Tennessee Commission on Continuing Legal Education & Specialization

LAWYER TO LAWYER MENTORING PROGRAM

WORKSHEET X

OFFICE PERSONNEL

Worksheet X is intended to facilitate a discussion about the roles and responsibilities of paralegals, administrative assistants, and other office personnel and how to establish good working relationships with others in the same office who are support staff, colleagues, or senior.

WHAT WENT WELL?

Start by sharing with each other a brief story of something that went well in your practice this week:

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Share your reflection by on one of these questions: What caused the good event? What does it mean? How did you contribute? Others? How can you have more such events in the future?

ACTIVITIES FOR TODAY

- Explain to the new lawyer each non-lawyer employee's role in the mentor's office/firm, including the employee's title, job duties, and relationship to the new lawyer (if any) if in an in-house mentoring relationship.
- Discuss the importance of having support staff on your team and treating them with respect.
- Share suggested "do's and don'ts" of dealing with support staff, colleagues, and those more senior than the new lawyer.
- If the new lawyer has an administrative assistant and/or paralegal, explain the types of tasks that are appropriate (and inappropriate) to ask each of them to do.
- If in an in-house mentoring relationship, discuss the office culture in terms of the types of tasks new lawyers are expected (although perhaps not told) to do rather than support staff. For example, if in an office where many lawyers share one administrative assistant, do the newer lawyers make their own changes to documents, make their own copies, etc. so that the administrative assistant can focus on doing those tasks for the more senior lawyers? Are new lawyers expected to type their own

document on their own computer and assistants expected to "format" them, or is there some other accepted way of doing things?

- If in an in-house mentoring relationship, discuss any considerations or prohibitions in asking support staff to put in time outside of normal office hours, including whether requests for overtime must be approved, whether overtime requests must only be made on a limited basis, how much advance notice is typically expected when asking staff to stay later than normal office hours, etc.
- If in an in-house mentoring relationship, discuss the specific skills and knowledge each support staff member has from which the new lawyer can learn or benefit.
- Read and discuss the suggestions regarding dealing with professional support staff in the attached articles. Tennessee Bar Association's *Law Practice Management Tips* and ABA Model Guidelines for the Utilization of Paralegal Services.
- Make suggestions about how to handle difficult situations where the new lawyer's administrative assistant or paralegal is not performing as expected. If mentoring in-house, explain any procedures that are in place to address this type of problem.
- Discuss the types of behavior that constitute the unauthorized practice of law in Tennessee and to the extent possible, define the "practice of law." See the attached excerpt from ABA Model Guidelines for the Utilization of Paralegal Services. Also attached, *Recognizing and Avoiding the Unauthorized Practice of Law* by Knoxville Bar Association Unauthorized Practice of Law Committee.
- Discuss an attorney's ethical responsibilities regarding non-lawyer assistants. See Tennessee Rules of Professional Conduct Rule 5.3.
- Discuss an attorney's ethical obligation to prevent the unauthorized practice of law and provide specific tips on how to prevent non-lawyer personnel from inadvertently (or intentionally) engaging in it. See Tennessee Rules of Professional Conduct Rules 5.3 – 5.5.
- If mentoring in-house, discuss the office policies (if any) that are in place to prevent the unauthorized practice of law by non-lawyer staff.
- Share with the new lawyer appropriate ways to monitor the work product of support staff for which the new lawyer is ultimately responsible as an attorney.

ACTION STEPS

End the session by discussing what action steps you can take to either improve or set yourself up for future success based on today's discussion. Discuss how one or more of your Signature Strengths can help you achieve success in these steps.

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RESOURCES

TENNESSEE RULES OF PROFESSIONAL CONDUCT

V. LAW FIRMS AND ASSOCIATIONS

RULE 5.3: RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

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

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer;

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

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

(1) the lawyer orders or, with 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 nonlawyer is employed, or has direct supervisory authority over the nonlawyer, and knows of the nonlawyer's conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

RULE 5.4: PROFESSIONAL INDEPENDENCE OF A LAWYER

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of RPC 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement;

(4) a lawyer may share a court-awarded fee with a client represented in the matter or with a non-profit organization that employed, retained, or recommended employment of the lawyer in the matter;

(5) a lawyer who is a full-time employee of a client may share a legal fee with the client to the extent necessary to reimburse the client for the actual cost to the client of permitting the lawyer to represent another client while continuing in the full-time employ of the client with whom the fee will be shared; and

(6) a lawyer may pay to a registered non-profit intermediary organization a referral fee calculated by reference to a reasonable percentage of the fee paid to the lawyer by the client referred to the lawyer by the intermediary organization.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation, or other association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or ownership interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

RULE 5.5: UNAUTHORIZED PRACTICE OF LAW;
MULTIJURISDICTIONAL PRACTICE OF LAW

(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.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's representation of an existing client in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's representation of an existing client in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

(e) A lawyer authorized to provide legal services in this jurisdiction pursuant to paragraph (d)(1) of this Rule may also provide pro bono legal services in this jurisdiction, provided that these services are offered through an established not-for-profit bar association, pro bono program or legal services program or through such organization(s) specifically authorized in this jurisdiction and provided that these are services for which the forum does not require pro hac vice admission.

(f) A lawyer providing legal services in Tennessee pursuant to paragraph (c) or (d) shall advise the lawyer's client that the lawyer is not admitted to practice in Tennessee and shall obtain the client's informed consent to such representation.

(g) A lawyer providing legal services in Tennessee pursuant to paragraph (c) or (d) shall be deemed to have submitted himself or herself to personal jurisdiction in Tennessee for claims arising out of the lawyer's actions in providing such services in this state.

(h) A lawyer or law firm shall not employ or continue the employment of a disbarred or suspended lawyer as an attorney, legal consultant, law clerk, paralegal or in any other position of a quasi-legal nature.

View complete rules and comments at: http://www.tsc.state.tn.us/rules/supreme-court/8

ABA Model

Guidelines

for the

Utilization of Paralegal Services

American Bar Association
Standing Committee on Paralegals

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Produced by the ABA Standing Committee on Paralegals.

ABA MODEL GUIDELINES
for the
Utilization of Paralegal Services

Preamble

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

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

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

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

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

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

Comment to Guideline 1

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

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

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

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

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

Comment to Guideline 2

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

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

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

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

becomes responsible for it to the client."

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

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

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

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

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

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

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

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

(A) RESPONSIBILITY FOR ESTABLISHING AN ATTORNEY-CLIENT RELATIONSHIP.

(B) RESPONSIBILITY FOR ESTABLISHING THE AMOUNT OF A FEE TO BE CHARGED FOR A LEGAL SERVICE.

(C) RESPONSIBILITY FOR A LEGAL OPINION RENDERED TO A CLIENT.

Comment to Guideline 3

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

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

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

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

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

Comment to Guideline 4

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

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

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

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

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

Comment To Guideline 5

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

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

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

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

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

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

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

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

Comment to Guideline 6

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

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

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

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

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

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

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

Comment to Guideline 7

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

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

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

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

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

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

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

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

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

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

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

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

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

Comment to Guideline 8

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

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

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

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

Comment to Guideline 9

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

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

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

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

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

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

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

Comment to Guideline 10

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

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

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

American Bar Association
Standing Committee on Paralegals
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New Lawyer Survival Guide

Advice from the trenches on how to live your life in the law

ILLINOIS STATE BAR ASSOCIATION

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ISBA New Lawyer Survival Guide

Introduction

W***elcome to the practice of law!*** The transition from law student to lawyer will be an exiting, sometimes unnerving, one, but be assured that everyone goes through an acclimation period.

This Guide has been developed by members of the ISBA who have gone though the same transition you are now experiencing. It addresses some common themes and provides some basic pointers. We hope it will prove useful as you begin your legal career.

However, since rules, forms, personnel and conduct vary throughout the 102 counties in Illinois, we can't begin to provide you with comprehensive information. So, never hesitate to question your peers, mentors, court personnel, or your fellow ISBA members about why or how things are done. Their advice can prove invaluable.

Again, we welcome you to the profession and wish you success as you embark on your career.

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.

~ Abraham Lincoln

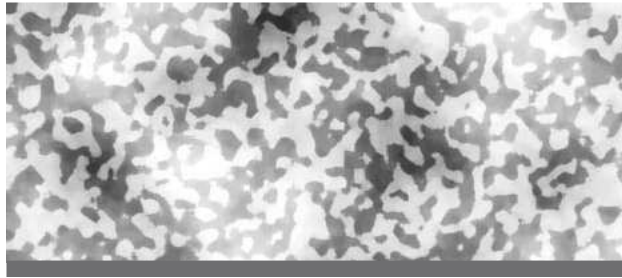
How To Get Organized—and Stay That Way!

As a new lawyer, you are faced with the challenge and necessity of being well organized. For many new lawyers, lack of organization in pre-lawyer days led only to personal suffering. As an attorney, the stakes are much higher. Disorganization is detrimental to your clients, to your firm, and ultimately, to your career. Set aside a small amount of time each day to get organized. In time, daily organizational practices will no longer be just one more task that needs to be done, but more of a good habit.

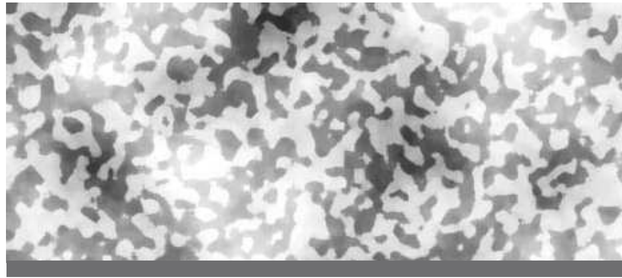
For many people, you, the new lawyer they engage, will be their first contact with an attorney. First impressions are often lasting ones. Establishing a good reputation as an effective and organized attorney is key to keeping clients. And perceptions formed by colleagues, partners, opposing counsel, and judges—as well as clients—will go a long way toward determining your future prospects.

Here are some practices that lead to better organization:

- Take time to become familiar with your cases.
- Keep a daily planner, detailing your appointments and court appearances for every day of the year.
- Maintain a "to do" list, which also prioritizes tasks by what needs to be done soonest, and what tasks are the most important.



- Create new files for new matters and new cases immediately after beginning work on the project.
- Clean your desk at the end of the day, or at least once a week in busier times. This greatly decreases the likelihood of losing or misfiling paperwork.
- Detail all events from every court appearance in your files as soon as possible after appearing in the courtroom. You can't rely on opposing counsel, your client, the clerk, or even the judge to keep detailed records of court proceedings and decisions.
- Complete your time sheets daily.
- Open your mail daily. File away all important mail related to your cases. Respond the same day to as many matters as possible. Throw away all junk mail or unnecessary mail—don't let it clutter up your desk.
- Check your phone messages and e-mail daily. Return messages promptly and note details of conversations in your files, if appropriate.
- Create a "tickler" file to remind yourself of approaching deadlines for filings or status checks on cases.
- Familiarize yourself with your firm's, company's or organization's filing, docketing, and billing systems. Don't be afraid to ask for help or compare organizing "notes" with others when you're newly hired.



- Make sure that your filing system is accessible and easy to understand. If you have emergencies that change your schedule, or if you are transferred to another assignment, you will still be able to communicate with staff at the office if your files are accessible and easily understood.
- Periodically review all files and assignments to ensure that you are up to date with everything you're supposed to be doing.
- Follow up with clients, partners, co-workers, and supervisors to let them know what you are doing on a case. It's good practice to let the people you work with know what you're doing so that there is no duplication of labor. Additionally, it fosters excellent attorney-client relationships when you keep the client abreast of the work you and your organization are doing on their behalf.

Being organized is crucial to the new attorney. Hopefully, you will bring strong organization skills to your new profession as a result of previous life experiences. If not, you must make it a priority to quickly learn these skills and put them into practice.

To re-cap: Lawyers need to maximize effective use of their time and be as efficient as possible. You must avoid missing deadlines or making a habit of creating last minute emergencies. Careful record-keeping helps you do that. As an effective new lawyer, you must also document what has been done and what needs to be done—and learn how to prioritize all of your tasks.

R-E-S-P-E-C-T
the Professional Support Staff

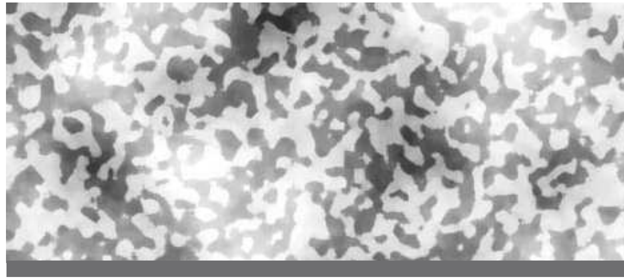
Remember that part of successfully working in any office, public or private, requires a team approach to accomplishing the goals of the organization. Professional support staff are just as important as attorneys in getting the job done properly. Professional support staff may include such persons as secretaries, paralegals and librarians.

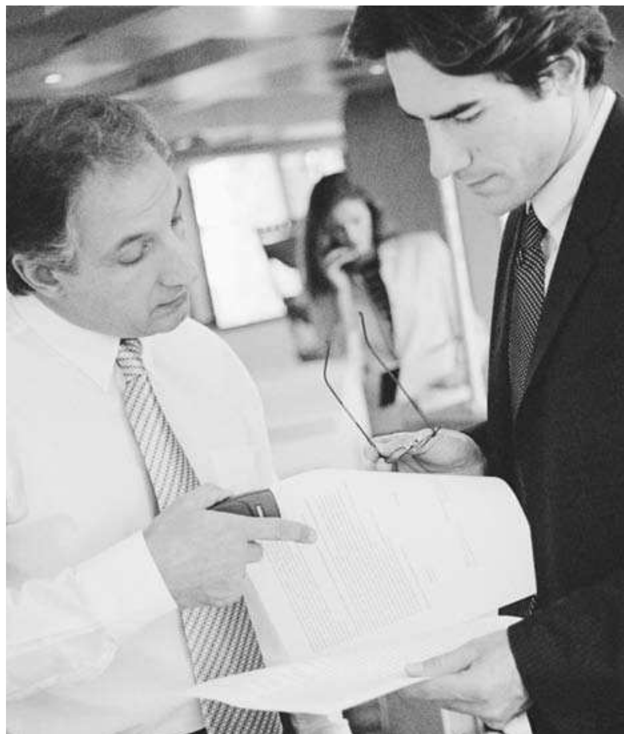
With the proper team approach, and by treating others as you would want to be treated, you can form solid working relationships. Remember that working with staff is a two-way street—they are there to help you, but you must also help them by fostering a positive work environment.

