

A BASIC GUIDE FOR PARALEGALS: ETHICS, CONFIDENTIALITY AND PRIVILEGE

**Thomas E. Spahn
McGuireWoods LLP**

Copyright 2006

\2574548.3

TABLE OF CONTENTS

I.	Ethics.....	1
	A. Source of Ethics Guidance	1
	1. Lawyers.....	1
	a. General Rules	1
	b. American Bar Association.....	2
	2. Paralegals	2
	a. Specific Ethics Rules for Paralegals	2
	b. Applicability of Lawyers' Ethics Rules to Paralegals	2
	c. American Bar Association.....	3
	d. Voluntary Paralegal Organizations	3
	B. Unauthorized Practice of Law Issues.....	4
	1. Lawyers -- Defining the "Practice of Law"	4
	2. Lawyers -- Prohibition on Assisting the Unauthorized Practice of Law.....	4
	3. Paralegals	4
	a. "Holding Out" Issues	4
	b. Prohibited Activities.....	6
	c. Permitted Activities	8
	d. Suspended or Disbarred Lawyers Acting as Paralegals	10
	e. Sanctions for the Unauthorized Practice of Law	10
II.	Confidentiality.....	12
	A. Ethics Rules	12
	B. Other Sources of Confidentiality Duties	12
	C. Dangers of Disclosure.....	13
	D. Penalties for Disclosure.....	13
III.	Attorney-Client Privilege.....	14
	A. Basic Rules	14
	B. Communications Directly to and from Paralegals	14

C.	Communications Between Clients and Lawyers -- Paralegals' Role in Creating the Privilege	15
D.	Communications Between Clients and Lawyers -- Paralegals' Role in Avoiding Waiver of the Privilege	17
IV.	Work Product Doctrine	20
A.	Basic Rules	20
B.	Differences Between the Attorney-Client Privilege and Work Product Doctrine.....	20
C.	Role of Paralegals in Creating the Protection	20
D.	Overcoming the Work Product Protection	21
E.	Role of Paralegals in Avoiding Waiver of the Work Product Protection	21
V.	Conflicts of Interest.....	23
A.	Simultaneous Representations on Different Matters.....	23
B.	Simultaneous Representations on the Same Matter	23
C.	Former Representations	23
D.	Conflicts with Personal Interests	23
E.	Imputed Disqualification	24
F.	Application to Paralegals	24
1.	Applicability of General Rules	24
2.	Hiring Paralegals.....	24
3.	Role in Conflicts Checks	27
VI.	Other Issues.....	28
A.	Lawyers' Liability for Failing to Supervise Paralegals	28
B.	Trust Accounts	30
C.	Lawyer - Paralegal Partnerships	30
D.	Sharing of Fees.....	30
1.	Employee Paralegals	30
2.	Independent Contractor Paralegals.....	33
E.	Fee Requests	34
F.	Ethics of Litigation.....	34
1.	Ex Parte Communications with Unrepresented Persons	34

2.	Ex Parte Contact with Represented Persons.....	35
3.	Deceptive Conduct.....	35
4.	Payments to Witnesses	36
G.	Rules Governing Client Files	38
H.	Professionalism and Civility	38

I. Ethics

A. Source of Ethics Guidance

1. Lawyers

a. General Rules

Lawyers practice under a license issued by their state government.

There have been increasing calls for some federal or multi-state licensing of lawyers as the practice of law becomes increasingly nationwide.

- As it is now, lawyers may play a limited role in other states, but must be admitted pro hac vice to appear in another state's court.
- The Supremacy Clause generally prohibits states from excluding lawyers from specific federal forums (such as Tax Court, military courts, etc.).

Most states organize, supervise and discipline lawyers with a mixture of involvement by the judicial, legislative and executive branches.

- Each state's supreme court generally plays the most active role in this process.
- State statutes often define the practice of law or provide other oversight.
- The executive branch sometimes handles discipline (especially in enforcing UPL rules).

States also take differing approaches to organizing their lawyers in bars.

- Some states have an "integrated bar," which all lawyers must join to practice law.
- Lawyers also organize themselves in voluntary bar associations.

Each state has adopted its own ethics rules governing lawyers.

- Most states follow a variation of the ABA Model Rules.
- However, there can be dramatic differences between states' ethics rules.
- State bars also issue legal ethics opinions that provide additional guidance.

b. American Bar Association

The American Bar Association is a purely voluntary bar association.

The ABA's ethics rules carry persuasive force, although they are not mandatory in any state.

- In 1983, the ABA replaced its Model Code of Professional Responsibility with its Model Rules of Professional Conduct.
- The ABA also issues legal ethics opinions.

2. Paralegals

a. Specific Ethics Rules for Paralegals

As with lawyers, each state takes a different approach to handling paralegals.

- States rely on laws, supreme court ethics rules, legal ethics opinions and other regulations.

No state requires paralegals to be licensed (New Jersey was the most recent state to reject a licensing requirement, in 1999).

California recently enacted a law that defines the term "paralegal," describes the activities that paralegals can and cannot engage in, and sets educational qualifications for paralegals. Cal. [Bus. & Prof.] Code §§ 6450 et seq. (2004).

- The law does not require licensing or certification for paralegals, but prohibits those not meeting the qualifications to use the term "paralegal."

Although the Virginia Supreme Court recently declined to adopt a carefully crafted formal rule governing Virginia paralegals ("proposed UPR 10"), those proposed regulations provide a useful compendium of paralegal "dos and don'ts."

b. Applicability of Lawyers' Ethics Rules to Paralegals

ABA Model Rule 5.3(a) requires that a law firm's partner "shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the [non-lawyer's] conduct is compatible with the professional obligations of the lawyer" (emphasis added).

ABA Model Rule 5.3(b) similarly requires that a lawyer "having direct supervisory authority over a non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer" (emphasis added).

c. American Bar Association

The ABA has issued ethics guidelines for paralegals:

- ABA Standing Committee on Legal Assistants, Model Guidelines for the Utilization of Legal Assistant Services (1991) ("ABA Model Guidelines");
- ABA Guidelines for Legal Assistant Training (1974).

d. Voluntary Paralegal Organizations

In addition to statewide organizations, paralegals may also look to ethics guidelines issued by several national voluntary associations.

- National Association of Legal Assistants, Model Standards and Guidelines for the Utilization of Legal Assistants (2000) ("NALA Model Standards");
- National Association of Legal Assistants, Code of Ethics and Professional Responsibility (2000) ("NALA Code");
- National Federation of Paralegal Associations, Model Code of Ethics and Professional Responsibility and Guidelines for Enforcement (1997) ("NFPA Model Code").
- American Alliance of Paralegals, Inc.

B. Unauthorized Practice of Law Issues

1. Lawyers -- Defining the "Practice of Law"

Defining the "practice of law" is remarkably difficult.

- An ABA Task Force specifically directed to prepare a "Model Definition of the Practice of Law" abandoned its task on March 28, 2003.

States' definition of practicing law can be in statutes (representing the legislative input), court rules (representing the judiciary) or other professional regulations (representing the executive branch's involvement).

Each state defines the practice of law in its own way.

2. Lawyers -- Prohibition on Assisting the Unauthorized Practice of Law

Most states' ethics rules acknowledge that lawyers may rely on paralegals when they practice law.

- "The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. Paragraph (a)(2) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work." ABA Model Rule 5.5 Comment [1].

Cases and bar opinions dealing with this issue are discussed below.

3. Paralegals

Paralegals' duty to avoid unauthorized practice of law violations focuses on three issues: (a) how paralegals "hold themselves out"; (b) prohibited activities; and (c) permitted activities.

a. "Holding Out" Issues

Because paralegals work so closely with lawyers, they must be careful to avoid "holding themselves out" as lawyers -- either intentionally or unintentionally.

- See, ABA Model Guidelines 4, 5; NALA Model Standards, Guideline 1, ¶ 1; NALA Code, Canon 5; NFPA Model Code, EC-1.7(b), (c).

Virginia's proposed rules, current standards and legal ethics opinions provide useful guidance on this issue.

- "A paralegal has an affirmative duty during any professional contact to clarify that the paralegal is not an attorney." Proposed Virginia UPR 10-103 (A).
- "A paralegal shall not provide, nor hold himself or herself out as being able to provide, legal services except under the direct supervision of an attorney authorized to practice law in the Commonwealth of Virginia." Proposed Virginia UPR 10-102 (H).
- "A paralegal may have a business card and may be included on the letterhead of a lawyer or law firm provided that the professional status of the paralegal is designated. A paralegal may sign letters on an attorney's letterhead, provided that such signature is followed by the appropriate designation of the paralegal's professional status." Proposed Virginia UPR 10-103 (B).
- "A paralegal must disclose professional status at the beginning of any professional contact." Virginia Standards Guideline IV.
- "In order to prevent any misunderstanding concerning the role of the paralegal, it is imperative that clients and others outside the law firm are advised that the paralegal is not an attorney." Virginia Standards Guideline IV Comment.
- "A paralegal may have a business card and may be included on the letterhead of an attorney or law firm provided the professional status of the paralegal is designated." Virginia Standards Guideline X.
- "A paralegal may sign letters on an attorney's letterhead, provided that such signature is followed by the appropriate designation of the paralegal's professional status." Virginia Standards Guideline X Comment.
- Virginia LEO 767 (1/29/86) (a law firm may include paralegals and other staff on the firm letterhead as long as they are properly identified).
- Virginia LEO 349 (11/30/79) (a law firm's business manager and paralegal may use business cards if their positions are clearly revealed on the card).
- Virginia LEO 338 (10/8/79) (a law firm's non-lawyer employees may use business cards if the cards indicate their non-lawyer status)
- Virginia LEO 326 (6/19/79) (the name of a paralegal may appear on a law firm's outside door if the label properly identifies the person as a paralegal).

