TECHNOLOGY AND TODAY'S PARALEGAL

ELECTRONIC COMMUNICATIONS AND CONFIDENTIALITY

Almost everyone has had the experience of sending an e-mail to the wrong recipient or accidentally using "reply to all" instead of "reply" and so broadcasting a personal message to a group. Similarly, law firm employees have sent inappropriate e-mails to partners and clients.

Careless communications can be more than simply embarrassing when they occur in a legal environment: confidential information could be disclosed and privilege lost. Such an incident can damage the sender's employment prospects, the interests of the client, and the reputation of the firm. This is a problem that goes beyond the workplace. Personal Web pages or social networking messages with inappropriate content may be seen by employers, opponents, or clients.

There are four major issues for paralegals to consider when using electronic communications or social media at work and at home:

1. Is a work-related communication truly confidential, or could an opposing party discover it during litigation?
2. Is a communication an appropriate use of the employer's property?
3. What sort of personal information is appropriate to share with the world through Facebook, Twitter, and other services?
4. Is the use of the social media forum consistent with the firm's policies?

CONFIDENTIALITY

Just labeling an e-mail or text message "confidential" does not mean that it will be treated as confidential. Simply adding nonprivileged material to a privileged communication will not protect the nonprivileged portion. Your firm should have a policy about when it is appropriate to send confidential information electronically and when it is not. Seek guidance from your supervising attorney if you have any doubt about the appropriateness of transmitting confidential information. Be particularly careful with your phone, tablet, laptop, or home computer if you are accessing work-related materials on these devices. Leaving a phone in a coffee shop or a computer logged in at home when company is visiting could expose confidential materials to outsiders and cost your client a legal privilege.

PERSONAL USE OF BUSINESS SYSTEMS

Many employers, including law firms, provide employees with communication devices and services, such as smartphones and laptops. Firms often allow some personal use of these devices but retain the right to monitor and audit the content of the e-mails, messages, and Web traffic on them. Be sure to check your employer's policies on appropriate use of such devices before making personal use, such as for e-mail and text messages, of firm-provided hardware or services. If you have a profile on LinkedIn or another service, be sure to ask if you may list the firm as your employer.

There are limits on employers' abilities to monitor personal communications, however. The United States Supreme Court held that a pager text-messaging service could provide an employer with the content of employees' text messages, but emphasized the extent of the measures the employer took to ensure that it did not violate the employees' privacy in reviewing personal use of the employer-provided electronic device.[a] Think carefully about how you are using employer-provided communications devices and systems. Make sure your use is within your employer's policies.

TECHNOLOGY TIP ABOUT ONLINE PERSONAL INFORMATION

Remember, when you post the details of your latest date or pictures of your vacation online, your employer or clients may stumble across those postings simply by Googling your name. Even if you change a Facebook page later, caching by search engines means that an embarrassing picture or post could linger in cyberspace for years. The bottom line: don't post pictures or text online that you would feel uncomfortable showing to your boss. Assume employers and prospective employers will search your name online.

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a. *City of Ontario, Calif. v. Quon*, 130 S.Ct. 2619 (2010).

When the Attorney-Client Privilege Arises

The attorney-client privilege comes into existence the moment a client communicates with an attorney concerning a legal matter. People sometimes mistakenly assume that there is no duty to keep client information confidential unless an attorney agrees to represent a client and the client signs an agreement. This is not so. The privilege—and thus the duty of confidentiality—arises even if the lawyer decides not to represent the client and even when the client is not charged any fee. Thus, mentioning to a friend that a party called your firm to discuss legal representation, and the firm declined to take the case, could violate the privilege.

Duration of the Privilege

The client is the holder, or "owner," of the privilege. Only the client can waive (set aside) the privilege. Unless waived by the client, the privilege lasts indefinitely. In other words, the privilege continues even though the attorney has completed the client's legal matter and is no longer working on the case.

Privileged information is confidential. If such information is disclosed to others, it is no longer confidential and can no longer be considered privileged. This is another reason why it is so important to guard against accidental violations of the confidentiality rule: if the rule is violated, information that otherwise might have been protected by the attorney-client privilege can be used against the client's interests.

EXAMPLE 4.9 By accident, a paralegal sends, by e-mail, a confidential document to opposing counsel instead of to the client. The document, because it contained the attorney's analysis of confidential client information, might be classified as privileged information under the work product doctrine. The disclosure of the information to the opposing counsel destroyed its confidential character.

Conflict of Interest

conflict of interest
A situation in which two or more duties or interests come into conflict, as when an attorney attempts to represent opposing parties in a legal dispute.

A conflict of interest arises when representing one client injures the interests of another client. Model Rules 1.7, 1.8, 1.9, 1.10, and 1.11 pertain to conflict-of-interest situations. The general rule is that an attorney should not represent a client if doing so would be adverse to another client. There should be no representation if there is a significant risk that the attorney's ability to consider, recommend, or carry out an appropriate course of action for the client would be materially (significantly) limited as a result of the attorney's other responsibilities or interests. A classic example of a conflict of interest is when an attorney represents two adverse parties in a legal proceeding. Clearly, in such a situation, the attorney's loyalties must be divided.

Simultaneous Representation

If an attorney reasonably believes that representing two parties in a legal proceeding will not adversely affect either party's interest, then the attorney is permitted to do so—but only if both parties give informed consent. Normally, attorneys avoid this kind of situation because what might start out as an uncontested proceeding could evolve into a legal battle.

EXAMPLE 4.10 A couple seeking a divorce have agreed how to handle the matter and hire one attorney to represent them both. It is not uncommon for such matters to end up in a nasty dispute. The attorney then faces a conflict of interest: assisting one party could injure the interests of the other.

Because of the potential for a conflict of interest in divorce proceedings, some courts do not permit attorneys to represent both spouses.