The keys to a solid professional relationship with support staff include respect, consideration, good communication, and basic courtesy.

Respect – Support staff are on the front lines for attorneys and deserve the utmost respect. They have to deal with the public, clients, and all of the members of your office. Tasks often include answering phones, filing, transcribing dictation, copying, faxing, research, mailings, etc. These all require attention to detail and good organization, especially when working with multiple attorneys.

Consideration – Be patient with staff as you get to know one another. It takes a while for team members to appreciate each others strengths and weaknesses. Do not overload your support staff with tasks. When you present tasks, be mindful of time constrains and feelings. If you





share support staff with other attorneys, remember that they all are placing similar demands on support staff, so make sure your timeframe for completing tasks is reasonable under the circumstances.

Good Communication – Do not expect support staff to read your mind. Give clear directions, write legibly, and prioritize your requests.

Basic Courtesy – Do not forget to say please and thank you. This may sound elementary, but when you treat your co-workers with respect, it helps foster a positive team environment. Little things, such as greeting your co-workers in the morning, showing concern for them, and praising a job well done are all ways to show courtesy.

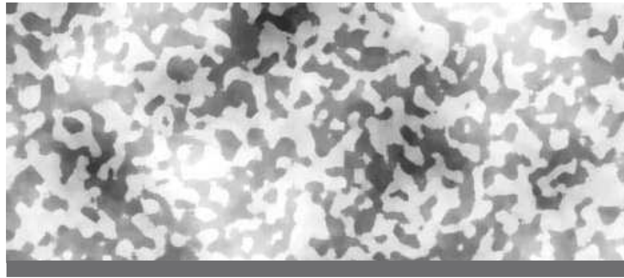
Court Personnel—
Know Them, Find Out What They Know

Few people know more about court procedure, conduct, or forms than the court staff. These people generally work every day on a specific aspect of the practice. Will the judge accept orders over the counter? Do I need a cover sheet to file a new case? Does the court accept agreed orders off call? Just about any procedural question dealing with a case—from initial filing to judgment or dismissal—can be answered by court personnel. These people include the circuit clerks at the counters, the judge's clerk of the courtroom, secretaries, judges' law clerks, and bailiffs.

When you file a new case, do it yourself or accompany whoever does so for your firm. Introduce yourself to the clerk and ask what is expected from their perspective. ARDC and county identification numbers? Cover sheets? Number of copies of each document?

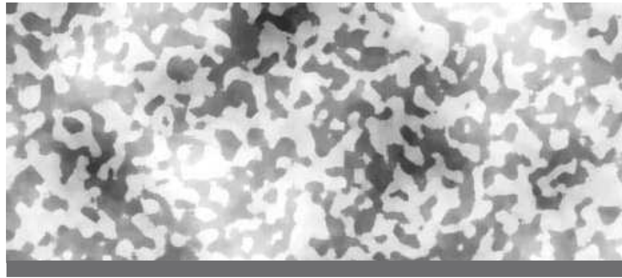
Learn how the system handles the incoming caseload. Usually the clerks are more than happy to explain how they handle your new case. You can eliminate simple procedural errors and not worry about delays from rejected pleadings.

If possible, arrive early or stay late at your first few court calls. Introduce yourself to the bailiff and court clerk. Do they require attorneys to check in? Can simple or uncontested matters be called ahead of the regular docket? If you have to cover two calls at once, speak with the bailiff or court clerk on how to hold your case. If court is in recess, ask if the judge is available to meet with you. In some counties and with some judges, you can spend a few minutes with a judge in chambers get-



ting introduced and receiving pointers.

Learn from the law clerk or courtroom clerk whether courtesy copies are necessary and if so, in what circumstance. Should draft orders be proposed with courtesy copies of the motion? In some counties, judges never see the court file, while in others the judge will receive the file days in advance of the call. Many of these answers



cannot be found under local or state rules. The judge may have no sympathy for your failure to follow that particular courtroom's procedure. Take the time to ask the courtroom staff.

You may notice experienced attorneys and bailiffs engaged in conversation before a call. Both work together, sometimes on a day-to-day basis, and understand and respect each other. Friendships develop. The bailiff informs the attorney when a pro se adversary has arrived. The attorney informs his client on courtroom decorum and the bailiff's responsibility to maintain order. You may notice judges whispering or even openly asking a clerk questions on procedure or forms. Trust has developed.

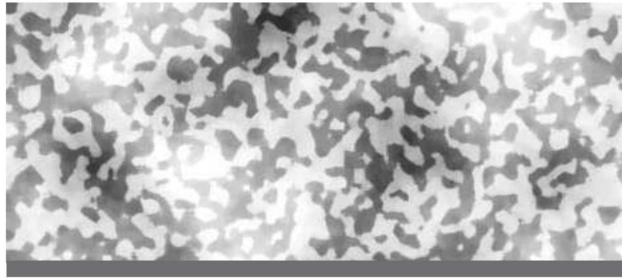
If nothing else, you must realize that court personnel are part of the system of justice. They are indispensable and trusted members of the process, and while they are more approachable than judges, they deserve the same courtesy.

Often there will be court personnel who will go out of their way to assist you. Be courteous and respectful to them. They do a difficult job, deal with a sometimes acrimonious public, and are underpaid. Do not take your adversarial position from oral arguments to the clerk's counter. If they can't do something, ask why, and then ask how you can accomplish your task. If they don't know the answer, politely ask to see the division's manager or the circuit clerk personally. Unless you have previously burned your bridges, court personnel will assist you in serving your clients.

Keep It Civil and Reap the Benefits

The old gangster movie adage rings true in the legal profession: It's nothing personal, it's just business. You must be able to separate your role as an advocate from personal feelings. You will argue venomous facts against the client of a good friend. But at the end of the case, despite the outcome, both attorneys should have respect for the manner in which the case was conducted.

No doubt you will run across jerks. No doubt at some point you will lash out at opposing counsel. However, good attorneys vigorously argue and advance their client's position without personal attacks. They do so without screaming or dramatics. If you run across an



attorney who thinks otherwise, you must rise above it. If you are in oral arguments, keep your eyes on, and address only, the court. Most judges will not tolerate theatrics. If you are outside the courtroom, politely excuse yourself and indicate you are available to engage in dialogue when your opponent is ready to do so.

Attorneys never obtain a better result for a client, or advance a position, by being obnoxious. Sometimes you have to watch a show for the other side's client. This accomplishes little on the merits of the case, and in fact, it's a great disservice to the profession because it reinforces the negative portrayal of lawyers often seen on prime-time television.

Tangible goodwill is based on your reputation. Referrals result from competent and professional representation. Judges, staff, and court personnel will be much more inclined to listen to you or give assistance if you have developed a good reputation. Advocate on behalf of your clients, attack opposing positions, question the interpretation of evidence—but do not attack the other side personally. Courtesy and advocacy are not mutually exclusive.

If you make an effort to establish rapport with opposing counsel, you will service both your client and your career. The merits of settlement positions and negotiations will be advanced, discussed, and considered with greater ease. Routine case management and procedure won't be a headache. Future contact on other matters will not instantly degrade into trench warfare. What do you gain? Referrals. Stronger settlements. Less costly service for your clients. In short, your career will be more rewarding.

Deal Well—and Often—with Your Clients

New lawyers are often anxious about dealing with clients—and with good reason. Clients are your livelihood. There is a delicate balance each attorney must find to gain the trust of clients and to adequately represent their interests. If attorneys establish good client management practices at the start of their careers, they will have a firm foundation on which to build a successful practice and reputation. Three areas where new attorneys can start building the foundations of their professional careers are: Avoiding conflicts of interest; clear communication with clients; and, knowing your limits as an attorney.

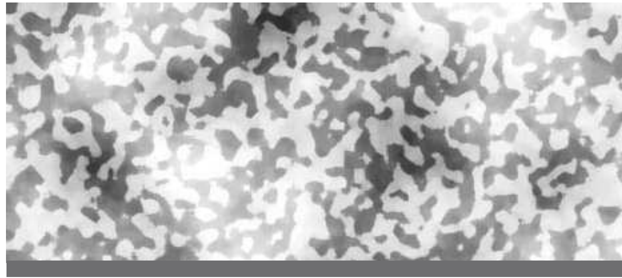
Conflicts of Interest

- The Illinois Rules of Professional Conduct prohibit attorneys from representing clients where they may have a conflict of interest. Always do a conflicts check prior to agreeing to represent a potential client.

Communication with Clients

- Be very clear with clients as to the scope of your representation and billing practices. Written engagement letters are a good way to outline these issues.

- Remember that clients are customers and should be treated with respect and care. They have entrusted you with assisting them with important matters in their lives, and good communication helps foster positive working relationships. Be courteous. Answer messages.



Don't avoid phone calls. Keep the lines of communication open. These things will help foster a positive relationship between you and your client and build trust.

- Be sure that you understand your client's ultimate goal, and set realistic expectations for your representation.

Knowing Your Limits as an Attorney

- Remember that you do not have to take every case that walks into your office. Learn to spot problem clients. (Read more about these clients on page 25.)

If you don't feel competent to handle the case, don't take it. Or, get another attorney to assist you who has expertise in that practice area.

Ethics—Upon This Mount Is Built Your Reputation

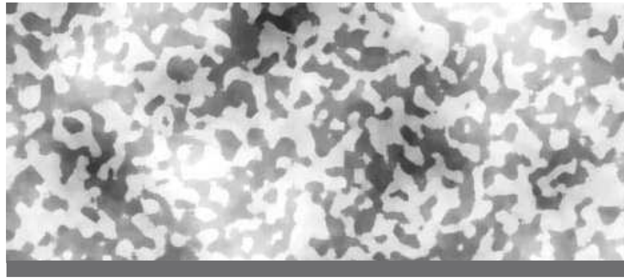
Newly admitted attorneys are not exempt from ethical issues. Professional responsibility classes in law school may not adequately prepare you for all of the ethics issues that await you in practice. Fortunately, there are many resources to guide you.

The primary source for ethics guidance is the Illinois Rules of Professional Conduct. These are found in Article 8 of the Illinois Supreme Court Rules, and may be obtained at <http://www.state.il.us/court/SupremeCourt/Rules/Art_VIII/>. A periodic review of these rules is a good idea for all attorneys in order to be mindful of them when sticky situations arise.

The second source for ethics guidance is a mentor attorney. Whether in your office or another attorney in your community, a more experienced practitioner often can help guide you through your ethical dilemmas.

Another source of help is the Illinois State Bar Association. For members, it provides an informal ethics advisory service that provides guidance based on the Illinois Rules of Professional Conduct.

This service is two-fold. First, the Board of Governors has approved a number of Advisory Opinions on Professional Conduct drafted by the ISBA Committee on Professional Conduct. These opinions are based on hypothetical fact scenarios submitted by member attorneys, and can often be applied to similar scenarios that other practitioners face. If a similar opinion is not available, the Committee on Professional Conduct may take up your inquiry, but it usually takes a minimum of nine months for opinions to be adopted and published. If the facts discussed in your inquiry are before a court or the ARDC, the committee will not comment. It is important



to note that ISBA Ethics Advisory Opinions do not have the weight of law, and should not be relied upon as a substitute for individual legal advice. ISBA Ethics Advisory Opinions are located at <http://www.isba.org/Courtsbull/EthicsOpinions/>.

Second, you may call the ISBA Ethics InfoLine and speak to an ethics advisory attorney in Springfield at 217-525-1760 or 800-252-8908 or in Chicago at 312-726-8775 or 800-678-4009.

The Illinois Attorney Registration and Disciplinary Commission also provides an ethics inquiry program for attorneys. Assistance can be reached by calling 312-565-2600 or 800-826-8625. Like help from the ISBA, the ARDC does not provide legal advice or binding opinions. Additional information on this service may be found at <http://www.iardc.org/ethics.html>.

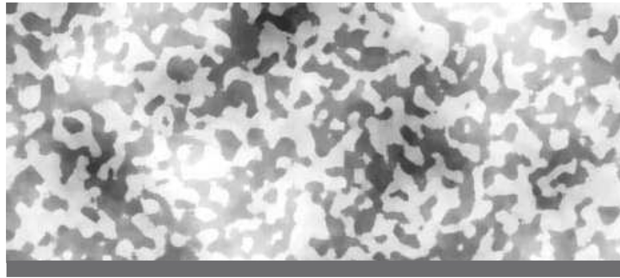
You Will Harvest What You Sow—Otherwise Known As "Client Development"

The practice of law is becoming increasingly competitive. Billable hours and the ability to develop clients or become a "rainmaker" are of growing importance. No longer does a law degree guarantee that lawyers will enter a law firm and automatically be made a partner seven to eight years later. No longer does a law degree guarantee financial success, or even a job.

Each passing year the population of lawyers in our country grows. Thus, it is never too early to at least be aware of the importance of developing clients along with developing the skills that will help you become successful at it. Successful lawyering and a successful practice depends not only on good legal skills, but also on good people skills and good marketing. Client development is a fact of life for even the most established lawyers and the firms.

