

## CHAPTER 4

# Ethics and Professional Responsibility



### CHAPTER OUTLINE

Introduction

The Regulation of Attorneys

Attorney Ethics and Paralegal Practice

The Indirect Regulation of Paralegals

The Unauthorized Practice of Law

Should Paralegals Be Licensed?

The Ethical Paralegal

### 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.

## Introduction

Paralegals preparing for a career in today's legal arena have a variety of career options. Regardless of which career path you follow, you should have a firm grasp of your state's ethical rules governing the legal profession. When you work under the supervision of an attorney, you and the attorney are team members. You work together on behalf of clients and share in the ethical and legal responsibilities arising as a result of the attorney-client relationship.

In preparing to be a paralegal, you must know what these responsibilities are, why they exist, and how they affect you. The first part of this chapter is devoted to the regulation of attorneys because the ethical duties imposed on attorneys affect paralegals as well. If a paralegal violates a rule governing attorneys, that may result in serious consequences for the client, for the attorney, and for the paralegal. Attorneys are subject to direct regulation by the state.

Paralegals are subject to less regulation, although states may impose more rules if believed desirable. Paralegals are regulated indirectly both by attorney ethical codes and by state laws that prohibit nonlawyers from practicing law. As the paralegal profession develops, professional paralegal organizations, the American Bar Association, and state bar associations continue to issue guidelines that serve to impact paralegals.

## The Regulation of Attorneys

Regulate can be defined as "to control or direct in agreement with a rule." To a significant extent, attorneys play critical roles in establishing most of the rules that govern their profession. One of the hallmarks of a profession is the establishment of minimum standards and levels of competence for its members. The accounting profession, for example, has established such standards, as have physicians, engineers, and members of other professions.

Attorneys are also regulated by the state, because the rules of behavior established by the legal profession are adopted and enforced by state authorities. First, by establishing educational and licensing requirements, state authorities ensure that anyone practicing law should be competent. Second, by defining specific ethical requirements for attorneys, the states protect the public against unethical attorney behavior that may affect clients' welfare. Because the rules limiting who can practice law are mostly written and enforced by lawyers, they also serve to assist lawyers by limiting competition from other groups, such as paralegals. We will discuss these requirements and rules shortly. Before we do, however, let's look at how these rules are created and enforced.

### Who Are the Regulators?

Key participants that determine what rules govern attorneys and the practice of law, as well as how these rules should be enforced, are bar associations, state supreme courts, state legislatures, and, in some cases, the United States Supreme Court. Procedures for regulating attorneys vary, of course, from state to state. We next look at some of the key regulators.

#### Bar Associations

Lawyers determine the requirements for entering the legal profession and the rules of conduct practicing attorneys will follow. Traditionally, lawyers have joined together in professional groups (bar associations) at the local, state, and national levels to discuss issues affecting the legal profession and to decide on standards of professional conduct.

In all states, to be admitted to practice, a prospective attorney must pass the state bar examination. Although membership in local and national bar associations is voluntary, membership in the state bar association (called a "unified bar") is mandatory in

many states. Many lawyers are also members of the American Bar Association (ABA), the voluntary national bar association discussed in Chapter 1. As you will see, the ABA plays a key role by proposing model (uniform) codes, or rules of conduct, for adoption by the states.

### State Supreme Courts

Typically, the state's highest court, often called the state supreme court, is the ultimate regulatory authority in a state. That court decides what conditions (such as licensing requirements, discussed below) must be met before an attorney can practice law within the state and when that privilege will be suspended or revoked. In most states, the state supreme court works with the state bar association. For example, the association may recommend rules and requirements to the court. If the court agrees, it can order the rules to become state law. Under the authority of the courts, state bar associations often handle regulatory functions, including disciplinary proceedings against attorneys who are accused of failing to comply with professional requirements.

### State Legislatures

State legislatures regulate the legal profession by passing laws affecting attorneys—such as statutes prohibiting the unauthorized practice of law and statutes concerning ethical conduct of licensed attorneys.

### The United States Supreme Court

Occasionally, the United States Supreme Court decides issues relating to attorney conduct. At one time state ethical codes, or rules governing attorney conduct, prohibited lawyers from advertising their services to the public. Restrictions on advertising were determined by the United States Supreme Court to be an unconstitutional limitation on attorneys' rights to free speech. Although there are still restrictions on what attorneys can say in advertisements, lawyer ads on television, billboards, radio, and the Internet are common.

## Licensing Requirements

The licensing of attorneys, which gives them the right to practice law, is accomplished at the state level. Each state has different requirements that individuals must meet before they are allowed to practice law and give legal advice.