- Virginia LEO 225 (5/21/73) (a law firm may place paralegals' names on their offices as long as it does not create the impression that the paralegals are lawyers).

b. Prohibited Activities

Paralegals may not engage in the practice of law -- an axiom that is easier to state than to apply.

- The stakes are high -- the unauthorized practice of law is a crime in every state (for example, a Class 1 misdemeanor in Virginia). Va. Code §54.1-3904.

States' analysis of this issue tends to focus on certain key prohibited activities, and specific types of interaction with a lawyer's clients that involve the greatest risk of engaging in the unauthorized practice of law.

- See, ABA Model Guideline 3; NALA Model Standards, Guideline 2, ¶ 1; NALA Code, Canon 1; NFPA Model Code, EC-1.2(a), (b); NALA Model Standards, Guideline 2, ¶ 2; NALA Code, Canon 3, Canon 4.

Virginia standards provide a very helpful list of what paralegals should not do. Paralegals should not engage in:

- **Providing legal advice**

"A paralegal shall not engage in the unauthorized practice of law and not encourage or contribute to any act by another that would constitute the unauthorized practice of law. A paralegal shall not provide legal advice, other than to a supervising attorney." Proposed Virginia UPR 10-102 (A).

"A paralegal may not accept the delegation by an attorney of any of the following responsibilities Rendering legal advice to a client." Proposed Virginia UPR 10-105 (3).

"A paralegal shall not determine for the client the validity of a client's legal claim." Proposed Virginia UPR 10-102 (E).

"A paralegal shall not give legal advice or opinions." Virginia Standards Guideline I Comment.

- **Establishing a lawyer-client relationship**

"A paralegal working under the supervision of a lawyer may participate in gathering information from a client during an initial interview, providing that this process involves nothing more than the gathering of factual data and

that the paralegal renders no legal advice to the client." Proposed Virginia UPR 10-102 (D) (emphasis added).

"A paralegal may not accept the delegation by an attorney of any of the following responsibilities Establishing a lawyer/client relationship." Proposed Virginia UPR 10-105 (1).

"A paralegal shall not accept cases." Virginia Standards Guideline I Comment.

- **Making fee arrangements**

"A paralegal may perform certain activities relating to the lawyer's fee agreement with the client. The paralegal may transmit the document to the client and obtain the client's signature on the document. The paralegal may answer factual questions regarding the fee agreement but such answers shall not include any advice as to the legal ramifications of the agreement's provisions." Proposed Virginia UPR 10-102 (F) (emphasis added).

"A paralegal may not accept the delegation by an attorney of any of the following responsibilities: (2) Establishing the fee to be charged for a legal service." Proposed Virginia UPR 10-105 (2).

"A paralegal shall not . . . set fees." Virginia Standards Guideline I Comment.

- **Maintaining a direct client relationship**

"A paralegal may not accept the delegation by an attorney of any of the following responsibilities Maintaining a direct relationship with the client." Proposed Virginia UPR 10-105 (4).

- **Appearing before a tribunal**

"A paralegal shall not represent a client before any tribunal and shall not sign pleadings on behalf of another person." Proposed Virginia UPR 10-102 (B).

"A paralegal may not represent a client before any court or administrative agency unless expressly permitted by statute or administrative regulation." Virginia Standards Guideline II.

- **Involving themselves in settlement negotiations**

"A paralegal may serve a limited role in settlement negotiations. A paralegal may transmit information and documents between the lawyer and client, such as the latest settlement offer. A paralegal may not evaluate the offer or make recommendations to the client regarding acceptance. A paralegal may convey to the client the lawyer's evaluation or recommendation of such offer." Proposed Virginia UPR 10-102 (G) (emphasis added).

An earlier Virginia UPL Opinion provides essentially the same guidance.

- Virginia UPL Opinion 191 (10/28/96) lists the following impermissible activities as follows: "[A] non-lawyer is not permitted to determine the validity of a claim, explain documents, fee agreements, the settlement of a claim, or negotiations with the adverse party or their insurer to a client. Each of these activities appear to directly involve the application of legal principles to facts, purposes or desires, and are therefore considered the practice of law and must be performed only by a licensed attorney."

c. Permitted Activities

Defining the type of permitted activities in which paralegals may engage presents the same line-drawing difficulties.

- The basic theme is the need for a paralegal to act under the direct supervision of a lawyer.

As with its list and explanation of prohibited activities, Virginia provides detailed guidelines about what paralegals can do:

- "A paralegal may provide services to assist a lawyer in the representation of a client, provided that: (1) The lawyer maintains a direct relationship with the client and supervises all matters; (2) The lawyer remains fully responsible for all work done by the paralegal on behalf of the client; and (3) The work product of the paralegal is considered to be part of the lawyer's work product." Proposed Virginia UPR 10-102 (C).
- "A paralegal working under the supervision of a lawyer may participate in gathering information from a client during an initial interview, providing that this process involves nothing more than the gathering of factual data and that the paralegal renders no legal advice to the client." Proposed Virginia UPR 10-102 (D).
- "A paralegal is permitted to sign legal documents as a witness or notary public, or in some other non-representative capacity, and may prepare

pleadings and other legal documents for use by a supervising lawyer."
Proposed Virginia UPR 10-102 (B).

The Virginia Standards provide the same guidelines.

- "A paralegal may perform any task delegated and supervised by an attorney, as long as the attorney is responsible to the client, maintains a direct relationship with the client and assumes full professional responsibility for the work product." Virginia Standards Guideline I Comment.
- "A paralegal may perform services for an attorney in representation of a client, except as otherwise prohibited by statute, court rule or decision, administrative agency rules or regulations or by rules of discipline relating to attorneys." Virginia Standards Guideline III.
- Paralegals are not prohibited from "signing documents as a witness or notary public, or in some other non-representative capacity" and are not prohibited from "drafting of documents or pleadings under the supervision of an attorney." Virginia Standards Guideline II Comment.

Various Virginia UPL Opinions have provided essentially the same guidance.

- Virginia UPL Opinion 191 (10/28/96) describes the permitted activities as follows: "[A] non-lawyer employee working under the direct supervision of a Virginia attorney may participate in gathering information from a client during an initial interview -- provided that this involves nothing more than the gathering of factual data and the non-lawyer renders no legal advice. . . . A non-lawyer employee may convey direct information from their supervising attorney to a client regarding the status of a case, or deliver documents with a request for some particular action."
- Virginia UPL Opinion 147 (4/19/91) indicates that a "paralegal company" may gather necessary real estate documents, complete non-legal documents and arrange for the necessary signatures and relaying of documents required for real estate closings.
- Virginia UPL Opinion 129 (2/22/89) indicates that paralegals employed by a non-profit organization may provide "services to and under the supervision of attorneys on behalf of the organization".

National organizations take the same approach,

- As long as they act with full disclosure, paralegals may engage in the following activities: maintaining client contacts after creation of the attorney-client relationship; sending and receiving correspondence from

clients and third parties; conducting factual investigations; conducting legal research (under a lawyer's supervision); drafting (for a lawyer's review) legal documents, correspondence, pleadings, etc.; summarizing pleadings and depositions; assisting and accompanying lawyers at meetings and court proceedings. See, e.g., NALA Model Standards, Guideline 5, ¶¶ 1-9.

Some laws, rules or regulations specifically allow paralegals to engage in what otherwise would be the unauthorized practice of law: "jailhouse" legal advisors; in-house legal advice, etc. ABA Model Guideline 2; NALA Model Standards, Guideline 3, ¶¶ 1-5; NALA Code, Canon 2.

d. Suspended or Disbarred Lawyers Acting as Paralegals

Although nothing prohibits a suspended or disbarred lawyer from acting as a paralegal, some states' ethics rules have specific and unforgiving restrictions that apply to such a situation.

For instance, Virginia has very strict rules.

- First, law firms may not employ "in any capacity" a lawyer whose license has been suspended or revoked if that lawyer was associated with the firm "at any time on or after the date of the acts which resulted in suspension or revocation." Virginia Rule 5.5(b). This means that a lawyer whose license is suspended or revoked may not stay at the same firm, even if acting as a paralegal or in some other role.
- Second, another law firm employing (as a "consultant, law clerk or paralegal") a lawyer whose license has been suspended or revoked may not represent any clients represented by the former lawyer or any of the former lawyer's associates on or after the date of the wrongful acts. Virginia Rule 5.5(c). This means that a law firm employing as a paralegal some lawyer whose license has been suspended or revoked may not represent any clients that the paralegal or any of the paralegal's former colleagues represented after the wrongful acts engaged in by the paralegal that caused his or her license to be suspended or revoked.

e. Sanctions for the Unauthorized Practice of Law

Paralegals who engage in the unauthorized practice of law are theoretically subject to criminal charges in most states.

- The unauthorized practice of law is a crime in most, if not all, states (for instance, a Class 1 misdemeanor in Virginia).