Early on, learn how to market yourself and your firm. Demonstrate your commitment to its success by cultivating new clients. Be sensitive, however, to your role with respect to client development. In some instances, it may be appropriate for you to take the lead with a potential client, while in others it might be best for you to support the client development efforts of others in your firm.

Many attorneys, both associates and partners, get nervous by the very thought of "marketing." However, it does not have to be an intimidating task. In fact, it can be fun. One way of making it more enjoyable is to simply place yourself in situations with potential clients that you enjoy. Pick something you like to do. Even involvement in sports or in your hobby can potentially be beneficial to



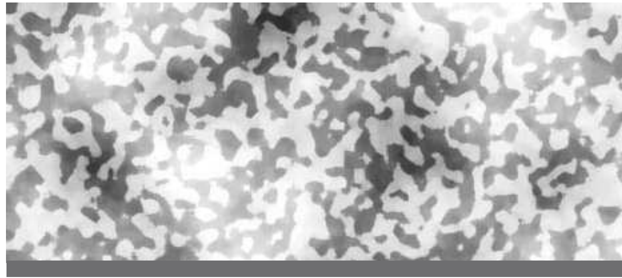
your long-term success in marketing yourself. In moderation, these types of activities will prove beneficial on both a personal and professional level.

In addition, to increase your exposure, you may want to join community or civic organizations such as the local Chamber of Commerce. Such organizations will benefit from your involvement and you get a chance to meet potential clients. Volunteering, joining alumni groups, political involvement, and church groups are other ways to give something back to the community. It also allows you to meet and associate with persons who are not attorneys, and allows them a chance to get to know you outside of your work environment. Your relationships with leaders in non-law related fields can be a big help in becoming a successful rainmaker.

Keep in mind that industry organizations, committees or study groups can often serve as referral networks. You may also want to join one or more of the national or local bar associations located in your area. Many of these groups are populated by well-established attorneys in their fields. Such memberships, particularly when coupled with active work with a bar section or committee, will allow you to meet other lawyers who can act as mentors, provide valuable advice, and who may refer work to you.

When persons or companies need an attorney for a particular problem, they go to their own attorney, or to a friend or member of their family who is an attorney. Being exposed to a large number of attorneys and having a hard-working, ethical reputation increases the likelihood that it will be you that these other attorneys refer when they need someone who practices in your field.

But don't put pressure on yourself to land a huge client or become a rainmaker overnight. You are unlikely to land a lucrative client immediately. Exposure is the key to client development. Take the time to meet people.



Develop a good reputation. Everyone you meet is a potential client or source of referral, including opposing counsel. Hand out your business cards and be prepared to recommend your firm's services when the appropriate opportunity presents itself.

Of course, don't view the people you meet as clients first. Rather, step back and begin to think of meeting people as a chance to improve your communication skills and to develop friendships and connections within the business world based on common interests.

It is also very important, in a polite way that fits your style, to learn to keep in touch. This can be done by periodically scheduling lunches with business people you meet, corresponding with them during holidays, sending a periodic e-mail, and/or forwarding newspaper clippings concerning mutual topics of interest. It can be as simple as mailing out your firm's newsletter every six months.

While they may not require your services the first time you meet, maybe months or years later when a specific problem arises, these people will remember you, your area of practice, and your law firm. At that point you are no longer a stranger, but a person with whom they have created a level of comfort.

Finally, there is no substitute for hard work. Treat every case like it is your most important case, and every client like they are your most important one. That approach, along with an eye on effective marketing techniques, should ensure success at client development in the years to come.

Give a Little, or a Lot—But Give: Public Service and Pro Bono

Despite your busy schedule, take the time to get involved with pro bono or public service projects. Lawyers have a duty to contribute to their community, and these opportunities can be rewarding both professionally and personally.

Always check with your firm before accepting pro bono matters. If a corporation or governmental body employs you, there may be policies on accepting pro bono work. You must be mindful of ethical obligations to provide competent and zealous representation to your clients, so be sure that the matters in which you agree to provide representation are of the nature that you can handle and are acceptable to your employer.

Pro bono opportunities await you from a number of different sources—your own firm, agencies, legal assistance organizations, local bar associations, or other community groups. Choose the one that is right for you and expand your horizons.

Remember that you don't always have to contribute in your capacity as an attorney. Public service work through charitable organizations or other organized public service projects can also be quite rewarding. Just as you have found mentors throughout your life, a number of youths may also be in need of mentors.

Find a local agency or school where you can volunteer your time. Assist local schools as a coach or judge for mock trial competitions. Many children can learn from your example. If working with young people is not your strength, volunteer with a local non-profit organization or other organized public service project. As a leader in your community, you can give back not just of your legal skills, but also of your personal strengths and talents.

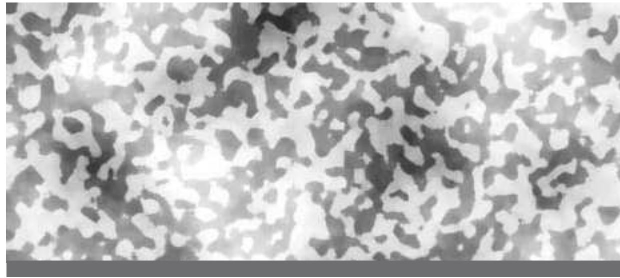
The Particular Advantages (Yes, There are Some) of Government Employment

Many new attorneys seek employment by the government after graduation. Among the types of governmental agencies that new attorneys work for are prosecutor's offices, the office of the public defender, the public guardian, or one of the many state, federal, or municipal administrative agencies. These organizations allow the young attorney an excellent opportunity to gain valuable experience, often providing the attorney with more autonomy and responsibilities than their counterparts receive in larger firms.

Government employment is also a great way to build your reputation, become exposed to a variety of issues, and to establish a network of contacts. Additionally, young attorneys who are employed by the government, in particular those who work for a prosecutor's office or for the public defender's office, gain invaluable experience in the courtroom, spending far more time litigating than do young attorneys in larger firms.

Attorneys employed by the government typically have a large caseload and keeping up with the work is critical. Otherwise, you'll end up with an unmanageable number of last minute emergencies. Additionally, government attorneys are usually working hand-in-hand with other agencies. If one link fails to produce, the system as a whole is damaged. There's no quicker way to establish a bad reputation than by consistently failing to be prepared.

Very often, the issues and challenges facing a new government attorney have been dealt with before by others, often attorneys working for the same organization. Seek out help. Governmental agencies tend to have veteran attorneys who are potentially great mentors—or who will at least offer assistance.



Unlike the attorney working for a firm, most attorneys who work for governmental agencies do not have to keep track of billable hours. This should never be perceived as a reason to work less or to be less organized. In many cases, due to the large caseload, there is some pressure to quickly move cases through the system. The effective attorney is one who thoroughly familiarizes themselves with each file and each case. But that works only if the attorney is organized and maximizes effective use of time.

Each case should be treated as if it is the most important case in that attorney's caseload. Many an attorney has had a case with which they were not completely familiar slip through the cracks—and then come back to haunt them. Furthermore, a government attorney frequently faces last minute tasks, deadlines, and shifts of priority. If the attorney is up to date, they can more easily handle the sudden surge in workload. Be organized and establish a reputation for being prepared and thorough.

Some types of government employment are often marked by frequent changes in assignments and duties, which can also mean that others may be handling and completing tasks and cases begun by you, and vice versa. Thus, it is important to keep accurate files, notes, and records, so that others can be prepared to handle your files on short notice.

Government attorneys often come into contact with many different people, including staff from other governmental agencies, other attorneys, courtroom personnel, and judges. Take the time to get to know these people, if possible. Be diplomatic. As always, establishing good relationships can make the job noticeably less difficult and more enjoyable. It's quite possible to be a very effective advocate for the interests a client or an agency without making the battles personal.

Above all, always be ethical. Governmental agencies will familiarize employees with the rules and typical ethical problems. Nothing is ever worth jeopardizing your reputation, values, and livelihood for.

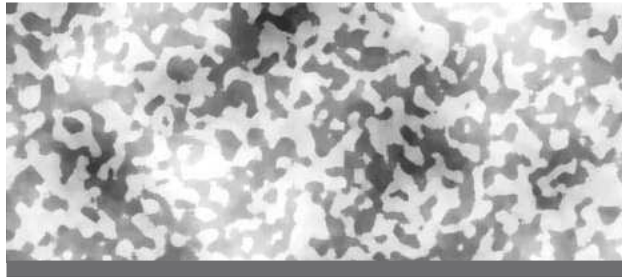
Taking Care of Yourself Is Important, Too

All those years of hard work and determination have paid off. You have graduated from law school, passed the bar exam, and have been sworn in to the Illinois bar. The good news is that you have proven to yourself and to others that you have the ability to be an attorney. The bad news is that it does not get any easier.

The profession you have chosen is one marked by stress, long hours, work-filled weekends, and difficult, challenging work. Many recent law school graduates are enthusiastic about their new positions and are willing to put in the hard work necessary to move up within their organizations. Perhaps the most important key to long-term success, however, is to take care of the person who got you where you are: Yourself.

You only get one life to live and one body to maintain. In the legal profession, stress is unavoidable. The long hours, difficult work, family demands, along with interacting with clients, superiors, and co-workers all guarantee it. Stress management plus maintaining balance and perspective are the key to physical and emotional stability. Here are some suggestions for taking care of yourself:

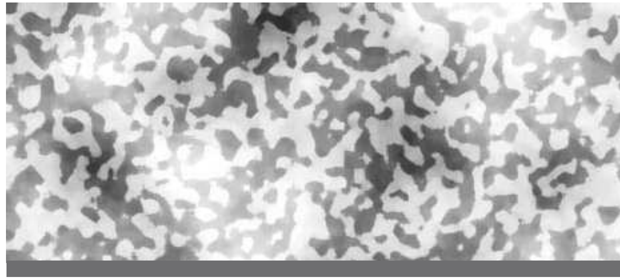
- ***Take your vacation time.*** Everyone needs time to revitalize. Whether you take a trip or relax at home, use your vacation time. No one benefits, including your employer, your client, those close to you, or yourself, if you cannot concentrate due to stress.
- ***Pace yourself.*** The life of a lawyer differs from the life of a law student in terms of pace and



intensity. There is no spring break or summer vacation on the job. While many law students follow intense periods of studying for final exams with extended vacation time, the work schedule of a lawyer rarely allow that. Therefore, it is imperative to maintain a steady and consistent work rate throughout the year. Taking care of the day-to-day business will minimize those inevitable last minute emergencies and allow you to shift focus when the need arises.

- ***Maintain your friendships with "non-lawyer" friends and relationships with your family.*** Almost everyone's family provided emotional support before they became attorneys. Almost everyone has had non-attorney friends both before they went to law school and during their law school years. These people are very important in our lives. Continue to spend time with family and draw support from them. Contrary to what every over-worked attorney will think at one time or another, there exists a world outside the world of law. You can't talk and think about the law and your job every waking moment—or you certainly shouldn't. Maintaining family ties and friendships enables you to keep your perspective.

- ***Spend time with your spouse or significant other.*** If you have one or the other, make sure to spend enough time with them. Because this person cares for you, and because of the special relationship that exists between you, this person may be willing to tolerate your busy schedule. Do not, however, take advantage. Even in the



busiest of times, don't be neglectful. The hard work that brought you to this point should now allow the two of you to enjoy your relationship together.

- ***Treat your body right.*** In order to promote your mental and physical health, you need to treat your body right. This includes exercising, getting enough sleep, and eating right. A regular exercise program helps relieve stress, boosts self-confidence, maintains appearance, and most importantly, makes for a healthier you. Even on those days you can't get a full workout in, a walk provides exercise and helps clear the mind. And, you can't function over a long period of time without sufficient, regular sleep. Finally, you need to watch what you put into your body as well. The long hours of work should not prevent you from eating right. Don't skip meals or rely on fast food.

Largely through your own efforts, you have succeeded. Now, taking care of yourself and maintaining a healthy lifestyle is key to continued success, not to mention prosperity and happiness. Hard work and long productive hours may be necessary, but not at the neglect of your mental and physical wellbeing.

One last time: Take time to rest. Get enough sleep. Enjoy your vacations and days off. Make sure to spend time with those important to you. Eat right. Exercise.

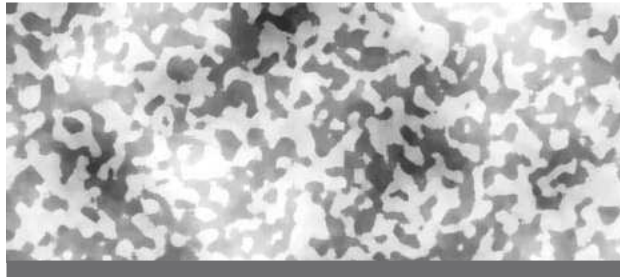
There lies the path to a long rewarding career and—A Life.

Advice from a Malpractrice Prevention Guru

The following two articles were written by Karen Erger and appeared, respectively, in the November 2001 and October 2002 *Illinois Bar Journal*.

Karen is a former vice president and director of loss prevention at the ISBA Mutual Insurance Company in Chicago. She now works with Homes, Murphy & Associates in Cedar Rapids, Iowa.

Prior to her association with the ISBA Mutual, she spent several years in private practice defending professional liability actions as panel counsel for many major insurance carriers and is a former insurance company claims supervisor and insurance agent. She received her B.A. and her law degree from the University of Chicago.



How To Spot the Client from Hell

By Karen Erger

Wake up and smell the brimstone – it's time you learned how to identify the prospective clients you need to turn away.

This article is *not* about "client selection." That phrase conjures up an image of a prosperous lawyer relaxing at his or her desk, reviewing a long list of prospective clients and picking only the pleasant, solvent ones with interesting legal matters. For most lawyers, reality is otherwise.

Instead, this article concerns client *rejection*: the practical necessity of turning away a few prospective "clients from hell" who are likely to wreak havoc on your sanity, your practice, and your claims history.[1] Consider the following scenarios.

