

Almost everything in life that is valuable can also be harmful. And so it is with one of the most valuable assets in the practice of law—an excellent paralegal. Most lawyers use paralegals to perform a wide variety of tasks, both in litigation and transactional matters. As a paralegal becomes more experienced, a lawyer may increasingly rely on the paralegal and feel confident in the ability of the paralegal to perform assigned tasks. But the use of paralegals can be dangerous. New paralegals may be unaware of important ethical obligations of lawyers; even experienced paralegals can become overconfident in their ability and exceed their authority. What steps should lawyers take to protect themselves against ethical problems caused by their paralegals?

Rule 5.3 of the Rules of Professional Conduct provides three levels of ethical obligations in the use of paralegals and other non-lawyer employees (such as secretaries, investigators, or office managers). First, a partner or person having similar managerial authority in the firm or legal organization has an obligation to “make reasonable efforts 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.” SCRPC 5.3(a). I refer to this as the structural obligation. It requires the firm’s partners to make sure the firm has in place policies and procedures designed to give reasonable assurance that nonlawyers comply with the rules of professional conduct. See comment 2 to SCRPC 5.3. (SCRPC 5.1 imposes similar obligations with regard to the conduct of subordinate lawyers.) Second, a lawyer who has direct supervisory authority over a nonlawyer has an obligation to “make reasonable

efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer.” SCRPC 5.3(b). Supervisors must implement and monitor compliance with the policies and procedures established by the firm and deal with problems that may arise. Finally, a lawyer is ethically responsible for the conduct of a nonlawyer if the lawyer orders the conduct, ratifies the conduct, or fails to take remedial action when the consequences of the conduct can be avoided or mitigated. SCRPC 5.3(c). Unlike tort law, a lawyer is not vicariously liable in a disciplinary matter for the misconduct of a non-lawyer unless the lawyer failed to comply with one of the obligations in Rule 5.3 (structural, supervisory, or direct responsibility). Cf. *In re Anonymous Member of the South Carolina Bar*, 346 S.C. 177, 552 S.E.2d 10 (2001) (noting that there is no vicarious ethical responsibility for the misconduct of an associate).

In carrying out the structural obligation, a firm must give paralegals appropriate instruction concerning the ethical aspects of their employment by lawyers. The comments state that the “measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.” SCRPC 5.3, cmt. 1. What type of training and instructions should lawyers give to their paralegals? Paralegals who go through formal training programs may already have received instruction in the ethical obligations of lawyers. If a paralegal does not have such instruction, a firm should provide training to the paralegal on such issues. In preparing training materials, a firm can turn to various sources. Two that are particularly helpful are the ABA Model Guidelines for the Utilization

of Paralegal Services (2004) and The Model Code of Ethics and Professional Responsibility of the National Federation of Paralegal Associations (2006), both of which are available on the Internet.

When a firm employs a new paralegal, the firm should impress on the paralegal the importance of ethical obligations in general and should emphasize the most important obligations that paralegals have. The following is a memorandum that firms could give to new paralegals or to other nonlawyer employees to accomplish this goal. While the memorandum contemplates a firm that is relatively large, it can easily be modified to a small firm or even the practice of a solo practitioner:

### **Memorandum to New Employees on Ethical Obligations**

Welcome to the firm. As we discussed during your interview, lawyers must adhere to strict ethical obligations. Violation of these obligations can subject lawyers to disciplinary action or civil liability. The following are major points that you should observe. If you have any doubt about your responsibilities, consult with your supervising lawyer.

1. *Identity of supervising attorney and head of section.* All employees should know the attorney who supervises their work, to whom they should go for instructions and if problems arise. All employees should also know the head of the section in which they practice, to whom they should go if problems develop that cannot be resolved by their supervising attorney.
2. *Clear identification of role.* Always identify yourself as a paralegal or an employee working for attorney X. If you believe the other person

is confused about your role, clarify the matter immediately.