State ex rel. Ind. State Bar Ass'n v. Diaz, 838 N.E.2d 433 (Ind. 2005) (enjoining a notary from assisting immigration clients, but allowing her to offer translations and other routine services); Dayton Bar Ass'n v. Addison, 2005 Ohio 6044, 837 N.E.2d 367 (Ohio 2005) (enjoining Addison from preparing wills or other documents, and fining him \$10,000; noting that he had never been a lawyer and was engaged in the unauthorized practice of law); courts may also investigate, and impose monetary sanctions, on paralegals who engage in improper UPL activities. United States v. Johnson, 327 F.3d 554 (7th Cir. 2003) (recognizing a court's inherent power to punish UPL activities by paralegals, and imposing \$7,000 "punitive" sanction on an organization of paralegals called the National Legal Professional Associates, which improperly advertised for and provided legal services to prisoners); Sussman v. Grado, 746 N.Y.S.2d 548, 552-53 (N.Y. Dist. 2002) (holding that "independent paralegal" who is the president and sole shareholder of a "Consulting Group" had engaged in the unauthorized practice of law by preparing an order involving two bank accounts; finding that the legal assistant "crossed the line between filling out forms [which would have been acceptable] and engaging in the practice of law by rendering legal services" because she "tried to create a legal document without the required knowledge, skill or training"; awarding plaintiff \$135.00 in damages, but referring the matter to the New York State Attorney General's Office for possible action against the paralegal).

As explained below, lawyers may be punished for not properly supervising paralegals.

II. Confidentiality

A. Ethics Rules

Lawyers' duty of confidentiality is one of the profession's "core values." ABA Model Rule 1.6.

- The ethics duty of confidentiality extends far beyond the evidentiary attorney-client privilege. ABA Model Rule 1.6 Comment [3].
- The duty generally covers any information learned during the attorney-client relationship (not just communications to or from a client).
- Even information in the public record can be subject to this ethical duty of confidentiality.

Lawyers must assure that paralegals under their supervision comply with this ethics duty of confidentiality.

- ABA Model Rule 5.3(a)(b) ("With respect to a nonlawyer employed or retained by or associated with a lawyer: a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable effort to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer; a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.").

Most paralegals' ethics guidelines contain a parallel duty of confidentiality.

- ABA Model Guideline 6; NALA Model Standard, Guideline 1, ¶ 2; NALA Code, Canon 7; NFPA Model Code, EC-1.5(a)-(e).

B. Other Sources of Confidentiality Duties

In addition to the ethics rules, lawyers and paralegals might be subject to confidentiality duties from other sources.

- Explicit or implicit retainer agreements with clients.
- Common-law fiduciary duty -- this is the highest duty known in the law.
- Tort principles.
- Employment agreements between lawyers (or paralegals) and their law firms, law departments, the government, etc.

- Court orders -- the confidentiality duty in court orders often outlasts the litigation.
- Confidentiality agreements entered into by parties in litigation, companies involved in business transactions, etc.
- Miscellaneous laws (such as the securities laws).

C. Dangers of Disclosure

Unfortunately, the opportunity for disclosing confidential information exists at all times and in many places.

Lawyers and paralegals must avoid inadvertently revealing confidential information at work.

- Inadvertent disclosure can come from sending a fax to the wrong number, accidentally including privileged documents in a production, etc.
- Confidential information can sometimes be revealed through sloppy document handling (leaving confidential information in conference rooms, etc.) or careless talk in elevators, rest rooms, etc.
- To avoid the risk of others deliberately or inadvertently revealing confidential information, lawyers and paralegals should share information within their law firms or law departments only with those who have a "need to know."

Outside work, the risks are even higher because there is no justification for ever sharing confidential information.

- Lawyers and paralegals should avoid sharing work-related information with anyone (even their spouses).

D. Penalties for Disclosure

Revealing confidential information at work can cause termination.

Paralegals who violate their supervising lawyer's duty of confidentiality can subject the supervisors to ethics charges (up to disbarment), malpractice actions, etc.

Lawyers and paralegals might even be subjected to criminal penalties for revealing confidential information.

III. Attorney-Client Privilege

A. Basic Rules

The attorney-client privilege absolutely protects from disclosure:

- (1) communications from a client;
- (2) to the client's lawyer (or to the lawyer's agent);
- (3) relating to the lawyer's rendering of legal advice;
- (4) made with the expectation of confidentiality;
- (5) and not in furtherance of a future crime or tort;
- (6) provided that the privilege has not been waived.

A client (or a lawyer) asserting the privilege must establish each of these elements.

The attorney-client privilege can apply in a number of ways to paralegals.

- First, the privilege can protect from disclosure communications directly to and from paralegals (but only under certain circumstances -- as described below).
- Second, the privilege can protect from disclosure communications between clients and lawyers. Paralegals play a critical role in properly creating the privilege covering these communications, and also avoiding waiver of the privilege protecting these communications.

B. Communications Directly to and from Paralegals

In most situations, the privilege will cover direct communications between a client and a paralegal assisting a lawyer in representing the client.

- Paralegals will generally be considered the lawyer's agent in communicating in this way.

Numerous courts have recognized that the privilege can cover direct communications with paralegals in these circumstances.

- Restatement (Third) of Law Governing Lawyers § 70 cmt. g at 539 (1998) ("A lawyer may disclose privileged communications to other office lawyers and with appropriate nonlawyer staff -- secretaries, file clerks, computer operators, investigators, office managers, paralegal assistants, telecommunications personnel, and similar law-office assistants."); von Bulow v. von Bulow, 811 F.2d 136 (2d Cir.); United States v. (Under Seal), 748 F.2d 871, 874 (4th Cir. 1984); In

re Stoutamire, 201 B.R. 592, 595 (Bankr. S.D. Ga. 1996); Flynn v. Church of Scientology Int'l, 116 F.R.D. 1, 4 (D. Mass. 1986); In re Witham Mem'l Hosp., 706 N.E.2d 1087, 1091 (Ind. Ct. App. 1999); Wal-Mart Stores, Inc. v. Dickinson, 29 S.W.3d 796, 804-805 (Ky. 2000) (finding that the attorney-client privilege and work product doctrine applied with equal force to a lawyer's paralegal; "[w]e believe that the privilege should apply with equal force to paralegals, and so hold. A reality of the practice of law today is that attorneys make extensive use of nonattorney personnel, such as paralegals, to assist them in rendering legal services. Obviously, in order for paralegals, investigators, secretaries and the like to effectively assist their attorney employers, they must have access to client confidences. If privileged information provided by a client to an attorney lost its privileged status solely on the ground that the attorney's support staff was privy to it, then the free flow of information between attorney and client would dry up, the cost of legal services would rise, and the quality of those same services would fall. Likewise, and for the same reasons, we hold that attorney work product prepared by a paralegal is protected with equal force by CR 26.02(3) as is any trial preparation material prepared by an attorney in anticipation of litigation." (citation omitted)); Commonwealth v. Mrozek, 657 A.2d 997 (Pa. Super. Ct. 1995) (holding that the attorney-client privilege covered the following client statement to a lawyer's secretary: "Honey, I don't think you understand. I've just committed a homicide. I have to talk with Sam.").

On the other hand, one recent New Jersey case provides a frightening example of what can happen when lawyers and paralegals are sloppy in their treatment of the attorney-client privilege (especially in a corporate law department setting).

- HPD Laboratories, Inc. v. The Clorox Company (D. NJ 2001)(U.S. Dist. LEXIS 8321) (06/08/01), (holding that the attorney-client privilege did not protect from disclosure communications between a long-time Clorox in-house paralegal and Clorox employees, because the employees were seeking the paralegal's own advice rather than working with the paralegal to obtain a lawyer's advice; noting that the paralegal did not copy in-house lawyers on her communications, and did not involve in-house lawyers in her meetings with Clorox employees; ordering the production of documents reflecting communications between the paralegal and Clorox employees).
- Corporate law departments would be wise to assure that their paralegals involve in-house lawyers to a degree sufficient to avoid this horrible result.

C. Communications Between Clients and Lawyers -- Paralegals' Role in Creating the Privilege

As critical players in clients' communications with lawyers, paralegals play a central role in assuring that privileged communications receive the protection they deserve.

If correspondence, memoranda, etc., meet the criteria listed above, paralegals should assure that the basis for the privilege appears in the documents -- which may be later viewed by a court in camera if the privilege becomes an issue.

Paralegals should carefully use a "privilege" stamp on these and other documents -- under-stamping may weaken the privilege claim and over-stamping might generate charges of abuse.

Paralegals should monitor third parties who are participating in (or might try to participate in) privileged communications -- but whose presence could destroy the privilege ab initio.

- Generally, clients' agents (such as accountants, consultants) are outside the privilege unless their role is to facilitate communications between the client and lawyer (such as translators, etc.).
- On the other hand, lawyers' agents (hired to assist the lawyer in providing legal advice) generally are inside the attorney-client relationship for privilege purposes.
- Paralegals should understand these differences and monitor both kinds of agents' involvement.

If the client will seek the protection of the "common interest" doctrine (sometimes called the "joint defense" doctrine) that maintains the privilege despite the involvement of third parties in litigation or business transactions, paralegals should assure that the doctrine's criteria are met.

- It is usually best to put such "common interest" arrangements in writing.

When dealing with corporations, paralegals should be familiar with the rule articulated by the United States Supreme Court in Upjohn Co. v. United States, 449 U.S. 383 (1981), which Virginia follows.