Pleased to meet you…won't you guess my name?

Scenario #1. At 4:30 on a Friday afternoon, a desperate prospective client presents himself at Jane Smart's office. He tells Jane that his three previous attorneys overcharged him and then abandoned him. This case means everything to the client, and the time to file suit is running short. Jane drops everything and rushes to help. By any standard, Jane pulls off a miraculous result.

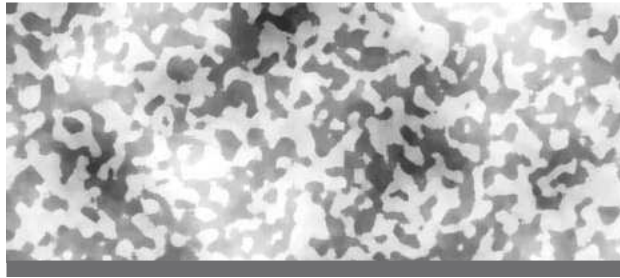
Jane gets stiffed for her fees and sued by the client.

Scenario #2. Joe Average agrees to represent a long-time client and turns in an adequate – but not stellar – performance. The outcome is less than wonderful.

Joe gets a fruit basket, a nice note, and full payment from the client.

Learning to smell the brimstone

As Jane Smart discovered, brilliant legal work alone does not insulate you from claims – and does not ensure payment of your fees, either. There are some clients who will *never* be satisfied with your services. They are predisposed to stiff you and sue you, regardless of the outcome of their legal matters. You might call them clients from hell.



Early identification of these difficult clients is the key. In the scenario above, Jane's client exhibited many warning signs. In this article, I've provided a "field guide" to some common clients from hell to assist you in identifying them. With practice, you can smell the brimstone early on and take appropriate steps to avoid claims.

Obviously, the easiest way to avoid a claim from a client from hell is to decline the representation. For most lawyers, this does not mean turning away many clients – perhaps one or two a year. It's simply not worth the risk to your reputation, your practice, your finances, or your mental health to represent a client who will never be happy with your work. Rejecting the client from hell enables you to focus your practice on the clients – like Joe Average's client in the above scenario – who understand that every case is not a winner and that you can't be a miracle worker all the time.

"By identifying potential clients from hell in advance, you can make good decisions about representing them and take appropriate measures if you decide to do so."

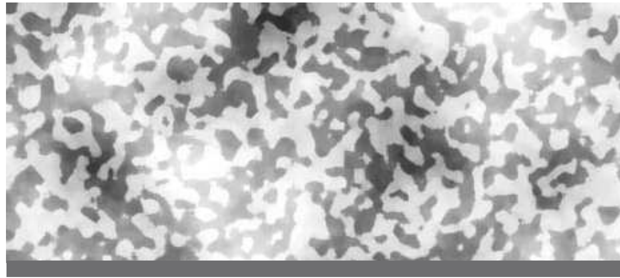
There may be times, however, when you cannot resist the temptation to represent a client from hell. Again, early identification is key, because it will enable you to take appropriate precautionary measures to minimize the likelihood of a claim. In this article, we'll review some strategies for avoiding claims when you deal with difficult clients.

A field guide to clients from hell

The following profiles will help you spot potential clients from hell, but there is no substitute for your gut feeling. Experienced lawyers often develop excellent instincts about prospective clients. Too often, they second-guess those instincts. Claims reports are often prefaced with the statement, "I had a bad feeling about this from the beginning." Trust the "bad feeling." It is usually correct.

1. The Shopper. The Shopper has consulted with several other attorneys about his legal matter before coming to you. Before you decide to represent him, you'll want to find out why those previous relationships didn't work out. Is he difficult to work with? Did he refuse to pay? If a number of lawyers have refused to represent him, is that because his legal position lacks merit?

There are legitimate reasons for a client to change lawyers. Perhaps, in fact, prior counsel has mishandled the



matter. In that case, be aware that by accepting the representation, you may be assuming liability for errors made by prior counsel. Note, too, that you have a duty to mitigate those errors. Your client may be unwilling (or unable) to pay you for your efforts to repair legal work for which he has already paid once.

Be sensitive, too, to the possibility that this once-burned client will be twice shy when dealing with you. If so, you will need to take special care to establish a relationship of trust.

2. The Pennypincher. Clients have a legitimate interest in the cost of your services. The Pennypincher, though, is obsessed. You get the idea that she resents paying anything at all. Perhaps even more worrisome is the Pennypincher's evil twin – the client who seems completely uninterested in the fees and costs associated with her legal matter. You wonder if she takes her financial obligations seriously.

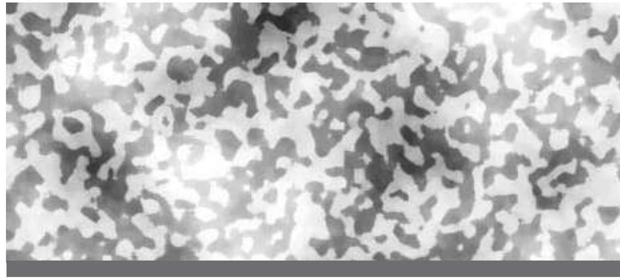
The risk here isn't just that you won't get paid – although that is bad enough. These clients are likely to bring a malpractice claim the moment you press them for fees.

There may be circumstances when you will want to take a matter without regard to the client's ability to pay. This is laudable, and, indeed, is part of an attorney's obligation to the legal profession. See Preamble, Illinois Rules of Professional Conduct. The key, however, is to decide *up front* whether you will perform your legal services on a pro bono basis. If not, and the client is unwilling or unable to pay your fees, decline the representation.

3. Mr. Great Expectations. This client has unreasonable expectations, either about the outcome of the legal matter or the time needed to achieve the result. For example, a plaintiff in a simple slip and fall case has read about huge jury verdicts and expects a million-dollar recovery. Or the defendant in a civil suit expects the case to proceed to trial in a month.

You must decide whether you can educate Mr. Great Expectations about the realistic prospects for his legal matter and the time necessary to achieve the desired outcome. If not, it is unlikely that your work will ever satisfy this client. Expect a malpractice claim – not a fruit basket – from him.

4. Ms. Eleventh Hour. Most commonly seen in your office a few minutes before the end of the business day, this client has a deal that "must" be completed tomorrow. Alternatively, she will often appear immediately before the applicable statute of limitations will run.



Most lawyers are in this profession because they want to help others. Before you ride to the rescue, however, consider that you have a duty to provide your clients with competent representation. Can you do that in the time available to you? If not, don't agree to represent Ms. Eleventh Hour.

If you decide to proceed, proper documentation of the scope of your services is essential. The client who comes to you with the eleventh-hour deal and tells you not to bother to evaluate it – "just paper the deal" – will not remember that instruction when the deal turns sour. An engagement letter that clearly delineates the scope of your services is essential.

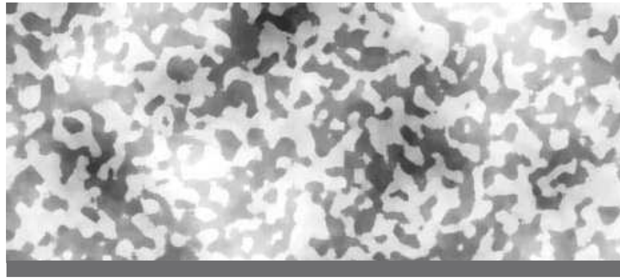
5. The Missionary. This client from hell is on a mission. Sometimes it's a noble mission – the selfless pursuit of a lofty principle. Sometimes it's a deadly mission – the client is out for blood and wants to annihilate the opposition. The problem in either case is that nothing short of total victory will satisfy the Missionary. Unfortunately, this is not always possible. Typically, too, the Missionary seeks victory "at any cost" – at least, until your bill arrives.

6. The Dirtball. If they made a movie about the Dirtball, it would be called *Sleazy Client, Hidden Lawsuit.* Unfortunately, if you represent a morally questionable and financially unstable client in a business venture, you may be tagged as a co-conspirator when your client's misdeeds come to light. If something doesn't "smell right" about your prospective client, his deal, or his finances, you owe it to yourself and your practice to check it out before you accept this representation.

7. Counsel's Li'l Helper. This client – or his lawyer friend or relative – has researched the issues involved in his legal matter prior to consulting you. He's second-guessing you even before you agree to represent him. He might hint that his research should result in a reduced legal fee – after all, he's done some of the work for you, right?

If your client or his lawyer buddy will be backseat driving throughout the representation, the groundwork is laid for an unsatisfactory lawyer-client relationship. Think long and hard about this representation.

8. Member of the "Frequent Lawsuit Club." To hear this client tell it, she's not the client *from* hell, but the client *in* hell – the victim of all sorts of wrongdoing. She has been a plaintiff in various lawsuits for as long as she can remember.



You decide: Is the client truly on a bad-luck streak and in need of your help, or is she perpetually dissatisfied and seeking vengeance for real and imagined wrongs? If the latter, don't be the next defendant on this client from hell's hit list.

9. Dr. Strangeclient. Everyone has quirks, but this client is off the dial. His bizarre, erratic behavior makes it difficult for you to understand or effectively communicate with him. You get the sense that he's living in an X-Files episode, with a bizarre conspiracy theory that explains it all.

You must ask yourself whether you can work with this client. If you can't competently represent him, decline the representation.

10. Your Nearest and Dearest. Friends and family can be clients from hell. Don't assume that Aunt Betty won't sue you for legal malpractice. It happens.

Resist the temptation to take a matter outside your legal expertise for a friend or family member. Ask yourself if you would accept the representation if the client were a stranger. If not, you will need to decline the representation. It can be tough (and humbling) to explain to Aunt Betty that you are a litigator, and you don't know the first thing about drafting her will. But it is professional and proper for you to decline a matter if you can't provide your client with competent representation.

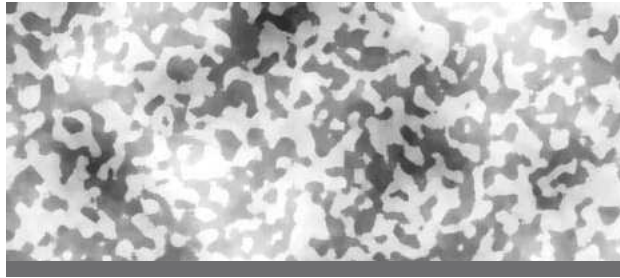
If you do decide to represent your nearest and dearest, be sure to follow all of your normal office procedures. Run a conflicts check, docket important dates, calendar the file for regular review, follow your normal billing procedures. Treat it like a "real matter" – because it is.

Resisting temptation

Suppose you've smelled the brimstone and decided not to represent the client from hell. Be sure to send the would-be client an "I'm Not Your Lawyer" letter. As an additional precaution, you may want to send the letter by certified mail, to verify that it was received. This will come in handy later on if the client resurfaces after the statute of limitations has run.

The road to hell – what to pack for your trip

If you decide to represent a potential client from hell, you will need to take special precautions to minimize the likelihood of a malpractice claim.



Set realistic expectations. Remember why this is a client from hell. He is predisposed to be less than satisfied with your legal services. Make it your mission to set realistic expectations throughout the representation so disappointment is less likely.

In your initial consultation, listen carefully and identify the client's goals. If they are unrealistic, now is the time to say so loudly and clearly. As the matter progresses, continue to identify and communicate weaknesses in your client's case. Throughout the representation, you must deliver the bad news "early and often" if you are to avoid a dissatisfied, unhappy client.

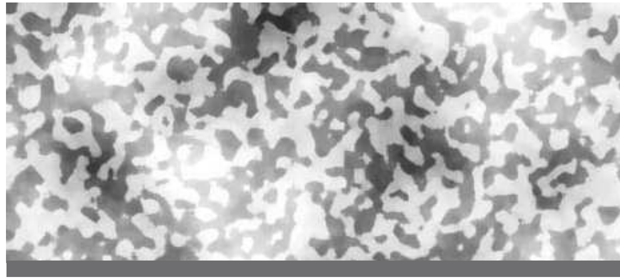
Use a written engagement letter. Your engagement letter is not just your first line of defense in a malpractice action – it is also part of the expectation-setting process. It communicates to your client the scope of your services, your client's responsibilities, and the manner in which you expect to be compensated for your services. Review the letter with the client to be sure that you have resolved any misunderstandings. (For more, see "Engagement Letters Can Reduce Malpractice Claims" at page 99 in the February '96 *Journal*.)

Communicate constantly. Provide the client from hell with written communication on all aspects of the representation. Don't forget to copy the client on all pleadings and correspondence.

You may be tempted to procrastinate on the client from hell's matter. No one likes to deal with difficult clients. Of course, this is one matter that you must keep abreast of. Assign mandatory file review dates and stick to them. Even if nothing is happening on the matter, communicate that fact. Demonstrate that you care about the matter and are paying attention to it.

Document client decisions. It is essential to document the client from hell's informed consent on all major decisions in the representation. This is particularly important if your client decides not to follow your advice. Documenting the client's decisions prevents "he said/she said" problems later, and may also cause your client to rethink her decision to disregard your legal advice.

Continuous risk assessment is key. Throughout the representation, be sensitive to the possibility that you may need to withdraw. Monitor your relationship with the client constantly.



Getting your due from the devil

Fee disputes with clients frequently result in malpractice claims, but this risk is heightened when you're dealing with the client from hell. To minimize fee disputes, observe the Ten Commandments of Billing:

1. Use Written Fee Agreements. Your engagement letter reminds your client that you expect to be paid for your services and spells out your agreement with respect to those fees.

2. Take a Retainer. Consider taking a retainer for your services if you suspect that payment may be a problem.

3. Bill on a Monthly Basis. Regular bills – even if your client is not paying them – remind the client that you are performing work for which you expect to be paid. Sending monthly bills avoids the shock to your client's budget that a larger, less-frequent bill might cause.

