Paralegal Ethics Presentation

Presented By
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Good afternoon everyone. I am happy to be here, especially so, after having received such a generous and warm introduction.

We are here to review the important principles of professional conduct and ethical considerations as it applies to paralegals and legal assistants.

I will concentrate on the following points: First, I will discuss the expanding role of paralegals in the practice of law. Then, I will address the Model Code of Ethics with a focus on the Rules governing Conflict of Interest and Confidentiality. And, finally, I will cover how these rules are implicated in the ever growing world of technology as used in the legal profession.

The Canon of Professional Ethics was developed to govern professional conduct in the practice of law in order to maintain integrity, honesty and respect in the profession. The history of the Code closely tracks the development of the legal profession itself. It has evolved throughout the years.

Indeed, the legal field has changed significantly since I started to practice law 17 years ago. At that time, typewriters with word processors were the norm, computers were a luxury and any internet access was virtually unheard of in law firms or legal departments with 50 or fewer attorneys. Well, the times certainly have, and are, continually "a changing."

Which reminds me of a phrase I learned and try to remember: ***" Life is change. But Growth* is optional. Choose wisely."**

The *legal system* is in a constant state of change, which has resulted in many positive developments which likewise should require our simultaneous **growth** in the process.

As you have seen for yourselves, this state of flux has been shaped by many different innovations such as: the expansion of information technology, the unprecedented size of law firms, the practice of law being focused around specific substantive and specialty areas, the increase of women and minority counsel to the profession and so on. Not surprisingly, as a result of this evolution, paralegals have emerged as an integral part of the legal system.

In fact, paralegals continue to assume a growing range of tasks in legal offices nationwide, and, perform many of the same tasks as lawyers. I researched the recent records of the U.S. Department of Labor, the Bureau of Labor Statistics and the Occupational Outlook Quarterly forecast which show that paralegals and legal assistants are projected to grow faster than the average ***for all*** occupations through the year 2012. The paralegal profession is solidly ranked as the fastest growing and one of the most secure occupations. The growth rate is estimated at 86% just for this year, 2005.

However, due to various factors such as the technology boom, the increase in the number of professsional paralegals, the increased size of law firms, the dynamics of personnel transitions

and the fact that lawyers and paralegals have become more mobile, legal professionals are faced with additional ethics considerations. It is therefore incumbent upon us to identify the ethical responsibilities associated with these changes.

The National Federation of Paralegal Association (NFPA) has adopted a Model Code of Ethics which is largely modeled after the American Bar Association Model Rules of Professional Conduct governing the practice of law by attorneys. Paralegals are not ***legally bound*** by either the NFPA or the ABA Code of Ethics, that is, there is no civil liability for violation of these rules. Nonetheless, as a professional, you should be knowledgeable about these standards and adhere to them, if for no other reason, than to avoid trouble with your job and to avoid harm to others.

The NFPA Model Code of Ethics sets forth 38 specific ethics rules. That's a lot of rules to remember. However, ***more*** can be complicated. I like to keep it simple. The distinguished journalist, Henry Louis Mencken is quoted as having stated : **" Say what you will about the Ten Commandments, you must always come back to the pleasant fact that there are only 10 of them!"**

On this note, I've take the liberty of paring down the various ethics rules simply to 8 general principles, or what I like to call, the **Rule of 8 "C's".**

Rule of 8 "C's"

C*ompetence* to be achieved through education, training and experience.

C*ommunication* in forthright manner, avoid ex parte communications.

C*onduct* oneself professionally, avoid the appearance of impropriety.

C*ontribute* to the improvement of the legal system, do pro bono work and other volunteer work.

C*onfidential* information is to be preserved.

C*onflict* of interests are to be avoided.

C*lear* identification of one's status as a paralegal.

C*omply* with legal authority governing the unauthorized practice of law.

In light of the expanding role of the paralegal, can anyone venture to tell me which 2 of the 8 "C" Rules you believe to be implicated the most in this day and age?

It appears that **Conflict of Interest** and **Confidentiality** issues have generated the greatest debate and concern, at least, according to the amount of material recently published on these two topics, which includes published Ethics Opinions.

Let's focus our attention, therefore, on Conflict of Interest and the Preservation of Confidentiality doctrines and the relationship of those doctrines to paralegals.

To start, ***What is a Conflict of Interest?*** We can safely assume that it is ***information*** of some sort. What kind of information?