- Under Upjohn, communications between a corporation's lawyer and any level of employee deserves privilege protection if: the employee knows that the person is a lawyer (or the lawyer's agent); the employee has important information that the lawyer must obtain in order to provide legal advice to the company; and the employee maintains the confidentiality of the communication with the lawyer.
- Some states (including Illinois) continue to follow what is called the "control group" test -- under which the attorney-client privilege only protects communications between lawyers and a corporation's upper management.

Under ABA Model Rule 1.13(d), lawyers (and their agents) must disclose to a corporate client's employees whom the lawyer is representing.

- Such disclosure prevents the employees from later arguing that there was an independent attorney-client relationship with the company's lawyer -- which would generate duties of confidentiality and prevent the lawyer (or the lawyer's agent) from revealing to the corporation what the employee told the lawyer -- this could also create conflicts disqualifying the lawyer from representing the corporation.

Paralegals play a key role in creating "privilege logs" as part of litigation document productions.

- The log must fully explain why a document is privileged, without revealing so much of the contents that the privilege is waived.

D. Communications Between Clients and Lawyers -- Paralegals' Role in Avoiding Waiver of the Privilege

The attorney-client privilege is fragile, and easily lost. Paralegals must play a key role in avoiding waiver -- which can cause botched business deals, lost litigation and even malpractice claims.

Paralegals should help assure that privileged information is not intentionally shared with those outside the attorney-client privilege.

- As indicated above, clients' agents, family members, etc., generally are outside the privilege. For instance, one court found that Martha Stewart waived the attorney-client privilege by sharing a privileged e-mail (which she had sent to her lawyer) with her daughter Alexis. United States v. Stewart, 287 F. Supp. 2d 461 (S.D.N.Y. 2003).
- In the corporate context, privileged information should not be shared outside those with a "need to know." Jonathan Corp. v. Prime Computer, Inc., 114 F.R.D. 693, 696 n.6 (E.D. Va. 1987) (noting that, because of the "failure to indicate on the face of the memorandum that the document was confidential or contained attorney-client privileged information, coupled with the fact that the memorandum was distributed to six (6) employees, this court has serious doubts as to whether [the party] has met its burden of demonstrating that the document was intended to be confidential").
- In states following the "control group" test (described above), information should not be shared outside the "control group" (upper management).
- In corporate transactions, courts disagree about the waiver effect of sharing privileged communications as part of a "due diligence" procedure (paralegals should check with their supervising lawyer before turning over litigation files, etc., to another company involved in a business transaction).

Paralegals play an even larger role in assuring that privileged information is not inadvertently shared outside the attorney-client relationship.

- The greatest danger of inadvertent waiver occurs during document productions in litigation.
- Unfortunately for paralegals, courts are not reluctant to describe their role in such mistakes. See, e.g., VLT, Inc. v. Lucent Technologies, Inc. 2003 U.S. Dist. LEXIS 723 (D. Mass. 2003) (explaining that a paralegal who mistakenly produced privileged documents during a document production was "unbeknownst [to the law firm] going through 'significant emotional difficulties' during the document review process that severely impaired her job performance and resulted in a mental breakdown (possibly caused by alcoholism) within the next few months after the document review. She was eventually fired for absenteeism"); Amgen Inc. v. Hoechst Marion Roussel, Inc., 190 F.R.D. 287 (D. Mass. 2000) (explaining how a paralegal at the well respected Boston firm of Choate, Hall & Stewart had accidentally produced approximately 200 privileged documents comprising 3,821 pages -- out of 200,000 pages reviewed and 70,000 pages produced; "when Choate's outside copy vendor arrived to collect non-privileged responsive documents to be numbered and copied for production, due to an error by a paralegal working with the copy vendor, the boxes containing the privileged documents were taken from the separate shelf"; describing these as "egregious circumstances" and finding that Choate's adversary did not have to return the documents; acknowledging that under First Circuit precedent, even the inadvertent production of documents might result in a subject matter waiver, but not ruling on the issue because Choate's adversary had not raised it); Lifewise Master Funding v. Telebank, 206 F.R.D. 298 (D. Utah 2002) (explaining that a litigant had accidentally produced privileged documents "when copies of documents were made and a paralegal apparently sent the wrong set with other properly disclosed documents"; finding that the "oversight was not gross," and concluding that "fairness dictates return of the documents.")
- Courts take one of three approaches: finding that lawyers and their agents can never waive the privilege because the client has not approved the sharing; finding that the accidental production of a privileged document always waives the privilege; or taking a "middle ground" that examines such factors as: the reasonableness of the procedure set up to avoid accidentally producing documents; whether the procedure was followed; the number of documents that "slipped through" and the speed with which their return was requested.
- In addition to being careful when documents are produced, paralegals should immediately advise their supervising lawyer if they find that a privileged document has been accidentally produced -- delay could itself create a waiver.

- In a recent troubling opinion, a court assessed the mistaken production of privileged documents in litigation between two large companies which had earlier agreed to a protective order requiring each company to return any documents "inadvertently produced" to the other during the litigation -- the court found that the responsible paralegal's mistakes were not inadvertent but instead amounted to "gross negligence," meaning that the non-waiver provision in the protective order did not require the receiving party to return the documents; also finding that the mistaken production resulted in a subject matter waiver (discussed below). VLТ, Inc. v. Lucent Technologies, Inc. 2003 U.S. Dist. LEXIS 723 (D. Mass. 2003).

The adverse effects of any waiver can be magnified by a doctrine called "subject matter waiver."

- Based on notions of fairness, the "subject matter waiver" doctrine prevents a party from revealing helpful privileged information while withholding less than helpful privileged information, thus requiring the party that produced some privileged information to produce all the remaining privileged information on the same subject matter. Federal Election Comm'n v. Christian Coalition, 178 F.R.D. 61, 74 (E.D. Va. 1998) ("Additionally, the Fourth Circuit recognizes the concept of subject matter waiver. That is, when a party waives the attorney-client privilege as to one document or communication, it may waive the attorney-client privilege as to all documents that bear on the same subject matter." (citing In re Martin Marietta Corp., 856 F.2d 619, 623 (4th Cir. 1988)); recognizing the distinction between this concept and the principle of unlimited waiver of the attorney-client privilege), aff'd in part, modified in part, 178 F.R.D. 456 (E.D. Va. 1998).
- Most courts limit the "subject matter waiver" doctrine to the intentional sharing of privileged information to gain some advantage.
- However, some courts apply the doctrine to even the inadvertent sharing of privileged information -- meaning that a misdirected fax or document production mistake could generate a waiver far beyond the document accidentally revealed. VLТ, Inc. v. Lucent Technologies, Inc. 2003 U.S. Dist. LEXIS 723 (D. Mass. 2003) (finding that the unintentional production of privileged documents during a production resulted in a subject matter waiver); Texaco Puerto Rico, Inc. v. Department of Consumer Affairs, 60 F.3d 867, 883-84 (1st Cir. 1995) ("In general, a waiver premised on inadvertent disclosure will be deemed to encompass 'all other such communications on the same subject'," holding that production of "four carelessly unveiled documents" waived the privilege otherwise protecting eighteen other documents); State ex rel. McCormick v. Zakaib, 430 S.E.2d 316, 319 (W. Va. 1993) (finding that the inadvertent production of documents waived the privilege applying to other documents "because the information contained in them relates to the same subject matter and does not disclose any additional privileged communications").

IV. Work Product Doctrine

A. Basic Rules

The work product doctrine offers limited protection to trial preparation material prepared by a client or by the client's agent (lawyers, paralegals, accountants, etc.) during litigation or in reasonable anticipation of litigation. Fed. R. Civ. P. 26(b)(3).

B. Differences Between the Attorney-Client Privilege and Work Product Doctrine

Many lawyers (and even courts) tend to equate or merge the work product doctrine and the attorney-client privilege. However, they are fundamentally different concepts.

- Unlike the attorney-client privilege, the work product doctrine: is relatively new; is based on court rules rather than the common law; covers documents prepared by the client or the clients agents (not limited to lawyers) rather than just protecting communications between a client and a lawyer; arises only at certain times (in connection with or in anticipation of litigation); can be overcome if the party seeking the information cannot obtain the "substantial equivalent" without "undue hardship"; and is not automatically waived by sharing it with third parties (waiver occurs only if the sharing makes it more likely that the materials will "fall into enemy hands").

C. Role of Paralegals in Creating the Protection

Paralegals play a key role in assuring work product doctrine protection.

The work product doctrine only protects documents created because of the litigation -- and does not extend to documents created in the ordinary course of business or which would have been created even if there had been no litigation pending or anticipated.

- Paralegals play a central role in properly characterizing documents that clients have prepared, and should suggest that clients creating work product indicate on the face of the documents why they are creating the documents.
- Paralegals can also help determine when a litigant first reasonably anticipated litigation -- which is the date the work product protection is triggered.
- If possible, it is best to document this anticipation contemporaneously so a court will later select the right date.

D. Overcoming the Work Product Protection

As indicated above, the work product doctrine is not a privilege -- it is a limited immunity that can be overcome in certain circumstances.

- For instance, if a paralegal interviews and prepares notes regarding a witness who later dies or disappears, the adversary would almost surely be entitled to see the notes -- the adversary cannot obtain the "substantial equivalent" because the witness is no longer available.
- Paralegals should therefore be very careful with what they write even in documents that are undoubtedly work product -- but whose protection may be stripped away through later events.