Similar conflicts arise when an attorney is asked to handle a family matter and the family members eventually disagree on what the outcome should be. Suppose two

adult children request the family lawyer to handle the procedures required to settle their deceased parent's estate. The will favors one child, and the other child decides to challenge the will's validity. The attorney cannot represent both sides without a conflict of interest.

Attorneys representing corporate clients may face conflicts of interest when corporate personnel become divided on an issue.

EXAMPLE 4.11 Finn, an attorney, represents ABC Corporation. Finn typically deals with the corporation's president, Johnson, when giving legal advice. At times, however, Finn deals with other personnel, including Harrison, the corporation's chief accountant. Harrison and Johnson disagree on some issues, and Johnson fires Harrison. Harrison wants attorney Finn to represent him in a lawsuit against the corporation for wrongful termination of his employment. Finn would have a conflict of interest. He could not represent Harrison, but he can continue to represent Johnson and ABC.

Former Clients

The ABA rules express caution when a lawyer may be in a position to represent a new client in a matter that would conflict with the interests of a former client. In such instances, at a minimum, the attorney must notify the former client of the matter and may need to obtain written consent. The rule regarding former clients is closely related to the rule on preserving the confidentiality of a client. The rationale behind the rule is that an attorney, in representing a client, is entrusted with certain information that may be unknown to others. That information should not be used against the client—even after the representation has ended.

JOB CHANGES AND FORMER CLIENTS. The rule concerning former clients does not prohibit an individual attorney or paralegal from working at a firm or agency that represents interests contrary to those of a former client. If that were the situation, many legal professionals would find it hard to change jobs. The rules depend on the specific circumstances. In some situations, when a conflict of interest results from a job change, the new employer can avoid violating the rules governing conflict of interest through the use of screening procedures. That is, the new employer can erect an **ethical wall** around the new employee so that the new employee remains ignorant about the case that would give rise to the conflict of interest.

ethical wall
A term that refers to the procedures used to create a screen around an attorney, a paralegal, or another member of a law firm to shield him or her from information about a case in which there is a conflict of interest.

WALLING-OFF PROCEDURES. Law offices usually have procedures for "walling off" an attorney or a paralegal from a case when a conflict of interest exists. The firm may announce in a memo to all employees that a certain attorney or paralegal should not have access to specific files and set out procedures to be followed to ensure that access to those files is restricted. Computer documents relating to the case may be protected by passwords or in some other way. Commonly, any hard-copy files relating to the case are flagged with a sticker to indicate that access to the files is restricted.

Firms normally take great care to establish and uphold such restrictions because if confidential information is used in a way harmful to a former client, the former client may sue the firm for damages. In defending against such a suit, the firm must show that it took reasonable precautions to protect that client's interests. The *Developing Paralegal Skills* feature on the facing page summarizes how steps are taken to build an ethical wall.

Other Conflict-of-Interest Situations

Other situations may give rise to conflicts of interest. Gifts from clients may create conflicts of interest, because they tend to bias the judgment of the attorney or paralegal. Certain gifts are specifically prohibited. For example, the *Model Rules* prohibit an attorney from preparing documents (such as wills) for a client if the client gives the attorney or a member of the attorney's family a gift in the will. Note that as a paralegal, you may

DEVELOPING PARALEGAL SKILLS

BUILDING AN ETHICAL WALL

Lana Smith, a paralegal, has been asked by her supervising attorney to set up an ethical wall because a new attorney, Chandra Piper, has been hired from the law firm of Nunn & Bush. While employed by Nunn & Bush, Piper represented the defendant, Seski Manufacturing, in the ongoing case in which Seski is being sued by Joseph Tymes. Smith's firm—and Piper's new employer—represents plaintiff Tymes in that case. Consequently, Piper's work for Nunn & Bush creates a conflict of interest, which Piper has acknowledged in a document signed under oath. Smith makes a list of the walling-off procedures to use to ensure that the firm does not violate the rules on conflict of interest.

CHECKLIST FOR BUILDING AN ETHICAL WALL

- Prepare a memo to the office manager regarding the conflict and the need for special arrangements to ensure that Piper will have no involvement in the Tymes case.
- Prepare a memo to the team representing Tymes to inform them of the conflict of interest and the special procedures to be followed.
- Prepare a memo to the firm giving the case name, the nature of the conflict, the parties involved, and instructions to maintain a blanket of silence with respect to Chandra Piper.
- Arrange for Piper's office to be on a different floor from the team (if possible) to demonstrate, if necessary, that the firm took steps to separate Piper and the team and to prevent them from having access to one another's files.
- Arrange with the office manager for computer passwords to be issued to the team members so that access to computer files on the Tymes case is available only to team members.
- Place "ACCESS RESTRICTED" stickers on the files for the Tymes case.
- Develop a security procedure for signing out and tracking the case files in the Tymes case to prevent inadvertent disclosure of the files to Piper or her staff members.

be offered gifts from appreciative clients at holidays. Generally, such gifts pose no ethical problems. If a client offers you a gift that has substantial value, however, you should discuss the issue with your supervising attorney.

Attorneys also need to be careful about taking on a client whose case may create an "issue conflict." Generally, an attorney cannot represent a client on a substantive legal issue if the client's position is contrary to that of another client being represented by the lawyer—or the lawyer's firm.

Occasionally, conflicts of interest may arise when two family members who are both attorneys or paralegals are involved in the representation of adverse parties in a legal proceeding. Because there is a risk that the family relationship will interfere with professional judgment, generally an attorney should not represent a client if an opposing party to the dispute is being represented by a member of the attorney's family (a spouse, parent, child, or sibling). If you, as a paralegal, are married to or living with another paralegal or an attorney, you should inform your firm of this fact if you ever suspect that a conflict of interest might result from your relationship. Similarly, if you discover that you may have a financial interest in the outcome of a lawsuit that your firm is handling (such as owning stock in a company involved in a lawsuit in which a party is represented by the firm), you should notify the attorney of the potential conflict.