Does it have to be ***attorney/ client privileged*** information? No. Does it have to include actual ***documented*** facts about a client's case ? No.

It only needs to be information about the client that, were it revealed to other members of the legal team, may cause some harm, injury or prejudice to the client.

The first step therefore, is to determine who is the client? The first thing a lawyer must do is to explain at the outset to all persons involved in a matter who the lawyer's client is. From the client's perspective, this is part of the fundamental duty to communicate with the client (Model Rule 1.4). The client is entitled, for example, to know if the lawyer is concurrently representing someone else in the same matter. Clarification of the client's identity in advance is also crucial to avoiding later conflict of interest allegations based on arguments that the lawyer represented a party whom the lawyer did not believe he or she was representing (see discussion of Model Rules 1.7, 1.9 and 1.10).

Finally, from the perspective of persons not represented by the lawyer, disclosure of the client's identity is part of the obligation the lawyer has been communicating with a person who is unrepresented.

In the employer-employee context, the most common client identity problem is for an employee to mistakenly believe that he or she is also represented by the lawyer for the employer. When the employer' s and employee' s interests turn adverse, this confusion can result in an apparent conflict, possibly requiring disqualification of the lawyer and/or compromising the employer's legal position, where there would have been no conflict if the lawyer had clearly explained at the outset that he only represented the employer.

Example: Lawyer represents X Corporation in an investigation of corporate wrongdoing by employees of X Corporation. Lawyer interviews an X Corporation employee, Joe Kickback, in connection with the investigation. Lawyer must make clear to Joe, preferably in writing prior to the interview, that the Lawyer represents X Corporation and that lawyer does not represent Joe. If Joe asks lawyer for advice on what to do, lawyer may tell Joe what X Corporation would like Joe to do, but lawyer should also tell Joe that lawyer cannot give him legal advice as to what it is in his best interest to do.

Finally, an organizational client is not to be confused with persons who run the organization. A lawyer who represents a corporation must represent the corporation' s interests, not the interests of its individual constituents. In a suit alleging sexual harassment by a corporate officer, for example, the facts may be such that it is best for the Corporation to admit that the incident happened and take prompt remedial action. A lawyer representing the corporation should, in this situation, advise the corporation' s senior officers or directors that they should do what is in the ***corporation' s*** interests, even if the interests of one or more of it's officers diverge.

It is important to remember that a paralegal possesses information about a client's transactions, the attorney's strategies, thought processes, work product or other client privileged information.

Conflicts of interests involving paralegals usually result from personal and business relationships outside the legal environment or from legal matters handled by the paralegal in former employment.

Just as a lawyer may not represent a party in a matter in which the representation is adverse to a current client (see Model Rule 1.7), so too for a paralegal. This problem often arises, for instance, when a lawyer representing an employer also represents an employee in the same matter. Simultaneous representation of a Corporation and one or more of its employees may be allowed, provided the corporation' s and the employee's interests are not currently adverse. If , however, the interests of the Corporation and the employee's later become adverse, the lawyer may have to resign from both representations.

A lawyer and/or paralegal also may not represent a party that is adverse to a former client in a matter that is substantially related to the matter in which the lawyer/paralegal represented the former client. (Model Rule 1.9). This means that where the lawyer/paralegal represents, for instance, both the employer and an employee in a suit over the employee's conduct, the lawyer cannot later represent either party in a dispute between them over the same matter. If the employer later fired the officer for sexual harassment, for example, the same lawyer could not represent the employer in litigation over the discharge.

Outside counsel in particular has to be concerned with the effect of disqualification on other lawyers and paralegals in their firm. The general rule is that conflicts are often imputed to other lawyers and paralegals practicing in the same firm, meaning that, where the same lawyer or paralegal could not represent both employer and employee under Rule 1.7, or is disqualified from representing either under Rule 1.9, another lawyer/paralegal in the same firm cannot do so.

When a substantial risk of conflict of interest exists, providers of legal services have an ethical and moral obligation to remove all doubts against the impropriety of the representation. The question therefore is “What appropriate actions or steps must be taken once it is determined that the paralegal has been exposed to confidential information?”

***Has anyone here had any first hand experience with this dilemma, and if so, how was it handled*?** If not, how do you think it should be handled once it is determined that a lawyer and/or paralegal has previously been exposed to confidential information outside the current working environment?

The Chinese Wall

An ethical wall is an imaginary boundary placed around an individual with whom a conflict of interest is discovered. This imaginary boundary is supposed to bar any communications, verbal or written, between members of the legal team handling the matter and the person with the conflict.

