011 U.S. Dist. LEXIS 147655, at \*30-31, \*31, \*32, \*33-34 (E.D. Pa. Dec. 22, 2011) (granting a law firm's motion for preliminary injunction to restrain a former lawyer from improperly recruiting a plaintiff's law firm's employees; also concluding that the former lawyer made false statements in marketing materials; "[B]ased on these facts alone, it is

also evident that Seithel's [former lawyer] statement that she had a leadership role in the various drug litigation matters was false for at least some of these cases. A person that took part in zero of twenty-five depositions, or who had absolutely no contact with certain clients, can hardly be said to have a leadership role in a litigation."; "Seithel stated that she had an 'experienced team in place with over twenty years of combined experience.' However, Seithel's 'team' consisted of one attorney with ten years of experience, a paralegal with ten years of experience, an administrative assistant, and a 'couple of interns.' The Court agrees with the Plaintiff's expert witness, Thomas Wilkinson ('Wilkinson'), that the unsophisticated client would assume that Seithel referred to twenty years of combined attorney experience, rather than twenty years of combined attorney and non-attorney experience." (emphasis added); "[T]he Court agrees with Plaintiff that Seithel's representation that she 'left the firm of Feldman & Pinto' was misleading, because it suggests that the separation was voluntary."; "It was also misleading for Seithel to have indicated in her letters, sent on July 7, 9, and 12, 2011, that she was now practicing under the law firm of Seithel Law, LLC, when in fact, the Articles of Organization for Seithel Law, LLC were not filed with the Secretary of State for South Carolina until July 20, 2011. . . . [T]he Court agrees with Wilkinson's testimony that omitting the fact that Seithel was not licensed to practice in Pennsylvania was also a misrepresentation that potentially mislead the clients who received her letter.").

## 6. Paralegals' Lawsuits Against Their Employers

Interestingly, some cases deal with paralegals' lawsuits against their employers.

- Pellegrino v. Oppenheimer & Co., 851 N.Y.S.2d 19 (N.Y. App. Div. 2008) (refusing to dismiss a paralegal's sexual harassment lawsuit against her former employer.).
- Patterson v. Law Office of Lauri J. Goldstein, P.A., 980 So. 2d 1234, 1237-38 (Fla. Dist. Ct. App. 2008) (allowing a paralegal to sue a law firm to enforce a lawyer's verbal agreement to pay the paralegal a percentage of fees earned in cases on which the paralegal worked; finding that the agreement violated the ethics rules, but nevertheless allowing the paralegal to enforce it; "In the instant case, Patterson [paralegal], who is not a member of the Florida Bar, is (a) not regulated by the Rules Regulating the Florida Bar and (b) did not have knowledge that Goldstein was breaking the Rules. We therefore find that Patterson was an innocent party and not in pari delicto to this fee-sharing agreement. We conclude that the agreement is enforceable by Patterson, who was not in pari delicto, notwithstanding the fact that it implicates Rule 4-5.4(a)(4). While we recognize generally that the Rules of Professional Conduct of the Rules Regulating the Florida Bar promote the public interest, we find that the public interest is not advanced if an attorney is permitted to promise a bonus arrangement that violates the fee-sharing rule, and then invoke the Rules as a shield from liability under that

arrangement. We specifically limit our holding to the factual circumstances of this case involving an employment relationship between an attorney and a paralegal. This opinion is not to be construed to apply to a proscribed referral fee arrangement, which is distinguishable because it raises a separate set of policy considerations.").

- Davis v. O'Melveny & Myers, 485 F.3d 1066 (9th Cir. 2007) (holding that law firm's employment agreement signed by plaintiff paralegal and others and requiring certain dispute resolution program processes was unconscionable because it was too one-sided and written too broadly), cert. dismissed, 128 S. Ct. 1117 (2008).

## 7. Professionalism and Civility

All of the ethics rules discussed in this outline try to balance lawyers' and their non-lawyer colleagues' duties to diligently serve their clients and their duties to others (courts, adversaries, and third parties).

- The ethics rules prohibit rude or discourteous behavior only at the extremes.

In fact lawyers and their non-lawyer colleagues must sometimes act in what seems like an unprofessional way in fulfilling their duty to diligently represent clients.

- For instance, most authorities agree that lawyers and their non-lawyer colleagues may not point out an adversary's mistake (such as missing the statute of limitations or other court deadline) without client consent.

Thus, the ethics rules really do not focus on the type of day-to-day interaction with others that most call "professionalism."

However, most lawyers and non-lawyer colleagues try, or should try, to act professionally.

- This professionalism involves the type of civility or courtesy involved in the classic "Golden Rule."
- Some states have adopted specific "creeds" for governing lawyer civility and courtesy.

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