Conflicts Checks

conflicts check
A procedure for determining whether an agreement to represent a potential client will result in a conflict of interest.

Whenever a potential client consults with an attorney, the attorney will want to make sure that no potential conflict of interest exists before deciding whether to represent the client. Running a **conflicts check** is a standard procedure in every law office and one frequently undertaken by paralegals. Before you can run a conflicts check, you need to know the name of the prospective client, the other party or parties that may be involved in the client's legal matter, and the legal issue involved.

Normally, every law firm has some established procedure for conflicts checks, and in larger firms there is usually a computerized database containing the names of former clients and the other information you will need in checking for conflicts of interest.

The Indirect Regulation of Paralegals

Paralegals are regulated *indirectly* in several ways. Clearly, the ethical codes for attorneys just discussed indirectly regulate the conduct of paralegals. Additionally, paralegal conduct is evaluated on the basis of standards and guidelines created by paralegal professional groups that create best practices but do not have the force of law, as well as guidelines for the utilization of paralegals developed by the American Bar Association and various states.

Paralegal Ethical Codes

Paralegals are increasingly self-regulated. Recall from Chapter 1 that the two major national paralegal associations—the National Federation of Paralegal Associations (NFPA) and the National Association of Legal Assistants (NALA)—were formed to define and represent paralegal professional interests on a national level. Both associations adopted codes of ethics defining the ethical responsibilities of paralegals.

NFPA's Code of Ethics

The NFPA's first code of ethics was called the *Affirmation of Responsibility.* The code has been revised several times and, in 1993, was renamed the *Model Code of Ethics and Professional Responsibility.* In 1997, NFPA revised the code, particularly its format, and took the step of appending to its code a list of enforcement guidelines setting forth recommendations on how to discipline paralegals who violate ethical standards promulgated by the code. The full title of NFPA's current code is the *Model Code of Ethics and Professional Responsibility and Guidelines for Enforcement.*

Exhibit 4.1 on the facing page presents the rules from Section 1 of the code, entitled "NFPA Model Disciplinary Rules and Ethical Considerations." For reasons of space, only the rules are included in the exhibit, not the ethical considerations that follow each rule. The ethical considerations are important to paralegals, however, because they explain what conduct the rule prohibits. The full text of NFPA's code (including the rules, ethical considerations, and guidelines for enforcement) is presented in Appendix C of this book.

NALA's Code of Ethics

In 1975, NALA issued its *Code of Ethics and Professional Responsibility,* which, like NFPA's code, has since undergone several revisions. Exhibit 4.2 on page 106 presents NALA's code in its entirety. Note that NALA's code, like the *Model Code of Professional Responsibility* discussed earlier in this chapter, presents ethical precepts as a series of "canons."

Compliance with Paralegal Codes of Ethics

Paralegal codes of ethics express the ethical responsibilities of paralegals generally, and they particularly apply to members of paralegal organizations that adopted the codes.

§1. NFPA MODEL DISCIPLINARY RULES AND ETHICAL CONSIDERATIONS

1.1 A paralegal shall achieve and maintain a high level of competence.

1.2 A paralegal shall maintain a high level of personal and professional integrity.

1.3 A paralegal shall maintain a high standard of professional conduct.

1.4 A paralegal shall serve the public interest by contributing to the improvement of the legal system and the delivery of quality legal services, including *pro bono publico* services.

1.5 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.

1.6 A paralegal shall avoid conflicts of interest and shall disclose any possible conflict to the employer or client, as well as to the prospective employers or clients.

1.7 A paralegal's title shall be fully disclosed.

1.8 A paralegal shall not engage in the unauthorized practice of law.

EXHIBIT 4.1

Rules from Section 1 of NFPA's *Model Code of Ethics and Professional Responsibility and Guidelines for Enforcement*

Only the disciplinary rules are shown in this exhibit. The ethical considerations, which are important to a paralegal's understanding of these rules, can be read in Appendix C of this book.

Any paralegal who is a member of an organization that has adopted one of these codes is expected to comply with the code's requirements. Compliance with these codes is not legally mandatory. In other words, if a paralegal does not abide by a particular ethical standard of a paralegal association's code of ethics, the association cannot initiate state-sanctioned disciplinary proceedings against the paralegal. The association can, however, expel the paralegal from the association, which may have significant implications for the paralegal's career.

Guidelines for the Utilization of Paralegals

As noted earlier, attorneys are regulated by the state to protect the public from the harms that could result from incompetent legal advice and representation. While licensing requirements may help to protect the public, they also give lawyers something of a monopoly over the delivery of legal services. The increased use of paralegals stems, in part, from the legal profession's need to reduce the cost of legal services. The use of paralegals to do substantive legal work benefits clients because the hourly rate for paralegals is lower than that for attorneys.

For this reason, bar associations (and courts, when approving fees) encourage attorneys to delegate work to paralegals to lower the costs of legal services–and thus provide the public with greater access to legal services.

NALA, the ABA, and many states have adopted guidelines for the utilization of paralegal services. These were created in response to questions concerning the role and function of paralegals within the legal arena that had arisen in earlier years, including the following: What are paralegals? What kinds of tasks do they perform? What are their professional responsibilities? How can attorneys best utilize paralegal services? What responsibilities should attorneys assume with respect to their assistants' work?

NALA's *Model Standards and Guidelines*

NALA's *Model Standards and Guidelines for the Utilization of Paralegals* provides guidance on several important issues. The document lists the minimum qualifications that legal assistants should have and then, in a series of guidelines, indicates what paralegals may and may not do. We will examine these guidelines in more detail shortly. (See Appendix B for the complete text of the annotated version of NALA's *Model Standards and Guidelines*.)

