

## **Chapter 3**

### Ethics and Professional Responsibility

#### **Chapter Outline**

1. Introduction
2. The Regulation of Attorneys
3. Attorney Ethics and Paralegal Practice
4. The Indirect Regulation of Paralegals
5. The Unauthorized Practice of Law
6. Should Paralegals Be Licensed?
7. A Final Note

#### **Chapter Objectives**

After completing this chapter, you will know:

- Why and how legal professionals are regulated.
- Some important ethical rules governing the conduct of attorneys.
- How the rules governing attorneys affect paralegal practice.
- The kinds of activities that paralegals are and are not legally permitted to perform.
- Some of the pros and cons of regulation, including the debate over paralegal licensing.

## Chapter 3 Ethics and Professional Responsibility

### Chapter Outline

- I. INTRODUCTION
  - A. A paralegal must know the ethical and legal responsibilities arising from the attorney-client relationship, why they exist, and how they affect the paralegal.
  - B. The ethical duties imposed on attorneys by state law affect paralegals.
  - C. Paralegals are indirectly regulated by attorney ethical codes and by state laws that prohibit non-lawyers from practicing law.
  
- II. THE REGULATION OF ATTORNEYS
  - A. Who Are the Regulators?
    - i. Key participants in the regulation of attorneys are:
      1. Bar Associations
      2. State supreme courts
      3. State legislatures
      4. The United States Supreme Court.
  - B. Licensing Requirements
    - i. Licensing gives an attorney the right to practice law.
    - ii. Licensing is accomplished at the state level, and each state has different requirements.
    - iii. To obtain a license to practice law in a state, an attorney normally must:
      1. Receive a bachelor's degree from a college or university
      2. Graduate from an accredited law school
      3. Take and pass a state bar examination
      4. Pass an extensive background inspection.
    - iv. Ethical Codes and Rules
      1. In addition to licensing requirements, the legal profession is regulated through ethical codes and rules adopted by each state.
      2. Today's state ethical codes are based, for the most part, on the ABA Model Code of Professional Responsibility (1969) or the ABA Model Rules of Professional Conduct (1983).
        - a. The Model Code of Professional Responsibility (or Model Code) consists of nine canons. Each canon is followed by "ethical Considerations," which are not mandatory, and "Disciplinary Rules," which are mandatory in character.

- b. The 1983 revision of the Model Code, called the Model Rules of Professional Conduct (or Model Rules), also spells out the ethical and professional duties governing attorneys and the practice of law.
- v. Sanctions for Violations
  - 1. Attorneys who violate their ethical duties may be subject to sanctions in the form of a:
    - a. *Reprimand*, which is a formal “scolding”
    - b. *Suspension*, which prohibits the attorney from practicing law for a specified period of time
    - c. *Disbarment*, which is a revocation of the attorney’s license to practice law.
  - 2. Additionally, attorneys are subject to potential liability for malpractice or violation of criminal statutes.
  - 3. If a paralegal’s breach of professional duty causes substantial harm to a client, the client may sue the attorney as well as the paralegal.

#### **Ethical Effectiveness**

Ethics is another area of the law that a paralegal needs to know. Each state has its own ethical code; and, while each state does not license or certify paralegals, paralegals can commit unethical behavior with attendant liability. Know your state’s ethical code; know what those words mean. Ignorance is not a defense. Strive for the highest ethics; be proud of yourself.

### III. ATTORNEY ETHICS AND PARALEGAL PRACTICE

#### A. The Duty of Competence

##### i. How the Duty of Competence Can Be Breached

- 1. Most breaches of competence are inadvertent and often have to do with missed deadlines. Use of a tickler system and good organization can make sure that all deadlines are met on time.
- 2. Other breaches, such as the inclusion of erroneous information in a document filed with the court, may expose the attorney and paralegal to liability for negligence.

##### ii. Attorney’s Duty to Supervise

- 1. The Model Rules require that attorneys *must* supervise the work of their non-lawyer assistants.
- 2. The 2002 revision to this rule specifies that it applies to lawyers in private law firms as well as lawyers in corporate legal departments, governmental agencies, and elsewhere.

##### iii. Inadequate Supervision

1. To ensure that your attorney is adequately supervising your work, improve communications between you and your attorney and ask for feedback about your work.

## B. Confidentiality of Information

- i. The rule of confidentiality is that all information relating to the representation of a client must be kept confidential unless the client consents to disclosure.
- ii. Paralegals should regard all information about a client or a client's case as confidential, unless (under the 2002 revision) the client gives "informed consent."