### Basic Requirements

Generally, however, there are three basic requirements:

1. In most states, prospective attorneys must have a bachelor's degree from a university or college and must have graduated from an accredited law school (in many states, the school must be accredited by the ABA), which requires an additional three years of study.
2. A prospective attorney must pass a state bar examination—a rigorous examination that tests the candidate's knowledge of the law. The examination covers both state law (law applicable to the particular state in which the attorney is taking the exam and wishes to practice) and multistate law (law applicable in most states, including federal law). In addition, most states require prospective lawyers to pass the Multistate Professional Responsibility Exam on ethics rules.
3. The candidate must pass an extensive personal background investigation to verify that he or she is a responsible individual and qualifies to engage in an ethical profession. An illegal act committed by the candidate in the past might disqualify the person from being permitted to practice law. Only when these requirements have been met can a person be admitted to the state bar and

#### licensing

A government's official act of granting permission to an individual, such as an attorney, to do something that would be illegal in the absence of such permission.

practice law in the state. In addition, each federal court requires admission to practice before an attorney can appear in a case filed there. This generally requires a sponsor and an application, but no test.

### Licensing and UPL

Licensing requirements for attorneys are part of a long history of restrictions on entry into the legal profession. Beginning in the 1850s, restrictions on who could (or could not) practice law were put in place by state statutes prohibiting the unauthorized practice of law (UPL). Court decisions relating to unauthorized legal practice also date to this period. By the 1930s, almost all states had legislation prohibiting anyone but licensed attorneys from practicing law. Many of the regulatory issues facing the legal profession—and particularly paralegals—are directly related to these UPL statutes.

#### unauthorized practice of law (UPL)

The performance of actions defined by a legal authority, such as a state legislature, as constituting the "practice of law" without authorization to do so.

### Ethical Codes and Rules

The legal profession is also regulated through ethical codes and rules adopted by each state—in most states, by the state supreme court. These codes of professional conduct evolved over time. A major step toward ethical regulation was taken in 1908, when the ABA approved the *Canons of Ethics*, which consisted of ethical principles. The states adopted these canons as law. (Canons are generally accepted principles.)

Today's state ethical codes are based, for the most part, on later revisions of the ABA canons: the *Model Code of Professional Responsibility* (published in 1969) and the *Model Rules of Professional Conduct* (first published in 1983 to replace the *Model Code* and revised many times since then). Although most states have adopted laws based on the *Model Rules*, the *Model Code* is still in effect in some states. New York still uses the *Model Code*, for example, while California and Maine have developed their own rules. You should become familiar with rules that are in effect in your state.

#### The Model Code of Professional Responsibility

The ABA *Model Code of Professional Responsibility*, often referred to simply as the *Model Code*, consists of nine canons. In the *Model Code*, each canon is followed by sections entitled "Ethical Considerations" (ECs) and "Disciplinary Rules" (DRs). The ethical considerations are "aspirational" in character—that is, they suggest ideal conduct, not necessarily behavior that is required by law. For example, Canon 6 ("A lawyer should represent a client competently") is followed by EC 6-1, which states (in part) that a lawyer "should strive to become and remain proficient in his practice." In contrast, disciplinary rules are mandatory in character—an attorney may be subject to disciplinary action for breaking a rule. DR 6-101 (which follows Canon 6) states that a lawyer "shall not . . . neglect a legal matter entrusted to him."

#### The Model Rules of Professional Conduct

The 1983 revision of the ABA *Model Code*—referred to as the *Model Rules of Professional Conduct* or, more simply, as the *Model Rules*—represented a major revision of the code. The *Model Rules* replaced the canons, ethical considerations, and disciplinary rules of the *Model Code* with a set of rules organized under eight general headings. Each rule is followed by comments shedding light on the rule's application and how the rule compares with the *Model Code's* treatment of the same issue.

Because the 1983 *Model Rules* serve as models for the ethical codes of most states, we use the 1983 rules as the basis for our discussion. It is important to note, however, that the ABA's ethics commission periodically updates and revises the *Model Rules* as necessary in light of the realities of modern law practice. The ABA's ethics commission has revised the *Model Rules* to address new ethical concerns raised by technological developments (such as client confidentiality using e-mail). To view the ABA *Model Rules of Professional Conduct*, go to the American Bar Association's website.

## Sanctions for Violations

Attorneys who violate the rules governing professional conduct are subject to disciplinary proceedings brought by the state bar association, state supreme court, or state legislature—depending on the state’s regulatory scheme. In most states, unethical attorney actions are reported by clients, legal professionals, or others to the ethics committee of the state bar association, which is obligated to investigate each complaint. For serious violations, the state bar association or the court initiates disciplinary proceedings against the attorney.

### Formal Sanctions

Sanctions imposed for violations range from a reprimand (a formal “scolding” of the attorney—the mildest sanction but one that can seriously damage an attorney’s reputation and practice), to suspension (a more serious sanction in which the attorney is prohibited from practicing law in the state for a given period of time, such as one month or one year), to disbarment (revocation of the attorney’s license to practice law in the state—the most serious sanction).