EXHIBIT 4.2

NALA's Code of Ethics and Professional Responsibility

Preamble: A paralegal must adhere strictly to the accepted standards of legal ethics and to the general principles of proper conduct. The performance of the duties of the paralegal shall be governed by specific canons as defined herein so justice will be served and goals of the profession attained.

The canons of ethics set forth hereafter are adopted by the National Association of Legal Assistants, Inc., as a general guide intended to aid paralegals and attorneys. The enumeration of these rules does not mean there are not others of equal importance although not specifically mentioned. Court rules, agency rules and statutes must be taken into consideration when interpreting the canons.

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

CANON 1.
A paralegal must not perform any of the duties that attorneys only may perform nor take any actions that attorneys may not take.

CANON 2.
A paralegal 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.

CANON 3.
A paralegal must not:

(a) engage in, encourage, or contribute to any act which could constitute the unauthorized practice of law; and
(b) establish attorney-client relationships, set fees, give legal opinions or advice or represent a client before a court or agency unless so authorized by that court or agency; and
(c) engage in conduct or take any action which would assist or involve the attorney in a violation of professional ethics or give the appearance of professional impropriety.

CANON 4.
A paralegal must use discretion and professional judgment commensurate with knowledge and experience but must not render independent legal judgment in place of an attorney. The services of an attorney are essential in the public interest whenever such legal judgment is required.

CANON 5.
A paralegal must disclose his or her status as a legal assistant at the outset of any professional relationship with a client, attorney, a court or administrative agency or personnel thereof, or a member of the general public. A paralegal must act prudently in determining the extent to which a client may be assisted without the presence of an attorney.

CANON 6.
A paralegal must strive to maintain integrity and a high degree of competency through education and training with respect to professional responsibility, local rules and practice, and through continuing education in substantive areas of law to better assist the legal profession in fulfilling its duty to provide legal service.

CANON 7.
A paralegal must protect the confidences of a 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.

CANON 8.
A paralegal must disclose to his or her employer or prospective employer any pre-existing clients or personal relationships that may conflict with the interests of the employer or prospective employer and/or their clients.

CANON 9.
A paralegal must do all other things incidental, necessary, or expedient for the attainment of the ethics and responsibilities as defined by statute or rule of court.

CANON 10.
A paralegal's conduct is guided by bar associations' codes of professional responsibility and rules of professional conduct.

The ABA's *Model Guidelines*

In 1991, the ABA adopted its *Model Guidelines for the Utilization of Legal Assistant Services.* The ABA Standing Committee on Paralegals revised these guidelines in 2003 and 2012 by basing them on the ABA's *Model Rules of Professional Conduct.* The document consists of ten guidelines, each followed by a lengthy comment on the origin, scope, and application of the guideline. The guidelines indicate, among other things, the types of tasks that a lawyer may not delegate to a paralegal and, generally, the responsibilities of attorneys with respect to paralegal performance and compensation. For further detail on the revised guidelines, now entitled *Model Guidelines for the Utilization of Paralegal Services,* go to the American Bar Association website and search for "paralegal."

State Guidelines

Most states have adopted some form of guidelines concerning the use of legal assistants by attorneys, the respective responsibilities of attorneys and legal assistants in performing legal work, the tasks paralegals may perform, and other ethically challenging areas. Although the guidelines of some states reflect the influence of NALA's standards and guidelines, they focus largely on state statutory definitions of the practice of law, state codes of ethics regulating the responsibilities of attorneys, and state court decisions. As a paralegal, make sure that you become familiar with your state's guidelines.

The Increasing Scope of Paralegal Responsibilities

The ethical standards and guidelines just discussed, as well as court decisions concerning paralegals, all support the goal of increasing the use of paralegals in the delivery of legal services. Today, paralegals can perform almost any legal task as long as the work is supervised by an attorney and does not constitute the unauthorized practice of law.

Wide Range of Responsibilities

Paralegals working for attorneys may interview clients and witnesses, investigate legal claims, draft legal documents for attorneys' signatures, attend will executions (in some states), appear at real estate closings (in some states), and undertake other types of legal work, as long as the work is supervised by attorneys. When state or federal law allows it, paralegals can also represent clients before government agencies. Paralegals may perform freelance services for attorneys and, depending on state law and the type of service, perform limited independent services for the public.

Legal assistants may also give information to clients on many matters relating to a case or other legal concern. When arranging for client interviews, they let clients know what kind of information is needed and what documents to bring to the office. They inform clients about legal procedures and what clients should expect to experience during the progress of a legal proceeding. As a paralegal, you will be permitted to give clients all kinds of information. Nonetheless, you must make sure that you know where to draw the line between giving permissible advice and giving "legal advice" that only licensed attorneys may give.

Follow ABA Guidelines

The tasks that paralegals are legally permitted to undertake are described throughout this book. As stated in the ABA's guidelines, paralegals may not perform tasks that only attorneys can legally perform. If they do so, they risk liability for the unauthorized practice of law.

The Unauthorized Practice of Law

State statutes prohibit the unauthorized practice of law (UPL). Although the statutes vary, they all aim to prevent nonlawyers from providing legal counsel. These statutes apply to all persons—including paralegals, real estate agents, bankers, insurance agents,

and accountants—who might provide services that are typically provided by licensed attorneys.

EXAMPLE 4.12 An insurance agent, talking to a client, offers advice about a possible personal-injury claim. The agent might be liable for UPL.

UPL statutes are not always clear about what constitutes the practice of law. Consequently, courts decide whether a person has engaged in UPL on a case-by-case basis. This may make it difficult to know exactly what activities constitute UPL. To avoid violating UPL laws, a person must be aware of the state courts' decisions on UPL. As we will see below, some states are addressing this problem.