### iii. Exceptions to the Confidentiality Rule

1. Client Consents to the Disclosure - The attorney may reveal confidential information if the client consents to the disclosure.
2. Impliedly Authorized Disclosures - The attorney can make disclosures that are impliedly authorized to carry out the client's representation.
3. Client Intends a Harmful Act - The attorney may make disclosures when the client reveals that she intends to commit a criminal act that may cause bodily harm or death to another.
4. Defending Against a Client's Legal Action - When a client files a malpractice lawsuit against an attorney, the attorney may disclose confidential information only to the extent that it is essential to defend against the lawsuit.
5. Revised Model Rule Expansions (2002 Revision)
  - a. A lawyer can reveal client confidences to the extent the lawyer reasonably believes necessary "to prevent reasonably certain death or substantial bodily harm."
    - 1) The rule no longer requires that the act be criminal or that the client intends the harm.
  - b. A lawyer can reveal client confidences to secure legal advice about a lawyer's compliance with the Rules.
    - 1) This exception is designed to prevent clients from utilizing a lawyer's services to commit fraud or cause substantial economic loss to another.
  - c. A lawyer can disclose confidential information to comply with the law or a court order.

### iv. Violations of the Confidentiality Rule

1. Paralegals should take great care never to reveal the identity of a client when discussing a case. A better policy is to never discuss anything concerning your work.
  2. Conversations Overheard by Others
    - a. Never discuss confidential information when you are in a common area.
  3. Electronic Communications and Confidentiality
    - a. Special care should be taken when talking on the telephone, using a cellular or mobile phone, or sending a fax or an e-mail message to prevent disclosure of confidential information.
    - b. Take care when sending e-mail messages that contain confidential information.
  4. Other Ways of Violating the Confidentiality Rule
    - a. A file or document sitting on a desk, if observed by a third party, can reveal confidential information.
    - b. A compute screen, if visible to those passing by your desk, could convey information to an unauthorized person.
- C. Confidentiality and the Attorney-Client Privilege
- i. What Kind of Information Is Privileged?
    1. State statutes and case law define what information falls under the *attorney-client privilege*.
    2. A certain part of the materials prepared by an attorney for a trial are protected under the *work product doctrine* and, as such, are privileged.
  - ii. When the Attorney-Client Privilege Arises
    1. The privilege and duty of confidentiality arises even though the attorney decides not to represent the client and even though the client is not charged any fee.
  - iii. Duration of the Privilege
    1. Outside of the exceptions named above, only the client may waive the attorney-client privilege.
- D. Conflict of Interest
- i. Simultaneous Representation
    1. An attorney faces a conflict of interest if an attorney engages in an activity that adversely affects a client's interests.
    2. An attorney may represent two parties in a legal proceeding only if that representation will not adversely affect either party's interest and if both parties agree to such representation.
  - ii. Former Clients

1. A lawyer who has formerly represented a client in a legal matter may not represent someone else in the same or a related matter in which that person's interests are adverse to the interests of the former client.
2. Job Changes and Former Clients
  - a. When a conflict of interest arises because of a lawyer's or paralegal's job change, an *ethical wall* is erected around the new employee to screen the employee from any information giving rise to the conflict of interest.
  - b. Walling-Off Procedures may include, for example, preventing access to specific files.
3. Other Conflict-of-Interest Situations
  - a. Other situations, such as receiving expensive gifts from a client, may create a conflict of interest.
4. Revision of the Model Rules Pertaining to Conflicts
  - a. The main change in the 2002 revision is that an affected client must give her informed written consent in order to waive a conflict.
  - b. A client cannot consent to a situation where the lawyer would represent more than one defendant accused of committing a crime for which the defendants could receive the death penalty.

#### IV. THE INDIRECT REGULATION OF PARALEGALS

##### A. Paralegal Ethical Codes

- i. NFPA's Code of Ethics
- ii. NALA's Code of Ethics
- iii. Compliance with Paralegal Code of Ethics

##### B. Guidelines for the Utilization of Paralegals

- i. NALA's Model Standards and Guidelines
- ii. The ABA's Model Guidelines
- iii. State Guidelines

##### C. The Increasing Scope of Paralegal Responsibilities

- i. Today, paralegals can perform virtually any legal task as long as the work is supervised by an attorney and does not constitute the unauthorized practice of law (UPL).
- ii. Other than tasks that only lawyers can legally perform, such as giving legal advice, paralegals may perform almost any type of legal work as long as the attorney authorizes the work and assumes responsibility for the paralegal's work product.