### Civil Liability

In addition to these sanctions, attorneys may be subject to civil liability for negligence. Under the common law, *negligence* (called *malpractice* when committed by a professional, such as an attorney or physician) is a tort (a wrongful act) that is committed when an individual fails to perform a legally recognized duty. Tort law allows one who is injured by another’s wrongful or careless act to bring a civil lawsuit against the wrongdoer for *damages* (compensation in the form of money). A client may bring a lawsuit against an attorney if the client has suffered harm because of the attorney’s failure to perform a legal duty.

If a paralegal’s breach of a professional duty causes a client to suffer substantial harm, the client may sue not only the attorney but also the paralegal. Although law firms’ liability insurance policies typically cover paralegals as well as attorneys, these policies do not cover paralegals working on a contract (freelance) basis. Just one lawsuit could ruin a freelance paralegal financially—as well as destroy that paralegal’s reputation in the legal community. Hence, obtaining liability insurance is important for freelance paralegals as well as for independent paralegals.

Attorneys and paralegals are also subject to potential criminal liability under federal and state criminal statutes prohibiting fraud, theft, and other crimes.

## Attorney Ethics and Paralegal Practice

Because the *Model Rules of Professional Conduct* guide most state codes, the rules discussed in this section are drawn from the *Model Rules*. Keep in mind, though, that your own state’s code of conduct is the governing authority on attorney conduct in your state.

As a paralegal, one of your foremost professional responsibilities is to carefully follow the rules in your state’s ethical code. You will want to obtain a copy of your state’s ethical code and be familiar with its contents. A good practice is to keep the code in your office. It is also helpful to develop a relationship with a trusted mentor at your firm for advice on such issues.

Professional duties—and the possibility of violating them—are involved in almost every task you will perform as a paralegal. Even if you memorize every rule governing the legal profession, you can still violate a rule unintentionally (few people breach professional duties intentionally). To minimize the chances that you violate a rule, you need to know not only what the rules are but also how they apply to the day-to-day realities of your job. In general, avoiding financial dealings and social relationships with clients helps you avoid violating ethical obligations.

#### reprimand

A disciplinary sanction in which an attorney is rebuked for misbehavior. Although a reprimand is the mildest sanction for attorney misconduct, it is serious and may significantly damage the attorney’s reputation in the legal community.

#### suspension

A serious disciplinary sanction in which an attorney who has violated an ethical rule or a law is prohibited from practicing law in the state for a specified or an indefinite period of time.

#### disbarment

A severe disciplinary sanction in which an attorney’s license to practice law in the state is revoked because of unethical or illegal conduct.

#### malpractice

Professional misconduct or negligence—the failure to exercise due care—on the part of a professional, such as an attorney or a physician.

#### damages

Money awarded as a remedy for a civil wrong, such as a breach of contract or a tort (wrongful act).

A paralegal discusses a potential conflict of interest with her supervising attorney. Attorneys and paralegals must be careful to avoid violating the ethical rules of the legal profession, because violations of the rules can have serious professional and financial consequences. What are some ways that you can avoid violating your state's code of ethical conduct?



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The rules relating to competence, confidentiality, and conflict of interest deserve special attention here because they pose particularly difficult ethical problems for paralegals. Other important rules that affect paralegal performance—including the duty to charge reasonable fees, the duty to protect clients' property, and the duty to keep the client reasonably informed—will be discussed elsewhere in this text as they relate to special topics.

## The Duty of Competence

Rule 1.1 of the *Model Rules* concerns a fundamental obligation of attorneys—the duty of competence. The Bar Association focuses on the requirement that attorneys provide able representation to their clients. Competency requires knowledge of the law, careful research to ensure being up-to-date, and proper preparation for representation. Most legal representation occurs out of court but requires the same knowledgeable approach. A breach (failing to perform) of this duty may subject attorneys to one or more of the sanctions discussed earlier. As a paralegal, you share in this duty when you work on an attorney's behalf.

### How the Duty of Competence Can Be Breached

Most breaches of the duty of competence are not intentional. Often, breaches of the duty of competence have to do with inadequate research, missed deadlines, and errors in legal documents filed with the court.

#### breach

To violate a legal duty by an act or a failure to act.

**INADEQUATE RESEARCH.** Paralegals do both legal and factual research for attorneys. Depending on the situation, an attorney's first step after meeting with a new client is often to have a paralegal research the facts involved, such as who did what to whom, when, where, and how. If the paralegal fails to discover a relevant fact and the attorney then relies on the paralegal's research in advising the client, the result could be a breach of the duty of competence.

Similarly, a paralegal conducting legal research might breach the duty of competence by failing to find or report a court decision that controls the outcome of a client's case. For example, suppose that a paralegal performs initial research into the law surrounding a particular dispute and reports the findings to the attorney. Then, while the paralegal is working on unrelated cases over the next few months, a state appeals court rules on a case with issues very similar to those involved in the client's dispute. If the paralegal or the attorney does not go back and confirm that the initial research results are still accurate, a ruling that would influence the client's case could be overlooked. This would breach the attorney's duty of competence to the client.