Paralegals, of course, can also refer to the general guidelines for their profession provided by NALA. Guideline 2 in NALA's *Model Standards and Guidelines* prohibits a paralegal from engaging in any of the following activities:

- Establishing attorney-client relationships.
- Setting legal fees.
- Giving legal opinions or advice.
- Representing a client before a court, unless authorized to do so by the court.
- Engaging in, encouraging, or contributing to any act that could constitute the unauthorized practice of law.

State UPL Statutes

Because of the difficulty in predicting with certainty whether a court would consider a particular action to be UPL, some states have made efforts to clarify what is meant by the "practice of law." About half of the states have a formal definition of what constitutes the practice of law, either by statute or by court ruling. For example, the Texas UPL statute provides, in part:

> the "practice of law" means the preparation of a pleading or other document incident to an action or special proceeding or the management of the action or proceeding on behalf of a client before a judge in court as well as a service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined.[1]

The Texas statute also states that this definition is not exclusive and that the state courts have the authority to determine that other activities, which are not listed, also constitute UPL. Other states' definitions focus on various factors, such as appearing in court or drafting legal papers, pleadings, or other documents in connection with a pending or prospective court proceeding. The enforcement of UPL statutes also varies widely among the states. In some states, the attorney general prosecutes violators; in others, a local or state prosecutor enforces UPL statutes, or the state bar association may be in charge of enforcement.

In the following pages, we discuss some of the activities that are considered to constitute UPL in most states. But it must be emphasized that a paralegal should know the details of the UPL statute in the state in which she or he works. Avoiding UPL problems is also discussed in the *Developing Paralegal Skills* feature on the facing page.

The Prohibition against Fee Splitting

An important ethical rule related to the unauthorized practice of law is Rule 5.4 of the *Model Rules of Professional Conduct*. For an attorney or a law firm to split legal fees with a nonlawyer is prohibited. For this reason, paralegals cannot be partners in a law partnership (because the partners share the firm's income), nor can they have a fee-sharing arrangement with attorneys.

DEVELOPING PARALEGAL SKILLS

THE DANGERS OF THE UNAUTHORIZED PRACTICE OF LAW

Every state restricts the "practice of law" to licensed attorneys. State bar associations take this restriction seriously, and they aggressively enforce UPL rules against anyone the bar suspects is infringing on attorneys' control of the practice of law.

Unfortunately, the definition of the "practice of law" is unclear, making it a trap for the unwary. The ABA defines it as "the rendition of services for others that call for the professional judgment of a lawyer." In essence, "practicing" law includes giving legal advice, preparing legal documents, and representing a client in court.

Of course, paralegals routinely do the first two of these. Each is perfectly legal as long as these activities are done under the supervision of a licensed attorney. For example, you will often have to relay legal advice from the attorney to the client. To protect yourself, you must make clear that the advice comes from the lawyer, not you. You can avoid unauthorized practice problems by:

- Being clear that everyone understands you are a paralegal in all communications and meetings by:
  1. Including your title when signing letters, e-mails, and other documents and on your business cards.
  2. Introducing yourself with your title in meetings.
  3. Disclosing your status when communicating with a court.
- Ensuring that activities that might be construed to be the "practice of law" are supervised by a licensed attorney by:
  1. Making sure that an attorney reviews and signs off on all legal documents you prepare.
  2. Explicitly stating that the attorney is the source of any legal advice when relaying advice to a client by stating, "I asked Attorney Smith about that and she said . . . ."
- Informing yourself about your state's unauthorized practice rules by:
  1. Researching court decisions, regulations, and state bar opinions on the topic.
  2. Contacting your state paralegal associations and state bar for information and publications on the topic.

Taking care to follow such guidelines will protect the law firm you work for and will protect you, your career, and your firm's clients. Be particularly careful when offering opinions about legal issues on social media sites so that you do not stray into offering legal advice.

One of the reasons for this rule is that it protects the attorney's independent judgment concerning legal matters.

EXAMPLE 4.13 An attorney shares office space with two CPAs (accountants) and the three of them work for some of the same clients. The three form a partnership. Is there a problem? Yes, in this situation, a conflict might arise between the interests of the partnership and the attorney's duty to exercise independent professional judgment about a client's case.

The rule against fee splitting also protects against the possibility that nonlawyers would indirectly, through attorneys, be able to engage in the practice of law.

Giving Legal Opinions and Advice

Giving legal advice goes to the essence of legal practice. After all, a person would not seek out a legal expert if he or she did not want legal advice on some matter. Although a paralegal can communicate an attorney's legal advice to a client, a paralegal cannot independently give legal advice.

The Need for Caution

You need to be careful to avoid giving legal advice even when discussing matters with friends and relatives. Although other nonlawyers often give advice affecting others' legal rights or obligations, paralegals should not do so. For example, when a person gets a speeding ticket, a friend or relative who is a nonlawyer might suggest that the person should argue the case before a judge and explain his side of the story. When a paralegal gives such advice, however, she may be accused of engaging in the unauthorized practice of law. Legal assistants are prohibited from giving even simple, common-sense advice because of the greater weight the recipient might give to the advice of someone who has legal training.

Similarly, you need to be cautious in the workplace. Although you may develop expertise in a certain area of law, you must refrain from advising clients with respect to their legal obligations or rights.

EXAMPLE 4.14 Suppose you are a bankruptcy specialist and know that a client who wants to file for bankruptcy has two options to pursue under bankruptcy law. Should you tell the client about these options and their consequences? No. Advising someone of legal options is dangerously close to advising a person of his legal rights and may therefore constitute the unauthorized practice of law. Even though you may tell the client that he needs to check with an attorney, this does not alter the fact that you are giving advice on which the client might rely.