##### D. Giving Legal Opinions and Advice

- i. The Need for Caution
    - 1. Be extremely careful to avoid giving legal advice even when discussing matters with friends and relatives.
  - ii. Be on the Safe Side
    - 1. Never advise a client or other person on any matter if the advice may alter that person's legal position or legal rights.
- E. Representing Clients in Court
  - i. Paralegals are allowed by statute to represent clients before some federal and state governmental agencies.
  - ii. Unless a statute or court rule provides otherwise, a paralegal is not allowed to appear in court on behalf of a client without the supervising attorney.
- F. Disclosure of Paralegal Status
  - i. Never assume that a client knows you are not an attorney.
  - ii. Always disclose your paralegal status to ensure that everyone with whom you communicate realizes that you are a paralegal and not an attorney.
- G. Paralegals Freelancing for Attorneys
  - i. In its landmark 1992 decision, the New Jersey Supreme Court stated that it could find no reason why freelance paralegals could not be just as adequately supervised by the attorneys for whom they worked as those paralegals working in attorneys' offices.
  - ii. Since 1992, other state courts and state bar associations have issued opinions holding that freelance paralegals who are adequately supervised by attorneys are not engaging in the UPL.
- H. Legal Technicians (Independent Paralegals) and UPL
  - i. Early Cases
    - 1. In 1978, the Florida Supreme Court held in *The Florida Bar v. Brumbaugh* that Brumbaugh, a paralegal, could (1) sell legal forms and other printed information regarding divorces and other legal procedures, (2) fill in the forms as long as the customer provided the information in writing, and (3) advertise her services.
    - 2. Another noteworthy case is *The Florida Bar v. Furman*, which was decided a year after *The Florida Bar v. Brumbaugh*. The *Furman* case received a great deal of publicity when Ms. Furman disobeyed a later injunction and was sentenced to prison for contempt of court.
  - ii. An Ongoing Problem
    - 1. Other independent paralegals have been sued by bar associations and others for the UPL.

2. In 1999, the Texas legislature authorized the sale of legal self-help software, books, forms, and similar products to the public, but *only* where they were for “self-help.” The law does not authorize persons not licensed to practice law to utilize these programs to give legal advice or assistance to others.

### **May I See Your Paralegal License, Please?**

While attorneys are licensed to practice law, paralegals are not currently licensed. Many states have considered a licensing program, which would require paralegals to meet certain educational requirements and other specified criteria before being allowed to practice their profession. The primary rationale for not licensing paralegals is that their work product is accomplished through attorney supervision. However, licensing will continue to be a debatable issue.

- V. SHOULD PARALEGALS BE LICENSED?
  - A. General Licensing
    - i. General licensing would require all paralegals to meet certain educational requirements and other specific criteria.
    - ii. A number of states—including Arizona, Hawaii, Maine, Minnesota, New Jersey, New York, Oklahoma, Rhode Island, South Dakota, Texas, Utah, and Wisconsin—have considered implementing a *general licensing* program.
    - iii. At present, California is the only state that currently makes it unlawful for persons to identify themselves as paralegals unless they meet certain qualifications.
  - B. Limited Licensing
    - i. With limited licensing, qualified paralegals would be authorized to provide specified legal services directly to the public.
    - ii. Types of “routine legal services” authorized under limited licensing are simple divorces, will executions, bankruptcy petitions, incorporation, real estate transactions, selected tax matters, and other specified services as designated by the state licensing body.
    - iii. At least twenty-two states allow some form of limited non-lawyer practice.
  - C. Direct Regulation: The Pros and Cons
    - i. Much of the debate over direct regulation has to do with *who* should do the regulating.
    - ii. The problem is that NALA, NFPA, and AAFPE have different views on the matter of regulation.
    - iii. NFPA’s Position
      1. NFPA endorses the regulation of the paralegal profession on a state-by-state basis.

2. NFPA contends licensing of paralegals would benefit both the public and attorneys because only demonstrably qualified paralegals would be licensed to practice the profession.
  3. NFPA proposes a two-tiered system of licensing: general licensing and specialty licensing.
- iv. NALA's Position
    1. NALA supports voluntary certification (self-regulation) but opposes licensing requirements for paralegals.
    2. NALA presently sees no demonstrated need to regulate paralegals because paralegals work under an attorney's supervision and attorneys are already regulated by state ethical codes.
  - v. The AAFPE Position
    1. AAFPE does not take an official position on paralegal licensing.
    2. AAFPE maintains the view that states should adopt certain educational standards for paralegals.
- D. Other Considerations
- i. Other groups, including lawyers, are concerned about the issue of licensing the paralegal profession.

VI. A FINAL NOTE

- A. As a professional paralegal, you will have an opportunity to voice your opinion on these important issues.
- B. The most important thing to remember as a paralegal is to think and act in a professionally responsible way in your particular workplace.