Although attorneys are ultimately responsible for competent representation, paralegals play an important role in providing accurate information to their attorneys. If you are ever unsure of the accuracy of your research results, make sure to let the attorney know of your doubts. Also, keep good notes recording each step you took in conducting research so that you know what still needs to be done. These measures help prevent accidental breaches of the duty of competence.

**MISSED DEADLINES.** Paralegals often work on several cases at once. Keeping track of every deadline in every case can be challenging. Organization is the key to making sure that all deadlines are met. All dates relating to actions and events for every case or client should be entered on a calendar. Firms typically use computerized calendaring and "tickler" (reminder) systems.

Besides making sure that all deadlines are entered into the appropriate systems, you should also have your own personal calendar for tracking dates that are relevant to the cases on which you are working—and then make sure that you consistently use it. Also, check frequently with your attorney about deadlines.

**ERRORS IN DOCUMENTS.** Breaches of the duty of competence can involve errors in documents. Incorrect information might be included (or crucial information omitted) in a legal document to be filed with the court. If the attorney fails to notice the error before signing the document, and the document is delivered to the court, a breach of the duty of competence has occurred. Depending on its effect, this breach may expose the attorney to liability for negligence. To prevent these kinds of violations, be especially careful in drafting and proofreading documents.

Generally, if you are ever unsure about what to include in a document, when it must be completed or filed with the court, how extensively you should research a legal issue, or any other aspect of an assignment, ask your supervising attorney for clarification. Make sure that your work is adequately overseen by an attorney to reduce the chances that it contains costly errors. Whether communicating by e-mail or in person, clear communication is critical, as the *In the Office* feature on the following page addresses.

### Attorney's Duty to Supervise

Rule 5.3 of the *Model Rules* defines the responsibilities of attorneys to nonlawyer assistants. Attorneys must supervise their assistants to ensure that they behave in accord with the standards of the profession. The rule also specifies the circumstances under which a lawyer is held responsible for conduct by a nonlawyer that violates an attorney's duty. The lawyer is responsible, for example, if she orders improper conduct or ratifies (approves of) it. Lawyers who have managerial authority in a law firm or have supervisory authority over a nonlawyer can also be held responsible for the nonlawyer's unethical conduct if they knew about it and failed to take action to prevent it.

This rule applies not only to lawyers who work in private law firms but also to lawyers in corporate legal departments, government agencies, and elsewhere. In addition, in the statements outlining attorneys' responsibilities toward nonlawyer employees in this area, the ABA commission changed the word *should* to *must*. Attorneys *must* both instruct and supervise nonlawyer employees concerning appropriate ethical conduct as they can be held personally responsible for the ethical violations of their subordinates.

### Inadequate Supervision

Because attorneys are legally responsible for their assistants' work, it may seem logical to assume that attorneys will take time to direct that work carefully. In fact, paralegals may find it difficult to ensure that their work is adequately supervised. Most attorneys and paralegals are very busy. Making sure that all paralegals' tasks are properly overseen can be time consuming. At the same time, attorneys—especially if they know their paralegals are competent—often do not take the time to read every document the paralegals draft. Nonetheless, as a paralegal, you have a duty to assist your supervising attorney in fulfilling his or her ethical obligations, including the obligation to supervise your work.

If you ever believe that your attorney is not adequately supervising your work, there are several things you can do:

- Improve communications with the attorney—generally, the more you initiate communication with your supervising attorney, the more likely the attorney will take an active role in directing your activities.
- Ask the attorney for feedback on your work. Sometimes, it helps to place reminders on your calendar to discuss particular issues or questions with the attorney. When the opportunity to talk arises, these issues or questions will be fresh in your mind.
- Attach a note to a document that you have prepared for the attorney, requesting him or her to review the document (or revised sections of the document) carefully before signing it.

Ensuring proper supervision to protect yourself is highlighted in the *Developing Paralegal Skills* feature on the facing page.

## IN THE OFFICE

### AM I CLEAR?

E-mail is a common form of communication, but it causes problems when not used properly. E-mails are the equivalent of letters or memos. When we write a letter or a memo, we usually read it more than once and think carefully about what we're saying. Too many times, we treat e-mails as if they were oral communications—that is, we write in a chatty and imprecise manner. Before sending any e-mail to a client, print it, read it, be sure it is addressed to the right party, and edit it. Remember that the matter you're discussing is important to the client. Your communication

should be professional and clear. You should always follow office e-mail procedures carefully.