Be on the Safe Side

What constitutes the giving of legal advice can be difficult to pin down. Paralegals are permitted to advise clients on certain matters, so drawing the line between permissible and impermissible advice may be difficult. To be on the safe side—and avoid potential liability for the unauthorized practice of law—never advise anyone regarding any matter if the advice may alter that person's legal position or legal rights.

Whenever you are pressured to render legal advice—as you surely will be at one time or another by your firm's clients or friends—say that you cannot give legal advice because it is against the law to do so. Paralegals usually find that a frank and honest approach provides the best solution to the problem.

Representing Clients in Court

The rule that only attorneys can represent others in legal matters has a long history. There are two limited exceptions to this rule. First, in 1975 the United States Supreme Court held that people have a constitutional right to represent themselves in court.[2] Second, paralegals are allowed to represent clients before some federal and state government agencies, such as the federal Social Security Administration. Hence, as a paralegal you should know that you are not allowed to appear in court on behalf of your supervising attorney—although local courts in some states have made exceptions to this rule for limited purposes.

Disclosure of Paralegal Status

Because of the close working relationship between an attorney and a paralegal, a client may have difficulty perceiving that the paralegal is not an attorney.

EXAMPLE 4.15 A client calls an attorney's office and is transferred to the attorney's paralegal. The paralegal talks with the client about a legal matter and advises the client that the attorney will be in touch. The client may assume that the paralegal is an attorney and may make inferences based on the paralegal's comments that result in actions with harmful consequences—in which event the paralegal might be charged with the unauthorized practice of law.

To avoid problems, make sure that clients or potential clients know that you are a paralegal and, as such, are not permitted to give legal advice.

Similarly, in correspondence with clients or others, you should indicate your nonattorney status by adding "Paralegal" or "Legal Assistant" after your name. If you have printed business cards, or if your name is included in the firm's letterhead or other literature, also make sure that your status is clearly indicated.

Guideline 1 of NALA's *Model Standards and Guidelines* emphasizes the importance of disclosing paralegal status by stating that all legal assistants have an ethical responsibility to "disclose their status as legal assistants at the outset of any professional relationship with a client, other attorneys, a court or administrative agency or personnel thereof, or members of the general public." Disciplinary Rule 1.7 of NFPA's *Model Code of Ethics and Professional Responsibility* also stresses the importance of disclosing paralegal status. Guideline 4 of the ABA's *Model Guidelines* places on attorneys the responsibility for disclosing the nonattorney status of paralegals.

Attorneys are responsible for the work product of their offices, including the work done by paralegals. Hence, attorneys are required to ensure that clients and other relevant parties, including other attorneys and the courts, know when work has been performed by a paralegal.

Paralegals Freelancing for Attorneys

Some paralegals work on a freelance basis, as discussed in Chapter 2. In a decision in 1992, the New Jersey Supreme Court held that freelance paralegals could be as adequately supervised by the attorneys for whom they worked as are paralegals working inside attorneys' offices. Since that decision, courts in other states, and ethical opinions issued by various state bar associations, have held that freelance paralegals who are adequately supervised by attorneys are not engaging in the unauthorized practice of law.

Legal Technicians (Independent Paralegals) and UPL

As mentioned in Chapter 2, legal technicians (also called independent paralegals) provide "self-help" legal services directly to the public. The courts have had to wrestle with questions such as the following: If an independent paralegal advises a client on what forms are necessary to obtain a simple, uncontested divorce, how to file those forms with the court, how to schedule a court hearing, and the like, do those activities constitute the practice of law?

Generally, the mere dissemination of legal information does not constitute the unauthorized practice of law. There is a fine line, however, between disseminating legal information (by providing legal forms to a customer, for example) and giving legal advice (which may consist of merely selecting the forms that best suit the customer's needs), and the courts do not always agree on just where this line should be drawn.

An Ongoing Problem

Legal technicians continue to face UPL allegations brought against them primarily by UPL committees and state bar associations. In one case, an Oregon appellate court upheld the conviction of Robin Smith for engaging in UPL. The bar association complained that Smith provided consumers with various legal forms, advised them on which forms to use, and assisted them in completing the documents. The court reasoned that by drafting and selecting documents and giving advice with regard to their legal effect, Smith was practicing law.[3]

Some legal technicians faced UPL charges in California when the legislature authorized nonlawyers to provide certain types of legal services directly to the public. Under that law, a person who qualifies and registers with the county as a "legal document assistant" (LDA) may assist clients in filling out legal forms but cannot advise clients which forms to use.[4] After the LDA law passed, the case was settled.

Chapter Summary / Ethics and Professional Responsibility

THE REGULATION OF ATTORNEYS

Attorneys are regulated by licensing requirements and by the ethics rules of their state. The purpose of regulation is to protect the public against incompetent legal professionals and unethical attorney behavior.

1. *Who are the regulators?*—Lawyers establish the majority of rules governing their profession through state bar associations and the American Bar Association (ABA), which has established model rules and guidelines relating to professional conduct. Other key participants in the regulation of attorneys are state supreme courts, state legislatures, and (occasionally) the United States Supreme Court.
2. *Licensing requirements*—Licensed attorneys generally must be graduates of a law school and have passed a state bar examination and an extensive personal background check.
3. *Ethical codes and rules*—Most states have adopted a version of either the 1969 *Model Code of Professional Responsibility* or the 1983 revision of the *Model Code,* called the *Model Rules of Professional Conduct,* published by the ABA. The *Model Rules, which* have been adopted in most states, are often amended by the ABA to keep up-to-date with the realities of modern law practice.
4. *Sanctions for violations*—The *Model Code* and *Model Rules* spell out the ethical and professional duties governing attorneys and the practice of law. Attorneys who violate these duties may be subject to reprimand, suspension, or disbarment. Additionally, attorneys (and paralegals) face potential liability for malpractice or for violations of criminal statutes.