"Opinion" work product receives a higher protection than factual work product.

- Some courts give absolute protection to "opinion" work product -- making it the equivalent of the attorney-client privilege -- while others give it only heightened protection.
- Lawyers may direct paralegals to infuse their work product (such as witness interview memoranda) with the paralegal's opinion -- thus increasing the odds of receiving this heightened protection.

E. Role of Paralegals in Avoiding Waiver of the Work Product Protection

Unlike the attorney-client privilege, the work product doctrine protection does not automatically evaporate for documents shared with third parties.

- Work product can sometimes be shared with third parties (witnesses, etc.) without waiving the protection. For instance, the same decision concluding that Martha Stewart had waived the attorney-client privilege protection covering an e-mail by sharing it with her daughter Alexis also found that she had not waived the separate work product protection covering the e-mail, because her daughter Alexis was her ally. United States v. Stewart, 287 F. Supp. 2d 461 (S.D.N.Y. 2003).
- Courts sometimes look for a confidentiality agreement in determining if sharing of materials has waived the work product protection, so paralegals should remind lawyers about the possible efficacy of such agreements.

Sharing factual and opinion work product with testifying experts can have dramatically different effects depending on what Virginia court is involved.

- Most courts agree that factual work product shared with a testifying (as opposed to non-testifying) expert must be produced to the adversary.

- As a result of Federal Rules changes in 1993, most courts also find that opinion work product shared with a testifying expert generally must be produced to the adversary. Lamonds v. General Motors Corp., 180 F.R.D. 302, 306 (W.D. Va. 1998).
- To make matters more confusing, some state courts agree with the new Federal approach, while others disagree. See, e.g., Wilson v. Rogers, 53 Va. Cir. 280, 282 (Portsmouth 2000) (relying upon Lamonds v. General Motors Corp., 180 F.R.D. 302 (W.D. Va. 1998), as representing "the more modern application of discovery practice," and holding that "to the extent that the materials sought relate to the preparation of expert testimony for trial they should be produced"; nevertheless holding that a letter from a testifying expert to counsel for the defendant was protected from disclosure because the letter and its attachments "suggest possible theories of defense as opposed to the opinion rendered by the expert. . . . By disclosing material to an expert to assist him in preparing expert opinion for trial, counsel opens the discovery door. On the other hand, asking an expert to assist counsel in preparation for cross-examination of another expert moves into the area of legal theories which are protected by the rule."; ordering production of correspondence between the defendant's counsel and testifying expert that the testifying expert "would use . . . in preparation of his opinion"); Moyers v. Steinmetz, 37 Va. Cir. 25, 26 29 (Winchester 1995) (ordering production of a lawyer's letter to an expert witness after redaction of the lawyer's mental impressions, opinions and legal theories; noting that no Virginia appellate court had ruled on the issue of whether making a privileged document available to an expert witness waives the privilege).

Paralegals should monitor what documents are being shared with what experts in what litigation to assure the maximum work product protection.

V. Conflicts of Interest

A. Simultaneous Representations on Different Matters

Every state prohibits a lawyer from ever being adverse to any current client on any matter whatever without the client's consent -- even if the matter is totally different from the representation in which the lawyer represents that client. ABA Model Rule 1.7(a). ABA Model Rule 1.7 Comment [2].

B. Simultaneous Representations on the Same Matter

Lawyers may sometimes represent multiple clients on the same matter, as long as no conflict of interest exists between them or is likely to develop. ABA Model Rule 1.7(b).

- Even so, starting a joint representation like this might create later problems if a conflict does develop -- because it might require the lawyer to withdraw from representing both clients.
- Unless the parties agree otherwise, there can generally be no secrets among jointly represented clients, meaning that paralegals acquiring information from one jointly represented client may have a duty to share it with the other client.

C. Former Representations

The conflicts rules applying to adversity to former clients are far different from the conflicts rules governing adversity to current clients.

- Lawyers do not owe a duty of loyalty to former clients as they do to current clients -- lawyers owe only a duty of confidentiality to former clients.
- This means that lawyers may be adverse to former clients unless they formerly represented the client on the same or "substantially related" matter (in which case the law will presume that they have material confidential information) or the lawyer actually acquired material confidential information from the former client. ABA Model Rule 1.9(a).

The rule governing adversity to former clients sometimes inhibits lawyers and paralegals from freely moving to another firm (see below).

D. Conflicts with Personal Interests

Lawyers (and paralegals) sometimes find that their personal interests conflict with their clients' interest.

- Doing business with clients involves special ethics rules containing consent and disclosure requirements. ABA Model Rule 1.8(a).

E. Imputed Disqualification

The stakes of an individual lawyer's or paralegal's disqualification is raised because of the "imputed disqualification" rule (ABA Model Rule 1.10).

- Under this Rule, a single lawyer's or paralegal's disqualification extends to the entire law firm or law department (absent an ethics rule allowing the disqualified person to be "screened").

This Rule makes it even more important for paralegals to avoid becoming a "Typhoid Mary" to a firm or law department that they join.

F. Application to Paralegals

1. Applicability of General Rules

As might be expected, the conflicts rules generally apply to paralegals too.

- ABA Model Guidelines 7; NFDIA Model Code, EC 1.6(a) - (g).

2. Hiring Paralegals

When lawyers leave one firm and move to another, the clients of the former firm become "former" clients of the lawyer for conflicts purposes.

- Absent consent, the lawyer may not take representations adverse to the former clients if the lawyer has material confidential information about them (either because the lawyer actually acquired the information or is presumed to have acquired it because the lawyer worked on the "same" or "substantially related" matters for the former client at the old firm).

A number of courts have applied these same rules to paralegals, and have disqualified law firms who have hired paralegals with conflicts. Owens v. First Family Financial Services, Inc., 379 F. Supp. 2d 840, 848, 849-50, 852 & n.9 (S.D. Miss. 2005)(disqualifying a plaintiff's law firm which handled pattern litigation against lenders, because it had hired a paralegal from a firm that represented lenders in exactly the same kind of cases; "The action before the Court, and all of the actions on which Wilson [paralegal] worked while at Forman Perry [previous law firm], are traditional consumer fraud actions, in which plaintiffs allege that a financial company wrongfully required certain insurance products be included with a loan. While Wilson never worked on this particular case while at Forman Perry, she was a supervising paralegal over numerous other consumer fraud actions involving these very same Defendants facing

identical claims."; "Plaintiffs repeatedly state that in the cases on which Wilson worked while at Forman Perry, the Plaintiffs in those cases were different than the Plaintiffs in this case. But this statement misses the point. While the same Plaintiffs may not be involved, the same Defendants are. And so are the very same claims, and the very same documents on which this lawsuit and the others are based. Moreover, the fact that different Plaintiffs are involved does not change the method by which these Defendants may analyze potential settlements for consumer fraud actions, and under the substantial relationship test, Wilson is presumed to have been privy to such confidential information. At the Gibson Law Firm, the lawyers of the firm undoubtedly [sic] had at least the opportunity (under the presumption), however inadvertently, to gain advantage from confidential information Wilson may have gathered while working for Defendants."; finding inadequate the new law firm's screening of the paralegal approximately six months after she joined the firm, during which time she was "heavily involved" in the actions against the lenders that she formerly represented, although on different claims); In re Complex Asbestos Litigation, 283 Cal. Rptr. 732 (Cal. App. 1st Dist. 1991) (disqualifying a plaintiff's asbestos law firm which hired a paralegal who had been involved in defending asbestos case at another firm); In re American Home Prods. Corp., 985 S.W.2d 68 (Tex. 1998) (disqualifying a law firm for hiring a paralegal from its opponent's law firm); see also Zimmerman v. Mahaska Bottling Company, No. 83, 554, 2001 LEXIS 163 (Kan. March 9, 2001) (disqualifying a law firm which hired a secretary from the adversary's law firm; finding that the secretary had acquired material and confidential information about the adversary; rejecting the possibility that screening the secretary at the new firm would save it from disqualification); Koulisis v. Rivers, 730 So.2d 289, 291 (Fla. 1999) (disqualifying a law firm for hiring a secretary (Holmes) who had worked at another firm (Bobo, Spicer) directly for the lawyer handling litigation adverse to the secretary's new firm; "[t]o properly analyze this case, Holmes must be viewed the same as if she had been an attorney at Bobo, Spicer assigned to handle the Koulisis case. It makes no difference that Holmes was a secretary and not an attorney. Where an employee of a law firm is privy to attorney-client confidences, 'a court should not look to what tasks the employee performs so much as to his or her access to the same types of privileged materials that lawyers would receive.'").

Other courts and bars recognize that a law firm hiring a paralegal who has worked on the other side of a matter may risk disqualification, but under a different standard than applicable when lawyers move from firm to firm. Although these decisions do not follow the same disqualification rules as for lawyers, they often exhibit the same confusing mixture of rebuttable and irrebuttable presumptions as judicial decisions assessing lawyer disqualification. For instance, some courts or bars irrebuttably presume that paralegals received confidential information at their old firms, but recognize a rebuttable presumption that they shared those confidences with colleagues at their new firms -- other courts or bars take exactly the opposite approach.