4. Send Detailed Billing Statements. Your detailed bill is part of your communications strategy with your client. Let your client know what you are doing to earn your fee.

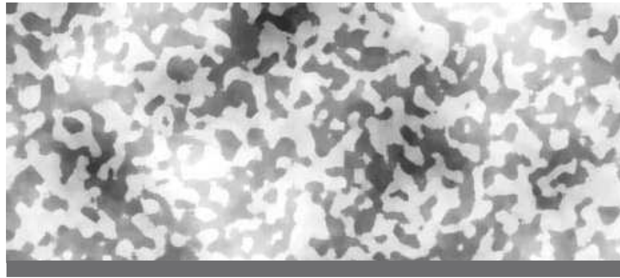
5. Make Daily Time Entries. It is impossible to provide detailed billing statements if you don't record your time as you work. You simply can't remember, in detail, what you did for which client a week ago. Errors and omissions on your bills are the inevitable result.

6. Proofread Bills. If your client spots errors on the bill, she will wonder whether you are making mistakes in other aspects of the representation as well.

7. Review Delinquent Accounts Monthly. Your client's failure to pay is a red flag that must be heeded. It can denote anything from dissatisfaction with your work to a lack of funds. If you discover the problem early, you maximize your chance of resolving it effectively.

8. Take Prompt Action on Accounts in Arrears. Send your client a letter addressing the payment situation, or, if appropriate, schedule a face-to-face meeting with the client to address the payment issue. If your client is unhappy with your work, you need to know that. If your client is having payment problems, you can attempt to address that situation with a payment plan, if appropriate.

9. Do Not Sue for Fees. As pointed out above, fee disputes are a fertile source of claims.



10. If You Ignore #9, Be Careful. If you're thinking about suing for fees despite the risk, proceed with extreme caution. First, evaluate the matter from the vantage point of a plaintiff's lawyer trying to make a malpractice case against you. Did your client achieve a good result? While you can't always (maybe not ever) control the outcome, a good one makes it much harder for your client to make a successful malpractice counterclaim. Is your work subject to attack? This question relates both to the actual work and to your file documentation. No one is perfect all the time. But the less perfect the work reflected by your file, the harder you will need to think about filing suit.

Finally, remember that you can't get blood from a stone. Consider whether your client will be able to pay a judgment if you prevail on your fee claim. If not, forget it.

If you're going to bring that fee suit come hell or high water, don't represent yourself. Hiring outside counsel sends the message that you are serious about collecting your fee. An additional benefit: outside counsel can be dispassionate about the suit when you cannot. If you spent many hours laboring with a difficult client only to get stiffed for fees, it's going to be tough for you to make rational decisions about the fee suit.

Out with the bad, in with the good

Avoiding clients who are unlikely to be satisfied with your legal services will enable you to focus your practice on the clients whom you can effectively and satisfactorily represent. By identifying potential clients from hell in advance, you can make good decisions about accepting representations from these clients and take appropriate risk management measures if you decide to represent them.

The goal is fewer claims – and, maybe, more fruit baskets.

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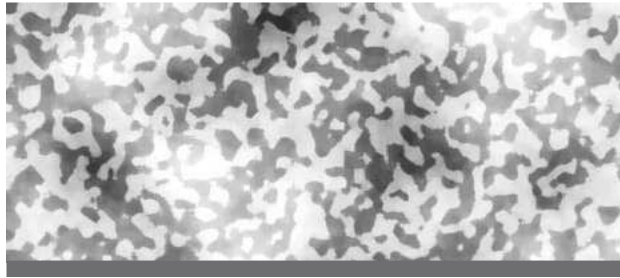
1. DISCLAIMER: (What do you expect from someone who has reviewed as many malpractice claims as yours truly?) This material includes loss prevention techniques designed to reduce the likelihood of being sued for legal malpractice. It is not the intent of these materials to suggest or establish practice standards or standards of care applicable to a lawyer's performance in any given situation. Rather, the sole purpose of these materials is to assist lawyers in avoiding legal malpractice claims, including meritless and frivolous claims. To that end, the intention is to advise lawyers to conduct their practice in a manner that is well above the accepted norm and standards of care established by substantive legal malpractice law. The recommendations contained in these materials are not necessarily appropriate for every lawyer or law firm and do not represent a complete analysis of each topic.



Ten Easy Things New Lawyers Can Do To Mess Up Their Careers

By Karen Erger

A career is a terrible thing to waste – but if you insist, here's how to do it.

October is a fine and dangerous season in America…. a wonderful time to begin anything at all.

– Thomas Merton[1]

As another October begins, and another class of lawyers prepares to take their oaths, it's time for some tips about malpractice avoidance for new lawyers. Here are 10 easy steps toward claims, ARDC beefs, and general career havoc:

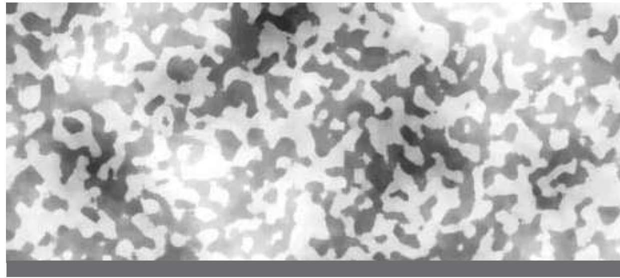
1. Practice with jerks

Choose your companions from the best; Who draws a bucket with the rest Soon topples down the hill. – William Butler Yeats[2]

Think about your first lawyer job as the next phase in your legal education – because it is. Here you will learn not just your area(s) of expertise, but also how to handle clients, how to organize your time, how to get paid for your work. Just as you picked the best law school you could afford, pick the best lawyers or firm you can to mentor you in this critical phase of your development – even if this means less money. The good habits you learn will last a lifetime, while bad habits, once learned, are not easily changed.

Because learning from others is much easier than figuring things out yourself, don't start your solo practice right out of law school. Learn from a seasoned lawyer for a while, even if it pays peanuts.

Watch out for lawyers and firms with a "cowboy" culture, who encourage you to act like you know it all and discourage you from asking questions or admitting that you need help. The only thing you will learn there is how to hide your errors. This brings us to Mistake #2.



2. Lie about and hide mistakes

Mistakes are a fact of life. It is the response to error that counts. – Nikki Giovanni [3]

A cautionary tale: Bright New Lawyer discovers that she has made a ghastly mistake. After many sleepless nights, New Lawyer hatches a plot to cover up the error, or to "fix" it secretly by unethical means. Sooner or later, the truth comes out and – surprise! The mistake could have been fixed if it had come to light right away. Or, the mistake wasn't a mistake *at all* – but the unethical "fix" lands the lawyer in a world of hurt with her firm, its malpractice carrier, and the ARDC.

Mistakes happen. When they do, get help *right away* from a more experienced colleague in your firm. If you have ideas about how to solve the problem, so much the better, but don't procrastinate, hoping the magic solution will come to you. Call upon the expertise of the lawyers around you. Maybe the problem is not a problem after all. Even if it is, there may be a remedy you have not considered.

Suppose the worst: You have, indeed, made a grievous error, for which there is no cure. At least your firm will know that you were on top of the situation *and* resisted the temptation to lie or cover up.

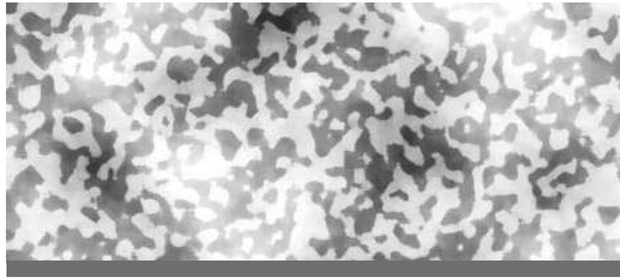
By the way, the manner in which your colleagues handle your mistakes should give *you* a pretty good idea about whether this is a firm in which you want to practice for the rest of your lawyer-life.

3. Be a jack of all trades

Be not a jack of all trades, but a master of one.[4]

By all means, explore the different areas of practice. Your ultimate goal, though, should be to find one or two on which you will focus.

It's getting harder all the time to be a "general practitioner" and keep up with changes in many different fields of law. Malpractice carriers see plenty of claims involving lawyers who dabble in unfamiliar practice areas. Many lawyers think that anyone can do a simple divorce/closing/whatever. Even if this were true, dabblers lack the



experience to know if a matter is truly "simple" or requires greater expertise.

Concentrating your practice will help you market your services. Your special knowledge makes you stand out from the crowd, whether you are bucking for partner at a firm or trying to attract clients.

Finally, it's just more fun to practice if you don't have to invent the wheel every day. You can concentrate on learning the finer points of your special practice areas and improving all the time.

4. Fail to set appropriate expectations

Ah! Let not hope prevail, lest disappointment follow.[5]

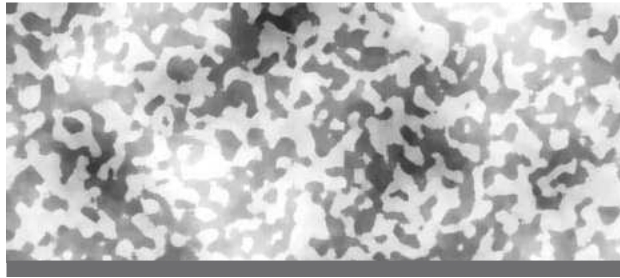
You can do a technically brilliant job and still end up with an unhappy client – claims people see it all the time.

Even the finest legal work in the world can result in a malpractice claim if you fail to meet the *client's* goals. When you first meet your client, let him do the talking, so you can learn what his expectations are. Beware the client who wants miracles from you, blood from the other party, or some combination of the two. If you can't adjust the client's expectations to something more realistic, you may have to turn the client away – or recommend that the firm do so.

Don't set yourself up for failure with off-the-cuff predictions about that outcome of the matter, or the time and cost necessary to achieve it. Once you say that the matter will be dismissed on summary judgment, take six months, or cost the client $5,000, the client will be disappointed with anything less. If you must give estimates, do so thoughtfully and conservatively. Don't come on like Super Lawyer – chances are that you can't leap that tall building in a single bound.

Do explain the legal process to your client, including all of the steps involved: "We'll start by filing a complaint, and then the other side will have 28 days to respond…" Encourage your client to ask questions.

Throughout the representation, set appropriate expectations for your client. When bad things happen, give the



client the news "early and often." Doing so is required by the Rules of Professional Conduct – see, e.g., Rule 1.4 – but it also tells your client that you're honest, and makes it less likely that the client will be shocked by a sub-optimal outcome.

5. Allow a communication breakdown

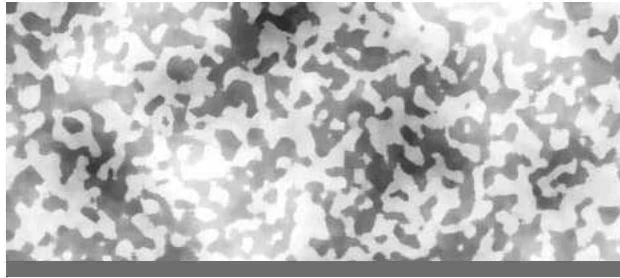
What we've got here is a failure to communicate.[6]

Some lawyers think of letters confirming client instructions as weaselly, time-wasting CYA letters. In fact, they *are* CYA letters – they Confirm Your Assignment. They enable your client to make informed decisions about the matter, and they ensure that you are implementing the client's wishes.[7] And, yes, they are also essential to defending malpractice claims. According to a recent study, more than 15 percent of all malpractice claims arise from a lawyer's alleged failure to obtain consent or to follow instructions.

Accordingly, make it your habit to confirm major client decisions in writing. Suppose you and your client agree that you will pursue her workers' compensation claim, but forego a potential products liability claim because it seems unlikely to succeed. After the statute of limitations runs, however, your client sues you for malpractice, alleging that you failed to file the products claim. Had you written a confirming letter, you not only would have been able to mount a successful defense, but you probably would have avoided the claim in the first place.

If a client's decision is against her best interests, or against your advice, be *extra* sure to document it with a letter. Say your divorce client rejects your advice to obtain a valuation of his wife's business. "That costs too much, and besides, I trust her." A year after the divorce, when he sees her driving around town in a Land Rover while he is living on mac 'n' cheese, it might be tough for him to remember that instruction. Moreover, your letter might cause him to reconsider his original decision. For some people, it's not real if it's not in black and white.

And of course, be sure to document all settlement offers and demands, and the client's response. In the "heat of battle" at a settlement conference, you can't send a letter, but you can write the offer or demand on a piece of paper and



have your client sign it. At least, write the client a letter when you get back to the office.

6. Forget to share the love

Be good…and let who will be clever. – *Charles Kingsley*[8]

The days of blind grading are over. It's not enough just to do good legal work – you must let your clients know you care about them and their matters. In fact, studies show that clients want a caring lawyer – even more than they want a brilliant one.

Don't let your client wonder if you are neglecting her matter. Copy her on every piece of correspondence and all pleadings. Consider getting a stamp that says: "For your information only – no response required." That way, you won't even need to draft a cover letter for "FYI" copies. Calendar regular status reports to your client, even if – *especially* if – nothing is happening in the matter.

It should go without saying, but I'll say it anyway: Return client calls promptly. Many claims and disciplinary complaints can be traced back to a lawyer's failure to return calls. If you can't call the client within 24 hours (at most), have your secretary return the call to advise when you will be available and to find out if immediate action is necessary.