The ethical wall is erected to ensure that there is absolutely no opportunity for client confidences and secrets to be revealed to anyone other than those handling the client's legal matters.

How to Erect the Wall

1.) Client’s "informed consent" waiving the conflict is needed to continue work.
2.) Adversary’s consent is also needed.

3.) Send memo alerting firm to conflict with instructions that no one is permitted to communicate any info. about the file with, or in front of, the person with whom the conflict exists.
4.) Maintain in the file a hard copy of that memo.
5.) Place on the file a red tag reminding everyone of the conflict.
6.) Maybe necessary to physically remove files to another location or ban access to computer stored info.

The point is, the paralegal profession has evolved, for the most part, to increase access to cost efficient, effective and quality services. Any undue limitation of the ability of the paralegal to participate in the delivery of legal services neither serves the client or the legal profession and hence, the Chinese Wall.

The proper use of an Ethical Wall is intended to protect the present and/or former employer from disqualification, to protect the client, to ensure employment opportunities for paralegals, and, above all, to maintain the stature of the profession.

Finally, I'd like to discuss one more point with you. Because any presentation on Paralegal Ethics would be deficient if the topic of Preservation of a Client's Right to **Confidentiality** were not addressed, especially so considering the widespread use of technology.

The NFPA Ethics Rules address the Preservation of Confidential Information in the following way:

(a) A paralegal shall be aware of and abide by all legal authority governing confidential information in the jurisdiction in which the paralegal practices.
(b) A paralegal shall not use confidential information to the disadvantage of the client.
(c) A paralegal shall not use confidential information to the advantage of the paralegal or of a third person.
(d) A paralegal may reveal confidential information only after full disclosure and with the client's written consent; or, when required by law or court order; or, when necessary to prevent the client from committing an act that could result in death or serious bodily harm.
(e) A paralegal shall keep those individuals responsible for the legal representation of a client fully informed of any and all confidential information the paralegal may have pertaining to that client.
(f) A paralegal shall not engage in any indiscreet communications concerning clients.

The use of the Internet in the legal profession poses a number of challenges to the maintenance of confidential information. Of course, cyberspace research, investigation and communications are becoming widely utilized in the legal and business communities.

The NFPA interprets the paralegal's ethical responsibility to maintain client confidentiality to ***extend to any form*** of communication in cyberspace, e.g., e-mail, list serves, bulletin boards, World Wide Web forms, forums and mailings, Internet Relay Chats, usenets and/or newsgroups.

You should be aware, that it is impermissible for a lawyer or a paralegal to use methods of obtaining evidence that violate the legal rights of a third party. Situations where this problem is likely to arise include surveillance of employees (hidden cameras in the workplace, phone taps, Internet surveillance, etc.), and unauthorized access to employee credit reports, criminal records or financial records. Some of these methods may violate the legal rights of the employee, or could give rise to civil liability on the part of the employer and if a lawyer/paralegal is involved, discipline of that lawyer/paralegal.

Another separate problem with many of these methods is that, even if they do not violate any one's legal rights, they can be deceptive and you may not engage in deception or assist clients in acts of deception. Model Rule 4.1states that a lawyer may not evade either of these prohibitions by directing a non-lawyer, such as a private investigator, to engage in conduct that the lawyer could not engage in.

Recording of conversations, an increasingly common practice in many workplaces, is one of the many contexts in which these problems arise. In Colorado, a Bar Opinion, held that an attorney may not direct or even authorize an agent to secretly and surreptitiously record conversations, and may not use the "fruit" of such improper recordings; but where the client lawfully and independently obtains recordings, the lawyer may use the recordings.

The upshot of both of these restrictions-----one violating the rights of third parties and the other on deceptive tactics-----is that lawyers and paralegals should distance themselves from some aspects of an investigation.

Private investigators might sneak through people's garbage and lie to people they interview, but a lawyer and her staff in most contexts may not do so and may not authorize someone else to do so. Sometimes it is best for a client to select and direct Private investigators, and then for the lawyer to examine, and where appropriate, use whatever evidence has been *lawfully* obtained by the investigators.

At other times, it is appropriate for a lawyer to advise a client that unlawful methods of gathering evidence will expose the client to civil and possibly even criminal liability, and that the lawyer will resign if the client persists in doing so.