See, e.g., New York State LEO 774 (3/23/04) ("When a New York law firm hires a nonlawyer who has previously worked at another law firm, the hiring firm must, as part of its supervisory responsibilities under DR 1-104(C) and DR 4-101(D), exercise adequate supervision to ensure that the nonlawyer does not reveal any confidences or secrets that the nonlawyer acquired while working at the other law firm. A law firm should (i) instruct all newly hired nonlawyers not to divulge any such information and (ii) instruct lawyers not to exploit such information if proffered. The hiring law firm need not always check for conflicts, but should do so in circumstances where the nonlawyer may be expected to have acquired confidences or secrets of an opposing party. If a law firm learns that a nonlawyer did acquire information protected by DR 4-101(B) that is material to a matter in which the adversary is represented by the nonlawyer's former employer, the law firm should adopt appropriate measures to guard against improper disclosure of protected information."; explaining that the appropriate steps the law firm might take include screening of the nonlawyer or "measures more radical than screening" such as: "[o]btaining consent from the opposing law firm's client," "[t]erminating the nonlawyer," or "[w]ithdrawing from the matter in question"); in re Mitcham, 2004 Tex. LEXIS 244 (Texas, 2004) (assessing the imputed disqualification impact of a paralegal (who later obtained a law degree) moving from firm to firm; "we have recognized different standards for attorneys and their assistants. For attorneys, there is an irrebuttable presumption they gained confidential information on every case at the firm where they work (whether they work on them or not), . . . and an irrebuttable presumption that they share that information with the members of a new firm . . . For legal assistants, there is an irrebuttable presumption they gain confidential information only on cases on which they work, and a rebuttable presumption they share that information with a new employer . . . The last presumption is rebutted not by denials of disclosure, but by prophylactic measures assuring that legal assistants do not work on matters related to their prior employment;" holding that a law firm's contractual agreement not to bring certain law suits because of the paralegal's employment had no time limit and required the new firm's disqualification even after the paralegal/lawyer had left that firm). In re TXU U.S. Holdings Co., No. 10-02-220-CV, 2002 TEX. App. LEXIS 9295, at *6-8 (Tex. App. Dec. 31, 2002) (explaining that "[a] different rule applies to a firm which hires a nonlawyer who previously worked for opposing counsel. . . . If the former client establishes that the nonlawyer worked on its case, a conclusive presumption exists that the client's confidences were imparted to the nonlawyer. . . . Unlike the irrebuttable presumption which exists for a disqualified attorney, however, a rebuttable presumption exists that a nonlawyer has shared the confidences of a former client with his new employer. . . . The presumption may be rebutted 'only by establishing that "sufficient precautions have been taken to guard against any disclosure of confidences"'"'; explaining that "nonlawyers are treated differently because of 'a concern that the mobility of a nonlawyer could be unduly restricted'"'; applying the irrebuttable presumption because the person who moved from firm to firm had been a nonlawyer at one firm but gained her law degree and

moved to another firm as a lawyer; conditionally granting a writ of mandamus and disqualifying the law firm she joined from representing plaintiffs in asbestos actions). Green v. Toledo Hospital, 764 N.E.2d 979 (Ohio 2002) (addressing the imputed disqualification effect of a law firm hiring a secretary from the adversary's law firm; finding inapplicable for non-lawyers the presumption that lawyers have obtained confidential information at their earlier firm if they worked on a substantially related matter, and instead requiring an evidentiary hearing to determine if the non-lawyer had been exposed to confidential information at the previous firm; explaining that upon such a showing the new law firm may rebut the presumption that the non-lawyer employee has shared confidences with the new law firm by showing that the non-lawyer has been screened at the new law firm). Accord, Virginia LEO 1800 (10/8/04) (a two-member law firm hiring a secretary who until the previous week was the only secretary at another two-member law firm representing a litigation adversary will not be disqualified from the case, as long as the new firm: warns the secretary not to reveal or use any client confidences acquired at the old firm; advises all lawyers and staff not to discuss the matter with the new secretary; screens the new secretary from the litigation matter (including the new firm's files on the matter); although not mandating any specific steps, the Bar recommends that the new firm "develop a written policy statement" regarding such situations, and note the need for confidentiality "on the cover of the file in question."); Maine LEO 186 (7/22/04) (distinguishing lawyers from non-lawyers in the effect of their hiring on imputed disqualification; adopting the reasoning of ABA Informal LEO 1526 (6/22/88), which allows a law firm to save itself from imputed disqualification when hiring a non-lawyer, if it screens the non-lawyer).

Paralegals who do not accurately and completely fill out whatever conflicts checklists they are given by their new firm risk jeopardizing that firm's role in what might be very significant litigation.

3. Role in Conflicts Checks

Some firms (or individual lawyers) ask paralegals to help them obtain information for purposes of running "conflicts checks" on new client (or new hirees) or actually analyze the conflicts reports generated by computer or other means.

To the extent they are asked to help with this task, paralegals should familiarize themselves with applicable conflicts of interest rules.

At the very least, paralegals should assure that their firm's conflicts database is up to date and accurate.

- Although most lawyers forget to change the database as the situation changes, they should be reminded to assure that any change in circumstance is reflected in their firm's conflicts database.

- For instance, a friendly co-defendant might become a cross-claim adversary -- the firm's conflicts database should be changed so that a lawyer later wishing to represent or become adverse to the now-adversary will make the proper conflicts decisions.

VI. Other Issues

A. Lawyers' Liability for Failing to Supervise Paralegals

Lawyers can be sanctioned by their bar for failure to adequately supervise paralegals.

- See, e.g., Florida Bar v. Abrams, 919 So. 2d 425, 429, 430 (Fla. 2006) (suspending a lawyer for one year for allowing a paralegal to act on his behalf in dealing with an immigration matter, including handling all interaction with the clients, and preparing and filing pleadings on the clients' behalf; "In the present case, the record shows that even though Akbas worked as a paralegal at U.S. Entry, she actually was the person in control of the corporation's day-to-day operations. She met with the clients, conducted the client interviews, and made the decisions as to the appropriate course of action for the clients"; explaining that "Abrams did not merely fail to supervise Akbas [paralegal] in the transmission of legal advice, but rather he provided no legal advice whatsoever. Instead, Akbas conducted client intake and formulated and dispensed legal advice"; In re Mopsik, 902 So. 2d 991 (La. 2005) (suspending for sixty days a lawyer who had not adequately supervised a paralegal, and allowing her to essentially act as a lawyer); Mahoning County Bar Ass'n v. Lavelle, 2005 Ohio 5976, 836 N.E.2d 1214 (Ohio 2005) (suspending for eighteen months a lawyer whose employee had falsified documents); in re Froelich, 838 A.2d 1117 (Del. 2003) (publicly reprimanding a lawyer for allowing an independent paralegal service to handle real estate settlements and the lawyer's escrow account without adequate supervision); In re Lester, 578 S.E.2d 7 (S.C. 2003) (publicly reprimanding a lawyer for allowing a paralegal to handle real estate closings without a lawyer present); People v. Milner, 35 P.3d 670 (Colo. 2001) (suspending for three years a lawyer whose paralegal provided advice to one of the lawyer's clients on domestic relations matters, and advised the client not to seek temporary custody of the client's children or speak with a government agency); In re Cuccia, 752 So. 2d 796 (La. 1999) (holding that a personal injury lawyer had not adequately supervised paralegals; also noting that the paralegal engaged in settlement negotiations with insurance companies and entered into binding settlements); In re Carlos, 227 B.R. 535 (Bankr. C.D. Cal. 1998) (finding that a law firm had assisted in the unauthorized practice of law by allowing a paralegal to negotiate a bankruptcy agreement with a debtor; acknowledging that the lawyer reviewed the agreement, but emphasizing that the lawyer had not been involved in any of the negotiations); In re Robinson, 495 S.E.2d 28 (Ga. 1998) (holding that Robinson had not adequately supervised paralegals, who had the sole interaction with the lawyer's clients and also arranged for the attorney-client relationship); Florida Bar v. American Senior Citizens Alliance, Inc., 689 So. 2d 255 (Fla. 1997) (finding that a lawyer had not adequately supervised paralegals, who contacted customers and sold them

estate planning documents; noting that the paralegals obtained information from the clients and prepared trust and estate documents using standardized forms; acknowledging that the lawyer later reviewed the documents, but nevertheless finding inadequate supervision and the unauthorized practice of law); People v. Fry, 875 P.2d 222 (Colo. 1994) (finding that a lawyer had engaged in improper supervision of a paralegal, who had met with and given legal advice to a bankruptcy client whom the lawyer had never met); Florida Bar v. Lawless, 640 So.2d 1098 (Fla. 1994) (suspending a lawyer for ninety days for failing to supervise an independent contractor paralegal); Office of Disciplinary Council v. Ball, 618 N.E.2d 159 (Ohio 1993) (suspending a lawyer for six months for failing to supervise a paralegal who misappropriated trust account funds).

One recent case included some almost humorous facts.