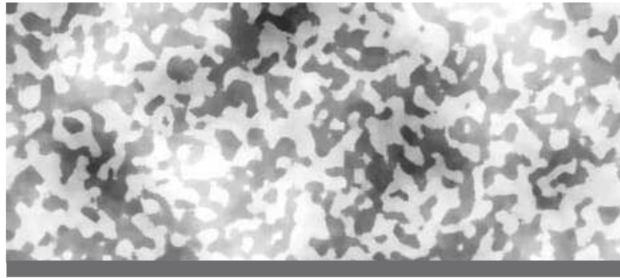
Note: If you have yet to meet a single client, re-read the above section, substituting the word "partner" for the word "client." Their expectations are very similar.

7. Fail to "show your work"

We can lick gravity, but sometimes the paperwork is overwhelming.

– *Wernher von Braun*[9]

As math students, many of us worshipped the God of Partial Credit. Even if you got the wrong answer, you could get partial credit by establishing that you followed the right steps – by "showing your work." This is a useful principle for lawyers, too. Some matters will not turn out well for your clients, but if you can establish that you followed the steps that a competent lawyer would take, it will help you avoid or defeat a malpractice claim. Make sure your file "shows your work."



If you performed legal research, keep a list of citations and printouts of online searches. At a minimum, this will keep you from retracing your steps over and over again. If you're drafting contracts, retain drafts with substantive changes in the file. Note the reasons for the changes on the drafts as you go.

Make it a habit to document your telephone calls. Use your computer, use your own "telephone conference form," but use something. You'll have a record of all client telephone calls if you pick up a pen (and use it) every time you use the phone. Heck, write it on the dinky little phone slip if you must. But write it somewhere.

8. Ignore the bottom line

Time goes, you say? Ah, no! Alas, Time stays, we go.
– Henry Austin Dobson[10]

Timesheets are hell, but nothing compared to the hell of trying to re-create an entire month's work on the last day of the month with a grumpy office administrator breathing down your neck. Do them every day, as you go. Here's added incentive: Studies show that lawyers who do their time every day earn 15 percent more than those who don't.

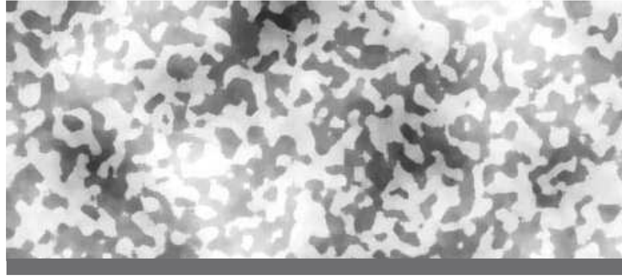
Write the description of your services just as carefully as you would write a letter to a client. For some clients, the bill is the only status report they will ever read.

9. Ignore the frontline

Constant attention by a good nurse may be just as important as a major operation by a surgeon.
– Dag Hammarskjold[11]

When you are out of the office, with other clients, or just plain busy, your secretary is your ambassador to your clients – not to mention other lawyers at your firm. He or she can also be a valuable source of information about "how things get done" – whether it's how to get the *good* pens or how to get your reply brief filed at the last minute. Be respectful and learn all you can.

Many of the best lawyers I know have had the same secretary for a decade or more – and they are quick to acknowledge the impact that these front-line people have on their practices.



10. Practice in a vacuum

One of the signs of passing youth is the birth of a sense of fellowship with other human beings as we take our place among them.

– Virginia Woolf[12]

Sometimes the *last* thing you want to do with the three hours of free time you've carved out of a harried week is chum around with other lawyers. Totally understandable – but try to make time to attend bar association events.

Are you practicing with jerks? Go and meet some lawyers whose habits you'd like to emulate. Are you finding your way in a new practice area? Go to a continuing education event – you'll learn from the course *and* the lawyers you meet there. Want to find some colleagues you can call next time you have a question? You'll meet them at bar events – and don't be surprised if they start calling *you* with questions and referrals.

Law can be surprisingly isolating and lonely. Taking your place in a community of dedicated lawyers will help your practice and your psyche.

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1. Recalled on his death, 10 Dec 68. Simpson's Contemporary Quotations, compiled by James B. Simpson (1988).
2. William Butler Yeats, "To a Young Beauty."
3. Of Liberation, st. 16, *Black Feeling/Black Talk/Black Judgment* (1970).
4. Chinese proverb.
5. Wrother, *The Universal Songster, Vol ii, p 86*.
6. Donn Pearce and Stuart Rosenberg, from the movie *Cool Hand Luke* (1967). A prison correctional officer makes this statement just after administering a vicious kick to inmate Luke.
7. See Illinois Rules of Professional Conduct, 1.2(a), 1.4(b).
8. *A Farewell*.
9. Chicago *Sun Times* 10 Jul 58
10. "The Paradox of Time," st. 1, Proverbs in Porcelain (1877).
11. News summaries, 18 Mar 56. From Simpson's Contemporary Quotations, compiled by James B. Simpson (1988).
12. "Hours in a Library," Times Literary Supplement (London, November 30, 1916).

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The Illinois State Bar Association (ISBA) was founded in 1877, and is a voluntary membership organization that serves approximately 30,000 members throughout the state. Over the years, ISBA has been a primary force in supporting Illinois attorneys and developing Illinois law. ISBA is dedicated to promoting the interests of Illinois lawyers and improving the quality of members' professional lives. Members enjoy an array of practice resources, networking opportunities with colleagues, and many valuable member benefits, some of which are described below.

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Springfield, IL 62701
217-525-1760
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www.iardc.org

Illinois General Assembly & Illinois Compiled Statutes
http://www.legis.state.il.us/

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Illinois Supreme Court
http://www.state.il.us/court/

Secretary of State
http://www.sos.state.il.us/

Seventh Circuit Court of Appeals
http://www.ca7.uscourts.gov/

State of Illinois
http://www.illinois.gov/

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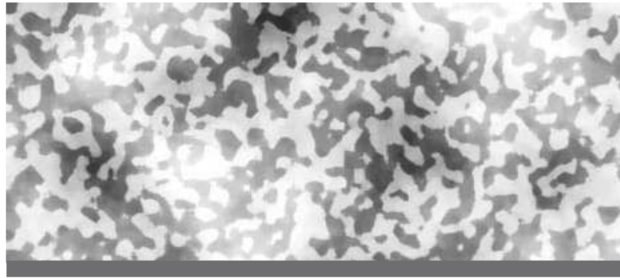

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The Illinois State Bar Association wishes you much success as you embark on your legal career. Please remember that we are here to assist you by providing support through ethics assistance, legislative representation, case updates, and numerous member benefits. If you have questions regarding your ISBA membership, please do not hesitate to contact us at 800-252-8908.

Many thanks to the volunteer member-attorneys who helped compile this pamphlet: Patrick J. Morley, Donald P. Shriver, Selina S. Thomas and Melinda J. Bentley.

And, special thanks to the ISBA Mutual Insurance Company for funding this booklet.

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ILLINOIS STATE
BAR ASSOCIATION

Your Partner in the Profession

Recognizing

And

Avoiding

The Unauthorized Practice of Law

Revised July 2003

DISCLAIMER

This Handbook has been prepared by the Knoxville Bar Association Unauthorized Practice of Law Committee as a service to lawyers who employ non-lawyer personnel to assist them in their practice. In preparing this Handbook it was our hope that we would be able to aid both lawyers and non-lawyers in recognizing situations that would constitute the unauthorized practice of law. We recognize that in many cases there are no hard and fast answers as to what constitutes the unauthorized practice of law, but it is our hope that this Handbook highlights areas that both lawyers and their support staff should recognize as areas or duties reserved for licensed attorneys. Because this book can not cover every possible situation where a non-lawyer may question whether or not they are faced with a task that may constitute the unauthorized practice of law, we urge you that, when in doubt, a non-lawyer staff should ask a lawyer for guidance and the lawyer, if unsure of the proper response, should contact the Tennessee Board of Professional Responsibility for guidance.

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Abbreviations Used in the Text

"BPR": The Board of Professional Responsibility, which enforces the obligations lawyers have under the "RPC."

"RPC": The Rules of Professional Conduct, which are contained in Tennessee Supreme Court Rule 8. The RPC establishes the ethical duties with which lawyers must comply. Failure to abide by the RPC can result in sanctions against the lawyer.

"UPL": The unauthorized practice of law.

I. RULES GOVERNING THE UNAUTHORIZED PRACTICE OF LAW

Tennessee's UPL statute says,

> No person shall engage in the "practice of law" or do "law business"…unless such person has been duly licensed therefore.[1]

The first step in understanding the scope of this law is to define the "practice of law" and "law business."

"Law business" means *the advising or counseling for a valuable consideration (meaning payment in money or something else) of any person, firm, association, or corporation as to any secular law (meaning rules other than those governing faith-based groups),*

or *the drawing or procuring of or assisting in the drawing for a valuable consideration of any paper, document or instrument affecting or relating to secular rights,*

or *the doing of any act for a valuable consideration in a representative capacity,*

or *obtaining or tending to secure for any person, firm, association or corporation any property or property rights whatsoever,*

or *the soliciting of clients directly or indirectly to provide such services.*[2]

In other words the "law business" involves:

- Receiving payment for legal advice,
- Receiving payment for preparing legal documents (directly or indirectly), or
- Receiving payment for representing someone in obtaining something to which that person is entitled under the law.

"Practice of law" means *the appearance as an advocate in a representative capacity,*

or *the drawing of papers, pleadings or documents,*

or *the performance of any act in such capacity in connection with proceedings, pending or prospective, before any court commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies, or the soliciting of clients directly or indirectly to provide such services.*[3]

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[1] Tenn. Code Ann. §23-3-103 (a)(Supp.2001)
[2] Id §23-3-101(1) (emphasis and formatting added)
[3] Id §23-3-101(2) (emphasis and formatting added)

The “practice of law,” therefore, involves

- Representing another person before a court or other tribunal or
- Preparing documents in a matter pending in the tribunal.

These definitions bring us slightly closer to understanding what amounts to a UPL activity, but they do not provide a list of what type of work must be performed by lawyers and what work may be performed by non-lawyers. Limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. The state sets a variety of qualifications for lawyers. Some of the rules are designed to prevent a person from obtaining a law license if he/she does not have the skill necessary to represent clients competently.

Applicants for a law license must,

- Meet certain educational requirements before being licensed and
- Pass the bar exam to make sure that their education was adequate.

After admission to the bar, the state wants to ensure that lawyers remain competent,

- They must continue their education with seminars every year to maintain a license; and
- If they deviate from the ethical standards they are sworn to uphold, they are subject to sanctions through the BPR. These sanctions range from a private reprimand to loss of the license to practice law.

Holding a law license is a "privilege," the courts tell us, not a "right." In other words, if you want to be a lawyer, you accept your license with the understanding that the state has the right to take that license away. This allows the state to oversee how skillful a lawyer is. Still, that does not explain why a non-lawyer is prohibited from doing things that the non-lawyer is as capable of doing as a lawyer.

> **"Instead of simply prohibiting non-lawyers from providing legal services, why doesn't the state just have education and testing for non-lawyers who want to provide a specific legal service?"**

In general, when the state considers regulation of any business or profession, the people who would be subject to that regulation often object.

Unfortunately, there is no such list, which may make one wonder,

> **“If it is so hard to identify what UPL is, why is it against the law?”**

The comments to Rule 5.5 of the Rules of Professional Conduct promulgated by the Tennessee Supreme Court address the question.

> **[L]imiting the practice of law to members of the bar protects the public against**

rendition of legal by unqualified persons.[4]

These qualifications form the primary reason that only lawyers are allowed to offer legal services.

II. UPL AND LAWYERS

[4] TSCR 8, Rule 5.5, cmt.1

PENALTIES

There are three possible penalties for practicing law without a license:

1. A person engaged in UPL is guilty of a crime;
2. An unlicensed person performing legal services could be liable for damages to the client if the legal work is not done properly; and
3. A lawyer could be disciplined for helping someone in UPL activity.

The RPC says, "A lawyer shall not (a) practice law in a jurisdiction where doing so violates the regulations of the legal profession in that jurisdiction; or (b) assist a person in the performance of activity that constitutes the unauthorized practice of law."[5]

Comment 2 to this rule provides:

> Paragraph (b) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See RPC 5.3. Likewise, it does not prohibit lawyers from providing professional advice and instruction to non-lawyers whose employment requires knowledge of the law, such as claims adjusters, employees of financial or commercial institutions, social workers, accountants, and persons employed in government agencies. In addition, a lawyer may counsel non-lawyers who wish to proceed *pro se*.[6]

The lawyer cannot incur civil or criminal liability for practicing law without a license because the lawyer, by definition, is licensed.[7] But lawyers who hold active licenses do run risks when UPL activities occur in their offices.

A lawyer may be liable to clients who have been damaged by the negligence of the lawyer's employee, just as any employer may be liable for an employee's conduct.[8]

III. EXERCISES

EXERCISE #1

[5] TSCR 8,Rule 5.5

[6] TSCR 8, Rule 5.5, cmt. 2

[7] We are not discussing here lawyers whose licenses have been suspended or revoked or lawyers licensed only in another state.

[8] For the employer to be liable, the employee must be acting within the "scope of employment." See, e.g., Tenn. Farmers Mut. Ins. Co. v. American Mut. Liab. Ins. Co., 840 S.W.2d 933 (Tenn. Ct. App. 1992). In the context of attorney liability, see, e.g., Collins v. Binkley, 750 S.W. 2d 737 (Tenn. 1988); Stinson v. Brand, 738 S.W. 2d 186 (Tenn. 1987).

Part A

Mr. and Mrs. Sellers, agreed to sell their property to Mr. AA Broker, a real estate agent, for $16,000. The sales contract, however, named Mr. BB Broker (AA's brother) as the buyer. The buyer agreed to pay the Sellers $1,000 in cash at closing, with the remaining $15,000 payable in six months. The contract also said that Mr. Broker would give the Sellers a note for the $15,000, with the property serving as collateral.