3. *Honesty.* Lawyers and their employees have a strict obligation not to engage in misrepresentation or deception on behalf of clients. Under no circumstances should you lie or deceive anyone in a professional capacity.
4. *Authority and advice.* Some legal work can only be performed by a lawyer. For example, you cannot appear in court or take a deposition. Generally, however, your supervisor may delegate to you any other work provided the work is properly supervised. You are not authorized to send letters on your own or to meet with clients or attorneys for the other party unless so directed by your supervising attorney. You are not authorized to give legal advice of any kind. When authorized by your supervising attorney, you may convey the lawyer's advice either orally or in writing. Normally, advice should be conveyed in writing. If you are conveying advice in writing, give the supervisor a copy of the letter before it is sent. If you are conveying advice orally, make a memorandum of advice conveyed and confirm the accuracy of the advice with your supervisor. If questions arise about any advice that you have communicated on behalf of the supervisor, inform the supervisor and follow his instructions.
5. *Confidentiality.* Rules of Professional Conduct state that all information relating to representation of a client is subject to the duty of confidentiality. You may not discuss cases or client affairs outside the office with spouses, friends, or anyone else, either in formal or informal settings. The appropriate answer to questions relating to cases in which you are involved is, "I'm sorry. I can't discuss that."
6. *Conflicts of interest.* When the firm takes on a new matter, it performs a review to determine whether the matter creates a conflict of interest with a current or former client. On occasion conflicts may arise with regard to your former employment. It is

also possible that the firm may undertake representation in a matter in which you have a personal or financial interest.

Report any such matter immediately to your supervisor.

7. *Contact with opposing party.* Lawyers and their representatives may not communicate in any way with an opposing party who is represented by counsel. All communications must be made only with opposing counsel. Do not contact the opposing party under any circumstances. If the opposing party calls the office, tell the party that you cannot discuss the case with him, direct him to talk with his lawyer, and immediately inform your supervisor.
8. *Contact with opposing counsel.* On occasion opposing counsel may contact you for information or documents relating to a case in which you are involved. Before revealing any information or providing any documents to opposing counsel, inform your supervising attorney of the request and receive instructions.
9. *Contact with jurors.* Lawyers and their representatives cannot communicate in any way with members of the jury in a pending case, with members of the pool from which a jury will be selected, or with family or household members of jurors. This prohibition applies even to informal communications that have nothing to do with a case and even if the juror is unaware that the communication relates to a lawsuit. Avoid any situation in which you might have contact with a member or potential member of the jury or with any family or household member of a juror.
10. *Billing.* This firm typically bills on either a contingent fee or an hourly basis. When the firm bills on a contingent fee basis, the client is normally charged for expenses. Time by secretaries or paralegals is not properly chargeable to clients in contingent fee cases as an expense. When the firm bills on an hourly basis, paralegal time is identified separately from lawyer time. It is

improper for a lawyer to charge for your time as the lawyer's time. The firm records time in units of 1/10th of an hour.

Honesty requires all lawyers and nonlawyers to be completely accurate in recording their time.

11. *Mistakes or problems.* If you make a mistake or if a problem arises, immediately discuss the matter with your supervising lawyer. Cover-up or delay in dealing with a problem is almost always worse than the problem itself.
12. *Misconduct by lawyers or firm employees.* The firm adheres to the highest standards of professional behavior. We expect and hope that you will never face an issue of misconduct by a supervisor, by another lawyer in the firm, or by anyone else associated with the firm. If you do face such a situation, report the misconduct to your supervisor unless the supervisor is involved, in which case you should report to [name]. Misconduct includes the following: improper billing, sexual harassment and other forms of discrimination, substance abuse that is job related, malpractice, and violation of duties to courts.

**I have read this memorandum on my ethical responsibilities, and I agree to adhere to its terms. I understand and agree that this memorandum is part of my employment contract. If I violate the terms of this memorandum, I am subject to immediate discharge for cause.**

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Signature

The duty to supervise requires lawyers to remind paralegals of their ethical obligations. At least annually lawyers should require their paralegals to reread and reexecute this memorandum of ethical responsibilities.

When properly trained and supervised, paralegals provide valuable assistance to lawyers. However, lawyers who fail to train and supervise their paralegals risk their licenses. ■