- Graham v. Dallas Independent School District, Civ. A. No. 3:04-CV-2461-B, 2006 U.S. Dist. LEXIS 13639, at *2 & n.2, *3, *5, *6 (N.D. Tex. Jan. 10, 2006) (assessing a motion to sanction a lawyer ("Layer") for essentially permitting a legal research firm run by a non-lawyer ("McIntyre") to prepare and file pleadings on behalf of the plaintiff in a lawsuit against the Dallas School District; noting that Layer: (1) had filed "an incomprehensible and untimely" response brief to one defendant's motion to dismiss; which had relied on Texas procedure rules even though the case was pending in federal court; (2) had responded to defendants' motion to dismiss the plaintiff's complaint (in part because it was unclear whether the plaintiff was suing the defendant in "his official or individual capacity") by arguing that his client's complaint "clearly stated that Defendants were being sued jointly and severally"; (3) had moved for contempt against several of the defendants for failing to serve a copy of a pleading, but withdrew the motion several days later because his office had actually received the defendants' pleading and had "wrongfully filed [it] in another client's file" (internal quotations omitted); (4) had filed a "nonsensical brief" asking to strike one of the defendant's motions because it incorporated the brief in the motion rather than filing a separate brief -- although no local rule required a separate brief; (5) was not prepared for a hearing, and appeared "unable to grasp basic legal concepts in Defendants' motions or even those contained in his own briefing"; (6) had moved to withdraw as counsel, but the plaintiff opposed the motion because (among other things) Layer had allowed non-lawyer McIntyre to prepare and file all the legal papers -- and further noting that the plaintiff "asserted that McIntyre had sought sexual favors in return for legal representation, and she claimed to have an audiotape recording of McIntyre propositioning her for sex"; (7) had stunningly insisted at a later hearing that he had not signed or proofed any of the filings in the case -- including the complaint -- "despite being [the plaintiff's] sole counsel of record"; (8) "when asked whether he had anything to do with preparing the responses to Defendants' motions to dismiss," had

told the court "'I don't believe I did' and that 'I certainly didn't do any research"; ordering Layer to pay defendants' attorney's fee and sending a copy of its sanction order to the Texas Bar).

Lawyers may also be found liable for malpractice if they fail to adequately supervise paralegals. Musselman v. Willoughby Corp., 230 Va. 337, 337 S.E.2d 724 (1985) (finding that a lawyer had committed malpractice by allowing a non-lawyer to handle a real estate transaction).

A lawyer responsible for a non-lawyer's conduct may be punished for his or her actions that would be a violation of the rules if the lawyer orders or knowingly ratifies the conduct, or if the lawyer is a partner or direct supervisor of the non-lawyer and "fails to take reasonable remedial action" when the lawyer "knows or should have known of the conduct at the time when its consequences can be avoided." ABA Model Rule 5.3(c)(2).

B. Trust Accounts

Any paralegals who might be asked to help handle other people's money should become familiar with the ethics rules governing this important topic.

C. Lawyer - Paralegal Partnerships

Paralegals may not form partnerships with lawyers for the practice of law.

D. Sharing of Fees

One of the axiomatic principles of every state's ethics rules is that lawyers may not share their fees with non-lawyers. See, ABA Model Rule 5.4(a).

This simple rule can be remarkably difficult to apply in situations involving paralegals.

1. Employee Paralegals

The difficulty in applying the fee-split prohibition in connection with employee paralegals arises from the reality that all or nearly all of law firm employees' salaries come from the law firm's fees -- because most law firms earn all or most of their profits from providing legal services.

- See, e.g., DC LEO 322 (2/17/04) ("in a sense, even paying nonlawyer employees a salary could be viewed as a sharing of fees, since fees are the firm's source of revenue").

To make matters more complicated, most ethics rules permit law firms to include their non-lawyer employees in profit-sharing arrangements.

- ABA Model Rule 5.4(a)(3) "a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement").

In trying to balance these seemingly inconsistent principles, most bars have struck what at first blush seems like an artificial distinction:

- permitting law firms to share law firm profits with paralegals as long as the profitability is measured on a firm-wide basis
- but prohibiting law firms from sharing fees earned on a particular matter.
- See, e.g., DC LEO 322 (2/17/04) (reviewing legal ethics opinions from other states, and concluding that the opinions nationwide "generally stand for the proposition that paying a percentage of firm net profits to nonlawyer employees is permissible, whereas paying a percentage of a fee in an identifiable case or series of cases is not").

Courts and bars have had great difficulty applying these admittedly confusing principles to paralegals.

As might be expected, many early cases condemned any relationship between a non-lawyer's salary and a particular case.

- See, e.g., State Bar of Texas v. Faubion, 821 S.W.2d 203 (Tex. App. 1991) (condemning an arrangement under which a paralegal/investigator was paid a percentage of gross fees calculated upon [the paralegal's] time involvement in a particular case; explaining that bonuses do not constitute improper fee-splitting if the bonuses are not based on a percentage of the firm's profits or legal fees).

However, a number of legal ethics opinions issued over 10 years ago took a different approach. These legal ethics opinions approved:

- An arrangement under which paralegals received set bonuses for every bankruptcy schedule drafted (as long as the paralegals would be paid regardless of the firm's collection of its fee from the client). Connecticut LEO 93-1 (1/27/92) (approving a law firm's compensation arrangement under which a part-time paralegal receives a weekly salary and "periodic bonuses" amounting to \$40.00 for "every set of Chapter 7 or Chapter 13 bankruptcy schedules drafted" and "\$5.00 per hour for every billable hour recorded by the paralegal on client work other than Chapter 7 and Chapter 13 debtor clients" (internal quotations omitted); noting that the paralegals would be paid "regardless of whether the firm collects its fee, regardless of how much the firm charges the client, and regardless of the firm's profitability" (internal quotations omitted)).

- An arrangement under which paralegals received a percentage of the firm's profits generated by the "sports and entertainment law practice area" in which the paralegals worked. Michigan LEO RI-143 (8/25/92) (approving a law firm's compensation arrangement under which paralegals working in the law firm's "sports and entertainment law practice area" would receive compensation based on "a percentage of the firm's net profits derived from the sports and entertainment law practice area"; concluding that Michigan's rule allowing non-lawyers to participate in a profit-sharing arrangement was not limited to calculations based on "net profits of the law firm's entire practice" rather than "net profits of a law practice area" (emphasis added); noting that "the result might be different if the compensation plan were based on the fees generated from a particular case or a particular client, rather than net profits of the law practice area of the firm").

At about the same time, several other legal ethics opinions seemed to take a different approach. These condemned:

- An arrangement under which real estate paralegals received bonuses based on the firm's income from the closings on which the paralegals worked (even if the calculations were used for "guidance only," and the bonuses were discretionary). North Carolina LEO 147 (1/15/93) (ruling as unethical a proposed compensation plan under which real estate paralegals would receive bonuses "calculated on the firm's net income from the real estate closings which the legal assistant has worked on," even if the bonuses were discretionary and the calculations were used for "guidance only"; "[i]t is apparent from the inquiry that the paralegal's bonuses would be calculated based upon a percentage of the income the firm derives from legal matters on which the paralegal has worked" – which violates the fee-split rules); Kansas LEO 95-09 (10/25/95) (condemning a law firm compensation program under which non-lawyer "collectors" would receive a percentage of amounts collected; "It is a reasonable process to base an employee's bonus on the success of the firm overall. It is the case by case, collection by collection-based bonus that we opine is impermissible here. The frequency of such bonuses is not a consideration, so long as the bonus or other salary consideration is not based upon a fee-by-fee, case-by-case formula, but rather relies on the net profit of the firm formula.")

More recent court and bar rulings have continued this confusing pattern.

- One bar approved an arrangement under which paralegals received monthly or semiannual payments based on the amount they had billed particular clients. South Carolina LEO 97-02 (3/97) (approving a law firm's compensation arrangement under which paralegals receive monthly or semi-annual payments "calculated as a percentage of the amount that the paralegal has billed to clients for services rendered"; contrasting this

arrangement with an impermissible plan under which "the bonus is based on a percentage of a particular fee earned").

- A state court indicated that profit-sharing plans for non-lawyers could not be based on the receipt of a particular legal fee. Trotter v. Nelson, 684 N.E.2d 1150, 1155 (Ind. 1997) ("a profit-sharing plan with a nonlawyer may not be tied to the receipt of a particular legal fee," although it may be based on the firm's overall net profits and business performance).

One of the most recent legal ethics opinions on this topic itself seemed to take both approaches, prohibiting an arrangement under which paralegals received bonuses based on the number of hours they worked on a particular case, but allowing the firm to consider that data as a factor in awarding bonuses.

- Florida LEO 02-1 (1/11/02) (prohibiting a lawyer from paying paralegals and other non-lawyer employees "based on the number of hours the non-lawyer employee has worked on a case for a particular client" (internal quotations omitted); explaining that a lawyer "may pay the firm's legal assistant a bonus, but that bonus cannot be based in any way upon a percentage of fees generated by the legal assistant or the firm and cannot be based upon generating clients for the firm. Bonuses to non-lawyer employees cannot be calculated as a percentage of the firm's fees or of the gross recovery in cases on which the non-lawyer worked," concluding that "the inquiring attorney may pay the legal assistant a bonus based on the legal assistant's extraordinary efforts on a particular case or over a specific period of time. While the number of hours the legal assistant works on a particular case or over a specific period of time is one of several factors that can be considered in determining a bonus for the legal assistant, it is not the sole factor to be considered. . . . A bonus which is solely calculated on the number of hours incurred by the legal assistant on the matter is tantamount to a finding that every single hour incurred was an 'extraordinary effort,' and such a finding is very unlikely to be true. Therefore, unless every single hour incurred by the legal assistant was a truly extraordinary effort, it would be impermissible for the inquiring attorney to pay a bonus to his legal assistant calculated in the manner the inquiring attorney has proposed. However, the number of hours incurred by the legal assistant on the particular matter or over a specified time period may be considered by the lawyer as one of the factors in determining the legal assistant's bonus.").