Typically, this transaction would involve the following documents:

- Deed from the Sellers to BB Broker,
- Promissory Note from BB Broker to the Sellers,
- Deed of Trust from BB Broker (and his spouse, if any) to the Seller's trustee.

AA Broker was a long time client of Law Firm, and he asked Law Firm's Secretary to arrange for Law Firm to:

- Check the title to the property,
- Prepare a deed with the name of the purchaser left blank,
- Prepare a note from Broker Brothers, Inc., to Mr. and Mrs. Sellers, and
- Prepare a deed of trust from Broker Brothers, Inc., to the Sellers' trustee.

Q: Why would Broker have the deed leave the purchaser's name blank?

A: Testimony at the trial was unclear, but it was probably because Broker planned to sell the property to a third party as soon as he closed the deal with the Sellers. If Broker recorded a deed from the Sellers to himself, he would have to pay a transfer tax. Then, when he re-sold the property, transfer tax would be due again.

Secretary asked Lawyer # 1 to check the property's title, and he prepared a title report.

Secretary then prepared the documents AA Broker had requested. Broker brought the Sellers to Law Firm's office for the closing. Mr. and Mrs. Sellers signed the deed to "____________,"and AA Broker signed the note and the deed of trust, which named Lawyer # 1 as the trustee. Secretary notarized the deed and deed of trust. She gave the deed to Mr. Broker and gave the note and deed of trust to Mr. and Mrs. Sellers.

Mr. and Mrs. Sellers took the note and deed of trust home and put them in a safe place. Later, the Brokers sold the property for $36,500 to Mr. and Mrs. Buyers, filling in the Buyer's name on the deed from Mr. and Mrs. Sellers.

Eventually, Mr. Broker paid Mr. and Mrs. Sellers only $4,163.11 of the $15,000 due under the promissory note.

Q 1: What recourse do Mr. and Mrs. Sellers have to collect the rest of the money owed to them?

Q 2: Law Firm's instructions came from Mr. Broker. Did Law Firm owe any duty to Mr. and Mrs. Sellers?

Q 3: Secretary prepared the documents. Did she owe any duty to Mr. and Mrs. Sellers?

Q 4: Law Firm sent Mr. Broker a bill for preparing the deed and for the title exam, but Mr. Broker never paid the bill. Does that affect whether Law Firm owed a duty to Mr. and Mrs. Sellers?

Q 5: Typically, Law Firm would have charged Mr. and Mrs. Sellers a fee for preparing the note and deed of trust. In this case, Law Firm never got around to billing them. Does that affect whether Law Firm owed a duty to Mr. and Mrs. Sellers?

Q 6: The contract between Mr. and Mrs. Sellers and BB Broker identified BB Broker as the buyer. Why would AA Broker tell Secretary to make the note from Broker Brothers, Inc.?

> <u>The Importance of Recording the Deed of Trust:</u> The purpose of giving Mr. and Mrs. Sellers a deed of trust was to give Mr. and Mrs. Sellers the right to foreclose if Broker did not pay the note. (By foreclosing, Mr. and Mrs. Sellers would sell the property to raise the money to pay the balance due under the note). Even if Broker sold the property to someone else before Broker paid off the note. The deed of trust would still bind the property, which means that the new owners would have to pay the debt to prevent the Sellers from foreclosing. The only way the new owners could avoid this result is if they did not know about the deed of trust. However, regardless of whether the new owners had actual knowledge of the debt, the law says that the new owners are "on notice" automatically if the deed of trust has been recorded at the courthouse. If the deed of trust was not recorded and the new owners did not have actual knowledge of the debt, Mr. and Mrs. Sellers could not foreclose against the new owners.

Q 7: When Mr. and Mrs. Buyers decided to buy the property, they had the title examined. Suppose that Mr. and Mrs. Sellers had recorded the deed of trust from Broker Brothers, Inc. How would Mr. and Mrs. Buyers have found the deed of trust in their chain of title?

<u>**HINT:**</u> To find out there are any deeds of trust against the property, the title examiner would check the index under the name of the person who owned the property according to the

courthouse records. Who owned the property according to these records at the time Mr. and Mrs. Buyers would look at those records? Would the deed of trust have appeared under that owner's name?

The story in Exercise #1 comes from a 1987 Tennessee Supreme Court decision.[9] The sellers sued the law firm that handled the closing, arguing that they had lost the opportunity to collect their debt because the documents were not prepared properly.

There were two major problems with the documents:

1. In their contract, the sellers agreed to finance the sale to an individual, but the promissory note was from a corporation. Since many corporations have no assets, the sellers probably would not have accepted a note from the corporation, unless the individual signed as guarantor to pay the note if the corporation did not.

4. The deed of trust was from the corporation, but the deed from the sellers was to "________." If the broker had filled in the name of the corporation on the deed, then the corporation would have been the owner of the property and entitled to encumber the property with a deed of trust. If the corporation's name was not filled in on the deed, the deed of trust from the corporation was worthless because the corporation had no interest in the property.

The sellers decided that the law firm that prepared the documents should be liable for the loss they sustained when the broker never paid the debt, so they sued both of the lawyers in the firm. One of the lawyers had written the title report to the broker. The other lawyer had nothing to do with any part of the transaction. Neither lawyer had seen the documents that the secretary prepared.[10]

Since the lawyers had never billed the sellers for anything, and all of their instructions had come from the broker, they persuaded the trial court to dismiss the case, arguing that they represented the broker, not the sellers.

The sellers appealed, and the Tennessee Supreme Court sent the case back to the trial court, ordering the court to hold a trial. The Supreme Court did not rule on whether the lawyers

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[9] Stinson v. Brand, 738 S.W.2d 186, 191 (Tenn. 1987).

[10] The lawyers were partners. The law says that all partners are liable for the acts of one partner or the acts of the partnership's employees.

were liable to the sellers. That would have to be decided at a trial. There is no appellate court record of what eventually happened in the case, but in ordering a trial, the Supreme Court did observe.

> We recognize that [the lawyers] insist that they represented only [the broker] in this case and that they followed his instructions to the letter. At best, however, the transaction was loosely and inexpertly handled, with a legal secretary being permitted to conduct an apparently routine matter without submitting the legal documents to her employers for approval.[11]

EXERCISE #1

Part B

What would lawyers have done to prevent this problem?

[11] Stinson v. Brand, 738 S.W.2d 186,191 (Tenn. 1987).

ETHICAL IMPLICATIONS

It is almost impossible for a lawyer to practice law effectively without staff support. As the RPC acknowledges,

> Lawyers generally employ non-lawyers in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such employees act for the lawyer in rendition of the lawyer's professional services. A lawyer should give such employees appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to the representation of the client, and should be responsible for their work product. 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.[12]

However, if the lawyer delegates a task that constitutes UPL, the lawyer will be in violation of the RPC:

> "A lawyer shall not ...assist a person in the performance of an activity that constitutes the unauthorized practice of law.[13]

Of course, we have already seen how difficult it can be to identify what UPL activities are. Some guidance is available to lawyers in the context of assigning work to paralegals:

- "Model Guidelines for the Utilization of Legal Assistance Services" adopted by the ABA Standing Committee on Legal Assistants.[14]
- The annotated "Model Standards and Guidelines for Utilization of Legal Assistants" enacted by the National Association of Legal Assistants, Inc.[15]

However, there is little guidance available regarding the scope of supervision that is required for other staff members. In addition, regardless of whether the lawyer adheres to recommended policies, the lawyer is ultimately responsible for the negligence of an employee.

The breadth of this rule can be seen in this 1988 Tennessee Supreme Court decision: Seller hired Lawyer to prepare a deed to Buyer. One of Lawyer's employees prepared the deed, which Lawyer reviewed. However, Lawyer did not notice that the section on the deed for the notary's acknowledgment did not contain the words "with whom I am personally acquainted."

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[12] TSCR, Rule 5.3 cmt.
[13] TSCR,Rule 5.5
[14] The Model Guidelines are available at the ABA's website: abanet.org/legalassts.
[15] The Model Standards are available at the NALA website: nala.org.

Without these words, the law does not recognize a deed as being recorded, even though a copy of the deed is physically present in the courthouse records. When Seller filed bankruptcy, the bankruptcy trustee sued Buyer to recover the house, alleging that the transfer to Buyer was void because the deed was not recorded. The bankruptcy judge agreed that the deed was not recorded and that the bankruptcy trustee was the true owner of the property, but the court also said that the trustee held the property in trust for Buyers. The court ordered the trustee to deed the property to Buyers-as soon as Buyers paid the court costs and attorney fees for the trustee's lawsuit. Buyers then sued Lawyer to recover these expenses, and the court ruled that Lawyer was liable.

Moral: A lawyer must review *everything* that a staff member prepares. If the notary public does not personally know the person signing the document, the acknowledgment may recite that the signer's identity was proved to the notary by "satisfactory evidence."

POTENTIAL UPL EXAMPLES – CRIMINAL PRACTICE

Example 1

Client calls office of his/her civil attorney and speaks with secretary/paralegal. Client tells staff person that his/her college student child received a speeding ticket. Client is worried about the effect of the ticket on his/her insurance premium. Client asks staff person if he/she could call the District Attorney's office to find out if there is any way to keep the ticket from being reported to the State.

Example 2

Client calls criminal defense attorney after criminal charge has been dismissed to inquire about having the record expunged. Client states that he/she has a job interview next week and expects that a background check will be performed by the potential employer. Client is worried about the potential discovery of the recent arrest. Attorney offers to file Order of Expungement for client. Since attorney is preparing to leave town for a week to attend a CLE conference, attorney asks secretary to obtain a blank Expungement Order form from the Clerk's office, fill in the blanks, sign the attorney's name, and file the Order with the Court.

Example 3

Client is on probation for criminal charge. Client's probation officer gave him/her a list of probation rules, but client lost his/her copy. Client cannot remember if he/she is permitted to travel out of the state while he/she is on probation. Client calls criminal defense attorney's office and asks secretary/paralegal if he/she thinks it is okay for client to travel to Florida for a family reunion next week.

Example 4

Citizen owns a rental house. Citizen's tenant paid this month's rent with a check that was returned by the bank due to insufficient funds. Citizen is not sure whether his/her remedy is in civil or criminal court. Citizen calls District Attorney's office and asks the receptionist (a non-lawyer support staff) what he/she should do to try to collect the worthless check.

Example 5

Secretary for criminal defense attorney calls secretary for Assistant District Attorney. Defense secretary tells DA secretary that defendant who is scheduled to be in court for trial tomorrow has called and says that he/she cannot appear in court. When defense secretary called the Clerk's office, the Clerk said that it would reset the case if "someone from the DA's office" will come to the Clerk's office and say that the continuance is okay. Defense secretary asks DA secretary to go to the Clerk's office so the case can be reset.

Example 6

Victim of crime comes to court for preliminary hearing in assault case. Victim's friends and family have told him/her that he/she needs to sue the defendant to recover medical expenses related to the assault. It has been 10 months since the assault occurred. While victim is speaking to District Attorney's victim-witness coordinator (non-attorney support staff) outside the courtroom, victim asks victim-witness coordinator what he/she should do to collect medical expenses from the defendant.

Example 7

Client calls for Divorce lawyer who is unavailable. Client informs Divorce lawyer's secretary that his wife wrongfully had him arrested for assault two days ago and that while charges are still pending they have made up and she wants him to come back to the house. Client wants to return to his home so that he can work on his marriage. Secretary responds that Client should have the wife sign a statement agreeing to his return to the home before Client does so.

IV. WHAT ARE UPL ACTIVITIES FOR LAW FIRM STAFF?

While there are no precise rules, there is a consensus that non-lawyers who work for lawyers are not allowed to engage in four common practices. The first two are easy to understand, even if they are not always easy to follow:

5. **The non-lawyer may not create an attorney-client relationship.** This means that the non-lawyer is not allowed to commit the lawyer to representing the client. However, if the non-lawyer leads the client to believe that the attorney-client relationship has been created, the lawyer (and the non-lawyer) will owe duties to that client just as if the lawyer had intended to create an attorney-client relationship.

6. **Enter into a fee agreement with the client.** Again, however, the lawyer may be bound by an agreement the non-lawyer makes with the client.

The next two prohibited practices are the most difficult to define:

7. A non-lawyer may not represent a client in a court or other tribunal except when the tribunal authorizes appearance by a non-lawyer.

4. **A non-lawyer may not give legal advice or opinions.**

EXERCISE: # 2: Representation in Court

There are tribunals that explicitly permit a non-lawyer to appear on behalf of a client, such as the Social Security Administration and the State Board of Equalization. But the definition of "appearing in court" can be ambiguous when the court's rules are not explicit. For example, may a non-lawyer appear at a docket call? According to the BPR,

> The [unauthorized practice of law statutes[16]] would appear to prohibit non-lawyers from appearing as an advocate in a representative capacity in any court proceeding. The Board has also previously opined that any appearance before a tribunal in a representative capacity constitutes the practice of law.[17] When an individual appears at docket calls and answers that docket call on behalf of another, he/she is acting in a representative capacity. Any attorney who assists a non-lawyer to appear for him or his clients would then be assisting in the unauthorized practice of law and violating the disciplinary rules.[18]

Q 1: Based on this rule, could a non-lawyer employee of a creditor attend a Section 351 Meeting of Creditors in bankruptcy court to question the debtor on behalf of the creditor?

A 1: According to a 1993 case, there is no problem with a non-lawyer asking a debtor questions at a Section 351 meeting.[19]

Q 2: What is the difference between appearing at a docket call and appearing at a Section 351 meeting?

Q 3: Would the result have been different if the person questioning the debtor had been a non-lawyer employee of the creditor's *lawyer* instead of the *creditor?*

Q4: What would the result be if a non-lawyer employee of a creditor filled out forms (such as a civil warrant in General Sessions Court) to collect a debt for the creditor?