If your firm uses social media, you should also use discretion when you create such communications. You are often judged on how carefully you communicate. Keep in mind that social media posts have turned up in lawsuits over office behavior. For example, posts on Facebook or Twitter have crossed the line into sexual harassment. Keep your posts professional, as they represent both you and the firm.



## Confidentiality of Information

Rule 1.6 of the *Model Rules* concerns attorney-client confidentiality. This rule is one of the oldest and most important rules of the legal profession. It would be difficult for a lawyer to properly represent a client without such a rule. A client must be able to confide in the attorney so that the attorney can best represent the client's interest. Because confidentiality is one of the easiest rules to violate, a thorough understanding of the rule is essential.

The general rule of confidentiality is that all information relating to representation of a client must be kept confidential. There are exceptions to the rule, which we discuss shortly.

The rule simply states that a lawyer may not reveal "information relating to representation of a client."

**EXAMPLE 4.1** You know that a client is the president of a local company. Do you have to keep that information confidential? Suppose you tell a friend, "Mr. X is the president of XYZ Corporation." The fact that X is president is widely known. But in saying that, people are likely to presume that X is a client of your firm. Mr. X may not want it known that he is talking to a lawyer. People who learn that Mr. X has been at the law firm may think "something is up," which is likely true. Confidence has been breached.

Consider another example. Suppose that one evening you told your spouse that you had met Mr. X that day. Your spouse might reasonably assume that your firm was handling some legal matter involving Mr. X and might repeat that to other people.

## DEVELOPING PARALEGAL SKILLS

### ADEQUATE SUPERVISION

Michael's supervising attorney, Muriel, asks him to prepare two complaints (documents filed with the court to initiate a lawsuit) and gives him specific information needed for the two different cases. Muriel is scheduled to attend a deposition (a pretrial procedure in which testimony is given under oath) in another matter this afternoon and asked Michael to finish the complaints and file them with the court today. Muriel tells Michael to use a complaint from a previous client's case as a model for creating the new complaints, replacing that client's information as necessary.

Michael finishes the work at 3:00 P.M. while Muriel is attending the deposition in the conference room. Michael needs to file the complaints at the courthouse by 5:00 P.M., but, knowing the adequate supervision rule, does not want to file the documents before Muriel has reviewed them. He decides that he must interrupt the deposition so that Muriel can look over the complaints before they

are filed with the court. He flags a few passages that he is unsure about and proceeds into the conference room. Muriel asks the opposing counsel to take a short break so she can step out of the room to review the documents.

### TIPS FOR OBTAINING ADEQUATE SUPERVISION

- Always ask your supervising attorney to review your work.
- Use notes or ticklers as reminders to ask for a review.
- Make the review as convenient as possible for your supervising attorney and mark anything that needs particular attention.
- Discuss any ethical concerns with the attorney.
- Be persistent.
- Complete your work in a timely fashion so the attorney can review it.

Because it may be difficult to decide what information is or is not confidential, a good rule of thumb is to regard all information about a client or a client's case as confidential.

### Exceptions to the Confidentiality Rule

Rule 1.6, Confidentiality of Information, provides for certain exceptions to the confidentiality rule, each of which we look at here.

**CLIENT GIVES INFORMED CONSENT TO THE DISCLOSURE.** The rule indicates that an attorney can reveal confidential information if the client gives informed consent to the disclosure. The attorney must fully explain the risks and alternatives involved in the disclosure for consent to be informed.

**EXAMPLE 4.2** Suppose an attorney is drawing up a will for a client. The client is leaving certain property to her son and not leaving a share of that property to her daughter. The daughter calls and wants to know how her mother's will reads. The attorney cannot divulge this confidential information because the client has not consented.

In this instance the attorney may explain to the client that if her daughter does not learn about the provisions of the will until after her mother's death, it is more likely that she will contest it in court. After the attorney and client discuss the alternatives, the client can give informed consent to the attorney to disclose information to her daughter.

**IMPLIEDLY AUTHORIZED DISCLOSURES.** The ABA rules allow attorneys to make disclosures of information that are presumed necessary to represent clients. This exception is clearly necessary. Legal representation of clients necessarily involves attorneys' assistants who must have access to the confidential information to do their jobs. If a paralegal is working on the client's case he must know what the client told the attorney about the legal matter and must have access to information in the client's file concerning the case.

**DISCLOSURES TO PREVENT HARM.** The *Model Rules* recognize that there are certain circumstances in which an attorney should be allowed to disclose confidential information when it is necessary to prevent harm to persons or property. Rule 1.6 specifically lists four exceptions to the confidentiality rule for this purpose:

1. An attorney is allowed to reveal a client's information to prevent possible death or substantial bodily harm.

**EXAMPLE 4.3** A client confides to his attorney that he assaulted and nearly killed several people recently. The attorney is not allowed to disclose this information. If that client tells the attorney that he is going to attack a specific person in the future, however, the attorney can disclose this information to prevent likely bodily harm to the person.