ATTORNEY ETHICS AND PARALEGAL PRACTICE

Some of the ethical rules governing attorney behavior pose difficult problems for paralegals, so paralegals should consult their state's ethical code to learn the specific rules for which they will be accountable. The following rules apply in most states.

1. *Duty of competence*—This duty is violated whenever a client suffers harm as a result of the attorney's (or paralegal's) incompetent action or inaction.
   a. Breaching the duty of competence may lead to a lawsuit against the attorney (and perhaps against the paralegal) for negligence. This may arise from faulty research, missed deadlines, or mistakes in documents.
   b. Attorneys must adequately supervise a paralegal's work to ensure that this duty is not breached.
2. *Confidentiality of information*—All information relating to a client's representation must be kept in confidence and not revealed to third parties who are not authorized to know the information.
   a. Paralegals should be careful on and off the job not to discuss client information with third parties. Breaches of confidentiality can include unauthorized persons overhearing telephone conversations or personal comments, or e-mails being sent to parties not intended to see them.
   b. Client confidences can be revealed only in certain circumstances, such as when a client gives informed consent to the disclosure, when disclosure is necessary to represent a client or to prevent harm to persons or property, or when a court orders an attorney to reveal the information.
3. *Confidentiality and the attorney-client privilege*—Some client information is regarded as privileged information under the rules of evidence and receives even greater protection by attorneys and paralegals subject to rules of confidentiality.
4. *Conflict of interest*—This occurs when representing a client injures the interests of another client.
   a. An attorney may represent both sides in a legal proceeding only if the attorney believes that neither party's rights will be injured and only if both clients are aware of the conflict and have given informed consent to the representation. Paralegals also fall under this rule.
   b. When a firm is handling a case and one of the firm's attorneys or paralegals cannot work on the case because of a conflict of interest, that attorney or paralegal must be "walled off" from the case—that is, prevented from having access to files or other information relating to the case.
   c. Normally, whenever a prospective client consults with an attorney, a conflicts check is done to ensure that if the attorney or firm accepts the case, no conflict of interest will arise.

THE INDIRECT REGULATION OF PARALEGALS

Paralegals are regulated indirectly by attorney ethical rules, by ethical codes created by NFPA and NALA, and by guidelines on the utilization of paralegals, which define the status and function of paralegals and the scope of their authorized activities. The ABA and some states have adopted guidelines on the utilization of paralegals. These codes and guidelines provide paralegals, attorneys, and the courts with guidance on the paralegal's role in the practice of law. The general rule is that paralegals can perform almost any legal task that attorneys can (other than represent a client in court) as long as they work under an attorney's supervision.

THE UNAUTHORIZED PRACTICE OF LAW

State laws prohibit nonlawyers from engaging in the unauthorized practice of law (UPL). Violations of these laws can have serious consequences.

1. *State UPL statutes*—Determining what constitutes UPL is complicated by the fact that many state laws give vague or broad definitions. One may look to court decisions in this area of law for guidance.
2. *The prohibition against fee splitting*—Paralegals working for attorneys and legal technicians (independent paralegals) need to be careful not to engage in activities that the state will consider UPL, such as a fee-sharing arrangement with an attorney.
3. *Prohibited acts*—Paralegals should always make clear their professional status so clients are not confused. While paralegals work under the supervision of an attorney, one can be an independent or freelance paralegal and need not be a full-time employee of an attorney. The consensus is that paralegals should not engage in the following acts:
   - **a.** Establish an attorney-client relationship.
   - **b.** Set legal fees.
   - **c.** Give legal advice or opinions.
   - **d.** Represent a client in court (unless authorized to do so by the court).
   - **e.** Encourage or contribute to any act that could constitute UPL.

SHOULD PARALEGALS BE LICENSED?

An issue for legal professionals is whether paralegals should be directly regulated by the state through licensing requirements.

1. *General licensing*—General licensing would establish minimum standards that every paralegal would have to meet in order to practice as a paralegal in the state.
2. *Registration*—Some states, such as Florida, encourage registration of paralegals. While not mandated, it does provide more visibility and professional recognition. Other states, such as California, have education requirements that must be met before one can claim to be a paralegal.
3. *Direct regulation*—The pros and cons of direct regulation through licensing are being debated vigorously by the leading paralegal and paralegal education associations, state bar associations, state courts, state legislatures, and public-interest groups.

QUESTIONS FOR REVIEW

1. Why is the legal profession regulated? Who are the regulators? How is regulation accomplished?
2. How is the paralegal profession regulated by attorney ethical codes? How is it regulated by paralegal codes of ethics?
3. What does the duty of competence involve? How can violations of the duty of competence be avoided?
4. What is the duty of confidentiality? What is the attorney-client privilege? What is the relationship between the duty of confidentiality and the attorney-client privilege? What are some potential consequences of violating the confidentiality rule?
5. How is the practice of law defined? The unauthorized practice of law (UPL)? How might paralegals violate state statutes prohibiting UPL? What types of tasks can legally be performed by paralegals?

ETHICS QUESTIONS

1. Norma Sollers works as a paralegal for a small law firm. She is a trusted, experienced employee who has worked for the firm for twelve years. One morning, Linda Lowenstein, one of the attorneys, calls from her home and asks Norma to sign Linda's name to a document that must be filed with the court that day. Norma had just prepared the final draft of the document and had placed it on Linda's desk for her review and signature. Linda explains to Norma that because her child is sick, she does not want to leave home to come into the office. Norma knows that she should not sign Linda's name—only the client's attorney can sign the document. She mentions this to Linda, but Linda says, "Don't worry. No one will ever know that you signed it instead of me." How should Norma handle this situation?