A4: In a 1939 case,[20] the Tennessee Supreme Court held that UPL involved "appearance as an advocate" for another person. While filling out the form arguably amounted to making an "appearance" on behalf of the creditor, it did not amount to being an "advocate." The employee, therefore, had not engaged in UPL.

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[16] Tenn. Code Ann. § 23-3-101(2)(defining the "practice of law); id. § 23-3-103(a) (limiting law practice to licensed attorneys).
[17] Opinion 83-F-44(a)
[18] Formal Ethics Opinion 85-F-94 (May 6, 1985)
[19] In Re Clemmons, 151 B.R.860 (Bankr. M.D. Tenn. 1993)
[20] Haverty Furniture Co. v. Foust, 124 S.W.2d 694 (Tenn.1939)

EXERCISE: # 3A MISCELLANEOUS SITUATIONS

How should a non-lawyer handle the following situations?

(1) Frank gets a speeding ticket. He asks his wife (who is a chiropractor) what he should do. Is Frank's wife allowed to give him advice? ___________________________________

(2) Frank gets a speeding ticket. He asks his neighbor (who is a paralegal in a law firm) what he should do. Is Frank's neighbor allowed to give him advice? __________________

Why are the situations in (1) and (2) different? ______________________________

(3) Ladawna's landlord wants to evict her for making lewd comments to other tenants. Farley is the paralegal who has been working on Ladawna's case and every time he has seen her, she has been wearing a halter-top and a towel wrapped around her waist. Can Farley advise Ladawna what to wear to court?_____________________________________

(4) Ladawna wants to call her boyfriend as a witness at the trial to testify that she only makes lewd remarks when she is on crack. Can Farley advise Ladawna not to bring her boyfriend to court? ____

(5) Ladawna asks Farley what a "detainer warrant" is. May Farley answer her question?
____

(6) Farley does not believe that Ladawna can prevent the eviction; but he does believe that if Ladawna will agree to leave (instead of going to trial), the landlord will give her more time to move. May Farley tell Ladawna that?_________________________________

(7) The lawyer who will be handling Ladawna's case does not believe that Ladawna can prevent eviction; but he does believe that if Ladawna will pay the landlord $50, the landlord will give her more time to move. The lawyer asks Farley to tell Ladawna that. May Farley convey that message to Ladawna?____________________________________

(8) Ladawna wants to sue her grandmother for damages to Ladawna's dirt bike, which her grandmother drove into a river. May Farley tell Ladawna how to file a lawsuit in General Sessions Court? ____

(9) Ladawna picked up a General Sessions Court civil warrant form from the court clerk's office. She asks Farley to help her fill it out because she cannot write. May Farley fill the form out for her?____

(10) Ladawna wants to sue her cousin for setting her winning lottery ticket on fire. The amount in controversy exceeds the General Sessions Court jurisdictional limits. May Farley tell Ladawna how to file a lawsuit in Circuit Court? _________________________

(11) May Farley prepare the complaint to file in Circuit Court and give it to Ladawna to file?____

EXERCISE: #3 B

How should a non-lawyer who works in a lawyer's office answer these questions from *clients?*

(1) Client in a divorce case; "He wants to have the kids every other weekend. Should I agree?"

(2) Defendant in a debt collection suit: "Can I set up a payment plan?"

(3) Client wants an order of protection: "What will happen when we get in the courtroom?"

(4) Client being evicted: "What should I say in court?"

(5) Client wants to collect a debt: "Can I tell him I'll have him arrested if he won't pay?"

(6) Client got a bad check from someone: "Can I tell him I'll have him arrested if he won't pay?"

(7) Client is dissatisfied with the outcome of a case: "I'm going to the judge's office. Where is it?"

(8) Client is dissatisfied with services received from another lawyer: "What can I do about that jerk?"

(9) Client wants to sue McDonald's for firing her for being late: "What can I do about this?"

(10) Client has been beaten by a spouse: "What can I do about this?"

EXERCISE: #3 C

How should a non-lawyer staff member answer these questions from someone who is *not* a client?

(1) Divorce case: "He wants to have the kids every other weekend. Should I agree?"

(2) Defendant in a debt collection suit: "Can I set up a payment plan?"

(3) Wants an order of protection: "What will happen when we get in the courtroom?"

(4) Being evicted: "What should I say in court?"

(5) Wants to collect a debt: "Can I tell him I'll have him arrested if he won't pay?"

(6) Got a bad check from someone: "Can I tell him I'll have him arrested if he won't pay?"

(7) Dissatisfied with the outcome of a case: "I'm going to the judge's office. Where is it?"

(8) Dissatisfied with services received from another lawyer: "What can I do about that jerk?"

(9) Wants to sue McDonald's for firing her for being late: "What can I do about this?"

(10) Has been beaten by a spouse: "What can I do about this?"

Guidelines for Paralegals and Other Members of a Law Firm's Support Staff

DO NOT give information if you are not sure of the answer.

DO NOT suggest that person take a particular action. (Questions usually begin, "Should I?")

DO NOT take sides in a case pending in court.

DO NOT give information to one party that you would not give to all parties.

DO NOT tell anyone what a judge has decided until the decision is public.

EPILOGUE

In 1947 two sisters in Obion County operated "an office purporting to be an insurance and real estate office .... [But plaintiffs claim] that the real business conducted by defendants in this office ... is the illegal practice of law."[21] The sisters prepared deeds, contracts, wills, and title opinions, and generally offered legal advice on a variety of issues. The Tennessee Court of Appeals found them to be engaged in the unauthorized practice of law.

The court ordered an injunction against the sisters' continuation of the UPL. But question (2) helps illustrate one of the most misunderstood concepts about the unauthorized practice of law, that it is merely a way to protect lawyers from competition. As the Court of Appeals said in a 1959 case in which the Tennessee Bar Association sued a title company to prevent the company from drafting documents incident to conducting closings:

> It is apparent from a consideration of the Chancellor's opinion [which held in favor of the Bar Association]... that his decision was influenced or motivated by a desire to protect the lawyers of general practice from what he considered unfair competition. In our opinion, this is not the proper test to be applied in determining whether or not the defendants ... are guilty of unauthorized practice of law...[22]

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[21] Union City & Obion Co. Bar Ass'n v. Waddell, 205 S.W.2d 573 (Tenn. Ct. App. 1947), cert. denied

[22] Bar Association of Tenn., Inc. v. Union Planters Title Guaranty Co., 326 S.W.2d 767,778 (Tenn. Ct. App. 1959), cert. denied

Law Practice Management Tips

Practice tips are provided to assist solo and small firm practitioners in the management of their law practices. They are not meant as legal advice, nor binding on the Tennessee Bar Association. Please check the Tennessee Code of Professional Responsibility before implementing any of these tips in your practice.

How's the financial side of your practice? Are you working harder than ever but not seeing your net income increase? Here are some tips to help you get a handle on the financial side of practicing law. If you miss any of them, just scroll down and you'll find those you've missed below.

Tip No. 1. Prepare an annual cash flow budget. Then break the annual budget down by month, budgeting for all of the expenses you know will be incurred in the month when they must be paid. Be sure to include a discretionary amount for unexpected expenses and your draw. And don't forget those annual expenses that can take a bite out of any cash flow plan - like malpractice insurance. Project your revenues based on the firm's past performance. If you don't have historical data to build a revenue model, build one based on anticipated hours you will bill multiplied by your average billing rate and discounted for write-offs, the average time it takes you to bill and the average time it takes to receive the fees you have worked. At the end of each month, look at your performance against your budget to see how you're doing. Make adjustments as necessary.
How's the financial side of your practice? Are you working harder than ever but not seeing your net income increase? The next few weeks are going to be devoted to the steps you need to take to make sure your hard work pays off. Here are some tips to help you get a handle on the financial side of practicing law.

Tip No. 2. Review annually the firm's practice area mix and significant client relationships to determine how profitable they are. When was the last time you reviewed what you're doing, who you're doing it for and how profitable it is? Look at the cost of the resources used to staff practice areas against the revenue they produce. If they are losing money or are only marginally profitable, consider moving out of that area of practice and focusing on those areas that are most profitable. If providing legal services to existing clients in a marginally profitable practice area enables you to keep certain clients who you represent in more profitable work, you may want to continue in the practice area, but be selective about any additional clients you take. Do you have one or two clients that require an enormous amount of hand-holding (for which you cannot bill)? Review the amount of non-billable time you're investing in those clients. Could that time be more profitably spent?

Tip No. 3. Delegate work to the most appropriate level. One of the best ways to increase revenue is to increase the volume of work that you have. But you can't do it all. You need help. Delegate work to appropriate levels. Senior attorneys should not be performing work that can be performed much more efficiently and profitably by paralegals or less senior attorneys. Proper delegation frees up senior attorneys to perform more sophisticated work at higher rates; and, as importantly, to develop new business. Less senior attorneys and paralegals can perform work at a lower cost to the client and more profitably for the firm. Firms often overlook the revenue opportunity that their paralegal staff represents. Proper delegation allows the firm to successfully manage an increased volume of work. Billing for paralegal time is another opportunity the firm has to increase its revenue while reducing the cost of services provided to its clients.

Tip No. 4. Delegate administrative functions. Many times attorneys spend too much time performing the firm's administrative functions. Do you know the value of the time you're spending on this non-billable function? Record all of your time spent on administrative functions over a period of 3 months. Multiply the number of hours by your average hourly rate, annualize it and then discount it by your average realization rate. That is the cost of your performing these administrative functions each year. That is the lost opportunity you had to develop new business or work on the business you have. Consider: With that money, could you afford to pay someone else to perform those functions, relieving you of the distraction from your practice and improving your opportunity to increase revenues. Further, an experienced office manager whose focus is on the business side of your practice will be invaluable in organizing your practice and focusing on the needs of your staff.

A good relationship between a lawyer and his/her legal assistant is critical to the lawyer's productivity. In today's market, a qualified, experienced legal assistant is hard to find (and to sometimes keep). Salary ranges continue to climb as the need for their skills continues to outpace the supply. Here are some practical and maybe some new ideas on how to improve the relationship between you and your legal assistant and to improve the legal assistant's productivity.

• Who has the ball? Delegation and communication must be clear. Give clear and complete instructions. When giving instruction to your assistant as to the status of a file, end the discussion with a question: "So, what's the next step and who is responsible for taking it?"

• Face Time. Many lawyers want to give instructions face-to-face, via phone or by yelling from their office as soon as something occurs to them. These verbal instructions are also interruptions to your assistant's flow of work (that she is doing for you). If you are simply off-loading information, do so via e-mail, a note or voice mail. Dictate instructions or information to your assistant. Save the face meetings for daily or weekly meetings with your assistant where a broader view of the day's/week's work is needed, sensitive information is discussed or subtleties need to be explained.

• Don't be so dependent! Look for ways in which you are duplicating administrative tasks or using your assistant in an unproductive manner. For example, legal assistants are commonly used to sort mail in various ways before it can be given to the attorney. They often are expected to handle personal business of the attorney, paying bills, etc. They are asked to screen client calls, get coffee and straighten your desk. Become better at managing your mail. Pay your bills on-line. Get your own coffee – the break will refresh your mind and become better organized yourself. Your legal assistant can do substantive work for you – sometimes billable – if you can become proficient in these administrative and personal areas.

• Ask the question. Ask your legal assistant how she feels you can make better use of her. Talk about what you're doing that works and that doesn't work. Listen and be open to trying her suggestions, even if you don't want to.

• Let them know they are needed. Tell you legal assistant how important he is to your success. And don't wait until "secretaries day" to do it. Tell them when they'd least expect it!
If your trust account records are in a computer program, regularly back up your data and print a copy of the transaction register and the individual client ledgers each month when you conduct the bank reconciliation.

Trust account records must be maintained for a minimum of 5 years. Remember that it's probable that your back-up hardware will become obsolete during that period. If your hardware malfunctions, you may not be able to repair or replace it.

Keeping hard copies as described assures that you have complied with your responsibility to maintain records for the requisite period without being concerned about technological obsolescence.

Many of the tech tools we use in our offices help reduce the time it takes to do our tasks. The value of your services does not diminish because the time it takes to do the tasks shortens. So how do you approach billing for these services that you've learned to more efficiently provide? You can approach it in at least one of the two following ways:

• You can charge less for the service because it takes less time. Corollary: you must get more work to fill the available time saved; or

• You may charge what the service is "worth" without reference to the time it takes consistent with the fee agreement. Corollary: you go home at a decent hour or get more work to fill the available time saved and pocket the enhanced income.

Define a scope of services that you can comfortably price at a set value. Most likely these will be services for which you already have the intellectual knowledge (forms, similar contracts, etc.) and that involve tasks you've done many times. Use the hourly rate for that part of the representation with more uncertainty. Define your scope of representation in your engagement letter in two ways: (1) services for the set fee and (2) services that will be charged at an hourly rate. Better yet, use two fee agreements sequentially with separate scopes of representation to give the client a chance to decide if the matter is worth pursuing after the fixed price part is completed.

Use the tech tools but do not short-change yourself in the process.

- Legal Links
- Legislative Updates
- Local Rules of Court
- Mediation
- Opinion Search
- Tennessee Rules of Professional Conduct
- TLAP
- Update Information

- Corporate Counsel Pro Bono Initiative
- Law Student Outreach
- Leadership Law
- Public Education
- Tennessee High School Mock Trial
- TLAP
- Youth Courts
- 2012 TBA Convention

- TBASCUS
- Tennessee Legal Organizations
- YLD
- YLD Fellows

- TBAConnect
- TBAToday
- TBA All Access Network
- Tennessee Bar Journal
- Tennessee Volunteer Attorney

- Corporate Counsel Pro Bono Initiative
- Disaster Relief Resources
- Finding an Attorney
- Hometown Support: Legal Help For Our Military
- I Want to Do Pro Bono
- Justice for All
- Member Search
- OnlineTNJustice.org

- Bar Center Information
- Frequently Asked Questions
- What is Where

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