This is addressed further in the *Developing Paralegal Skills* feature on the facing page.

2. In certain situations, an attorney can disclose confidential information to prevent a client from committing a crime or fraud. The crime or fraud must be reasonably certain to result in significant injury to the financial interests or property of another. Also, the client must have used or be using the attorney's services to perpetrate the crime or fraud. If both these conditions are present, then the attorney can disclose information to the extent necessary to enable the affected person to contact the appropriate authorities.
3. If a client used the attorney to help commit a crime or fraud, and the crime or fraud will likely cause injury to the financial interests or property of another, the attorney can disclose confidential information to the extent necessary to prevent or reduce that injury.

## DEVELOPING PARALEGAL SKILLS

### WHAT IF YOU LEARN YOUR CLIENT IS PLANNING TO COMMIT A CRIME?

Communications between a client and his or her attorney, including those with the attorney's paralegal, are usually covered by the attorney-client privilege. Privileged statements may not be disclosed without the client's consent. When the client makes statements that suggest he or she is going to commit a crime, however, the privilege does not apply.

For example, in one criminal case, the defendant told his lawyer that he was going to attempt to bribe one or more witnesses against him and that if he was unable to do so, he would "whack" the witnesses.<sup>a</sup> Later the defendant also threatened the lawyer. The lawyer reported these threats to the district attorney and withdrew as the

defendant's counsel. The defendant's new lawyer tried to have the first lawyer's testimony about the threats excluded, but failed. Because the defendant had threatened a criminal act (assaulting the witnesses and lawyer) that could involve bodily harm or death, the California appeals court held that privilege did not apply.

State rules on privilege differ, and you should make sure that you understand the range of crimes covered by your state's laws. All states exempt threats of death or serious injury, and such statements should be reported immediately. In addition, some states require reporting of certain criminal acts.

a. *People v. Dang*, 93 Cal.App.4th 1293, 113 Cal.Rptr.2d 763 (2001).

4. An attorney can also disclose confidential information to establish a defense to a criminal charge in a controversy between the attorney and the client based on conduct involving the client. Similarly, the attorney may respond to allegations in proceedings regarding the attorney's representation of the client.

**DISCLOSURES TO ENSURE COMPLIANCE WITH MODEL RULES.** If a lawyer is unsure what is required to comply with the *Model Rules of Professional Conduct* in a particular situation, the lawyer can seek legal advice from another lawyer without violating confidentiality.

**EXAMPLE 4.4** An attorney who is representing a corporation becomes suspicious that the corporation is engaged in fraud. The attorney is not sure what her professional responsibilities are in that particular situation, so she can seek confidential legal advice to assist her in complying with the *Model Rules*.

**DEFENDING AGAINST A CLIENT'S LEGAL ACTION.** An attorney may also disclose confidential information if the information is necessary to establish a defense in an action brought by a client against the attorney.

**EXAMPLE 4.5** A client sues his attorney for malpractice due to litigation that did not go well. The lawyer might need to reveal confidential information to prove that he was not negligent.

Note, though, that the attorney is permitted to disclose confidential information only to the extent that it is essential to defend the lawsuit.

**DISCLOSURES TO COMPLY WITH COURT ORDER OR OTHER LAW.** An attorney may also reveal information relating to the representation of a client if ordered to do so by a court or other governmental entity.

**EXAMPLE 4.6** An attorney representing a client in a divorce case knows the client is hiding valuable assets from his wife. In that situation, a court could require the attorney to reveal confidential information from the client related to the hidden assets. The attorney should first attempt to persuade the client to disclose the assets. The attorney can reveal as much information as is reasonable to satisfy the needs of the court or other governmental entity.

### Violations of the Confidentiality Rule

Naturally, paralegals are tempted to discuss work with family members, co-workers, and friends. As a paralegal, a great temptation you will face is the desire to discuss an interesting case with someone you know.

You can deal with this temptation in two ways: you can decide never to discuss anything concerning legal matters at work, or you can limit your discussion to issues and comments that will not reveal the identity of clients. The latter approach is more realistic for most people, but it requires great care. Something you say may reveal a client's identity, even though you are not aware of it. (See the *Ethics Watch* feature on the facing page.) Developing a reputation for being discreet will enhance your career by encouraging attorneys and clients to confide in you.

**CONVERSATIONS OVERHEARD BY OTHERS.** Violations of the confidentiality rule can happen by oversight.

**EXAMPLE 4.7** Suppose that you and a secretary in your office are working on the same case and continue, as you walk to the elevator, a conversation about the case. In the hall or on the elevator, your conversation could be overheard, and the confidential information revealed could have an adverse effect on your client's interests.

It is important to avoid the possibility of accidentally revealing confidential information. Therefore, never discuss confidential information when you are in common areas.