2. Independent Contractor Paralegals

Interestingly, one bar has found that independent contractor paralegals should be treated under a different approach.

This bar reasoned that independent contractor paralegals might be in a position to affect the lawyer's decisions -- thus triggering the "evil" designed to be prevented by the fee-split prohibition.

- Utah LEO 02-07 (9/13/02) ("lawyers may hire a paralegal on an "independent contractor basis" as long as the lawyer controls the work; explaining that a lawyer's employees may be compensated with a percentage of the gross or net income of the lawyer (as long as the compensation is "not tied to specific fees from a particular case"), but that an independent contractor legal assistant may not receive a percentage of a lawyer's gross or net income, and instead must be "totally independent from the lawyer's relationship with, and compensation from, the client"; explaining that "the apparent difference between the permissible sharing of fees for employee-paralegals and the impermissible sharing of fees with an independent contractor stems from the nature of the lawyer/paralegal relationship, the employee-paralegal, being an employee of the lawyer, is not in a position to exert undue influence on the lawyer. The independent paralegal would be in a less subordinate role").

E. Fee Requests

Most courts recognize that paralegals' time should be treated the same as attorneys' time for purposes of fee-shifting statutes or contracts.

In any situation in which a client might seek the recovery of fees (by law or contract), paralegals should be very careful in how they record their time.

- Keeping the time completely and accurately will assure the client's maximum recovery, and avoid charges of "padding" or even fraud.
- Because some courts allow discovery of the billing records of a law firm seeking the recovery of attorneys' fees, paralegals should describe their work in an objective way that will not come back to "haunt" their firms.

F. Ethics of Litigation

1. Ex Parte Communications with Unrepresented Persons

Most states' ethics rules prohibit lawyers from providing any legal advice to unrepresented third parties -- except for the advice to hire a lawyer. ABA Model Rule 4.3.

- Paralegals are bound by the same provision.

The Rules allow litigants in a civil action to suggest that potential witnesses with whom they have some connection (because the witnesses are current or former

employees or agents, or family members) not to speak with the adversary -- as long as refusing to speak would not harm the witness. ABA Model Rule 3.4(f).

2. Ex Parte Contact with Represented Persons

Most states' rules generally prohibit a lawyer (or someone acting on behalf of a lawyer) from communicating ex parte with a represented person -- without the other lawyer's consent. ABA Model Rule 4.2.

When the adversary is a corporation, it is sometimes difficult to determine whether lower-level employees are "represented" by the company's lawyer for these purposes.

- As indicated above, communications between a corporate lawyer and lower-level employees may be entitled to the attorney-client privilege protection if they meet the Upjohn standards. However, a different test applies here.

Most states' ethics rules generally prohibit ex parte contacts with a corporate adversary's upper management (called the "control group"), but many rules allow ex parte contacts with lower-level employees.

In addition to this principle, courts have also ruled on the propriety of this conduct.

- Some federal courts seem to follow the ABA approach -- which prohibits ex parte contacts with a corporate adversary's "control group" and even lower-level employees to the extent that their acts, omissions or statements could bind their company or create liability. Tucker v. Norfolk & W. Ry., 849 F. Supp. 1096, 1098 (E.D. Va. 1994); Queensberry v. Norfolk & W. Ry., 157 F.R.D. 21, 23 (E.D. Va. 1993).

As a matter of ethics, the ABA indicates that a litigant may have ex parte contacts with a corporate adversary's former employee. ABA LEO 359 (3/22/91).

- However, some courts prohibit such ex parte contacts with former employees. Armsey v. Medshares Mgmt. Servs., Inc., 184 F.R.D. 569, 573 (W.D. Va. 1998).

Paralegals who are asked to conduct such interviews should be familiar with these differing approaches.

3. Deceptive Conduct

The ABA Model Rules flatly prohibit a lawyer from ordering another lawyer to engage in any deceptive conduct. ABA Model Rule 5.1(a)(b).

However, ABA Model Rule 5.3 only requires a lawyer to assure that non-lawyers under the lawyer's supervision engage in conduct that is "compatible" with the ethics rules.

Some courts permit knowingly deceptive conduct by those acting under lawyer's direction -- but only to a point. See e.g., Gidatex, S.r.L. v. Campaniello Imports, Ltd., 82 F. Supp. 2d 119, 122-24 (S.D.N.Y. 1999) (finding that lawyers could ethically arrange for private investigators to portray themselves as interested consumers and record conversations with store clerks in an effort to see if stores were violating the trademark laws by "palming-off" merchandise; noting that "hiring investigators to pose as consumers is an accepted investigative technique, not a misrepresentation;" "enforcement of the trademark laws to prevent consumer confusion is an important policy objective, and undercover investigators provide an effective enforcement mechanism for detecting and proving anti-competitive activity which might otherwise escape discovery or proof"); Apple Corps. v. International Collectors Soc'y, 15 F. Supp. 2d 456, 474-76 (D.N.J. 1998) (holding that a lawyer did not act unethically in directing a private investigator and a staff member to make purchases by phone to verify that a third party was violating a consent order; the callers simply represented themselves as consumers and did not intimidate the third party into making the sale).

- These courts would probably have decided differently if the deception covered more than the litigant's identity and the reason for the communication.

Paralegals who are asked to engage in conduct that is arguably deceptive or gives them some pause should research this issue or seek a second opinion within the firm.

4. Payments to Witnesses

Paralegals coordinating interviews or depositions of fact witnesses may face requests by those fact witnesses that they be reimbursed for expenses and (in some situations) paid for the time the witnesses spend reviewing documents, preparing for testimony, testifying, etc.

Although there is not much law on this issue, the stakes are high.

- Denying a fact witness's request for such reimbursement could: cause the witnesses to refuse the normal cooperation that makes the process easier, such as: traveling to another state for a deposition or trial if the witness is outside the court's subpoena power; accepting service for a deposition in another state; meeting beforehand with lawyers for the party seeking the testimony, thereby reducing the element of surprise; agreeing to review documents ahead of time, etc.

At the extreme, a disgruntled witness might even threaten to "shade" testimony.

- On the other hand, making payments to fact witnesses could be seen as "buying" the witness's testimony, which creates cross-examination possibilities for the adversary and (at the extreme) even a risk of "obstruction of justice" charges.

It seems clear that a party seeking a fact witness's testimony may pay reasonable out-of-pocket expenses.

It is much more difficult to determine whether a party can pay a fact witness for time that the witness spends.

- Most states appear to allow a lawyer to reimburse an hourly worker who actually incurs out-of-pocket lost earnings.
- While it is a closer question, most states seem to allow payments to fact witnesses who could argue that they would otherwise have had time to engage in income-earning pursuits (such as a consultant who might otherwise have had a client pay for his or her time). This is not as clear as the hourly worker who must take off from work, because consultants often cannot show that they would have otherwise earned money from clients for the precise time they spent on the case.
- The most difficult issue arises when a witness has not actually lost income, but has nevertheless been inconvenienced and (justifiably) would like to be paid for the inconvenience.

The ABA has indicated that lawyers may compensate fact witnesses under certain conditions.

- ABA LEO 402 (08/02/96) (a lawyer may compensate a non-expert witness for time spent in attending a deposition or trial, meeting with the lawyer to prepare for providing testimony and reviewing documents, as long as the fee is reasonable and the payment is not "being made for the substance or efficacy of the witness's testimony"; determining the reasonableness of the fee is easy when the witness loses hourly wages or a professional fee, but becomes more difficult "where the witness has not sustained any direct loss of income" (if, for instance, the client is retired or unemployed)

A more recent state legal ethics opinion also provides guidance, agreeing with the ABA that a party may pay a fact witness for time spent, under certain conditions.

- Delaware LEO 2003-3 (08/14/03) (holding that a lawyer "may pay out-of-pocket travel expenses to witnesses"; explaining that a company may

compensate a retired employee of another company for his time (at a rate that the retired employee charges in his full-time independent consulting business), but may not compensate a retired company employee for his time at the rate that the employee was paid when last employed at the company -- because the former employee was presently unemployed; noting that there was no evidence that the witness "will lose an economic opportunity by spending time preparing for his testimony and testifying" at the trial; acknowledging that the witness might be entitled to a "somewhat reduced rate of compensation for the burden of devoting his time to prepare for the Delaware Trial rather than enjoying his retirement," but noting that such an inquiry was not before the bar).

- This concept makes sense -- even a retired former employee who will not lose any "out-of-pocket" lost earnings by spending time reviewing documents, preparing for testimony, etc. is losing the opportunity to enjoy retirement.

Lawyers and paralegals must still wrestle with the opportunity that such payments give the adversary for cross-examination.

- For this reason, some lawyers choose not to pay fact witnesses for the time the witnesses actually spend testifying -- which arguably creates the most awkward appearance if the adversary cross-examines the fact witness.

G. Rules Governing Client Files

Paralegals play a central role in creating and maintaining client files. This might involve paralegals in a number of issues involving client files.

The ABA Model Rules may require lawyers to turn over a client's files to the client, even if lawyers have not been fully paid. ABA Model Rule 1.16(d).

H. Professionalism and Civility

Paralegals should strive to act in a professional and courteous way.