2. The law firm of Dover, Cleary and Harper decides to store all of its data in the cloud and enters into a contract with Cloud Service Provider for data storage. The firm does not mention its conversion to cloud storage to any of its clients. Six months later an employee of the Cloud Service Provider notices that one of the firm's clients, a local celebrity, has serious financial problems and broadcasts this fact on Facebook, causing significant embarrassment to the client. The client is able to track the disclosure of her confidential information on Facebook to Cloud Service Provider, which obtained the client's file from Dover, Cleary and Harper. Is the law firm guilty of an ethical violation?

PRACTICE QUESTIONS AND ASSIGNMENTS

1. In which of the following instances may confidential client information be disclosed?
   - **a.** The client in a divorce case threatens to hire a hit man to kill her husband because she believes that killing her husband is the only way that she can stop him from stalking her. It is clear that the client intends to do this.
   - **b.** A former client sues her attorney for legal malpractice in the handling of a breach-of-contract case involving her cosmetics home-sale business. The attorney discloses that the client is having an affair with her next-door neighbor, a fact that is unrelated to the malpractice case or the breach-of-contract case.
   - **c.** Attorney Sam prepares a will for a client; the will leaves the client's vacation home to Sam.
   - **d.** A new client brings a case to attorney Mark and asks Mark to represent him. The case would require Mark to sue a former client whom he previously defended on the same issue.

2. Using the material presented in the chapter on conflicts of interest, determine which type of conflict of interest is presented in the situations below:
   - **a.** A lawyer has a case pending before the state supreme court, advocating that divorced parents must obtain court permission for their children to move more than 300 miles from the other parent. The same lawyer takes a case for a client who wants to move 700 miles from the other parent, and he argues that the court does not need to grant permission. This case will likely end up before the state supreme court.
   - **b.** Melissa is an attorney with a criminal law practice. She has a big case in which her client was convicted of violating the state's recently enacted medical marijuana law, and she is appealing his conviction to the state supreme court. Tom, her husband, is a paralegal who works for the state attorney's office and has been assigned to gather research opposing the brief that Melissa filed on behalf of her client.

3. Which of the following actions should you take as a paralegal to avoid charges of engaging in the practice of law?
   - **a.** Include the title "paralegal" when signing letters and e-mails.
   - **b.** Introduce yourself without using your title in meetings with clients.
   - **c.** Include the title "paralegal" on your business cards.
   - **d.** Disclose your status as a paralegal when communicating with a court.

4. Matthew Hinson is a legal technician. He provides divorce forms and typing and filing services to the public at very low rates. Samantha Eggleston uses his services. She presents him with her completed forms, but she has one question: How much will she be entitled to receive in monthly child-support payments? How may Matthew legally respond to this question?

5. A paralegal experienced in employment discrimination law was hired by an attorney to develop a practice requiring appearances before both the state discrimination agency and the EEOC. The paralegal had previously advocated for clients before this state agency as permitted by state law. The attorney had no experience with employment discrimination cases. The attorney's clients were charged contingency fees, with the attorney

receiving two-thirds of the fees and the paralegal one-third. The paralegal solicited clients and handled their cases without supervision, to the extent of having more than forty cases pending before the state agency. The paralegal also removed cases from the agencies and refiled them in the courts using the attorney's name and bar license without seeking the attorney's approval for doing so. Using the material in the chapter, what ethical violations did the paralegal commit? Did the attorney violate any ethical duties?

6. According to this chapter's text, which of the following tasks can a paralegal legally perform?
   a. Provide legal advice to clients in the course of helping them prepare divorce pleadings.
   b. Interview a witness to a car accident.
   c. Represent a client in court.
   d. Set legal fees.
   e. Work as a freelance paralegal for attorneys.
   f. Work as a legal technician providing legal services directly to the public.

GROUP PROJECT

This project involves the review of your state's version of one of the ethical rules of competence, conflict of interest, or client confidentiality as assigned by your instructor. Students one, two, and three will locate your state's version of the rule using online sources, your school's library, or a local law library. They will also summarize the assigned sections of the rule and will determine which rule is the law in your state. Student four will compare the summarized sections of the state rule to the ABA Model Rule discussed in this chapter and will present the comparison to the class.

INTERNET PROJECTS

1. Access your state's rules online to learn the requirements for becoming licensed to practice law in your state. In addition, find out how your state defines the unauthorized practice of law. Do your state's rules differ from the requirements mentioned in the text? If so, how?
2. Go to **www.legalzoom.com** and click on "LLC." Generally, what product(s) and guarantee(s) does LegalZoom provide?
   a. What legal services are offered at the three different pricing options?
   b. Describe how an LLC is created by LegalZoom. Is any information given about whether an attorney files the documents with the state or creates a company-specific operating agreement?
   c. Does LegalZoom provide any information on how to choose between an LLC or a corporation as the appropriate organizational form for a customer's business? What services or guidance is provided to customers who do not elect to purchase the package offering attorney consultation?
   d. Review the material in the chapter on software as it relates to the unauthorized practice of law (UPL). Is LegalZoom providing forms or legal advice? Is LegalZoom engaging in UPL? Why or why not?
   e. Do an Internet search on "lawsuits against LegalZoom." Summarize your results in one paragraph.

END NOTES

1. Title 2 of the Texas Government Code, Section 81.101.
2. *Faretta v. California*, 422 U.S. 806 (1975).
3. *Oregon State Bar v. Smith*, 942 P.2d 793 (1997).
4. This law is codified in California Business and Professions Code, Sections 6400–6416.
5. *In re Nolo Press/Folk Law, Inc.*, 991 S.W.2d 768 (1999).
6. Texas Government Code Section 81.101(c) (Vernon Supp. 2000).