**ELECTRONIC COMMUNICATIONS AND CONFIDENTIALITY.** Whenever you talk to or about a client on the telephone, make sure that your conversation will not be overheard by a third party. You may be sitting in your private office, but if your door is open, someone may overhear the conversation. Even employees of the firm should not hear information about cases they are not working on.

Paralegals should take special care when using cell phones. Although conversations on cell phones are difficult to intercept, there is still a security risk. No doubt you have overheard other people talking on their phones as if other people could not hear. Some violations of confidentiality are low-tech, such as talking on the phone in the open, while others are more sophisticated. The *Featured Contributor* on pages 98 and 99 provides more details about electronic security issues.

**OTHER WAYS OF VIOLATING THE CONFIDENTIALITY RULE.** There are many other ways in which you can reveal confidential information without intending to do so. A file or document sitting on your desk, if observed by a third party, may reveal the identity of a client or enough information to suggest the client's identity. A computer screen, if visible to those passing by your desk, could convey information to someone not authorized to know that information. You might be speaking to an expert witness about rescheduling a meeting and accidentally let something about the case slip out.

Alternatively, you might be friendly with a paralegal at an opposing attorney's office because the two attorneys have worked on many cases together. You are on the phone trying to work out a date for an important meeting. This paralegal suggests a date, and you tell her that the attorney for whom you work is scheduled to be in court on a specific client's case that day. If you name the client, or indicate that the attorney will be

#### third party

A person or entity not directly involved in an agreement (such as a contract), legal proceeding (such as a lawsuit), or relationship (such as an attorney-client relationship).

## ETHICS WATCH

### SOCIAL EVENTS AND CONFIDENTIALITY

You are at a party with some other paralegals. You tell a paralegal whom you know well of some startling news—that a client of your firm, a prominent city official, is being investigated for drug dealing. Although your friend promises to keep this information strictly confidential, she nonetheless tells her husband, who tells a coworker, who tells a friend, and so on. Soon, the news is in the open and the resulting media coverage harms the official's reputation in the community.

Revealing the juicy gossip breached your obligation to the client. If it can be proved that the harm is the result of your breach of the duty of confidentiality, the official could sue you and the attorney and the firm for whom you work for damages.

In this situation, you would have violated the *NFPA Model Code of Ethics and Professional Responsibility*, Section 1.5(f), which states: "A paralegal shall not engage in any indiscreet communications concerning clients." This behavior would also have violated the *ABA Model Guidelines for the Utilization of Paralegal Services*, Guideline 6: "Attorneys may utilize paralegals, but the attorneys must take proper steps to be sure that client confidentiality is protected." Finally, you would have violated the *NALA Code of Ethics and Professional Responsibility*, Canon 7: "A paralegal must protect the confidences of a client."

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arguing a particular type of motion in the case, you may breach the duty of confidentiality. As the *Technology and Today's Paralegal* feature on page 100 emphasizes, there are many aspects to confidentiality.

### Confidentiality and the Attorney-Client Privilege

All information relating to a client's representation is considered confidential information. Some confidential information also qualifies as privileged information, or information subject to the attorney-client privilege.

The attorney-client privilege can be vitally important during litigation. As you will read in Chapter 10, prior to a trial each attorney is permitted to obtain information relating to the case from the opposing attorney and other persons, such as witnesses. This means that attorneys must exchange certain information about their clients. An attorney need not provide privileged information, however—unless the client consents to the disclosure or a court orders it. Similarly, if an attorney is called to the witness stand during a trial, the attorney may not disclose privileged information unless the court orders it.

#### attorney-client privilege

A rule of evidence requiring that confidential communications between a client and his or her attorney (relating to their professional relationship) be kept confidential, unless the client consents to disclosure.

#### What Kind of Information Is Privileged?

State statutes and court cases define what constitutes privileged information. Generally, any communications concerning a client's legal rights or problems fall under the attorney-client privilege.



## FEATURED CONTRIBUTOR

### SECURING CLIENT INFORMATION IN THE DIGITAL AGE

Anita Whitby

#### BIOGRAPHICAL NOTE

Anita Whitby is a business law attorney and Park University faculty member. She has extensive experience as a course developer and teacher of legal studies and business law courses. Ms. Whitby is also a textbook reviewer for Cengage Learning and serves on the advisory board for the series known as *Annual Editions: Business Ethics*. Her current research interests include data privacy ethics, intellectual property, and immersive online learning.

The Digital Age has ushered in an array of electronic devices and technology to help streamline law offices. However, the use of such electronic devices and technology presents serious ethical issues. The following best practices will help paralegals avoid common pitfalls associated with the use of popular devices and technology.

#### E-MAIL ENCRYPTION

When the topic of e-mail security comes up, we often think about it in terms of hackers attacking a computer network. However, it is the act of sending unsecured e-mail communication that is the main source of client data breaches. Communicating with clients via e-mail may seem harmless, but it must be done with extra precaution. Whether you are using a laptop or smartphone, be sure to use encryption software for client communication. Encryption ensures that client informa-

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tion is protected. Because the communication cannot be “unlocked” without a “key,” misdirected communication is not in danger of being disclosed to a third party.