As to the Internet, there is a dearth of case law and legal authority on the topic of confidentiality with respect to the use of the Internet and communications via the Internet. The New Jersey Bar Association, while currently investigating the issues concerning confidentiality and privilege in cyberspace, has not issued a formal opinion directly on point. The NFPA, however, has discussed various forms of security to protect a client's confidential information and privilege.

Some of those forms of security involve:

~Encryption

One form of security is encryption, but, there is no definite evidence that it will secure all Internet communications; in addition, encryption presents other problems as well, for example, administration, distribution and authentication. Some attorneys and bar organizations have suggested, but not yet imposed an obligation to encrypt e-mail communications concerning clients.

In fact, numerous cyber-legal-ethics experts disagree that encryption solves the potential problems associated with cyberspace let alone that it is even necessary to preserve client confidentiality and privilege.

In fact, the Attorneys' Liability Assurance Society (ALAS), a law firm malpractice insurance company, states that it is not necessary for ethics, privilege or liability purposes to encrypt communications on the Internet except for matters so important that *any* threat of interception must be avoided.

~Disclaimers

Another form of security or attempt to preserve the confidential nature of communications is to add a disclaimer. Many law firms and legal departments of corporations have already done so. For instance, with respect to client e-mail communication, some have suggested the following disclaimer:

> ***DISCLAIMER***
>
> *E-mail communication on the Internet may NOT be secure. There is a risk that this confidential communication may be intercepted illegally. There may also be a risk of waiving attorney-client and/or work-product privileges that may attach to this communication. DO NOT forward this message to any third party. If you have any questions regarding this notice, please contact the sender.*

With respect to inadvertent disclosure, in pertinent part,

> *DO NOT read, copy or disseminate this communication unless you are the intended addressee. This e-mail communication contains confidential and/or privileged information intended only for the addressee. If you have received this communication in error, please call us (collect) immediately at [insert phone number] and speak to the sender of the communication. Also, please notify immediately via e-mail the sender that you have received the communication in error.*

To date, the courts have ruled that there is a reasonable expectation of privacy in private e-mails. However, the Internet has been determined to be a public medium in a case challenging the Texas State Bar Association's rules limiting lawyers' advertising activities in the public media.

In fact, an opinion concerning a securities fraud action included dicta that the ***information superhighway*** is a source of information in the public domain. Therefore, such a conclusion about the privacy of e-mails cannot be made to extend to list serves and certainly does not exist in other forms of public or quasi-public communications, which, in some cases, are searchable using a variety of Internet search engines.

So, if the information communicated is not kept private, then a breach of client confidentiality or privilege may arise. In *Castano v. American Tobacco Company*, 896 F. Supp. 590 (E.D.La. 1995), the court refused to suppress allegedly privileged documents that the defendants had made publicly available on the Internet, but reserved the question of whether the use of such documents might be prohibited at trial.

~Establishment of Internal Policies and Procedures is another Method of Security addressed by the NFPA

Of course, legal professionals should take appropriate steps to ensure internal security within a law office or legal department with respect to access to computer terminals and passwords. Legal professionals should also establish written procedures and/or policies to ensure that confidentiality is protected in public or quasi-public posts.

Albeit, laden with unresolved disputes concerning client confidentiality and privilege, cyberspace presents extraordinary opportunities to conduct paralegal work in a cost-efficient manner benefiting both the legal profession and the public it serves. In the absence of methods to secure "Internet communications" and of regulations governing those communications, the same standards which govern other communications, govern those conducted by and engaged in, by paralegals in cyberspace.

In short, during the course of employment, paralegals are exposed to facts, strategies, analysis and conclusions protected by the attorney client privilege and the work product doctrine.

The preservation of a client's confidences and secrets must be of the utmost concern by all individuals associated with the extension of legal services. Caution and prior thought about your communications is the best course to ensure compliance with your ethical and moral obligations.

It is important for you, in considering these problems, to recognize that breaches of ethics rules can have profound consequences for the law firm and the law firm's client. These include disciplinary sanctions, possible civil liability, possible criminal liability and sanctions imposed within the context of a particular case (e.g. exclusion of evidence, disqualification of counsel, payment of opposing party attorney's fees, etc.).

So, in conclusion, the morale of this presentation is to remember, that an inch of foresight is worth 4 miles of vigilance.

SMILE

Thank you for your attention. You have been a warm and thoughtful audience! I will be happy to answer any questions about this topic or any related topic to the extent that I am able.