#### CLIENT WORKPLACE E-MAIL & CONFIDENTIALITY

What if a client prefers to communicate via e-mail? The American Bar Association recently issued an ethics opinion regarding the attorney’s duty to caution clients about communicating sensitive information via workplace e-mail. A prime example is the client who communicates with the law firm through a workplace computer. In this situation, the client does not have an expectation of privacy because the employer’s e-mail system is being used. A paralegal should notify the supervising attorney when there is a potential issue about the manner in which a client is communicating sensitive information to the firm.

**EXAMPLE 4.8** Suppose that an attorney’s client is a criminal defendant. The client tells the attorney that she was near the crime site at the time of the crime, but to her knowledge, no one saw her. This is privileged information that the attorney may disclose only with the client’s consent or on a court’s order to do so.

**work product**  
An attorney’s mental impressions, conclusions, and legal theories regarding a case being prepared on behalf of a client. Work product normally is regarded as privileged information.

**WORK PRODUCT.** Certain materials relating to an attorney’s preparation of a client’s case for trial are protected as privileged information under the work product doctrine. Usually, information concerning an attorney’s legal strategy for conducting a case is classified as work product and, as such, may be subject to the attorney-client privilege. Legal strategy includes the legal theories that the attorney plans to use in support of the client’s claim and how the attorney interprets the evidence relating to the claim.

### E-MAIL "RECALL"

Security breaches can result from something as simple as sending an e-mail to the wrong recipient. The e-mail "recall" feature can be used, but the "recall" feature does not work for e-mails that have already been opened. In addition, the recall feature does not always function properly due to firewalls and other network settings. Therefore, a paralegal must be diligent in verifying the correct recipients before e-mail communications are sent. You can opt to use e-mail software that delays outgoing communication for a short period of time before it is sent. That allows extra time to address issues that may arise.

### METADATA

Because documents contain metadata, a paralegal must be certain that sensitive information has been properly redacted. Saving a document in PDF format does not "scrub" it of revisions that may have been made. Also, if you use an older version of Adobe software, you may mistakenly believe that it is sufficient to use the markup feature to "strike out" sensitive data. That works when the document is in print form. However, the underlying data still exists in electronic versions of the document and can be readily accessed. Therefore, be sure that electronic documents have been "scrubbed" of metadata. Newer versions of Adobe software allow users to highlight the material and then apply redactions to the document. You can be certain that a document is free of metadata by simply scanning a hard copy of the document and then using that "clean" version of the electronic document for dissemination.

### WI-FI HOTSPOTS & WIRELESS PHONES

An often overlooked security danger involves the use of wireless devices to transmit e-mails, texts, and other communication via public Wi-Fi. These networks are unsecured. They should not

be used to communicate confidential information. Use a secure mobile hotspot instead. It allows multiple Wi-Fi devices to connect to a secured mobile broadband network.

Wireless phone communication is also of concern because, like public Wi-Fi, it is not always secure. Third parties can use scanners to intercept cell phone calls. Many clients are unaware of the risks or have to be reminded of the potential for an unintended disclosure of their confidential information.

### ENCRYPTION, BIOMETRIC TECHNOLOGY & REMOTE WIPES

Smartphones and laptops contain a treasure trove of information, so they must be encrypted and password protected.

Many users employ biometric technology (fingerprint authentication) as an added layer of security. Although biometric technology isn't 100 percent foolproof, many still consider it to be a viable option. With the adoption of "bring your own device" (BYOD) policies, law firms also secure data by programming security software to overwrite files remotely. This is especially helpful for lost or stolen devices because the "remote wipe" erases sensitive data completely.



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### SOCIAL MEDIA

Social media applications are an ever-increasing source of data breaches because of how quickly malware and viruses can spread through social networks. Avoid clicking on links from dubious sources and never download a third-party application without verifying its source. Use a passphrase instead of a simple password for social media accounts. Create a unique, 15-character passphrase that includes uppercase and lowercase letters, along with symbols and numbers. Update your passphrase often. Last, but not least, avoid the temptation to share work details online.

Certain evidence gathered by the attorney to support the client's claim, however, such as financial statements relating to the client's business firm, would probably not be classified as work product.

**CAUTION ADVISED.** Because it is often difficult to tell what types of information (including work product) qualify as privileged, paralegals should consult with their supervising attorneys whenever issues arise that may require that such a distinction be made. It is important to note that like any other confidential information relating to a client's case, privileged information is subject to the exceptions to the confidentiality rule discussed above. You should be alert for accidental disclosures by opposing counsel or paralegals. If you think someone on the other side of a case has disclosed confidential information to you, immediately tell your supervising attorney.